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## Nonprofit Law, Economic Challenges, and the Future of Charities: Introduction

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**SYMPOSIUM**

**NONPROFIT LAW, ECONOMIC CHALLENGES,  
AND THE FUTURE OF CHARITIES**

**INTRODUCTION**

*Linda Sugin*

A generation ago, the law of nonprofit organizations was virtually invisible compared to the law of business organizations. But there has been a growing focus on the nonprofit community and the legal regime that governs it, by politicians, regulators, and the press. The current flurry of proposed legislation and regulation for nonprofits discussed in the essays that follow may simply reflect nonprofit law catching up. The charitable sector has become larger, but its importance to the economy and the social fabric has grown disproportionate to its size—nonprofit institutions include most higher education, health-care, arts, religious, and social service organizations. These institutions have become more visible, and the need for a well-developed legal regime designed specifically for the independent sector has become clear. While business corporations have long been well advised, even today many large nonprofit organizations do not have fully staffed in-house general counsel. The increasing professionalism of the nonprofit sector has been accompanied by increasing attention to the legal regime in which nonprofits operate. It is a development that should not surprise us and that we should greet as a reflection of the sector's coming of age.

As part of that maturation process, the shortcomings within the nonprofit community have become more apparent, and demands for its accountability have grown. We have seen a multitude of proposals, both legal and aspirational, for improving the governance of nonprofit organizations. Many of those proposals resemble regulation of for-profit corporations, and some of the essays in this Symposium discuss that resemblance and whether the model fits for nonprofit organizations. The need for law that specifically addresses the demands and functions of charities has become clearer, and the role of lawyers has become more crucial in navigating the many challenges that nonprofits face.

The purpose of this Symposium is to discuss law and practice in the nonprofit world—to think about how lawyers, boards, and managers can grapple with the changing landscape of regulation, the changing public perception of the nonprofit sector, and the sector's overall growth and

development. Sometimes it seems that the law goes in its own direction, oblivious to the purposes for which it exists. Even without adoption of any of the new regulations that are on the table, we live in a world in which nonprofit organizations are subject to a fair dose of regulation at both the state and the federal level. Regulation is justified because nonprofit organizations, and charities in particular, enjoy significant advantages under the law, and carry out important social functions in which the public has a strong interest.

This Symposium grew out of what I see as the public/private conundrum facing the nonprofit community and the law governing it. Nonprofit organizations are being called upon to better resemble for-profit organizations in a variety of ways. Those calls come from different sources—from donors increasingly interested in results that can be understood in terms parallel to bottom-line assessments to which businesses are accustomed, from cuts in government funding and increased programming that make nonprofits add more businesslike activities to finance their work, and from increasing numbers of for-profit competitors who have been able to mobilize technology and marketing to succeed in markets previously reserved to nonprofit organizations. At the same time, the law of nonprofit organizations imagines a simpler world in many ways, and new legal issues arise with surprising frequency. The focus on corporate governance and accountability in the post-Enron for-profit world has spilled over into the nonprofit world, and nonprofit organizations are being called upon to govern their institutions more like their for-profit counterparts.

State attorneys general and the Internal Revenue Service, the official enforcers of nonprofit law, cannot keep up with the increasing number, variety, and innovations of nonprofit institutions, so organizations operate in a world of little governmental oversight. Despite the interest of a handful of state officials and a couple of powerful senators, there seems to be little political will to fund a scheme of comprehensive governmental control; many people undoubtedly believe that it is a good thing. The government and the nonprofit sector have always had a complicated relationship, and skeptics disagree about whether the coercion of government or the private power of organizations presents a greater threat to the public good. Whether minimal government control is a good idea or not, it means that institutions and individuals who care about the charitable sector must increasingly provide their own oversight, along with the press, whose role in recent years has become central in informing both the public and the regulators about problems within the sector. Without greater government resources, we will need increased institutionalization of alternative mechanisms for oversight, so that the regulatory regime can integrate the press and nongovernmental or quasi-governmental organizations into the already overlapping scheme of federal and state regulation.

At the same time that we are concerned about abuses of the public trust and insuring integrity within the sector, I think that many of us still expect

charities to reflect our altruistic spirit and provide a wide variety of public goods. We want charities to be better, in some sense, than ordinary businesses. We want their goals to be loftier and their managers to be more virtuous, and even while we demand that they are accountable in the same ways as for-profit businesses, I think that we genuinely believe that most people who choose to devote their energies to charity are really committed to the goals of their organizations and the public good. It is not new that people are becoming philanthropists, that groups are organizing to achieve goals that government is unable or unwilling to pursue, or that some individuals in the charitable sector are abusing the public trust and the generosity of donors. But I think it is new that we are expecting the highest level of professionalism and accountability from charities, and that we are demanding legal consequences for missteps and oversight of internal governance. The increased public focus on the nonprofit sector brings new opportunities to achieve good, but also the threat of failure and exploitation. More people are donating to charity than ever before, the number of organizations is ever increasing, and public awareness of good works is on the rise. The calls for greater transparency and effectiveness that we hear are a consequence of this trend, and should be embraced as a sign of the sector's success and importance. I hope that the following discussions will help us better define our direction into the future.

This Symposium is the product of the hard work of many individuals, in addition to the participants whose work is included here. I am especially grateful to Deans William Treanor and Matthew Diller, who supported this conference financially and otherwise. Helen Herman, and her staff in the office of academic programs, did an excellent job taking care of all the logistics related to the conference. Lesley Friedman Rosenthal and Cecelia Gilchrist at Lincoln Center were wonderful partners in conceiving and organizing this conference. And finally, the *Fordham Law Review's* editors and staff have done a tremendous job throughout the process, seeing this book to publication.

*Notes & Observations*