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# The Twilight of Organizational Form for Charity: Musings on Norman Silber, A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector (book review)

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## BOOK REVIEW

### THE TWILIGHT OF ORGANIZATIONAL FORM FOR CHARITY: MUSINGS ON NORMAN SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR*

NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM:  
THE EMERGENCE OF THE MODERN NONPROFIT SECTOR*.  
Boulder: Westview Press, 2001. Pp. 184

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In the months following the September 11 attacks, the nonprofit sector took center stage. But with prominence comes scrutiny, and the extraordinary role of private philanthropy in this context has raised uncomfortable questions. First, over 250 new nonprofit organizations formed to handle the outpouring of contributions, and the Internal Revenue Service announced expedited review for new applications for federal tax exemption.<sup>1</sup> Yet these organizations—along with existing major charities like the American Red Cross and the Salvation Army—found themselves tripping over each other, unable to ensure that the more than \$1.5 billion in contributions was being distributed wisely,

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1. See IRS News Release, No. IR-2001-82, Sept. 18, 2001, available at <http://www.irs.gov/pub/irs-news/ir-01-82.pdf> (last visited June 11, 2002). The release stated, in pertinent part:

The IRS . . . has established a special expedited review and approval process for new organizations seeking tax-exempt status to provide relief to the [September 11] victims. New organizations should apply for tax-exempt status by filing IRS Form 1023, available at [www.irs.gov](http://www.irs.gov) and write at the top of the form "Disaster Relief, Sept. 11, 2001." The IRS will give such applications immediate attention.

*Id.* As of June 11, 2002, the IRS had recognized the exempt status of 284 new organizations formed for the purpose of providing relief to September 11 victims. See Internal Revenue Service: The Digital Daily, at <http://www.irs.gov/exempt/display/0,,1=3&genericId=20932,00.html> (last visited June 11, 2002).

fairly and expeditiously.<sup>2</sup> Wouldn't *fewer* charities be better? Second, the fund raising practices of some of the charities—notably the Red Cross—brought charges of deceptive charitable solicitation practices.<sup>3</sup> It turns out that some charities had a different purpose in mind than merely functioning as a conduit to victims.<sup>4</sup> But isn't the point of organized philanthropy its value added? Professionals experienced in the range and long-term effects of a multitude of calamities can minimize the particularism that characterizes individualized, as opposed to governmental, relief: The private donations, when added to the billions in federal relief and untold billions in private insurance and other governmental assistance, prompts the question of whether the victims of this particular disaster might reap a windfall.<sup>5</sup> Third, the "dark side" of the sector came disturbingly to light with the federal government's freezing of assets of the Holy Land Foundation and a few domestic

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2. See, e.g., David Barstow, *\$850 Million for Charity, Not Centrally Monitored*, N.Y. TIMES, Oct. 11, 2001, at B1 ("There are hundreds of disaster organizations, nonprofit groups, foundations, government agencies and corporations involved . . . [D]onations are also piling up because many of the new relief funds still do not have the basic elements of governance in place, such as boards of directors, mission statements, written standards.").

3. This finding was echoed in an August 2002 report on the American Red Cross posted by the Better Business Bureau's Wise Giving Alliance, a charity rating agency. See <http://www.give.org/reports/arc.asp> (last visited Sept. 27, 2002). The controversy forced the board of the Red Cross to demand the resignation of its director, Bernadine Healy. See, e.g., *Nightline: Did She Quit or Was She Pushed, and Why, As America Fights Back* (ABC News Broadcast, Oct. 26, 2001) (transcript on file with the Hofstra Law Review). A congressional body held hearings into the performance of September 11 philanthropies. See *List of Witnesses to Appear Before Committee on Ways and Means Subcommittee on Oversight on Response by Charitable Organizations to Recent Terrorist Attacks*, available at <http://waysandmeans.house.gov/oversite/107cong/ov-7wit.htm> (last visited June 11, 2002), containing links to prepared statements. Shortly thereafter, the Red Cross promised to spend the balance of the principal of the Liberty Fund on the victims and their families, and named former Senator George Mitchell to develop a plan of distribution. Accepting Mitchell's recommendation that "recipients of these monies are in the best position to assess their own immediate and long-term needs," the Red Cross announced that ninety percent of the nearly \$1 billion raised would be distributed by the first anniversary of the attacks. See [http://www.redcross.org/press/disaster/ds\\_pr/020130libertyfund.html](http://www.redcross.org/press/disaster/ds_pr/020130libertyfund.html) (last visited Sept. 27, 2002). The Red Cross slightly reduced this percentage when it unexpectedly continued to receive another couple of hundred million dollars. It also expressed concern about jeopardizing its tax exemption by distributing living expenses to families that had no financial need. See *Quarterly Report on the Liberty Fund* (through July 31, 2002), at <http://www.redcross.org>.

4. See *supra* note 3.

5. See, e.g., Diana B. Henriques & David Barstow, *Victims' Fund Likely to Pay Average of \$1.6 Million Each*, N.Y. TIMES, Dec. 21, 2001, at A1 (describing distribution plan of federal compensation fund established by Congress for the families of victims who elect to waive their right to sue; awards would be reduced by life insurance, pension payments, or other government assistance, but not by charity); Thomas Connor, *Terror Victims Aren't Entitled to Compensation*, WALL ST. J., Jan. 2, 2002, at A18 (comparing public payments for various terrorist acts, and proposing that the notion of "compensation" be replaced with need-based "compassionate aid").

Muslim groups.<sup>6</sup> An organization whose purposes can be carried out only through illegal activities clearly violates public policy; but what about multipurpose bona fide charities that incidentally engage in illegal activities?

Although unprecedented in scale, the questions raised by September 11 philanthropy have eternally troubled policy makers. To generalize from these examples, debate constantly revolves around what, if any, role the state should play in three key areas: (1) preventing duplication of charitable services, with its attendant inefficient use of resources; (2) protecting donors, from both misleading fundraising drives and look-alike charities; and (3) restricting "charitable" purposes and activities, for nonprofit corporate status and, separately, tax exemption.<sup>7</sup> To complicate matters, the state itself consists of multiple players—which decisions should be left to legislatures, attorneys general and other regulators, and judges?

In time to help us understand this legal state of affairs is a provocative and illuminating historical study of American nonprofit corporate law by Norman Silber.<sup>8</sup> Professor Silber challenges the modern nonprofit scholar and practitioner—accustomed to autonomy for charities—to consider living under quite a different regime.<sup>9</sup> While state practices varied, American discomfort with the corporate form persisted in the nonprofit realm long after business incorporation became standardized.<sup>10</sup> For most of the twentieth century, several states—notably New York and Pennsylvania—continued to treat the grant of a nonprofit charter as a privilege.<sup>11</sup> And not just by the state legislature: Judges and administrators endeavored to avoid the perceived evils of wasteful duplication of charitable services; names that might cause confusion with an existing (and competing) nonprofit; and unpatriotic planned activities, if not purposes.<sup>12</sup> Professor Silber, however, finds that discretion by judges "became so strong that their personal reservations—

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6. See, e.g., Noreen S. Ahmed-Ullah & Laurie Cohen, *Muslims Now Hesitant to Give; Fear About U.S. Scrutiny Raises Conflict with Key Doctrine of Islam*, CHI. TRIB., Sept. 30, 2001, Metro section, at 1; Lisa Getter et al., *Islamic American Nonprofits Face Increased Scrutiny in U.S.*, L.A. TIMES, Nov. 4, 2001, at A1; Judith Miller, *U.S. to Block Assets It Says Help Finance Hamas Killers*, N.Y. TIMES, Dec. 4, 2001, at A9.

7. See Evelyn Brody, *The Limits of Charity: Fiduciary Law*, 57 MD. L. REV. 1400, 1405 (1998) [hereinafter Brody, *Fiduciary Law*].

8. NORMAN I. SILBER, *A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR* (Westview Press, 2001).

9. See *id.* at 9.

10. See *id.* at 5-6.

11. See *id.*

12. See *id.*

religious, political, class, cultural, racial, and social—as a matter of legal doctrine were sufficient to sanction disapproval.”<sup>13</sup> Inevitably, state paternalism came to be perceived as state suppression of nonmajoritarian and unpopular causes.<sup>14</sup> In the sweep of 1960s civil rights reforms celebrating diversity and individual expression, the grant of nonprofit corporate status was reconceptualized from a privilege to an entitlement.<sup>15</sup> Today, filing a certificate of incorporation for a nonprofit corporation is merely one item on a law firm associate’s checklist in setting up a new charity.

### I. THE BENEFITS AND COSTS OF JUDICIAL DISCRETION

Professor Silber’s fascinating exploration of a near-century of jurisprudential subjectivity reveals an extraordinary hunger for uniformity in the conception of the public good. (Don’t forget that the Justices of the New York Supreme Court are elected).<sup>16</sup> World War I brought a suspicion of national-identity groups, out of fear that they foster “dual fealty.”<sup>17</sup> Similarly, Justices were skeptical that advocacy groups (“propagandists”) could promote the social order.<sup>18</sup> Other forms of heterodoxy were disapproved—a New York judge rejected the charter of a Jewish group whose board would meet on Sundays.<sup>19</sup> (Not surprisingly, one Justice Levy in a later case held that the work of charities was not “labor” and so would not be violating Sabbath laws).<sup>20</sup>

Professor Silber also finds a few more-thoughtful jurists. He recounts with evident appreciation the outcome of cases where Justice Levy denied approval to the charter of a particularly unsettling organization (one of the Nazi-supporting Bunds),<sup>21</sup> and granted approval to an unconventional but desperately needed group (an organization that rescued Jewish children from Nazi Germany).<sup>22</sup> A pro-American patriotic group went too far in calling for amendments to the

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13. *Id.* at 5.

14. *See id.* at 6.

15. *See id.* at 115.

16. A stylistic delight augments Professor Silber’s legal realism: For each decision by a Justice of the New York Supreme Court, Professor Silber provides a biographical note based on the jurist’s obituary that later appeared in *The New York Times*.

17. SILBER, *supra* note 8, at 39-40.

18. *See id.* at 40-41.

19. *See id.* at 32.

20. *See id.* at 42.

21. *See id.* at 53-54, 76 n.165 (describing *In re General Von Steuben Bund, Inc.*, 287 N.Y.S. 527 (Sup. Ct. 1936)).

22. *See id.* at 51, 75 n.154 (describing *In re German Jewish Children’s Aid*, 272 N.Y.S. 540 (Sup. Ct. 1934)).

Constitution that would provide for the forfeiture of the U.S. citizenship of those who join any organization supporting the overthrow of the government by force or violence, or who write, publish, or possess for purposes of circulation materials expressing such views.<sup>23</sup> The Justice found it "unthinkable that approval should be given on behalf of the people of the State of New York to anyone to incorporate for the purpose of advocating a constitutional amendment of this character."<sup>24</sup>

Once the exigencies of the Second World War faded, however, continuing trial court hostility to civil rights groups in the 1950s provoked a fatal backlash to judicial discretion.<sup>25</sup> In 1961, the New York Court of Appeals effectively ended the practice when it ordered the lower court to approve the charter of a white supremacist group.<sup>26</sup> In *Association for the Preservation of Freedom of Choice, Inc.*,<sup>27</sup> the trial judge had rejected the certificate of incorporation of a hate group, ruling: "Our system of government can only be maintained by the free and untrammelled collision of ideas, but when those ideas run counter to the mores or policies of our laws, no group should be permitted to organize in *corporate form* with the sanction of the state to espouse such ideas."<sup>28</sup> The New York high court reversed,<sup>29</sup> declaring:

[Agitating] for the repeal or modification of any law . . . , provided such agitation is not coupled with the advocacy of force and violence[,] . . . is not against public policy whether indulged in by an individual or a membership corporation, but of course approval of a corporate charter devoted to such a purpose does not imply approval of the views of its sponsors. It simply means that their expression is lawful, and their sponsors entitled to a vehicle for such expression under a statute which cannot constitutionally be made available only to those who are in harmony with the majority viewpoint.<sup>30</sup>

At the same time that he chronicles the loss of the state's gatekeeper role in regulating incorporation, however, Professor Silber probes whether incorporation ever conveyed much information about the

23. See *id.* at 56-57.

24. *Id.* at 57 (quoting *In re Patriotic Citizenship Ass'n, Inc.*, 53 N.Y.S.2d 595, 597 (Sup. Ct. 1945)).

25. See *id.* at 99-107.

26. See *id.* at 113.

27. 188 N.Y.S.2d 885 (Sup. Ct., 1959).

28. *Id.* at 889.

29. 174 N.E.2d 487 (N.Y. 1961).

30. *Id.* at 490.



worthiness of a particular organization.<sup>31</sup> What difference would it have made if the Bund were granted corporate status? Why should the Jewish rescue organization have had to prove itself to the state? Moreover, as Professor Silber writes: "There is no clear way to measure the harm that free speech suffered and/or the social cohesiveness gained by discretionary review."<sup>32</sup> How a nonprofit operates has more social significance. Thus, the notion of a benevolent despot who safeguards society by preventing the formation of harmful nonprofit corporations appeals to a false, unattainable, and undesirable god. While we might wish for the simplicity of identifying "good" and "bad" charities based on their organizational documents, even the most disturbing organization can dress up its purposes with the right-sounding words, and the regulator's job only begins at the moment of birth. The current approach conforms to the American bias against ascribing legal significance to individuals based on their status, as opposed to their actions.

The aspect of judicial screening that sought to eliminate "harmful" competition between charities might evoke more sympathy, but, in the end, proves equally futile and misguided.<sup>33</sup> Superficially, one can appreciate the sentiment expressed by Justice Stoddart: "I do not believe the public should have numerous groups soliciting funds when one well-recognized and well-operated organization is [already] seeking their contributions."<sup>34</sup> However, the marketplace for contributions remains an

31. See SILBER, *supra* note 8, at 128-29. A charity can form as a trust rather than in corporate form—although the tortured history of the validity of charitable trusts in New York and Pennsylvania itself could fill a book (and has filled parts of several). See *Trs. of Phila. Baptist Ass'n v. Hart's Ex'rs*, 4 U.S. 1, 48-50 (1819) (declaring invalid charitable trusts in those states that failed to adopt statutes to replace English ones repealed after the Revolution—including the 1601 Statute of Charitable Uses). *Hart* was effectively reversed by *Vidal v. Mayor, Alderman and Citizens of Philadelphia*, 43 U.S. 127 (1844) (finding evidence that charitable trusts existed at common law independent of Statute of Charitable Uses). See also *Tilden v. Green*, 28 N.E. 880 (N.Y. 1891) (holding charitable testamentary trust invalid due to lack of certainty of beneficiary). See generally CARL ZOLLMAN, *AMERICAN LAW OF CHARITIES* (1924); HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY, 1776-1844* (1961); MARION R. FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT* (1965); Stanley N. Katz, Barry Sullivan & C. Paul Beach, *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893*, 3 LAW & HIST. REV. 51 (1985); PETER DOBKIN HALL, *INVENTING THE NONPROFIT SECTOR* (1992).

Nor does denial of a charter make the activity illegal. "Unincorporated associations, which do not ask the approval of the Supreme Court or the sanction and help of the state itself, ought to be just as able as any corporation to achieve the ends that these signers are aiming at," declared one New York Justice in denying the charter of a group that wanted to convert Jews to Christianity. *In re Am. Jewish Evangelization Soc'y, Inc.*, 50 N.Y.S.2d 236, 237 (Sup. Ct. 1944) (discussed in SILBER, *supra* note 8, at 61).

32. SILBER, *supra* note 8, at 65.

33. See *id.*

34. *In re Waldemar Cancer Research Ass'n*, 130 N.Y.S.2d 426, 426-27 (Sup. Ct. 1954). For this and other examples, see SILBER, *supra* note 8, at 62-63 and accompanying notes.

important check on older institutions, which in any case enjoy the advantages of greater name recognition and established reputation in attracting donative support. The regulator still can play an important role in seeking to ensure the efficient use of charitable resources: The New York Attorney General prodded the September 11 charities into *privately* coordinating their relief efforts by creating a combined database.<sup>35</sup> As Professor Silber chronicles, the problem of fraudulent charitable solicitation has come to be addressed by regulatory agencies whose jurisdiction extends to all fundraisers, incorporated or unincorporated.<sup>36</sup>

In the end, judicial discretion over charity incorporation fell during the general social rebellion against orthodoxy, the rise of advocacy and identity groups (notably the NAACP), the legal-process reform against ad hoc judicial rulings in favor of administrative deliberation and consistency, and the reconception of property rights to include government licenses.<sup>37</sup> Entertaining as well as erudite, Professor Silber's account of the transformation of New York law reads like a detective story with a bevy of improbable heroes: students.<sup>38</sup> He observes that the majority opinion by the New York Court of Appeals in *Preservation of Freedom of Choice* cites no authorities—no case law—other than academic pieces, including three student law review notes.<sup>39</sup> The great irony that Professor Silber observes is that the corporate form no longer was the bane of liberals, but rather their salvation: as his book is titled, a “corporate form of freedom.”<sup>40</sup>

## II. THE NEXT HISTORY

In the concluding sections of his book, Professor Silber probes whether some of the continuing problems in nonprofit governance can be addressed through a tighter process for defining charity.<sup>41</sup> These final

35. It appeared from press reports that the Attorney General initially sought public involvement, if not control, over such a database, but yielded to charities' concerns over confidentiality. For a description of an umbrella group for the major New York human services charities, see the webpage on the New York Attorney General's website, WTC Relief Info, at <http://www.wtcrelief.info/Charities/Information/pages/News.jsp?newsID=9> (posted Dec. 14, 2001) (on file with the Hofstra Law Review). See also *supra* note 3 and accompanying text.

36. See SILBER, *supra* note 8, at 93, 148-49. Professor Silber examines the deficiencies of the regulatory schemes for fundraising, describing the paucity of monitoring and investigation. See *id.* at 148-49.

37. See SILBER, *supra* note 8, at 93-107.

38. See *id.* at 114.

39. See *id.* at 114-15. See generally *id.* at 101-13 (discussing the academic pieces).

40. See *id.* at 102.

41. See *id.* at 172.



thoughts, though, have a tentative quality, and are the least satisfying part of Professor Silber's book. And not surprisingly—after all, Professor Silber himself just presented such a persuasive case against case-by-case definition of charity that he finds it difficult to articulate an argument for state supervision at the organizational stage.<sup>42</sup>

Consider tax exemption, which has come to be seen as the "true" subsidy by the state.<sup>43</sup> Professor Silber asserts: "the problem for the next generation of lawmakers and policymakers would be to find a way to redraw the line between privilege and entitlement to the advantages of nonprofit organization without allowing inappropriate actors to make objectionable, discretionary value judgments."<sup>44</sup> But it turns out that there are turtles all the way down: Congress has shown little appetite for defining "charitable" any more narrowly than do the states—the key modifications being for activities that pester politicians, like political activity and excessive lobbying.<sup>45</sup> Moreover, despite the view of the IRS as the charity regulator of last resort, Congress has never explicitly granted the IRS plenary equity authority over charities,<sup>46</sup> and hardly funds its exempt-organization division at a level sufficient to fully monitor and supervise the sector.

Like all good histories, Professor Silber's monograph serves as a cautionary tale: By illustrating how inherently political (in the broad sense) is the answer to the question "how private is private

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42. See *id.* at 169-74.

43. *Id.* at 9.

44. *Id.* In the 1969 Tax Reform Act, Congress adopted two major changes to the tax-exemption regime available to charities. First, it required charities (excepting only churches and small organizations) that sought tax recognition of tax exemption under Internal Revenue Code section 501(c)(3) to apply for a ruling from the IRS. See I.R.C. §§ 501(c)(3), 508. Second, Congress adopted tighter disclosure rules and other constraints on those tax-exempt charities classified as "private foundations." See *id.* §§ 508(b), 509, 4940-48. While Congress grants some types of charities (notably, schools and hospitals) automatic nonprivate foundation status, other newly formed organizations cannot establish their entitlement to nonprivate foundation status until a testing period has elapsed. See *id.* §§ 501(e)-(f), 508(a). Accordingly, the IRS will issue a provisional ruling on this aspect of their application for recognition of exemption. The IRS' threshold recognition of exemption under section 501(c)(3) is not, however, provisional, as Professor Silber suggests. See SILBER, *supra* note 8, at 153, 170.

45. See I.R.C. § 501(c)(3) (granting charity status only if "no substantial part of the activities of [the organization] is carrying on propaganda, or otherwise attempting, to influence legislation . . . and [the organization] does not participate in, or intervene in . . . , any political campaign . . ."). Nor does Professor Silber see why tax exemption should be conditioned on a narrower conception of the public good than should nonprofit corporate status. See SILBER, *supra* note 8, at 156-58. See generally Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998).

46. See Evelyn Brody, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?*, 21 U. HAW. L. REV. 537, 543 (1999).

philanthropy?," he helps us to appreciate why we cannot go back to a gatekeeper role for the charity regulator. The history of the next period of the charitable sector will consider more fundamental issues. I believe that understanding charity accountability today takes us from the legitimacy of state oversight to the role of extra-legal institutions to a questioning of the significance of organizational form.

### A. *Accountability of the Regulator*

Regulators suffer from a lack of transparency in their charity oversight, making it impossible to assess their effectiveness in improving charity governance—or even whether they are acting at all.<sup>47</sup> Moreover, state attorneys general might act out of parochial motives. Perhaps the sector should call on state charity officials and the IRS to publish annual reports explaining, at least in general terms, both the level and types of enforcement and outcomes achieved.

### B. *"Private" Regulation*

Formal law is probably the institution that least influences and improves charity governance and performance.<sup>48</sup> Over the decades, private regulation of charitable activity has occurred through religious institutions, scientific philanthropy, federated philanthropy, charities bureaus, community foundations, and state and national associations of nonprofit organizations. As described above with respect to the September 11 charities, donor and public expectations (and news media) can bring faster and more lasting changes than can government prosecution.<sup>49</sup> As the Attorney General of New York showed, government can play a prescriptive, in addition to enforcement, role.<sup>50</sup>

47. As I have described elsewhere, few cases involving nonprofit fiduciary issues reach the courts. Reform rather than punishment is generally the regulator's goal, and charities prefer a chance to improve their behavior while avoiding embarrassment and personal liability. "Closing agreements" between the regulator and the charity to end an enforcement action can be quite detailed, often spelling out specific terms dealing with future governance. Sometimes regulators will settle only if the charity assents to public disclosure of the agreement, which otherwise would be confidential. See Brody, *Fiduciary Law*, *supra* note 7, at 1410-11.

48. See generally Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433 (1996) [hereinafter Brody, *Institutional Dissonance*]; Evelyn Brody, *Accountability, and Public Trust*, in THE STATE OF NONPROFIT AMERICA (Lester Salamon, ed., Brookings Institution Press and the Aspen Institute) (forthcoming 2002).

49. See *supra* notes 1-4 and accompanying text.

50. See, for example, the "Years in Review" published by the Pennsylvania Attorney General, containing summaries of significant cases brought by the Charitable Trusts and Organizations Section. Years 1997-2000 are available at <http://www.attorneygeneral.gov/pei/years.cfm> (last visited Sept. 26, 2002). For a proposal for public-private collaboration, see Joel Fleishman, *Public*

I do not suggest, however, that the law should be tightened to codify these institutional dictates, because institutional dictates can be as misguided as they are strong. Notably, Professor Silber advocates "tailored and standardized" disclosure rules regarding "such matters as the use to which funds solicited have been applied, salaries, overhead costs, and other information."<sup>51</sup> Were it only so easy! A fierce debate has longed raged over how to categorize fungible dollars—to achieve meaningful and not just uniform reporting. Think of the practical pressures on a charity trying to raise funds from a public ignorant of the charity's fiscal requirements. After all, many people think that providing charity is a free good—and so general overhead, much less fund raising expenses, should be zero. Unfortunately, one of the great lost opportunities of the September 11 experience was the failure of charities to defend the costs of wisely allocating charitable resources. If any charity had the reputation to explain costs of overhead, it was the American Red Cross; once the public outcry grew over how it intended to distribute the money contributed to its Liberty Fund, however, the charity was forced into such a retreat that it even asserted that all

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*Trust in Not-for-Profit Organizations and the Need for Regulatory Reform*, in PHILANTHROPY AND THE NONPROFIT SECTOR 172 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999). Distinguishing between two aspects of charity governance, Professor Fleishman would leave the nonprofit sector to address "unwise, injudicious, or careless—but not illegal—patterns of actions by bona fide not-for-profit organizations," while confining government enforcement action to fraudulent behavior by those acting "under cover of a fake not-for-profit mask." *Id.* at 186. He then advocates for joint efforts by the sector and government. *See id.* at 187. Finally, if the two prior strategies fail, as a last resort Professor Fleishman would adopt a new federal agency (subordinate to state enforcement) whose powers would be limited to procedural issues, rather than program content, and which would generally "defer to state accountability-enforcing authorities who have earned the reputation for effective action . . ." *Id.* at 187-91.

For an international regulatory comparison, see the Charity Commission for England and Wales at <http://www.charity-commission.gov.uk> (last visited June 6, 2002). In addition to registering and regulating charities, this body assists charities in improving operations, and publishes such documents as "The Hallmarks of a Well-Run Charity." Note that the English company statute does not have a separate corporate form for charities. *See* Charity Commission for England and Wales, Publications: Quick Links at <http://www.charity-commission.gov.uk/publications/ccpubs3.asp> (last visited June 6, 2002); Department of Trade and Industry, Modern Company Law for a Competitive Economy: Final Report URN 01/942 and URN 01/943 at 86-88, §§ 4.63-4.67, available at [http://www.dti.gov.uk/cld/final\\_report/index.htm](http://www.dti.gov.uk/cld/final_report/index.htm) (last visited Apr. 12, 2002) (recommending such an organizational form); *see also* Charity Commission for England and Wales, PR25/01: The Charitable Incorporated Organisation (CIO) – the Future for Charities available at <http://www.charity-commission.gov.uk> (July 26, 2001) (last visited June 6, 2002).

51. SILBER, *supra* note 8, at 171.

overhead costs of the Fund's activity would be borne from other sources.<sup>52</sup>

### C. *The Twilight of Organizational Form for Charity?*

Ultimately, Professor Silber still believes that we can invest the nonprofit corporate charter with legal significance for the benefit of the public—although he would augment the regime by requiring provisional charters and periodic reviews.<sup>53</sup> I, on the other hand, have become an organizational-form agnostic: While supporting periodic regulatory review of charity operations, why should the public care whether the entity forms as a trust, a corporation, or an unincorporated association?<sup>54</sup> After all, the consequences of failing to satisfy legal standards should meaningfully relate to a state interest—loss of tax exemption, say, rather than loss of limited liability protection for organizing as a corporation.<sup>55</sup>

52. See *supra* note 3 and accompanying text (describing Congressional hearings into how the Red Cross (among others) was intending to honor the wishes of donors). We need to appreciate that a state attorney general wears two potentially conflicting hats: to protect consumers and to oversee the wise expenditure of charitable resources. Focusing exclusively on the first role, as the New York Attorney General appeared to do, risks treating charities as mere agents of donors, without regard to the greater social good that can be accomplished with now-charitable resources.

53. See SILBER, *supra* note 8, at 170-71.

54. See generally Brody, *Fiduciary Law*, *supra* note 7; Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687 (1999) [hereinafter Brody, *Tax Reform*].

55. Thus, the hate group Association for the Preservation of Freedom of Choice, as discussed above, might be a nonprofit corporation, but it will not likely be entitled to federal income tax exemption. See, e.g., *Nationalist Movement v. Comm'r of Internal Revenue*, 102 T.C. 558 (1994), *aff'd per curiam*, 37 F.3d 216 (5th Cir. 1994) (denying section 501(c)(3) status to an organization chartered under Mississippi law as a "a non-profit charitable, educational and fraternal organization dedicated to advancing American freedom, American democracy and American nationalism").

I doubt that Professor Silber would support the approach either of the Charity Commission in England with respect to the Church of Scientology or of the Attorney General of Illinois with respect to the World Church of the Creator. See Decision of the Charity Commissioners [sic] for England and Wales, available at <http://www.charity-commission.uk.gov/registration.pdf/costfulldoc.pdf> (Nov. 17, 1999) (last visited June 6, 2002) [hereinafter *Decision: England and Wales*]; *People ex rel. Ryan v. World Church of the Creator*, 760 N.E.2d 953 (Ill. 2001). In England, the Charity Commission rejected the application of the Church of Scientology (England and Wales) to register as a charity, on the grounds that it was not a religion and its core activities of "auditing" and "training" provide private, rather than a public, benefit. See *Decision: England and Wales*, *supra*; see also Debra Morris, *Church of Scientology is Denied Charitable Status by the Charity Commission*, 28 EXEMPT ORG. TAX REV. 219 (2000); Rosamund Smith et al., *The Parity of Charity*, LAW, 39 (Mar. 19, 2001) ("charity lawyers are waiting to see whether an appeal will be lodged and whether the [European] Human Rights Act will be invoked"). In Illinois, the Attorney General sought to freeze the assets of a white supremacist group, The World Church of the Creator, for failing to register as a charity. See *People ex rel. Ryan*, 760 N.E.2d at 955. The organization succeeded in having the statute voided as unconstitutionally vague, but the Illinois Supreme Court upheld the statute. See *id.* at 963. Incidentally, in its

Most recently, the debate over the legal relevance of organizational form has focused on the extent to which an attorney general's common law authority over charitable trusts extends to the activities and decisions of charities taking the nonprofit corporate form.<sup>56</sup> Incidentally, in its application for sales-tax exemption, the organization had been denied charity status by the Illinois Department of Revenue.

Moreover, the nonprofit organization (in any form) itself is continuing to diminish in importance. Under federal welfare reform and devolution, states can contract with for-profit providers as well as nonprofits for social services.<sup>57</sup> Medicare "vouchers" are good at for-profit, nonprofit, and public hospitals; similarly, demand-side tax credits, such as the education credits, can be used for tuition paid to any type of accredited institution.<sup>58</sup> The state of Pennsylvania just turned over the management of the Philadelphia public schools to Edison Schools, a private company.<sup>59</sup>

As Professor Silber's study shows, we can add the act of obtaining nonprofit corporate status to the list of once-hotly-debated legal issues that no longer trouble us, but whose ghostly outlines remain. To the perplexity of law students, corporate statutes continue to explicitly grant perpetual life, the right to acquire and alienate property, and the power to sue and be sued.<sup>60</sup> Going forward, the legal system will concern itself more with the harder questions of regulating charitable activity, and less with how charitable activity is organized.

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application for sales-tax exemption, the organization had been denied charity status by the Illinois Department of Revenue. See Kirsten Scharnberg, *Smith's Legacy of Hate and Fear: Six Months After Benjamin Smith's Spree, The Pain He Inflicted is Far From Over*, CHI. TRIB., Jan. 3, 2000, at 1.

56. See, e.g., Michael W. Peregrine, *Corporate Law Developments for Exempt Organizations*, 29 EXEMPT ORG. TAX REV. 21 (2001) (describing recent attorney general actions against nonprofit corporate health care systems, a museum and a university).

57. See Brody, *Institutional Dissonance*, *supra* note 48, at 451.

58. See Brody, *Tax Reform*, *supra* note 54, at 706-07; Andrew Ruskin, *Empowering Patients to Act Like Consumers: A Proposal Creating Price and Quality Choice Within Health Care*, 73 ST. JOHN'S L. REV. 651, 668-69 (1999).

59. See, e.g., Jacques Steinberg, *In Largest Schools Takeover, State Will Run Philadelphia's*, N.Y. TIMES, Dec. 22, 2001, at A1.

60. See, e.g., N.Y. BUS. CORP. LAW § 202 (McKinney 1986).