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The Fundamental Role of States in Governance Issues

Improving Charity Governance with Advance Rulings

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I. INTRODUCTION: THE CHALLENGES FOR STATE ENFORCEMENT OF FIDUCIARY DUTIES

Governing charitable organizations isn't getting any easier. Not only has the number of organizations grown,[1] but their legal complexity has increased as well.[2] Charities play a crucial role in the economic, social, and cultural structures of society,[3] but they are privately governed organizations with legal structures that closely resemble businesses.[4] The better charities are run, the more they can contribute to their public missions and overall social welfare.[5] The state does not dictate "how to 'do' charity,"[6] but state attorneys general ("AG") are the primary overseers of charity behavior, responsible for enforcing the obligations of loyalty, [7] care,[8] and obedience[9] that fiduciaries have under the laws of every state. The AG's

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[1] The number of public charities registered with the Internal Revenue Service increased 42% from 2000 through 2010, to almost a million organizations. In 2010, the entire nonprofit sector – which includes private and public charities, small organizations not required to register, religious organizations, and other non-charitable nonprofits -- exceeded 2.3 million organizations. *See* Amy S. Blackwood, Katie L. Roeger, and Sarah L. Pettijohn, *The Nonprofit Sector in Brief: Public Charities, Giving, and Volunteering*, 2012 at 1-2 (Urban Institute) *available at* http://www.urban.org/uploadedPDF/412674-The-Nonprofit-Sector-In-Brief.pdf.

[2] *See* John D. Colombo, *Commercial Activity And Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487, 489 (2002) ("it is now common to find charities engaged in numerous economic activities through a variety of business arrangements including subsidiary corporations, joint ventures, and contractual agreements").

[3] In 2010, public charities reported $1.51 trillion in revenue and $2.71 trillion in assets. *See* Blackwood et al, supra note 1 at 1. Nonprofits paid 9.2% of all wages and salaries in 2010. *See* The Nonprofit Almanac, 2012 *available at* http://nccs.urban.org/statistics/quickfacts.cfm.

[4] The Model Nonprofit Corporation Act (Third Edition) was drafted by the American Bar Association's section on business law, and closely resembles the Model Business Corporation Act.

[5] In order to qualify for tax exemption, charities must be "organized and operated exclusively" for public purposes defined in the statute. IRC §501(c)(3).

[6] Evelyn Brody, *The Legal Framework of Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 243 (Powell and Steinberg eds. 2d ed., 2006).

[7] *See* Daniel Kurtz, BOARD LIABILITY 59 (1988). ("The basic duty of loyalty … requires a director to have an

burden is great because very few other parties are allowed to bring suit to enforce these duties.[10]

The challenges that states face in governance enforcement are not new. Charities offices are underfunded and understaffed and they have not grown at the rate of the sector itself. This fact enables deliberate malfeasance by charity insiders to continue undetected by attorneys general. At the same time, well-meaning directors often lack the knowledge necessary to carry out their legal obligations to the organizations that they serve, and in many states, there is virtually no easily accessible information to guide fiduciaries in their roles.[11] To complicate things further for state AGs, the IRS has encroached on the states' traditional role in overseeing nonprofit governance, even though the IRS may not have the legal authority to preempt the states' traditional functions, and despite its questionable suitability for the task.[12]

In recent years, the media and private watchdogs have become the most important enforcers of charity fiduciary behavior, leading the state authorities in some cases, and even supplanting them in others. While the media has long played a central role in uncovering wrongdoing,[13] the proliferation of charity rating and monitoring institutions[14] has tipped the

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undivided allegiance to the organization's mission … when using either the power of his position or information he possesses concerning the organization or its property."). The famous quote in the corporate context, equally applicable to nonprofits, is Judge Cardozo's description of the duty as "[n]ot honesty alone, but the punctilio of an honor the most sensitive." Meinhard v. Salmon, et al., 249 N.Y. 458, 464 (1928). The Model Nonprofit Corporation Act requires that directors act "in a manner the director reasonably believes to be in the best interests of the nonprofit corporation." §8.30(a)(2).

[8] New York law provides a succinct definition for care: "Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." NY NPCL §717(a). To satisfy the obligation, "trustees must affirmatively exercise discretion and make a deliberate judgment." The Committee to Save Adelphi v. Diamandopoulos, Report and Recommendation of Regents Panel 16 (Feb. 5, 1997) *available at* :https://folio.iupui.edu/bitstream/handle/10244/502/THE%20COMMITTEE%20TO%20SAVE%20ADELPHI.pdf?sequence=1.

[9] See Marion Fremont-Smith, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION (2004). While some scholars dispute the separate obligation of obedience, I have previously argued for it. *See* Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893 (2007).

[10] In addition to the attorney general, directors have standing to bring suit for violations of fiduciary duties, but beneficiaries and donors generally do not. *See generally*, Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 IOWA J. CORP. L. 655 (1998). Many fiduciary duty cases are dismissed for lack of standing. *See infra* note 27.

[11] Visits to the attorney general websites of all 50 states revealed that some sites had no search function (Alabama and Wyoming) and others had no information on charities (Mississippi, Nebraska, West Virginia). The vast majority had very little information for charities, primarily directed towards donor protection. Only a few states had a substantial amount of helpful information for charity fiduciaries (California, Massachusetts, New York).

[12] *See, e.g.*, KathleenTeltsch, *United Way Awaits Inquiry On Its President's Practices*, NEW YORK TIMES, Feb. 24, 1992 (Reports of William Aramony's behavior had been uncovered in "several publications.").

[13] *See, e.g.*, American Institute of Philanthropy – Charity Watch *available at* http://www.charitywatch.org/; Better Business Bureau --- Wise Giving Alliance *available at* http://www.bbb.org/us/charity/l; Charity

balance further away from legal to non-legal enforcement mechanisms.

This development threatens the states' control over the definition of good governance and wrongdoing. Media exposure is a non-legal shaming remedy for governance failures, and we should be skeptical about the equity and efficiency of such a remedy. The court of public opinion is not a good arbiter of charity governance because it may get the standards wrong, may sensationalize stories to grab attention, and may produce overall negative effects on the charitable sector and society as a whole.

There is a tension inherent in the charities enforcement work of the Attorney General between effectiveness in a particular case and usefulness to the charitable sector as a whole. Unlike the IRS, which oversees charities as an auxiliary to policing their tax exemptions, state attorneys general are protectors of the charitable sector. The state's role overseeing charities is as *parens patriae*,[15] so its object is to protect the public good; effectiveness in AG enforcement implies preservation of charitable assets. These goals often counsel secrecy and settlement by the state with a charity under investigation without legal enforcement proceedings. Where the AG can reform a charity and improve its governance by demanding internal changes in structure, process, or policies, confidentiality is desirable so that the charity suffers no loss of donors or public embarrassment. Except in the situation where a charity is fraudulent at its core, or there is no public benefit that it provides, a targeted remedy that corrects a problem is best for minimizing damage to a charity's mission, and perhaps to the reputation of the charitable sector as a whole.

Unfortunately, secrecy and settlement are prime causes of what may be the most pressing legal problem facing charities and their advisors today – the lack of law.[16] If participants in the charitable sector –particularly lawyers – had greater knowledge of both the issues raised in AG investigations and the solutions designed by the state, they would be in a better position to advise nonprofit boards on how to behave. The lack of law stems from both the dearth of decided cases that specifically involve charities, and the scarcity of specific rules and standards applicable to charities in many states. Some states have no unique charities law at all, creating the impression either that charities are somehow beyond the law or that there is nothing unique about the law of charities compared to the law of other institutions.[17] While the law of charities overlaps with the law of trusts and the law of

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Navigator *available at* http://www.charitynavigator.org/; GiveWell Blog *available at* http://blog.givewell.org/; Stanford Social Innovation Review - Blog – Watchdog *available at* http://www.ssireview.org/blog/category/watchdog.

[14] *See* James Fishman, *Stealth Preemption: The I.R.S.'s Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545 (2010); Lloyd H. Mayer & Brendan M. Wilson, *Regulating Philanthropy in the 21st Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479 (2010); Marcus S. Owens, *Charities and Governance: Is the IRS Subject to Challenge?*, 60 EXEMPT ORG. TAX REV. 287 (2008).

[15] Latin for "parent of the nation" which in the legal context refers to the state having standing to sue on behalf of its citizens.

[16] *See* Brody, *supra* note 6 at 244 ("it is not easy to say what 'the law' is in the nonprofit sector").

[17] Sophisticated lawyers have advised New York charities to incorporate in Delaware because it has no separate law.

business corporations, there are unique characteristics of charitable organizations that demand specific law. Those characteristics were apparent to the drafters of the 1601 Statute of Charitable Uses, and the increasing complexity of charities' structures and operations today makes legal rules even more important now.

This paper is primarily concerned with institutionalizing better nonprofit governance by helping fiduciaries understand their obligations in difficult cases. The advance ruling process it advocates aims to strengthen the private governance of charities by growing a body of law one real question at a time. Nevertheless, it is important to recognize that legal efforts to improve governance must continue along both a narrow path for individual charity problems and a wider one to better establish standards of behavior in the sector as a whole.[18] There is a place in charity governance for best practices that are not law, and it is important to identify which issues are appropriate for attorney general enforcement as an *application* of law. General principles of good governance with the imprimatur of law can be made widely available either as legislation, regulation, or official state standards of best practices. These are worthwhile initiatives, but they are not my focus today.

These challenges facing the nonprofit community and its state regulators—too little law, resource constraints, the confidentiality paradox, increased complexity of charities operations, and the rise of media enforcement— demand innovative solutions. The states need to improve charity governance while balancing diverse concerns for the sector and the public at large. I believe that it will be worthwhile for states to shift from a focus on better enforcement *ex post* to a focus on better governance *ex ante*[19] by devoting more attention (and resources) to assisting well-meaning directors in carrying out their fiduciary obligations and actively controlling their charities. Correspondingly, state AGs may worry less about punishing those who fail in their duties. Too much attention by state AGs to enforcement after wrongdoing may squander the potential for good that well-meaning charity fiduciaries are unable to harness without assistance. The returns to better *ex post* enforcement, as measured by preservation of charitable assets and overall social benefit, may not be worth as much as the returns to *ex ante* governance improvement.

The next section of this paper, Part II, briefly describes the minimal legal enforcement of fiduciary obligations in nonprofit organizations. It considers whether underenforcement is a problem by comparing nonprofit organizations and business organizations, focusing more specifically on the special problems of enforcing the duty of care. Part III considers the media's role in oversight of nonprofit governance and explains how the importance of reputation in the charities world has allowed the media to effectively displace legal authorities. It considers whether the press is so successful in enforcing the

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[18] These efforts have certainly been underway for some time, both at the legal and self-regulatory level. See e.g., American Law Institute, PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS (in progress), Panel on the Nonprofit Sector, STRENGTHENING TRANSPARENCY, GOVERNANCE, ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS (June 2005).

[19] This is consistent with the approach of the Leadership Committee for Nonprofit Revitalization, REPORT TO ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, REVITALIZING NONPROFITS, RENEWING NEW YORK 23- 34 (Feb 16, 2012).

fiduciary duties of nonprofit directors that we do not need more governmental oversight, but ultimately expresses skepticism about the press displacing government enforcement. Part IV suggests a solution to some of the enforcement challenges faced by state charities bureaus and the problem of too little law by advocating an Attorney General-based advance ruling process for fiduciary duty questions, modeled on the private letter ruling procedure administered by the IRS. It argues that such a process would be an equitable and efficient alternative to media enforcement, and would also be preferable to other suggestions in the literature for addressing the problem of charitable fiduciary enforcement. Part V briefly concludes.

II. WHERE'S THE LAW IN NONPROFIT GOVERNANCE?

A. Legal Enforcement of Fiduciary Duties is Minimal

Published opinions concerning the fiduciary duties of individuals who control nonprofit organizations are few, and cases holding directors liable for breach are scarce. While directors have obligations of loyalty, care and (maybe obedience), states enforcing fiduciary duties concentrate on the duty of loyalty, which demands that fiduciaries refrain from using their positions to improperly obtain personal benefits.[20] That emphasis is not surprising given that violations of loyalty are the clearest example of unfair treatment by a fiduciary of a charity. Judicial consequences for breaching the duty of loyalty vary depending on the court and the severity of the infringement, but the goals of the remedies include punishing the director, making the organization whole, and serving as a warning to future directors not to engage in self-dealing. Courts have found the duty breached when there is clear self-dealing by the director that enriches the director at the expense of the charity.[21] In some cases, large monetary penalties have been imposed on the breaching parties and awarded to the organization.[22]

Occasionally, an organization may be dissolved for self-dealing.[23] Though a dramatic remedy, dissolution may be desirable where there is no public purpose or charitable activities to be preserved by keeping the organization alive. In the most egregious fraud cases,

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[20] *See* James J. Fishman & Stephen Schwarz, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 163 (4th ed. 2010).

[21] *See* Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429 (1st Cir. 1996); State ex rel. Little People's Child Dev. Ctr., Inc. v. Little People's Child Dev. Ctr., Inc., No. M2007-0034-COA-R3-CV, 2009 WL 103509 (Tenn.Ct.App Jan. 9, 2009); Summers v. Cherokee Children & Family Services, 112 S.W.3d (Tenn. Ct. App., 2003); Marist College v. Nicklin, No. 01-94-00849-CV, 1995 WL 241710 (Tex. App. April 27, 1995) (not designated for publication); John v. John, 153 Wis.2d 343 (Wis. Ct. App. 1989).

[22] *See Boston Children's Heart Found*, 73 F.3d at 431, 443 (awarding judgments in favor of Boston Children's Heart Foundation for $6,562,283.02); *Little People*, 2009 WL 103509 at *11 (awarding judgment against defendants for $1,782,666.00), *Marist College*, 1995 WL 241710 at *2 (awarding the College a total of $19,825.22, with $8,189.76 coming from Nicklin directly). *See also John*, 153 Wis.2d at (where a director was enjoined from serving as the organization's director in the future and was required to pay a monetary sum of $1,171,418.00 plus interest).

[23] *See Cherokee Children*, 112 S.W.3d at 531.

individuals may create an organization for nothing but self-enrichment, so the purpose of the organization is not really charitable at all, but exists only to siphon funds from the charitable sector into private hands. The Coalition Against Breast Cancer, which managed to raise substantial sums from donors, is a good example. It was "a sham charity that ha[d] diverted nearly all of the millions of dollars raised in the name of breast cancer to its officers, directors and fundraisers." In its complaint, the Attorney General demanded the organization's dissolution.[24]

Despite these examples, director liability is unusual, and in cases involving breach of care alone, it is exceptional.[25] Care is more likely to be enforced if it is accompanied by a breach of loyalty than if it constitutes gross negligence with inchoate consequences for the organization. The combination care-loyalty pattern is predictable and the harm from failure to exercise care more concrete where it is an accessory to a loyalty breach – a powerful insider steals from an organization (loyalty) and the directors charged with monitoring him are not paying attention (care), so the charity's losses are undetected, prolonged, and/or large. If an organization has any directors who were not involved in self-dealing that occurred, they presumably failed in their oversight role. But it is unusual for the negligent directors, who enjoyed no personal financial benefits from the wrongdoing, to be personally liable for the losses. New York's settlement with Educational Housing Services and its directors is a recent example of this combination: while the founder siphoned money from the organization, the rest of the directors failed to stop him. The EHS case is unusual because the negligent directors agreed to pay $850,000 in damages for their breach of fiduciary duties to the organization, even though they had not financially benefitted.[26]

Notwithstanding some enforcement successes at the administrative stage or in litigation, plaintiffs generally lose in charity fiduciary duties actions. Because attorneys general are the only party with undisputed standing to sue, courts commonly dismiss fiduciary breach cases for lack of standing.[27] Where plaintiffs are permitted to proceed, some courts have concluded that the defendant owed no fiduciary duty to the plaintiffs, based on an

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[24] Schneiderman v. Coalition Against Breast Cancer complaint at: http://www.ag.ny.gov/sites/default/files/press-releases/2011/Summons%20and%20Complaint.pdf June 27, 2011.

[25] Since care violations are often alleged coincident with loyalty violations, it is often hard to differentiate the remedies for each.. Monetary liability for a care violation alone is rare, though there are exceptions that prove the rule. *See* Lifespan Corp. v. New England Medical Center No. 06-CV-421-JNL, 2011 WL 2134286 (D.R.I. May 24, 2011)($272,756 judgment in care case); In Matter of Donner, 82 N.Y.2d 574 (1993)(liability for trustee for lack of due care); Lynch v. John M. Redfield Foundation, 88 Cal. Rptr. 86 (Cal Ct. App. 1970).

[26] *See* In re Investigation by Eric T Schneiderman, Attorney General of the State of New York, of Educational Housing Services Inc. AOD 12-121 (Dec. 9, 2012).

[27] *See* Wisdom v. Centerville Fire Dis., Inc., 391 Fed. Appx. 580 (9th Cir. 2010); Kidwell ex rel. Penfold v. Meikle, 587 F.2d 1237 (9th Cir. 1979); George Pepperdine Found. v. George Pepperdine, 126 Cal. App. 2d 664 (D. Cal. 1954); Askew v. Trs. of Gen. Assembly of Church of Lord Jesus Christ of Apostolic Faith, F. Supp. 2d (E .D. Pa. 2009); Lundberg v. Lascalles, No. 59178-9-I, WL 4157779 (Wash. App. Div. 1, Nov. 26. 2007); Koch v. Ironwood Country Club, No. E030460, 2002 WL 19654666 (Cal. App. 4 Dist., Aug. 26, 2002); O'Donnell v. Sardegna, 336 A.2d. 398 (Md. 1994); Grand Council of Ohio v. Owens, 620 N.E. 2d. 234 (Ohio App. 10 Dist., 1993).

analysis of the relationship between the parties in the dispute.[28] Others cases hold that the directors have acted within the appropriate bounds of their fiduciary duties,[29] which are broad because the "best judgment rule" protects nonprofit managers from liability for mistakes in judgment if they act in good faith, with sufficient care, and without conflicts of interest.[30] Even where plaintiffs prevail, the remedies for gross negligence may be weak: In a leading care case, the court ordered future trustees of an organization to read his opinion explaining why the directors involved in the case were grossly negligent in carrying out their obligations.[31] While the judge was innovative, as a punishment for wrongdoing, the remedy was undeniably pathetic. As a whole, enforcement of charity fiduciary duties is modest.

B. Are Business Organizations A Good Model for Charities?

It is common for the law of nonprofit organizations to look to its for-profit counterpart as a model. For example, the standards for loyalty and care in nonprofit corporations mirror the standards for business corporations.[32] Businesses and nonprofits share the same kinds of agency cost problems, and good governance in both contexts depends on keeping greed and sloth at bay. And business organizations have a lot more law to guide them than do nonprofits, so the tendency to look to the law of business organizations is sometimes the only option.

Since corporate shareholders can bring derivative suits against directors, courts have had an opportunity to consider more claims for breach of care against directors of businesses than nonprofits. However, in the business corporation context, like for nonprofits, the duty of care is almost never enforced by a court.[33] Some corporate law scholars seem to be satisfied

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[28] The relationship between the parties is analyzed and found to be one not requiring fiduciary duties. *See* Paul v. Judicial Watch, Inc., 543 F. Supp. 2d 1 (D.D.C. 2008); Olson v. Automobile Club of Southern California, No. B201428, 2009 WL 1-39573 (Cal. App. 4 Dist., Dec. 4, 2009); State by and through Pierotti v. Sundquist, 884 S.W. 2d 438 (Tenn., 1994); Fine Iron Works v. Louisiana World Exposition Inc., 472 So.2d 201 (La.App. 4 Cir., 1995).

[29] *See* Consumers Union of U.S., Inc. v. New York, 5 N.Y. 3d 327 (N.Y. 2005); South Bay Rod and Gun Club v. Dashiell, No. GIE023335, 2009 WL 4547032 (Cal. App. 2 Dist. April 20, 2009); White v. Bd. of Dirs. of St. Elizabeth Baptist Church, 974 So. 2d 164 (La. App. 2 Cir., 2008); Murrell v. Crocker, No.

B190152, 2007 WL 1839478 (Cal. App. 2 Dist. June 28, 2007); In re Northridge Earthquake Commercial Litig. *(Farmers Group)*, No. BC258542, WL1832970 (Cal. Sup. Ct. Aug. 17, 2004).

[30] *See* Fishman & Schwarz, supra note 20, at 153. The best judgment rule is the nonprofit corollary to the business judgment rule in corporate law.

[31] "Ordered that each present trustee of Sibley Memorial Hospital and each future trustee selected during the next five years shall, within two weeks of this Order or promptly after election to the Board, read this Order and the attached Memorandum Opinion and shall signify in writing or by notation in the minutes of a Board meeting that he or she has done so." Stern v. Lucy Webb Hayes Nat. Training Sch. for Deaconesses & Missionaries, 381 F. Supp. 1003, 1021 (D.D.C. 1974) (known as the "Sibley Hospital Case").

[32] Compare the Model Nonprofit Corporation Act and the Model Business Corporation Act.

[33] *See* In re Citigroup Shareholder Derivative Litigation, 964 A.2d 106 (Del. Ch. 2009); *In re Caremark*, 698 A.2d 959 (Del. Ch. 1996), Aronson v. Lewis, 473 A.2d 805 (Del. 1984)(discussing care, but not imposing any liability for its breach). Joy v. North, 692 F.2d 880 (2d Cir. 1982) (explaining the business judgment rule and rare liability for corporate directors). The most famous case imposing liability for lack of care, Smith v. Van Gorkom, 488 A.2d 858 (Del 1985) led to an upheaval in the legal community and adoption of the liability shield

with the lack of legal enforcement of care. Edward Rock and Michael Wachter describe the corporation as "self-governing," and argue that if courts intervened regularly in questions of negligence, centralized management could not function.[34] Centralized management is necessary in nonprofit organizations as well as business corporations because decisions must be made and implemented, so we might conclude, by analogy, that we should leave nonprofits alone to self-govern also

Keeping courts out of questions of negligence in nonprofit governance would reduce the role of the state. But given the press' and the public's interest in nonprofit governance (and scandals), media oversight of nonprofit governance would continue regardless of the state's choice.[35] The "self-governing" nonprofit organization would be subject to internal controls and media scrutiny. Abstention by the state would increase the importance of the media's role, and its method of shaming charities leaders into good behavior. Would that be preferable to a larger state role? David Skeel argues, in the business context, that shaming of corporate directors is a particularly good approach to enforcing care violations because monetary liability is inappropriate where the directors did not personally benefit from their fiduciary failures.[36] The problem with ill-fitting judicial remedies is common to breaches of care in both the for-profit and nonprofit context, so shaming might be a better remedy for both. Skeel notes that there has been judicial shaming in the business context by the Delaware courts, which have lectured corporate directors in their opinions.[37] In addition to front-page newspaper embarrassment, official shaming is an option in the nonprofit sector as well; the AG could publish lists of negligent directors and their organizations.[38] But an official shaming remedy would require the same kind of enforcement costs as other official remedies – the state would need to undertake investigations and prosecutions in getting to that result. The beauty of a shaming regime is that the press can do it without the participation of the state so the attorney general can direct its attention to other issues.[39]

The most significant recent developments in nonprofit law have related to disclosure,[40] a feature of the federal securities laws. Disclosure may make organizations more internally self-regulating by relying on both reputational incentives and fear of enforcement.

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in Del. §102(b)(7). *See* Roundtable Discussion: *Corporate Governance*, 77 CHI-KENT L. REV. 235 (2001).

[34] Edward Rock and Michael Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1699 (2001).

[35] Part III, *infra*, discusses media shaming in more detail.

[36] David Skeel, Jr., *Shaming in Corporate Law* 149 U. PA. L. REV. 1811, 1854 (2001) (discussing the Caremark case).

[37] *Id*. at 1855 fn 178.

[38] Charities bureaus already do engage in a shaming activity by publishing statistics about fundraisers' share of money raised on behalf of charities. *See* e.g. State of New York Charities Bureau, PENNIES FOR CHARITY: TELEMARKETING BY PROFESSIONAL FUNDRAISERS at: http://www.charitiesnys.com/pennies_report_new.jsp. For better or for worse, the media is a more effective purveyor of shame because it gets more readers.

[39] *See* text and notes 71-76, *infra*.

[40] *See* 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); Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183 (2012).

If an organization must disclose what it is doing, it is more likely to try to do everything right. It is also more likely that the authorities will discover any wrongdoing and proceed to enforce. Disclosure has long been a feature of federal law concerning public corporations,[41] though the nature of the disclosure and the breadth of disclosure requirements differ substantially for businesses and charities.[42] IRS Form 990, the informational return that tax-exempt organizations must file with the federal government, was recently revised to increase the governance disclosure it requires. The form asks organizations to explicitly state, for example, whether they have a written conflict of interest policy, whistleblower policy, and document retention policy.[43]

Although the form states that these are policies not required by the tax law, anyone completing the form gets the clear message that they answer "no" to these questions at their peril. These filings are provided to the government, but it may be more significant that they are readily available online,[44] so that the public reputation of an organization is at stake in these answers. Some commentators have been skeptical about the value of increased disclosure requirements as a self-enforcement mechanism for the nonprofit sector, particularly given the costs to the sector of disclosure itself.[45] The link between disclosure, reputation, and governance improvement may simply be too weak for increased public disclosure to be worth its cost, and it is impossible to know how much "self-governance" disclosure actually produces.

Disclosure may be a more desirable solution in the business context than in the nonprofit context. The key factor that makes disclosure powerful in business law -- and allows courts to reasonably stay out of negligence questions -- is markets. Courts do not need to enforce the duty of care, not because business corporations are actually "self-governing," but because the market for corporate control monitors corporate governance.[46] Business directors and executives ignore the fiduciary standards of conduct at their peril. But nonprofit directors need not fear a market monitor. In the charities context, there is no parallel market that functions as a market for control because nonprofits do not have shareholders who can sell control.[47] There are no proxy contests or even director elections. Nonprofit boards are

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[41] Companies with more than $10 million in assets whose securities are held by more than 500 owners must file reports. Reports are publicly available at http://sec.gov/edgar/searchedgar/webusers.htm

[42] There are many more 990s filed than 10-K reports, and while the precise content of the disclosed information differs, both forms require financial information and governance information. Though small charities do not have to file lengthy reports, small and private businesses are not subject to the federal requirements.

[43] Internal Revenue Service Form 990 Part VI Section B.

[44] www.guidestar.org.

[45] *See* Reiser and Brody, supra note 40; Ellen Aprill, *What Critiques of Sarbanes-Oxley Can Teach About Regulation of Nonprofit Governance*, 76 FORDHAM L. REV. 765 (2001); Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205 (2004).

[46] Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POLITICAL ECON. 110 (1965). This is the classic story anyway, which has been refined, critiqued, and tested in the corporate law literature, but is beyond the scope of this essay.

[47] *But see* Dana Brakman Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 5 BYU L. REV 1181 (2006)(analyzing changes in control and direction of nonprofit organizations and comparing them to

self-perpetuating: current directors recruit their cohorts and successors.[48]

The market in which nonprofits operate is a market for charitable donations, government contracts, and volunteer services. It is possible that these markets impose some governance constraints; an organization that does no good is likely to eventually wither from lack of support. But these markets are not efficient, so they are unlikely to be nearly as powerful as the market for control in the business context. Henry Hansmann's explanation for why nonprofits exist – "contract failure" -- would suggest that donors, beneficiaries and volunteers would be slow to recognize a nonprofit's failure to carry out its mission. Lack of information is a crucial component of "contract failure," which Hansmann defines as "the inability to police producers by ordinary contractual devices."[49] For example, donors who finance charitable services for others cannot be sure that the services are actually being provided because they cannot see the services themselves. Hansmann explains that the nonprofit form of organization exists to overcome this problem. The nondistribution constraint that characterizes nonprofits substitutes for a working market: I may not be able to confirm that you used my money the way you promised to, but at least I know that you did not put it in your pocket. None of these nonprofit constituencies have as powerful a force at their disposal as the corporate takeover market.[50] Donors can withhold their funds, volunteers their services, and government their contracts, but with self-perpetuating boards, their effect on governance is limited. So the business corporation model of self-enforcement seems ill-suited to nonprofits. The duty of care may be enforced by an invisible hand for public companies, but it is enforced. To the contrary, fiduciary duties of nonprofit organizations either need to be enforced by the state, or left to the media's enforcement. The next section considers the latter option.

III. MEDIA OVERSIGHT OF CHARITIES GOVERNANCE

A. Media Enforcement is More Robust than Legal Enforcement

Stories of charities abuses have long been popular with newspapers,[51] and the growth of the internet has allowed more charities watchdogs to arise. Thus, despite its lack of legal status, the media has become a more important player in the story of charities regulation. Underenforcement of fiduciary duties by attorneys general and courts does not mean that nonprofit fiduciaries escape condemnation for their wrongdoing. Instead, individuals who control charities are more likely to be censured in the court of public opinion than in a court

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corporate takeovers).

[48] *See* James Fishman and Steven Schwarz, supra note 20 at 127 (Organizations without members have no constituents that behave like shareholders, so their governing boards choose their successors.)

[49] Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 845 (1980).

[50] *Cf.* David Schizer, Subsidizing *Charitable Contributions: Incentives, Information and the Private Pursuit of Public Goals* 62 TAX L. REV. 221 (2009) (arguing for greater monitoring of nonprofits by donors).

[51] The United Way story was uncovered by the Washington Post. *See* Harvey Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms*, 23 J. CORP. L. 631, 633 (1998).

of law.

Individuals who benefit personally at the expense of the organizations they serve are prime targets for the press since their stories can be quite sensational. The recent front-page story in the New York Times about Cecilia Chang, a dean at St. John's University who killed herself in November during her trial for stealing more than a million dollars from the university and its donors was both bizarre and violent.[52] While the legal authorities were criminally prosecuting Chang, news stories can drag in other individuals who may not have been criminally culpable, but may have fallen short in carrying out their fiduciary obligations.[53] For example, the Times reported that the university's current president, the Rev. Donald Harrington, accepted a Patek Philippe watch and custom suits from Chang's Taiwanese supporters.[54] Although a less lurid part of the story, it is quite troubling from the perspective of his fiduciary duties, and certainly embarrassing for him, regardless of whether the state proceeds against him.[55] In this way, Times' story played a crucial role in investigating St. John's leadership from a governance perspective.

Media shaming also embarrasses organizations, tarnishing their charitable halos. The disgrace of Lance Armstrong as a hero-athlete has cast a dark shadow over his immensely popular cancer charity, Livestrong. A front-page newspaper story, published after Armstrong's doping admission, made some pretty serious accusations of conflicts of interest: "While Mr. Armstrong's celebrity fed the charity, the charity also enhanced his marketability. Livestrong also engaged in some deals that appeared to have benefited him and his associates, according to interviews and financial records."[56] The story also said that Armstrong used the charity as part of his defense to the doping accusations. If true, the newspaper's claims suggest troubling governance breaches at the charity, involving both care and loyalty. Livestrong's financial support had already suffered in the wake of Armstrong's personal doping scandal, with corporations withdrawing their support for the foundation, despite Armstrong's prompt resignation as its chairman as the scandal started to grow. While the allegations of conflicts in governance pertain to years before the doping scandal, the timing and tone of the newspaper story can only damage the foundation now. It may or may not be true that breaches occurred, but even if there was no legal wrongdoing, a major newspaper can inflict a lot of damage with a story like this.[57]

Lapses in the duty of care, which requires attention and deliberative process in decision making, might seem less sensational than stealing from charity, but they can also

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[52] *See* Rashbaum, Ruderman et al. *Fallen Dean's Life, Contradictory to Its Grisly End*, N.Y. TIMES Dec 11, 2012 at A1.

[53] *See id*.

[54] *See id*.

[55] *See id*.

[56] Stephanie Saul, *Armstrong's Business Brand, Bound Tight With His Charity*, N.Y. TIMES, Jan. 13, 2013 at A1.

[57] The story also mentions that the charity "hired top lawyers with nonprofit expertise to make sure its deals were in its best interests and complied with I.R.S. rules." *See* Stephanie Saul, *supra* note 56.

appeal to a curious public. The story of Brandeis University's botched attempt to close its Rose Art Museum and sell the art to ameliorate its dire financial troubles was featured prominently in the press,[58] even though the problem was mismanagement, rather than theft.[59] Facing undeniable financial troubles, the Brandeis Board of Trustees voted to close its campus art museum, and sell the collection without discussing the issue with the museum's leadership, its supporters, or Brandeis' own fine arts faculty and students. The Boston Globe immediately picked up the story,[60] and the New York Times followed soon thereafter with both a news story[61] and a scathing editorial criticizing the decision.[62]

Ultimately, the University backed down and reversed course, but not before the Massachusetts AG commenced an investigation, and museum supporters commenced a lawsuit.[63] Brandeis' President Jehuda Reinharz resigned two days after an internal report on the Rose crisis was issued, though he claimed the decision was not motivated by the Rose fiasco.[64]

Attorneys General are often followers to the media. Investigation of improprieties at the Getty Trust by the California Attorney General's office followed an expose in the Los Angeles Times, and led to state oversight of the trust for a period of years.[65] The Boston Globe first revealed financial abuses at the Cabot Trust,[66] and then the Massachusetts

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[58] *See* Randy Kennedy & Carol Vogel, *Outcry over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 28, 2009, at C1; Lisa Kocian, *Students Rally for Brandeis Museum: Loss Will Hurt School Stature, Protestors Say*, BOSTON GLOBE, Jan. 30, 2009.

[59] *See* Linda Sugin, *Lifting the Museum's Burden from the Backs of the University: Should the Art Collection be Treated as Part of the Endowment*, 44 N.E. L. REV. 541, 566-68 (arguing that the Rose problem was gross negligence – a problem of lack of due care because of the manner in which the university reached the decision, and not because the substance of the decision was beyond the powers of the university). *See also* Paul Dillon, *The Rose Art Museum Crisis*, 151 New Direction for Higher Education 83 (Fall 2010)(arguing that the incident illustrates the complexities in university decision making and control, and was exacerbated by Brandeis' organizational culture).

[60] *See* G. Edgers, *Ailing Brandeis Will Shut Museum, Sell Treasured Art: No Other Choice Says President*, BOSTON GLOBE, Jan. 27, 2009 at A1.

[61] *See Brandeis Says It Plans to Sell Art Collection to Raise Cash*, N.Y. TIMES , Jan. 27, 2009, at A19; Kennedy and Vogel, *supra* note 58.

[62] "Selling the university's art collection would help plug its financial gap, but it would create a gaping hole in Brandeis's mission and its reputation." Editorial, *Art at Brandeis*, N.Y.TIMES, Feb. 2, 2009, at A20. The editorial implied a breach of the duty of obedience.

[63] *See* Sugin, *supra* note 59 at 543.

[64] Dillon, *supra* note 59 at 88.

[65] *See* Bill Lockyer, Attorney General, REPORT ON THE OFFICE OF THE ATTORNEY GENERAL'S INVESTIGATION OF THE J. PAUL GETTY TRUST 1 (2006)("The office of the Attorney General's CharitableTrusts Section in July 2005 initiated a civil investigation of the Trust. The probe was launched following a series of article in the *Los Angeles Times* …"). There was no finding of criminal wrongdoing in the Getty Trust investigation, so the investigation solely concerned governance lapses.

[66] Most notoriously, Paul Cabot, the trustee, increased his salary from the trust to $1.4 million one year to cover the cost of his daughter's wedding.

authorities followed up and provided for restitution to the charity.[67] State authorities cannot be blamed for following the press – it is undoubtedly an efficient strategy for regulators because they waste little time identifying the problems.[68] But it is nonetheless troubling that the media leads in this way because the media's leadership in overseeing nonprofit organizations reduces the role of the law. There is less need for official action when the remedies the law might provide have already been meted out or have been rendered moot: a damning story in a newspaper is sufficient to dry up donations for an organization. Why do a better job managing an organization if it has already lost its support?

The immense power of reputation is the reason why the media have so successfully displaced legal authorities in charities enforcement. The benefits of charity participation are often reputational benefits – your name on a building, status in the community, honors and awards from local institutions. These accouterments of charity leadership are all tied to status in the community, and reputational incentives have long functioned as self-monitoring devices for charities leaders. These reputational incentives for good performance are consistent with a commitment to mission. Almost all trustees volunteer their time and expertise,[69] suggesting that charities directors generally accept their roles out of non-pecuniary dedication to their organizations. Studies show that nonprofit employees accept less compensation, support, and infrastructure at their jobs than their for-profit counterparts, signaling their mission commitment as well.[70]

Reputational incentives for charities leaders are aligned with mission commitment because the reputation of an organization and its leaders converge. While reputation is a self-enforcing mechanism that encourages many individuals to act with self-sacrifice for the common good, it is also a tool that the media powerfully and purposely wields.

B. The Good and Bad of Media Enforcement

The most compelling arguments in favor of media enforcement -- and the shaming sanctions that accompany it -- are that it is effective and cheap. Media participation in nonprofit enforcement allows state attorneys general to devote their scarce resources elsewhere, which might produce greater overall benefits for both the sector and society. Given the community of upstanding people who generally serve as charities fiduciaries,

[67] Globe Staff, *Some Officers of Charities Steer Assets to Selves*, BOSTON GLOBE, Oct. 9, 2003: Sacha Pfeiffer, Michael Rezendes, Mass., *2 Other States to Probe Foundations*, BOSTON GLOBE, Oct 10, 2003; Michael Rezendes and Walter Robinson, *Foundation Chief Agrees to Repay Over $4M*, BOSTON GLOBE, Dec. 16, 2004.

[68] States also depend on whistleblowers and individuals with knowledge of improprieties and access to information. *See*, e.g., Massachusetts Charitable Organization Complaint Form *available at* http://www.mass.gov/ago/docs/nonprofit/charities-complaint.pdf.

[69] *See* Kurtz, supra note 7 at p. 6. Directors do not work full-time for an organization. Nonprofit executives, who do, receive compensation, one of the most controversial issues in nonprofit governance today. See NYS Assembly Bill No. 10508 (introduced May 29, 2012) (prohibiting salaries for directors of public charities and instituting standards for reasonableness of executive compensation).

[70] Peter Frumkin and Elizabeth Keating, *The Price of Doing Good: Executive Compensation in Nonprofit Organizations*, Hauser Center for Nonprofit Organizations Working Paper No. 8 (2001), ssrn=292253 at p. 8(citing studies)

media shaming should be perceived as a serious punishment. Even if the wrongdoer is shameless, so that the reputational penalty is ineffective as to him, the collateral effects on other charities leaders could justify the approach. Most charitable fiduciaries are respected members of the community and care to remain that way, so shaming may be well targeted to be effective with the intended group. Media enforcement can raise standards of governance throughout the sector by spreading fear of humiliation and thereby deterring bad behavior.

According to Marion Fremont-Smith and Andras Kosaras' compendium, most cases described in newspaper stories on charity wrongdoing also involve a government enforcement party at some point.[71] However, there are some cases in which no government agencies were involved, and the "case" was overseen entirely by the press, sometimes with impressive results. The Dallas Morning News reported that the Kimbell Art Foundation paid its President and Vice-President $1.5 million each. Even though there was no government action to recover excess benefits, the individuals agreed to forego future compensation – an impressive remedy.[72] The San Diego Union Tribune reported that the executive director of the San Diego Museum of Art was alleged to have received excessive compensation, and financial controls were implemented at the organization.[73] In other cases, the charity took the matter into its own hands after press reports, which is also a desirable outcome from a good governance perspective. For example, in the case of The Giving Back Fund, the charity sued the self-dealing director and settled the case, and in the case of the Communities Foundation of Texas, the charity investigated itself and implemented internal controls.[74] On the other hand, there are press stories followed by no remedial action, such as at the National Foundation for AIDS relief, which also involved allegations of excessive compensation reported in the press.[75] Thus, not all media enforcement produces governance improvement.

The press has a long history of monitoring abuses in the nonprofit sector, so it is experienced in this role, another argument in its favor. Perhaps the most famous nonprofit abuse – the United Way scandal involving William Aramony – was exposed by the Washington Post in 1992.[76] And, we might believe that media enforcement is more effective today than it was 20 years ago because it is more sustained and focused. There are a number of reputable organizations that hold themselves out as charity watchdogs, reporting on the activities and decisions of organizations.[77]

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[71] Marion Fremont-Smith and Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2002*, 42 EXEMPT ORG. TAX REV. 25 (2003).

[72] Id. at p. 53.

[73] Id. at 55.

[74] Id. at 52.

[75] Id. at 55.

[76] Charles Shepard, *Perks, Privileges and Power in a Nonprofit World*, WASHINGTON POST A1 (Feb. 16, 1992). Reports of William Aramony's behavior had been uncovered in "several publications." Kathleen Teltsch, *United Way Awaits Inquiry On Its President's Practices*, NEW YORK TIMES (Feb. 24, 1992).

[77] *See*, e.g., American Institute of Philanthropy – Charity Watch: http://www.charitywatch.org/, Better Business Bureau --- Wise Giving Alliance http://www.bbb.org/us/charity/, Charity Navigator: http://www.charitynavigator.org/, GiveWell Blog: http://blog.givewell.org/, Stanford Social Innovation Review – Blog – Watchdog: http://www.ssireview.org/blog/category/watchdog.

In spite of these reasons to be enthusiastic about media enforcement, there are more reasons to be skeptical. The increasing power and influence of media enforcers needs to be countered by greater activity by state attorneys general, not less. The problem is not only that bad things are happening without consequences. The problem is also that there is not enough guidance for those who want to do the right thing. States must make and develop law, something the media is institutionally unable to do. They also need to be the neutral arbiter of good charity governance, applying the law in an evenhanded and accountable way, without concern for celebrity and sensationalism, a neutrality that the media cannot guarantee.

"The majority of publishers, editors and reporters contend that the primary role of journalism is to expose wrongdoing."[78] This is a problem from the perspective of media enforcement of legal obligations for a few reasons. The press may be too zealous in looking for abuses where none exist, or in identifying something ambiguous as wrongdoing. The press may prove itself too enthusiastic an enforcer, able to indict without following through on evidence to convict, and burying vindication where few readers tread.[79] While the state may not be arbitrary and capricious in its legal decisions, the press is not bound by the same standard. There is no required fair process for media accusations, or requirement for proportionality. If the press' role is to expose wrongdoing, then scandals get reported while successes do not. Even where the press gets the facts right, which it often does, this imbalance is problematic for the charitable sector because it creates the impression of more wrongdoing as a percentage of the whole than is accurate. The sector as a whole suffers when the bad is the only story and the good is ignored.

The media attention to a particular scandal might not reflect the seriousness of any legal violations, but might instead reflect the public interest in a celebrity[80] or a well-known institution. A small scandal involving a well-known individual is likely to get more press attention than a larger one that's less sensational. Under the law of some states, the legal punishment allowed for care violations can be limited,[81] but the press may shame regardless of statute. The press is in a position to embarrass everyone, whether they did something evil, clueless, or harmless. Its enforcement is insensitive to fine legal distinctions, meting out a

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[78] David Bornstein, *Why 'Solutions Journalism' Matters, Too*, NY TIMES OPINIONATOR December 20, 2011, (*citing* The Journalism of Outrage: Investigative Reporting and Agenda Building in America By David L. Protess, Fay Lomax Cook at p. 14).

[79] By the time a determination of no wrongdoing is concluded, the public humiliation has already occurred. If you blinked, or failed to get to page 13, you would have missed the clearing of General John Allen in the Tampa socialite scandal. Thom Shanker, *Pentagon Clears Commander Over E-Mails*, NEW YORK TIMES A13 (Jan 23. 2013).

[80] See Deborah Sontag and Stephanie Strom, *Star's Candidacy in Haiti Puts Focus on Charity* NEW YORK TIMES A4 (Aug 17, 2010)(detailing allegations and problems with the hip-hop star Wyclef Jean's post-earthquake Haiti charity).

[81] Organizations can include a provision in their certificate of incorporation limiting remedies for breach of care to non-financial penalties. Del G. Corp. Law §102(a)(7)(allowing inclusion in certificate of incorporation of "provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director"); see also Model Nonprofit Corporation Act §8.31 (describing liability standards for directors).

uniform punishment of public embarrassment. Even more than legal authorities, who may have trouble with remedies,[82] media enforcement cannot tailor remedies to suit particular problems.

The current crisis in the newspaper business might mean less careful enforcement than should be acceptable as a substitute for legal action. Newspapers are traditionally concerned about their own reputations, so readers are confident in the reliability of their reporting. But the newspaper industry has suffered a severe blow in the last decade.[83] In their struggle to survive, some newspapers have sacrificed in ways that reduce confidence in both their integrity and their ability to report accurately. Hundreds of journalists have been fired. While we cannot blame newspapers for responding to their own industry's pressures, we need to recognize that the changes might make them less reliable monitors of fiduciary behavior. It may be unfair to expect that newspapers can afford to carry the burden of law enforcement.

The ubiquity and permanence of information on the internet also raises concern about the media's reliability for nonprofit enforcement. Not only are there more watchdogs than there were a decade or two ago, but their accusations are increasingly easy to find and more accessible to more individuals. It is much cheaper to be a media watchdog today than it once was, which has led to a proliferation of oversight, both reliable and questionable. Along with the many reputable websites run by organizations committed to defined standards, there are also individuals who have self-selected as monitors of charity behavior.[84] A Google search will reveal their accusations as readily as those of more careful institutions. More troubling is the fact that any accusation of misbehavior, whether ultimately proved true or not, is permanently in the searchable history of an individual or group. The internet broadens the range of embarrassment to a wider, more geographically dispersed audience. Every future employer, client, and blind date will know that an individual was involved in something embarrassing related to a charity. Reputational taints are more permanent today than they were when the daily newspaper was discarded at the end of the day, so we should be more careful about imposing reputational costs on people.

The public may have unrealistically high expectations for charity officials. There is interest in the indiscretions of charities leaders because there is a widely held expectation that those who serve charities are better than the rest of us. "Although we have come to expect a certain amount of lying, cheating, and stealing in the private and public sectors, in the court of public opinion, the nonprofit sector, and especially charities, are held to a higher standard."[85] The halo effect of charities extends to all who are associated with them, and

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[82] *See* text at note 31, *supra*.

[83] *See* Jack Fuller, WHAT IS HAPPENING TO NEWS: THE INFORMATION EXPLOSION AND THE CRISIS IN JOURNALISM (U. Chicago Press 2010). *See also,* Marion Fremont-Smith, *Can Nonprofits Save Journalism? Legal Constraints and Opportunities* (Joan Shorenstein Center Press, Politics, Public Policy Oct. 2009).

[84] Are you familiar with Don't Tell the Donor blogspot, The Nonprofiteer.net, Nonprofit Board Crisis Blog? It is hard to know who to trust.

[85] Barbara Kellerman, BAD LEADERSHIP: WHAT IT IS, HOW IT HAPPENS, WHY IT MATTERS 165 (Harv. Bus. School Press).

evidence that individuals are lowly humans is sometimes treated as scandalous. In William Aramony's obituary, readers were reminded about his extramarital affair with a girl just out of high school.[86] There was nothing criminal about the affair in itself – she wasn't a child—and yet, it seemed that his position as a major charity leader was inconsistent with his sex life. He siphoned money from the United Way for her, but more broadly for himself, which was the illegal part, but reading the obituary, you might think the scandal was about sex rather than money. Even donors to charities are more scrutinized than others who engage in the same type of behavior. Consider Alberto Vilar, who was convicted of defrauding a client out of $5 million and sentenced to nine years in jail. His crimes have received much more attention than similar crimes of others because he was a well-known philanthropist and his misappropriations might have been connected to gifts he made to the Metropolitan Opera.[87]

Public approbation can arise if there is a suggestion of impropriety, even where it is not clear that any legal wrongdoing actually occurred. Some people believe that charities executives should accept less compensation than they would have received for similar work in the private sector. The press is perennially interested in nonprofit executive compensation, even when there is no claim of impropriety connected to it,[88] and charity executives are unable to keep their salaries private because the Form 990 requires disclosure.[89] The New York Regents overhaul of Adelphi University's board was partly about its President's compensation of $837,113 (including retirement benefits and in-kind perks) in 1995-96.[90] That was very high at the time for a college President, but was it so high to be an obvious waste of university resources? The same year, Florida State University paid its basketball coach Bobby Bowden more than $1 million.[91] Many of the well-known governance scandals involve compensation and perks,[92] even though the determination of reasonable compensation under the law is difficult and inexact.[93]

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[86] *See William Aramony Dead at 84* 11/28/2011, THE NONPROFIT TIMES http://www.thenonprofittimes.com/article/detail/william-aramony-dead-at-84-4239; Robert McFadden, William Aramony, *United Way Leader Who Was Jailed for Fraud, Dies at 84*, NEW YORK TIMES (Nov. 13, 2011).

[87] There was a lengthy profile of him in the New Yorker Magazine. See James Stewart, *The Opera Lover: How Alberto Vilar's Passion for Philanthropy Landed Him in Jail*, THE NEW YORKER, 13th & 20 February 2006. Vilar's appeal is currently pending and he was released from jail on the orders of the Second Circuit in October 2012. *See Appeals Court Orders Bail for a Donor*, NEW YORK TIMES A25 (Oct. 3, 2012).

[88] The New York Times reports on college presidents annually. See e.g., Tamar Lewin, *Three Dozen Private-College Presidents Earned Over $1 million in 2010, Study Finds*, NEW YORK TIMES A16 (Dec. 10, 2012); Tamar Lewin, *Private College Presidents Getting Higher Salaries*, NEW YORK TIMES A17 (Dec. 5, 2011).

[89] Part VII of the 990 requires information about the compensation of officers, directors, trustees, key employees, and five highest compensated employees.

[90] The Committee to Save Adelphi v. Diamandopoulos, Report and Recommendation of Regents Panel 16 (Feb. 5, 1997) available at https://folio.iupui.edu/bitstream/handle/10244/502/.

[91] He was the first college coach to break the $1 million mark, but now that is common. See Michael Sanserino, *College Coaches' Salaries Continue To Soar*, PITTSBURGH POST-GAZETTE (Mar 29, 2012) at http://www.post-gazette.com/pg/11015/1118218-142.stm#ixzz1h7B7XKs4.

[92] For example, Barry Munitz, of the Getty Trust, enjoyed excessive perks, but did not siphon funds from the charity. See Getty report, *supra* note 65.

[93] For a good discussion of reasonable compensation and IRC §4958, which imposes an excise tax on excess benefit transactions with insiders, see Jill Manny, *Nonprofit Payments to Insiders and Outsiders: Is the Sky the*

Under federal law, the section 4958 regulations[94] take an arm's-length comparative approach to compensation, expressly allowing comparison with for-profit compensation for similar jobs,[95] even though that might appear excessive to people who are committed to lower relative salaries in the nonprofit sector.[96] The standard for excessive compensation in the federal tax regulations do not always coincide with the expectations that people have about what is a fair pay package for nonprofit executives, and compensation has increased even after the adoption of the federal rules.[97] Public outrage over salaries is not always rational or justified.

The media operates with little check on its judgment because there are no "norm entrepreneurs"[98] in nonprofit governance who use the media, but are more reliable watchdogs than the journalists themselves. I am thinking of the model of Robert Monks and Nell Minow, who have been effective in fostering improved corporate governance by publicizing inadequate behavior in the media. Monks and Minow are in the business of advising shareholders for institutional investors. On one occasion, they placed a full page ad in the Wall Street Journal accusing the directors of the Sears Corporation of being "non-performing assets" and within a short time, the directors changed their behavior.[99]

Monks and Minow are effective non-governmental watchdogs due to a combination of factors that are mostly inapposite in the nonprofit context. First, their clients (and consequently their business) stand to gain or lose on account of their actions, so they have capital and goodwill at stake when they accuse boards of bad performance. Their successes in corporate governance reforms translate into profits for their clients and for themselves. Second, their actions come at significant cost to themselves – their Sears board ad in the WSJ

Limit? 76 FORDHAM L. REV. 735 (2007).

[94] IRC §4958 imposes an excise tax on excess benefit transactions, which include excessive compensation of individuals in positions of control in the organization.

[95] The rebuttable presumption of reasonableness in Treas. Reg. §53.4958-6(c)(2) requires that the organization use appropriate comparability data for compensation. The regulation states: "In the case of compensation, relevant information includes, but is not limited to, compensation levels paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions…"

[96] A proposed New York law takes a narrower approach:

> Compensation exchanged by a not-for-profit corporation for the performance of services by an executive must not be excessive and the governing body (i.e., the board of directors, board of trustees, or equivalent controlling body) shall consider factors including, but not limited to: compensation levels paid by similarly situated not-for-profit corporations as defined in section one hundred two of this chapter; the availability of similar services in the geographic area of the applicable provider of services; current compensation surveys compiled by independent firms; and actual written offers from similar institutions competing for the services of the applicable executive.

New York Assembly Bill 10508 §17 (proposed NPCL §727)(May 29, 2012).

[97] *See* Manny, *supra* note 93.

[98] *See* David Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1859 (2001).

[99] *Id*. at 1836 et seq.

cost over $100,000.[100] Third, they have credibility on account of their experience and their personal investment in the cause; Monks was once a bank President and he has used his personal resources to fund his ventures. Without established norm entrepreneurs with stakes in the outcome of nonprofit governance, the arbiters of reputation for nonprofit actors are the media itself, who lack the incentives and constraints that norm entrepreneurs face.

Media oversight might not be as effective in deterring bad behavior as one might hope, and too much media attention to nonprofit abuses may backfire and reduce overall social welfare. In the criminal context, scholars have argued that too much shaming can reduce public interest in the bad behavior and consequently fail to produce the intended deterrence; the public may become accustomed to the negative publicity and stop noticing it.[101] That would be a problem in the charitable context as well, undermining the effectiveness of media oversight without governance improvements. The opposite effect from media overload is also troubling in the charitable context: too many stories of charity abuse can undermine the public's trust in the charitable sector as a whole and the public's commitment to support it.

Sometimes bad leaders bring fundamentally good organizations down with them, an unfortunate by-product of public shaming of fiduciaries. Charitable institutions are more vulnerable to the effects of public ignominy than are for-profit corporations because the loss of donations can have an immediate devastating effect on charitable services; charitable donors are not equivalent to washing machine purchasers, who may buy a good product even if it is produced by a company with bad governance.[102] Hale House, one of the "most famous charities in the world" in 1985,[103] never fully recovered from its 2001 scandal, which involved the theft of millions by the organization's president (and founder's daughter).[104] While it is impossible to know whether the organization could have recovered from the abuses if it had sufficient funds, the donating public did not give it that chance. Hale House continues to exist today, but it is a shadow of its former self. Business shaming strategies may encourage better corporate governance,[105] but charity shaming strategies are unlikely to produce net benefits to the charitable sector because the immediate deleterious effect on donations is likely to be more harmful than the long-term salutary effects on governance improvements.

There has been a lively debate in the criminal law literature about shaming as a

[100] *Id*. at 1826 n. 56.

[101] Toni Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1930 (1991).

[102] The stock price may reflect bad press, but the price of the stock in the market may not have any immediate effect on the underlying operations of the business. Chartable organizations with large endowments may weather volatility in donations better than others, but many organizations have no endowment on which to rely.

[103] Kathryn Jean Lopez, *Scandal at Hale House: Sifting Through the Rubble of a Once-Proud Nonprofit*, PHILANTHROPY MAGAZINE (Aug./Sept. 2001).

[104] In 2008, Hale House substantially scaled back its program, still suffering from reduced funds. See Heidi Evans, *Hale House Shuts Doors to Orphans*, NEW YORK DAILY NEWS (Oct. 8, 2008).

[105] See Jayne Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999) (arguing that corporate directors should be required to be present at criminal sentencing of the corporation).

criminal sanction. While media shaming of nonprofits is not quite analogous, the criminal law debate may shed some light on the general desirability of a shaming strategy. Proponents of shaming argue that it is an effective and efficient alternative to other criminal penalties, and opponents argue that shaming disrespects individuals and is not ultimately successful as a deterrent.[106] As we consider the remedy of public embarrassment for negligent charity governance, it is helpful to note that the weight of opinion in that literature seems to have turned decidedly against shaming, with Dan Kahan, an early champion,[107] explicitly recanting.[108] The reasons are many, but those who are willing to countenance shaming in the criminal context are dubious about the conditions under which it would take place in our society.[109] We generally operate in a community that is too big for effective shaming sanctions, which demand reintegration after shaming. Misgivings among criminal law scholars should make charities officials wary about embracing reputational sanctions to foster better nonprofit governance.

In addition, there are important distinctions between criminal law shaming and enforcing fiduciary duties through public embarrassment that make the strategy even less attractive in the latter context. First, the criminal law literature evaluates shaming as opposed to incarceration,[110] while incarceration is not the model in fiduciary duty enforcement. In governance, the alternative is some greater governmental participation along a wide spectrum of enforcement that might include regulation, disclosure, liability and/or advisory procedures like the one advocated here. Rehabilitation in this context is about fostering good decisionmaking practices, and as long as there are alternatives to shaming that might achieve that goal better than public humiliation, they should be pursued. Second, the criminal law literature assumed that shaming would be imposed by a governmental institution, so that a court might require a convicted drunk driver to publicize that fact in a bumper sticker, or publish a list of the clients of prostitutes. Reputational punishments for inadequate charity governance meted out by the press are wholly outside the law. For all these reasons, enforcement by humiliation is bad policy that undermines the rule of law, even if effective in improving charity governance.

If we are dissatisfied with the role of the press and believe that the corporate model of self-enforcement ill suits nonprofits, greater government involvement by the state will be necessary. Media attention is unlikely to wane, and increased media regulation is unlikely to be desirable or pass muster under the First Amendment. The government needs to do more to reset the balance. Charities officials have lost ground, and that is troubling because the charities bureaus, unlike the journalists and bloggers, are concerned with the legal standards

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[106] See Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law* 116 HARV. L. REV. 2186 (2003).

[107] Dan Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV 591 (1996).

[108] Dan Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006).

[109] *See* Massaro, *supra* note 101.

[110] *See* Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385 (2007).

and with protecting the charitable sector and its resources. The primary reason why states should respond to the challenge of private enforcers is because there is no guarantee that the private enforcers care to, or are in a position to, maximize public benefit. But that is the obligation of state charity officials and the reason they have an indispensable role in enforcing fiduciary duties. State attorneys general cannot be passive observers of media enforcement; if the state chooses to underenforce fiduciary obligations, it is choosing to allow private parties to manage that enforcement instead. Since that option is not acceptable, the state must do something, and perhaps it is time to try something new.

IV. STRENGTHENING NONPROFIT FIDUCIARY DUTY LAW: FROM *EX POST* ENFORCEMENT TO *EX ANTE* PREVENTION

The problem of gross negligence needs a solution that produces more focused attention and more expert decisionmaking by individuals running nonprofit organizations. Unfortunately, both attorneys general and courts are unable to assure those consequences with the tools currently at their disposal. They can easily order financial restitution, which is an appropriate remedy in cases of loyalty breaches, but a financial remedy is rarely a cure for the problems of insufficient care or obedience, unless that breach is clearly connected to a loss of charitable funds.[111] The remedy in the *Sibley Hospital* case[112] was a judicially imposed education for directors in their governance obligations, which attempts to fit the problem at hand, although it is very weak as an enforcement sanction. Nevertheless, lawyers advising charities believe that the duty of care is authentic and that the minimum standard of charity oversight requires fiduciaries to pay attention and gather information.[113] What should the states do about the duty of care?

There are substantial roadblocks to increased enforcement of fiduciary duties. Disclosure requirements have increased for charities in recent years, but state resources have not increased to study the disclosures, and the market responding to that disclosure is not as powerful as the one for corporate control. States could try to mimic the shareholder derivative action for nonprofits and promote judicial enforcement of trustee fiduciary obligations by expanding the rules for standing and allowing private parties to assist the state in enforcement. They could alternatively pare back the best judgment rule, which protects the decisions of trustees except in the most egregious cases. Though some scholars have advocated broader standing rules, more plaintiffs would mean more harassment and expense for nonprofit organizations, with questionable benefits to offset those costs. Similarly, the best judgment rule strikes an important balance in the law. It is essential in the nonprofit sector not only to enable organizations to attract directors, but more importantly, to maintain the private character of charity governance.[114] Judicial micromanagement of charity governance is unlikely to produce net benefits for the charitable sector, and any judicial

[111] *See* text and note 26 *supra*.

[112] *See* note 31 *supra*.

[113] *See* Goldschmid, *supra* note 51 (describing law as "aspirational").

[114] *See generally*, Evelyn Brody and John Tyler, HOW PUBLIC IS PRIVATE PHILANTHROPY: SEPARATING MYTH FROM REALITY (2d ed. Philanthropy Roundtable 2012).

solution could require changing core elements of nonprofit law. A less dramatic solution would be preferable.

We need to focus on the goals of greater enforcement for fiduciary duties, particularly the duty of care. In both the nonprofit and for-profit context, care has been interpreted to require process, but that process is always a proxy for improved substance. Care demands deliberative decisionmaking and information gathering in the hope that the substantive decisions that boards reach are better. But process is not always a good substitute for a correct answer on the merits, and some studies indicate that imposing some forms of "good" process do not necessarily improve substantive outcomes.[115] But the goal remains wise substantive decisions.

The perennial problem of scarce state enforcement resources has understandably beggared charitable governance; many AGs focus their limited attention on the problems of fraud, leaving governance for the sector to manage.[116] But the best use of scarce public resources needs to be evaluated more broadly, considering the context of the social benefits of the charitable sector as a whole. It is a mistake to focus solely on the budgetary costs to state AG offices in determining whether it is worthwhile to invest in charity governance. The larger social costs of poor governance need to be factored in as well. Solutions should value overall efficiencies so that the costs to charities, as well as government, are considered. These charity costs include the difficulty of attracting good directors, litigation costs incurred whether governance practices are vindicated or not, and public faith in the integrity of the sector. States and individual organizations should both be willing to make investments that can prevent greater public and charity costs in the future.

For these reasons, I propose a formal advance ruling procedure under which state attorneys general would provide advice to nonprofit fiduciaries on specific decisions. Such a process would be particularly valuable for care questions, since there is no adequate way to repair care after a breach. An advance ruling process could extend to loyalty and obedience questions that organizations face, and it might be a more efficient use of state resources than other approaches to improved enforcement. Instead of punishing fiduciaries after poor substance comes to light, enforcement resources would be better spent on improving decisions *ex ante*. A central problem with fiduciary duties of nonprofit directors is that there is so little legal authority on even the most fundamental issues that nonprofit fiduciaries—and their lawyers -- regularly find themselves facing. There are too many questions for which there are no definitive answers.

My proposal for an advance ruling process takes advantage of some of the unique characteristics of charities. While there is admittedly deliberate wrongdoing in the charitable sector, public policies should capitalize on the widespread belief that charitable fiduciaries are devoted to the missions of their organizations and volunteer to participate as a way to do

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[115] For example, independent boards might not produce better governance. See Kathleen Boozang, *Does an Independent Board Improve Nonprofit Corporate Governance?* ssrn=229082 (July 2007).

[116] Judging from their websites, many states focus their attention specifically on solicitation fraud.

good in the community. My proposal relies on their good intentions and honest efforts, while recognizing that there is a limit to their time, attention, and good judgment. Will Rogers is claimed to have said that "good judgment comes from experience, and a lot of that comes from bad judgment." The problem for fiduciaries is that there is no room for the bad judgment to come first, so good judgment needs to come from training and advice. The gut feeling that a lawyer may have when presented with a transaction between an organization and one its directors may not raise any red flags for a well-meaning fellow director who is ignorant of the law and busy with other concerns.

The specter of public embarrassment that nonprofit fiduciaries face when they err is likely to be sufficient to encourage them to take extra steps to avoid mistakes – as long as the cost of avoidance is not too high. The risk of making a bad mistake might be small, the risk of being found out is even smaller, and the risk of being legally sanctioned is virtually nonexistent, but the risk of being embarrassed in the community could be substantial. Trustees can be expected to make a cost-benefit analysis of any ex ante mechanisms that can prevent future missteps.

The New York Attorney General is on the right track with its new Directors U, which offers instruction in good governance to nonprofit directors.[117] Some states include guidelines for good practices on their websites, but a visit to the attorney general websites of all fifty states has revealed how little is available to guide the well-meaning but confused charity fiduciary. Many states are more focused on fundraising and the important issues of solicitation fraud and donor protection than charity governance, per se. New York is way ahead of the pack in offering both training and attorney matching services to nonprofits.[118] Training charitable fiduciaries to understand their obligations, and preparing them to manage problems they might face could greatly improve the quality of charity governance. However, I am skeptical about how many individuals will volunteer to undergo New York's training if they are not legally required to do so under the statute.[119] Board meetings and charity functions are already an imposition on the time of volunteer board members who have jobs, families, and other obligations. People do not necessarily recognize that they could use training until they have a problem they cannot solve, and even then, they are likely to be more concerned with a specific solution to that problem than with general standards of behavior that might not shed light on the specific case.

An advance ruling process responds to these concerns because it allows fiduciaries to bring specific problems to the AG's charities experts, and get an answer for how they should behave in a particular case. The process could resemble the private letter ruling process at the IRS.[120] A charity would have to follow procedures determined by the state and have a

[117] *See* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-bold-plan-revitalize-and-reform-new-yorks-nonprofit-sector.

[118] This is an initiative with the New York City Bar Association. *See* http://www.nycbar.org/public-service-network.

[119] NYS Assembly 10508 §19 (adding NPCL §116) provides that nonprofit corporations contracting with the state may attend state consortium training free of charge, but does not require them to do so.

[120] *See* Rev. Proc. 2012-1, 2012-1 I.R.B. 1 (Jan 3, 2012).

question that the charities bureau is willing to rule on. The ruling request would need to set out both the legal questions presented and the facts to which the law should be applied.[121] In the tax context, the question is often: Will this transaction be taxable? In the charities context, the question will often be: Will these actions satisfy the board's fiduciary obligations? While the bureau might be able to answer with a short yes or no, even a minimal application of the law to the facts would be helpful to other boards with similar problems. In selected cases, the bureau might choose to write a longer "opinion" analyzing an important question of law.

Like private letter rulings, these advance rulings would not have precedential effect or become binding on the state in other cases, but they would provide guidance to the charity requesting the letter,[122] and they would establish a body of law that advisors could use in understanding the contours of charity fiduciary law. After some time, for example, we would get a sense of what constitutes adequate minimum participation necessary for a board member to satisfy her duties, and the kinds of deliberations and disclosures that would satisfy the statutory procedures for review of conflict transactions[123] (as well as the nature of the conflicts transactions that are acceptable).

An advance ruling process makes financial sense for both states and charities. An important feature of tax private letter rulings are the fees that requesting parties must pay.[124] For strapped charities bureaus, fees paid by requesting parties can finance all or part of the project. The IRS charges more for more complex rulings and reduces fees for small taxpayers; charities bureaus could follow the same pattern. If the fees are not too high, it would often be in the best interest of a charity to pay the fee and request the letter because a favorable ruling would not only foreclose state enforcement, but also protect an organization from private litigation on that issue, a real advantage for the organization. The IRS requires that requesting parties draft what is essentially a legal brief, and submit it as part of the ruling request. This reduces costs for the government in researching the issue and identifying relevant authority. Depending on the issue, some types of charity requests might be prepared without the assistance of a lawyer; the charities bureau could design a model form for certain types of ruling requests that moderately competent directors could complete.

This proposal is not for purposeful wrongdoers, or for completely clueless charity fiduciaries, so an advance ruling process would not preempt all state enforcement of fiduciary breaches. The process is intended for well-meaning, busy, and somewhat ignorant directors (which probably makes up the vast majority). They need to know that they can turn to the charities bureau for guidance, but they do not need to know much about the substance of their obligations before they do. This is an important advantage of the proposal because it

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[121] *See id*. §7.

[122] *See id*. §11

[123] *See* Model Nonprofit Corporation Act §8.60.

[124] *See* IRC §7528; Rev. Proc 2012-1, *supra* note 120 at §15 and Appendix A, and Rev. Proc. 2012-8, 2012-1 I.R.B. 235. (Jan 3, 2012)

is easier to recognize that you have a question than it is to determine the answer. Requesting a ruling on a unique question seems more realistic than expecting charity fiduciaries to suddenly embrace their legal responsibilities with sustained attention and study. In the aggregate, an advance ruling process has the potential to improve nonprofit governance throughout the sector because the AG will be guiding the contours, and more specific guidance that lawyers can use in dispensing advice will become available over time, eventually reducing the need for rulings common issues.

V. CONCLUSION

We are in an unfortunate bind in the charities-law world. If an organization resolves an issue with the attorney general's office, the entire procedure is likely to stay confidential. That is good for the organization involved because it suffers none of the reputational harm that public disclosure – and embarrassing press -- brings. But for the charitable community as a whole, that resolution is mixed. It is good that organizations reform their activities to better carry out the goals of the charitable sector. But it is unfortunate that there is so little application of the law for charities to look to in measuring their own compliance. State charity bureaus could follow the IRS ruling model of confidentiality by protecting the identity of an organization, but disclosing its issues. In the version publicly available under the Freedom of Information Act (and regularly published), IRS letters provide sufficient facts for subsequent actors to measure their similarity to the requesting party, but not so much that applicants are outed in the process.

I know that the popular mantra both in and out of the nonprofit world is transparency. But transparency is sometimes overrated. Disclosure is desirable when it encourages individuals not only to comply with the liability standards of the law, but when it boosts a higher aspirational standard of behavior.[125] But transparency is not helpful where daylight threatens the mission and public support for organizations experiencing governance challenges. The public interest is served when charities regulators intervene as a problem develops, and design solutions with an organization that prevents debacles. Once the media has reported a problem, a constructive remedy is unlikely. The shaming effects on individuals and organizations involved are already part of the permanent internet record. The only solution that really addresses the problem of media shaming that protects charities and prevents mistakes made by agents is one that precedes widespread publicity. The attorney general's office needs to be involved earlier, and its role needs to be more advisory, and less enforcing. Some charities officials already see their role this way, but it would be good to institutionalize that role with a constructive operation.

Earlier intervention by the attorney general can prevent later needs for enforcement, so the total commitment of resources by the state might not be so much higher than it is today. Consider the example of the Rose Art Museum again. The University's unilateral announcement was followed quickly by litigation that continued despite intervention by the

[125] The questions about governance on the Form 990 might signal the aspirational standard. The sector itself can also offer such standards. See Panel on Nonprofit Sector, *supra* note 18 at 90-91.

state. The Massachusetts attorney general was involved in the resolution of the problem, but too late to prevent the incident from becoming a debacle for Brandeis and its President. The matter was not finally closed until the litigation settled quite a while later.[126] Earlier involvement by the attorney general that forestalls private actions would benefit the charitable sector by reducing the costs of missteps. The resources that go into disputes with private parties are a precious loss to the charitable sector. Even where challengers are denied standing to challenge the charity's actions, the action is a drain of charitable resources. It would be worth extra investment in the charities bureaus to prevent the massive expenses incurred in litigation.

In the business context, we may be less worried about dumb decisions because we are confident that the market will eventually correct them. In the charity context, we may be more concerned about any interim waste of charitable resources, and there is no ultimate market correction. While attorneys general should not act as super-trustees of nonprofit organizations, charities bureaus are in the business of maximizing benefits for the charitable sector. They know about conserving charitable assets, and they work within the framework of the law and its norms of fairness.

For the protection of the sector as a whole, and its reputation for doing good, we need a procedure that minimizes both real mistakes and opportunities for public embarrassment that do not translate into public benefits. Any enforcement that punishes following a breach is inferior to a mechanism that can prevent such a breach. The administration of the law needs to be more proactive because the media is likely to become more powerful, more ubiquitous, and more decentralized. Greater government participation is necessary to recalibrate the balance between private punishments and public law.

[126] Brandeis announced the settlement with the plaintiffs and the termination of the AG's investigation on June 30, 2011. See http://www.brandeis.edu/now/2011/june/rose.html.