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Transparency, Media and Technology: New Expectations, New Opportunities

A New Ethic of Transparency in Charities: The Shared Goal of Journalists and State Regulators

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I. INTRODUCTION

Transparency for charities is talked about as a core value of the nonprofit sector, but it is a value articulated more often than practiced. Few aspects of the 501(c) tax status are as stridently defended by nonprofits as the provisions that allow nonprofits to keep much of their core information secret from the public, particularly donors, and other information relatively obscure such as investments. In this author's experience with organizations ostensibly devoted to disclosure, the most virulent pushback came from actually advocating not for disclosure in general terms, but disclosure as applied to specific nonprofit entities, especially when a call for donor disclosure in the operations of the 501(c)(3) foundation arms of public universities[1] *unleashed a torrent of criticism that such transparency would work only to the benefit of political reactionaries bent on destroying the nonprofit sector.*

It is something of a secret that secrecy is so valued in the nonprofit sector. The public has become aware of this regarding the behavior of 501(c)(4) social welfare organizations, unleashed by the 2010 decision of the Supreme Court in Citizens United v. the Federal Election Commission to accept unlimited corporate donations without revealing the specific sources and amounts. The result is that many (c)(4)s have been paired with Super PACs which can accept and program donations from 501(c)(4)s, with the donors' identities hidden behind the (c)(4)s' protections against public disclosure.

Transparency is no less practiced sometimes by public charities. The defenders of secrecy in sources and amounts of donations cite prospects of political repercussions for donors to unpopular causes. Oddly, that argument is frequently used by recipients of corporate philanthropic donations who say that compelling corporations to disclose all of their charitable donations (as opposed to only those that flow through a corporate foundation) would subject corporations to criticisms from shareholders and others. One would think that these arguments

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[1] Rick Cohen, "Opinion: Donations to Public-University Foundations Ought to Be Matters of Public Record," Chronicle of Higher Education (April 23, 2004) http://www.calstate.edu/pa/clips2004/april/19april/open.shtml

against mandatory disclosure of corporate charitable disclosure would be falling by the wayside as shareholders increasingly say through shareholder resolutions that they deserve to know how executives spend corporate dollars for political contributions. Why would the charitable donations of large corporations be any less an area of legitimate concern by shareholders and the public at large?

After a protracted dynamic aimed at requiring increased information in the IRS Form 990 and 990PF, it seems that the appetite of Congress for additional legislative action on nonprofit transparency is spent. With the 113th Congress, if there is legislative space beyond the cascading fiscal cliffs plus issues of gun control, immigration reform, and climate change, it is difficult to imagine much congressional energy for tinkering with nonprofit disclosure requirements beyond, perhaps, some new requirements of disclosure for 501(c)(4)s in light of indications that the FEC inappropriately extended secrecy to (c)(4)s even though Chief Justice Roberts hardly said such in his Citizens United majority decision.

Confronting a difficult wall of secrecy shielding most nonprofits, regulators must be hard pressed to capture information in anything close to "real time" that can be used to protect taxpayers, donors to nonprofits, and the intended beneficiaries of nonprofits. The case that is suggested in this paper is that state regulators have an opportunity of working with traditional print and online media to promote transparency and to use the tools of journalism to enhance the ability of government to elevate the recognition of nonprofits that are pushing the boundaries of societally productive transparency and uncovering information that nonprofit malefactors are trying to keep hidden from regulators and the public at large.

II. THE VALUE OF MEDIA FOR NONPROFIT TRANSPARENCY

In latter part of 2011, a California-based nonprofit fiscal sponsor called the International Humanities Center was unable to account for the funding it had been raising and keeping on behalf of over one hundred small organizations, many not even organized as 501(c)(3)s. The organizations that had used IHC as its fiscal sponsor were largely volunteer, generally focused on their programs on art, theater, and social welfare, and little interested or trained in finance and bookkeeping. The director of IHC for its part made promises that the funding snafu would be straightened out and the organizations that trusted IHC with their finances would be made whole—even though they had to depend on IHC to tell them what "whole" would mean. Those promises were made even though one of the Center's top financial managers had decamped for the Philippines and the director of the organization was doing little or nothing to rectify the financial snafu other than hoping that a new source of funding would descend on the organization.

All told, the money lost by the IHC members was relatively small, ranging from several thousand dollars for some of the groups up to over $400,000 for a women's organization that builds health facilities in Pakistan and Afghanistan. The story of the IHC has now reverberated through independent press to the mainstream press and as a consequence to the attention of state regulators, but it is long past the time when the IHC groups can have any expectation of compensation for their losses. In all candor, the organization that conducted the initial investigative examination of the IHC encountered the story only as an outgrowth of a prior story conducted by the same journalist (for another online press outlet), the collapse of the Vanguard Public Foundation, in which announced grant recipients never received their promised grants because of the diversion of foundation funds to cover up for a speculative investment scheme.

Nonetheless, the press coverage, picked up in the Los Angeles Times on the IH Center, and in several Bay Area outlets on the Vanguard Public Foundation, helped galvanize public attention about what were practices that materially harmed small nonprofit organizations and the communities they were meant to serve. Given the limited resources available to state regulators, the press can play a valuable role in serving as an early warning system of nonprofit management if the press knew what to look for and monitor, much like the reporters on business press beats knowing what to spot regarding corporate issues.

The lack of depth in much press coverage of the nonprofit sector suggests a role for regulators to build a productive relationship with the press. In the instances of the IH Center and Vanguard stories, it is easier—and a bit too late in the process—to identify individual malefactors carrying out variations of a Ponzi scheme on nonprofit institutions as opposed to spotting financial and managerial practices that suggest areas for regulatory oversight. Regular seminars for regulators and the press to discuss areas of repeated weaknesses in nonprofit management and finance should be pursued to enhance the ability of the press to spot issues early enough that they might be subjected to intervention and correction before irremediable losses occur.

The exchange of information and insights between regulators and the press could lead to fruitful areas of analysis regarding nonprofit financial and managerial vulnerabilities such as self-dealing and conflict of interest, excessive compensation, speculative investment strategies, for-profit telemarketing contracts, and lending to nonprofit insiders. At the same time, this kind of exchange could fruitfully redirect journalists away from the mechanical ratios for calculating administrative "efficiencies" that lead so many journalists, following the lead of charitable rating organizations, into fruitless investigative byways.

III. PRESS LIMITATIONS

No one would suggest that the mainstream media is robustly covering the nonprofit sector. The highest profile mainstream journalist on the nonprofit beat, so to speak, a reporter at the New York Times, has now been assigned to cover different subject matter. Coverage of nonprofit stories will, as determined by the editors, be spread across different desks. While the Times reporter in question was unique in the depth of her critical understanding of the sector, the shift from a "charity" reporter may not be as problematic as one might suspect. Rather than running charity stories that are typically charitable good news from charity reporters, moving the coverage of charity and philanthropy into the political and business pages opens up the coverage of charity to different analytical lenses that might be useful complements to the efforts of regulators to spot issues warranting intervention and action.

Both reporters and regulators should expect vigorous pushback from nonprofits that see critical coverage of nonprofits as press "bullying" of a nonprofit sector "unable to fight back."[2] It is ironic, of course, that that specific charge of nonprofits unable to fight back referenced the Boston Globe "Spotlight" series of several years ago on family foundations' trustees' paying themselves exorbitant fees and benefits for what should have been their voluntary service on their foundation boards.

In the language of social media, there are "memes" in the nonprofit sector about press coverage that suggests that the press is overwhelmingly negative about the nonprofit sector. The best known analysis to that effect was a 2003 report on press coverage of philanthropy that concluded that there was a "dramatic decrease in positive coverage of philanthropy" in a six month period between 2002 and 2003 compared to a comparable period in 1997 and 1998.[3] The authors described it as an "alarming trend that foundations must work to reverse." The alarming numbers were eight percent of the stories addressing issues of fraud in philanthropy and five percent as addressing scandal (deception and wrongdoing). The fraud stories included a number that involved tainted charitable giving associated with miscreant corporations, notably personal donations from former Tyco CEO Dennis Koslowski that were later reveals to have been paid for from corporate funds, and the scandal stories included several stories about the use of corporate philanthropy by Citigroup's then CEO, Sanford Weill, to help stock analyst Jack Grubman get his children admitted to an exclusive private school.

The notion that eight percent or five percent of stories deal with fraud or scandal hardly adds up to a drumbeat of negative coverage. A University of Southern California study of nonprofit press coverage published in 2005 came up with an entirely different analysis: "The results indicate that newspaper coverage about nonprofits is generally quite favorable. More stories left readers with an overall favorable impression of nonprofits than an unfavorable one. For example, slightly more than six out of 10 stories described nonprofits as delivering a service to someone in need. In comparison, only a little more than one out of 10 stories highlighted financial irregularities or mismanagement at a nonprofit."[4] The problem that the USC researchers found was not an issue of media bias,[5] but a lack of analytical depth.

Nonetheless, the notion that there are barriers or firewalls between the nonprofit sector and other sectors, making for clearly distinguishable charity and philanthropy stories distinct from other sectors, is difficult to understand, even in the analysis suggested by the 2003 study. Certainly the "negative" stories the 2003 study cited involved plenty of actors from "other" sectors engaged in the nonprofit sector. It is an old-fashioned vision of charity or charity and philanthropy as a class of "do-gooders" as opposed to people connected to normal society—including government, corporations, and labor—in multiple ways. These reports seem to

[2] http://www.mediaethicsmagazine.com/index.php/100-analysescommentary-past/688917-the-press-as-bully-media-coverage-of-non-profits

[3] Truth on the Sidelines: Philanthropy and Foundations in the Media
http://douglasgouldandcompany.com/resources/Truth%20on%20the%20Sidelines%20FINAL.pdf

[4] http://cppp.usc.edu/doc/RP22.pdf

[5] Or researcher bias, as the 2003 report authors described the press as "preoccupy(ied) with negative stories, exposing deception and seeing the 'high and mighty' fall from their pedestals"

overlook that the nonprofit sector is hardly tiny, hardly inconsequential, and hardly isolated. Nonprofits are more than 10 percent of the U.S. GDP, employ more than 14 million people, and occupy more than 60 million people at volunteers at some time or another in a calendar year. Monitoring and reporting on the probity of nonprofits is societally important, not an inappropriate investigation of a small, defenseless, resource-less sector.

However, the lack of depth in much press coverage of the nonprofit sector suggests a role for regulators to build a productive relationship with the press. In the instances of the IH Center and Vanguard stories, it is easier—and a bit too late in the process—to identify individual malefactors carrying out variations of a Ponzi scheme on nonprofit institutions as opposed to spotting financial and managerial practices that suggest areas for regulatory oversight. Regular seminars for regulators and the press to discuss areas of repeated weaknesses in nonprofit management and finance should be pursued to enhance the ability of the press to spot issues early enough that they might be subjected to intervention and correction before irremediable losses occur. Contrary to fears that this sort of intelligent coverage of the nonprofit sector will weaken charity and philanthropy, the role of the press in helping to spot, uncover, and promote action against charitable malefactors can actually strengthen the sector. The alternative is to wait until financial, managerial, and ethical problems in specific organizations fester until they are beyond remedy, leaving organizations such as the clients of the International Humanities Center or the grantees of the Vanguard Public Foundation to rue their inability to have protected themselves from predatory managers and investors.

IV. Champions Of Transparency

The advocates of nonprofits have a tendency to look backwards in the definitions of their parameters of the sector, failing to incorporate changes in the environment facing nonprofits. One of course is the increasing fuzziness of the nonprofit sector as it succumbs to the self-promotion of social entrepreneurs and their preferred alternative vehicles of "B Corporations" and low profit limited liability corporations (L3Cs), which under the state legislation that has given them profile and legitimacy are actually even less transparent than 501(c) entities. Nonetheless, 501(c)(3) foundations have become enthusiastic promoters of these new entities without giving much thought to their accountability to the public and the transparency of their operations.

The fact that these new hybrid entities, able for example to camouflage executive salaries because they don't file 990s, are less rather than more transparent than 501(c)s doesn't seem to have gotten any attention in press coverage and seems to have bypassed foundations as an issue, particularly as foundations have gravitated to what some call "sector agnostic" approaches, feeling no particular need to support nonprofits over any other kinds of organizations.[6] Regulators and journalist may see a need for increased transparency in nonprofit operations, but much of the charitable sector, despite lip service, doesn't. From a journalist's perspective, the telling evidence is the virtual silence from the nonprofit sector, other than a very small number of campaign finance advocacy organizations such as Democracy 21, promoting increased

[6] http://www.nonprofitquarterly.org/policysocial-context/21196-the-nonprofit-sectors-policy-challenges-in-the-year-ahead.html#.UQBNkh3C2So

disclosure of donors to 501(c)(4) organizations in the wake of court decisions suggesting that the Federal Election Commission overstepped its authority in exempting the political expenditures of (c)(4)s from the disclosure regimens applicable to PACs and Super PACs.

Working with the press, state regulators might be well advised to begin a campaign of sorts to promote the value of transparency through identifying and highlighting champions of nonprofit transparency. Because foundations as entities that hold, invest, and distribute tax exempt resources that would otherwise be public were it not for the tax code, a useful place to search for potential champions of transparency is in the corridors of institutional philanthropy.

Even if it might be uncomfortable for institutions used to operating at a relative distance from public scrutiny, several public benefits might be realized by increased foundation transparency. As Vikki Spruill, the new leader of the Council on Foundations, noted in one of her first official communications to the Council's membership, institutional philanthropy faces "its most critical moment…right now. At a time when our world faces a storm of converging challenges with dwindling resources, philanthropy's positive impact remains a mystery to far too many…[W]e must seize the imperative to help society better understand philanthropy's impact and contributions."[7]

The admonition that foundations have to do a better job at telling their story is a frequent refrain from foundation leaders, but that isn't transparency. At best, it is managed transparency—telling the story that foundations want public policy decision-makers, the general public, and their specific stakeholders to hear and understand. Transparency, however, is not managed through public relations firms. Transparency empowers the users, the recipients of information, to hold powerful agencies of government, well-heeled donors to political campaigns, and institutions without direct levers of official accountability to the public somewhat more accountable. When you stage-manage transparency, it simply isn't transparency. That doesn't mean simply opening the doors of foundations and inviting the public to rifle through file cabinets, but it does mean trying to find ways of making essential information more accessible and reviewable by outsiders.

Foundations have had an odd, somewhat dichotomous relationship toward transparency. In recent history, the advent of the 990 is one example. Prior to enactment of the Taxpayer Bill of Rights, many foundation leaders were opposed to the liberalization of public access to 990s, and when the law was passed, foundation leaders attempted to find ways of divorcing 990PFs from the public access the law required of nonprofits' 990s—and then some worked to delay the applicability of the law to foundations.

More recently, this dichotomous identity has been similarly exemplified by the foundations' crisis response to the California legislation that would have required a handful of large foundations to report on their grantmaking to nonprofits headed by people of color and reporting on their own staff and board demographics rather than making more grants for communities of color. Foundations fought the bill, AB624,[8] tooth and nail, although many of the

[7] http://www.cof.org/templates/content5.cfm?ItemNumber=18630

[8] http://racialequity.org/docs/cohen.pdf

same foundations are strong supporters of racial disclosures required of banks in the Home Mortgage Disclosure Act, have supported nonprofits demanding similar disclosures of utility companies in front of the state's Public Utilities Commission, and have fought strenuously against California's Proposition 54 initiative (which would have generally banned the state from collecting race and ethnicity data).

Another dimension of foundations' split thinking on transparency is found in their relationship with "stakeholders." This is more than just a fancied up description of grant recipients whose opinions on how well they are treated by foundation program officers are now solicited de rigueur. Stakeholders are different than insiders such as donors, board members, and staff. The Denver Foundation describes "external stakeholders" as "people who are impacted by your work as clients/constituents, community partners, and others."[9] Lauren Tulp of the Gordon and Betty Moore Foundation suggested grantees, community residents, and external experts are potential stakeholders, while other foundations such as the Bill & Melinda Gates Foundation and some health conversion foundations have recruited stakeholders to participate in foundation grantmaking activities.

The common parlance in the foundation world is that stakeholders with a "vested interest" in the foundation's work merit inclusion in efforts to assess what the foundation impact is and should be for various communities. But while the concept of stakeholders is common in foundation circles, when it comes to discussions of transparency, the circle for inclusion becomes distinctly narrower.

A foundation champion for transparency could promote the positive elements and public benefits of improved disclosure standards which in passing also contribute to a more robust environment for oversight and accountability. Some of the public purposes that might be served if the foundation sector were to adopt improved disclosure standards could be role models for the nonprofits foundations support through their grants:

Telling a better story: Spruill's charge to the sector is to explain what organized philanthropy is and does, but doing so is much more credible when it emerges from the analysis of independent analysts and the public. If philanthropy has a strong story to tell, it should be one that can be told by independent observers taking advantage of transparency to examine the data. The same applies to the nonprofit sector in relating to the public and providing analytical depth for journalists.

Fostering civic engagement: Foundations are relatively unified, regardless of their political leanings, in favor of increased civic engagement. Foundations can make a sectoral commitment to make more foundation information available in order to make citizens and policymakers better "consumers" of foundation products, just as foundations want to help citizens be better consumers and participants in the processes of government and business. A core value of the nonprofit sector is civic engagement which would be enhanced by championing improved transparency and disclosure practices.

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[9] http://www.nonprofitinclusiveness.org/identifying-internal-and-external-stakeholders

Enhancing legitimacy in public policy role: Increasingly, foundations and nonprofits have been moving into the public policy arena, not simply through their grantmaking but through their direct participation. Foundations, for example, partner with government at various levels, including a recent spate of foundation engagements with the federal government in programs such as the Social Innovation Fund at the Corporation for National and Community Service and the Department of Education "Race to the Top" program. In some cities—notably, Detroit, where local government has taken a turn toward the dysfunctional—foundations are developing and running programs that are, in some ways, taking the place of the public sector. As foundations move beyond supporting nonprofits to become direct players in the public arena, they must also increase their public transparency. The same holds true for nonprofits in their relationships with government. To improve and strengthen democracy in this nation, we have to have mechanisms and instruments for "following the money," but it would be far more productive to see this practice occur as a result of best practices and good governance, with philanthropic champions promoting them, as opposed to hardening the issue of disclosure into an adversarial standoff between nonprofits and philanthropy on one side and regulators and journalists on the other.

Can philanthropy do this? We would contend that this is what philanthropy can and ought to do. It has the flexibility of resources and operations that government doesn't and hard-pressed nonprofits often don't. There are examples of philanthropy taking the lead in difficult issues of this sort that seem to have been heavier lifting than standing up for a public ethic of disclosure would be. For example, some foundation leaders took on their peers in arguing to protect the estate tax against the Bush Administration's plans to eliminate it as the so-called "death tax" at a time when much of institutional philanthropy (and the nonprofit sector in general) thought that steering clear of the estate tax to avoid ruffling the feathers of wealthy donors would be the politically safest course of action. The leadership of a few foundations picked up on the AB624 impetus for increased racial, ethnic, and gender diversity in foundation leadership, resulting in some foundation initiatives such as "Diversity in Philanthropy" to promote more racial equity in foundation operations and foundation grantmaking. The former executives of the Hewlett Foundation, the Surdna Foundation, and Atlantic Philanthropies some years ago collaborated to promote increased levels of general operating support grantmaking, going against the grain of foundations wanting to exercise more control over the use of their grants by restricting their purposes.

There are some in the foundation world who are already moving in this direction, particularly at the Foundation Center in its "Glass Pockets"[10] initiative trying to induce greater transparency in foundation activities. As one foundation leader in the Glass Pockets initiative noted, "In addition, most observers judge foundations by their effectiveness, efficiency, and transparency, not their asset size."[11] One of the emerging trends among the Glass Pockets foundations has been an increasing reliance on social media as a tool for improving practices of transparency.[12] Whether they intended it or not, the practice of using social media for foundations to increase their own transparency has been to elevate social media as a tool for

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[10] http://www.glasspockets.org/

[11] http://blog.glasspockets.org/2013/01/dileonardi-20130123.html

[12] http://blog.glasspockets.org/2011/08/whinnem_20110809.html

foundations, nonprofits, and the public at large to better understand and communicate philanthropy and ultimately what it means to be and operate as a nonprofit.

Call this a Nixon-in-China idea, of foundations working with regulators to champion the values of transparency for themselves and as role models for nonprofits. It is difficult to imagine that there would be public clamor for new regulations for increased nonprofit transparency and disclosure, not even a call for improving the reporting on the less penetrable aspects of the Form 990, particularly the all-important parts on investments which are filled with information that rarely gets a second's worth of attention. Changing the ethic of transparency is going to need champions promoting it, beginning for themselves, and extending to the sector within which they operate. It is a role for philanthropic champions, drawn from the part of the nonprofit sector whose reporting is voluminous and simultaneously often unrevealing.

V. CONCLUSION

Opponents of expanded transparency remind us of the 1956 case of NAACP v. Alabama, in which the U.S. Supreme Court ruled in favor of the NAACP. The Alabama state government had demanded the NAACP's full membership list in order to verify its qualification as an out-of-state corporation authorized to do business in the state, but it was an all-too-obvious effort to attack the NAACP after the Montgomery bus boycotts. The court ruled that the Alabama state government's requirement, applied only to the NAACP, would have violated the First Amendment free speech and free association rights of the NAACP members.

Opponents of expanded nonprofit and philanthropic transparency also raise questions of practicality. If you demand more transparency, where does the line get drawn? What about a nonprofit's or foundation's inner workings becomes "public" if transparency is expanded? And they ask, aren't private charity and private philanthropy essentially just that—private? In this perspective, the public has no specific right to demand increased transparency from entities that are created and capitalized by the willingness of private individuals to pay from their pockets to support nonprofits' good works.

It is true that the nation must guard against the exploitation of increased disclosure, such as repeats of what Alabama—and several other southern states as well—tried to do to the NAACP during the 1950s to silence the protests of African Americans for basic civil rights. But the secret financing flowing to and through some elements of the nonprofit sector through 501(c)(4)s is just as destructive to the American polity, except unlike Alabama's past ham-handed attempts, it is widespread, secret, pernicious, and increasingly part and parcel of modern American political practice. The misuse of charitable resources by 501(c) organizations of any type, leaving donors, charities, and communities waiting for resources that never materialize because of mismanagement and misspending, is equally destructive.

When nonprofits and foundations explicitly choose to sidestep practices of transparency, for example, holding a White House dialogue on social enterprise, but denying access to press coverage,[13] the nonprofit sector is seen as secretive, with something to hide, and when you are seen as having something to hide, people look for the dirty laundry that may be lurking. When the press coverage of the Knight Foundation's "Sunshine Week" highlights examples of nonprofits and foundations resisting transparency and disclosure,[14] the nonprofit sector looks bad and is ill-served by the nonprofit entities resisting reasonable requests for enhanced transparency. On the other hand, when charities such as Mercy Corps and Medical Teams International demonstrate and model transparency far beyond any state or federal requirements,[15] the nonprofit sector is strengthened, not weakened. A new ethic of transparency and disclosure, involving state regulators and the press in a mutually educational dynamic for improved and thoughtful reporting—tied to the elevation of champions of transparency—would seem to be a positive step for the charitable and philanthropic accountability.

[13] http://www.nonprofitquarterly.org/policysocial-context/21071-closed-white-house-innovation-conference-signals-attack-on-transparency.html#.UQBcGh3C2So

[14] http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=2038:nonprofits-transparency-and-sunshine&catid=149:rick-cohen&Itemid=117#.UQBcwx3C2So

[15] http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=11616:transparency-as-a-tool-in-vetting-good-nonprofit-work&catid=155:nonprofit-newswire&Itemid=986#.UQBdrR3C2So