MAJOR LEGAL TOPICS TO BE COVERED IN A LAW SCHOOL COURSE ON NONPROFIT ORGANIZATIONS*

by

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Introduction

In thinking about what ought to be covered in a law school course on nonprofits, it occurred to me that it would be instructive to begin with what is currently being included by those of us who teach such courses. For one thing, that would give me some idea of what others thought important enough to warrant coverage. Furthermore, by looking at what my fellow instructors assign their students on particular topics and at how much time they plan to devote to those topics, I thought I might get some rough idea about the relative importance of those topics. And by carefully reading between the lines of their syllabi, I hoped even to gain some insights into the basis of these judgments. The point of looking at syllabi would not be to cull what should be taught from what is being taught, but rather to discover where the implicit inclusion issues lie in the minds of those who have had to address them.

Knowing that both Independent Sector and the NYU Program on Philanthropy and the Law were in the process of collecting and publishing syllabi from nonprofit courses, I asked each program to share with me what they had received. Each of them was most cooperative and generous with what they had; unfortunately, neither had very much. Both projects were still in their early phases when I began my work, and neither would be completed until I was essentially done.

But the materials they shared with me, together with other syllabi I had previously collected from acquaintances in planning my own nonprofits course, tended to confirm my impression that most nonprofits courses cover roughly the same core issues.[1] There are undeniably some differences at the margin, but the main differences seem to be in degrees of emphasis in the middle. The question implicit in the syllabi I examined is thus less what to include than what to emphasize, and why.

For heuristic purposes, I identify two ideal types of nonprofit courses, one that

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1. I say "tended to confirm," not only because the IS and NYU projects themselves are far from complete, but also because my analysis of the syllabi they have collected thus far was thoroughly impressionistic and unsystematic.

deals generally with the entire nonprofit realm and one that focus particularly on organizations exempt from federal income taxation. To some extent this division is reflected in the names of real courses. But, as I have indicated, there is substantial overlap among all the nonprofit syllabi I have seen, even between courses that most closely fit the nonprofit model on the one hand or the exempt organization model on the other. This common ground is fairly easy to account for. Though federal tax law is only one of several bodies of law that bear on nonprofits, its impact is particularly pervasive in terms of both positive encouragement and extensive regulation and oversight. Perhaps for that reason, there is a relatively large amount of legal scholarship dealing with tax issues, and probably a relatively wide range of opportunities for lawyers in private practice.

My paradigms are designed less to describe a real division among tax exempt and nonprofit courses than to identify a tension within courses as to what topics to emphasize, a tension that is difficult to describe briefly without resorting to tendentious dichotomies like "theoretical versus practical" or "academic versus professional."[2] Without wholly avoiding the problem of stereotyping, I will describe this as the tension between an "undergraduate" and a "professional" approach. I do not mean to suggest that the difference between the general nonprofits course and the exempt organizations course I have in mind is somehow like the difference between an undergraduate philosophy seminar and Introduction to College Accounting. From what I have read of the syllabi from the more explicitly tax-oriented courses, and from what I know of those who teach these courses, the more apt comparison is to the difference between Philosophy 101 and Advanced Symbolic Logic. Tax mavens will certainly profit from a highly technical exempt organizations course, even as undergraduate philosophy majors will benefit from Boulean algebra. But a more broadly-

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2. These ideal types also reflect a tension in my own approach to the area of nonprofits. My formal study of nonprofits was in a non-tax oriented course, but my practice in the area was largely tax-oriented, and my acquaintance with practitioners in the field, many of whom teach the course as adjunct professors and share with me their syllabi, is through the ABA Tax Section's Committee on Exempt Organizations.

based nonprofits course, like Philosophy 101, will have greater appeal, and arguably greater utility, to the generalist.

In deciding how to resolve this tension and, more generally, what topics should be included and emphasized, I tried to step back from the particular issues that come immediately to mind as demanding attention and to think through -- more systematically than I must admit I had in planning my own nonprofit course -- the function of the nonprofit course in law schools. For that function, I thought in terms of the role that our graduates themselves will be playing in the nonprofit world, especially as compared to their likely roles in the governmental and for-profit spheres.

In some ways law school graduates function similarly in all three sectors. Most of them, most of the time, will serve as specialists in the law, whether as outside counsel or as in-house legal staff. Some of them, at least some of the time, will step out of their specifically lawyerly roles to fill the shoes of the generalists who head organizations -- whether they be in the government, for-profit, or nonprofit sector -- and who are thus ultimately responsible for recommending, if not actually making, basic policy choices.

There is, however, a notable difference between the development of professional management in the government and for-profit sectors on the one hand and in the nonprofit sector on the other. Advanced degrees have long been offered in business and public administration; the professionalization of nonprofit management has proceeded much more slowly, and its very desirability is still debated.[3] Accordingly, it is more likely that lawyers will head the show, or at least be as knowledgeable

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3. As Paul Ylvisaker has noted,

> the very question of whether philanthropy can or should be a career or a profession is arguable. The job market is miniscule; appointments are idiosyncratic; lateral and upward mobility is limited; skill comes mostly from experience, and experience is not widely accepted as transferable; and even the professionals wonder if long service in philanthropy is good for society.

Ylvisaker, Foundations and Nonprofit Organizations, in **The Nonprofit Sector** 360, 363-64 (W. Powell ed. 1987).

about general policy matters as those who do, and thus be the sources of insight into basic policy decisions. Thus, even when they are nominally in a strictly lawyerly role, our students who practice in the nonprofit field are likely to have a greater role in shaping the policies of the entities they represent than are their counterparts in the government and the for-profit spheres. Even in a nonprofits course designed primarily as an advanced tax elective, there is ample reason not only to include, but also to emphasize, very general policy issues. Given the pervasiveness of tax law in the nonprofit sphere, the lawyer nonprofits contact first about a wide range of issues is likely to be a tax lawyer. That lawyer is also likely to be an important source of advice well beyond the strictly legal, if only for want of alternative professional experts.

There is a second reason for emphasizing broad and basic policy issues in a law school course on nonprofits, a reason that, like the first, is also related to the professional interests of our students. Only a relatively small handful of students in their own practices will be engaged in any substantial amount of work for nonprofits, and even nonprofit specialists tend to spend significant amounts of time in other areas, particularly allied fields of tax or corporate law. The second role of the nonprofit course has to do with what our students are doing outside the nonprofit sphere. Here the function of the nonprofit course is less like an undergraduate survey course than it is like a different kind of undergraduate course, a kind typified for me by a history course at my undergraduate alma mater entitled "The Papacy Since the Schism." This course was offered at a nonsectarian school, by a thoroughly free-thinking professor whose scathing comments on the Church might have been taken for anti-Catholic animus had he not demonstrated an equal contempt for the Protestant clergy. The course was clearly out of the mainstream of the history curriculum; even in that branch of the humanities program, it was an eddy, if not a backwater.

Why was it in the curriculum? Several facts go a long way toward explaining its inclusion, but not far toward justifying it. For one thing, students loved the course; it had an enormous appeal to late adolescent iconoclasm. For another thing, a very senior professor wanted to teach it, and this particular senior professor was well liked by past as well as present students. He loved Italian culture, and his distaste for the

religious side of the papacy was more than offset by his appreciation for the Renaissance popes as art patrons.

But if these facts suggest that it was good politics for the university to tolerate the course, they hardly prove that it was wise policy. There was, to be sure, something in the professor's preference beyond mere self-indulgence. He, and perhaps the university administration with him, saw it in some sense as a course in art history. But my own undergraduate academic advisor gave a broader reason, a reason that has illuminated for me the second basic reason for teaching nonprofit organizations in law school. My advisor's theory was that the papacy course gave an "outside view" of post-Medieval European history, a view that was at once distinct both from the liberal tradition, with its Whiggish emphasis on the development of modern nation states with liberal democratic polities and capitalist economies, and from the Marxist tradition, with equally secular premises behind its emphasis on class struggles and revolutionary progress. The papacy offered a vantage point from which to examine these relatively new developments, the perspective of an organization that was explicitly and aggressively hierarchical, traditional, and religious. Moreover, the papacy was an institution that, though different from those that tend to occupy center stage, has nevertheless continued to interact with them.

In several ways the course on nonprofits occupies a similar place in the law school curriculum. Compared to the "Third" sector, particularly its charitable component, the other two sectors, the market economy and the modern territorial nation-state, are relative newcomers. Like the Roman Catholic Church, the nonprofit sector (of which the Church is, after all, a part) long antedates them. The implicit converse of asking why nonprofits fill roles not performed by these newer sectors is the question of why the latter are themselves superior in some ways, for some functions. More particularly, the separate issues of what motivates nonprofit managers, what their fiduciary duties ought to be, and to whom those duties are owed all cast light on similar issues in the other two sectors.

This admittedly debatable view of the place of the nonprofits course in the law school curriculum is the general standard by which I assess the relative importance of

particular topics to be covered in that course. There are also subordinate themes that, sometimes consistently with that general standard and sometimes not, counsel in favor of including certain items. I will try to identify these subthemes at the appropriate points in what follows.

I have presented the topics in a sequence that is meant to be analytically clear, but that may not be pedagogically sound. I do not mean to suggest that this is how the topics would fit into an "ideal" course on nonprofits; I emphasize that this is not quite how I myself arrange them, because of time constraints and other skewing factors. Those of you who are better at the Socratic method will be able to combine in the analysis of a particular case or ruling various issues that I discuss separately here.

I. Setting the Stage -- General Background Material.

My own syllabus, like most of those I have perused, begins with a general survey, an overview of issues or items not only interesting in their own rights, but also important as background for what is to follow. Some of this material can be largely handled as background reading, with lectures to show its relation to the rest of the course.

1. Demographics. Most syllabi try to give a snapshot view of what we are dealing with. I'm not a fan of facts and figures; in my course this is background data that gets little mention in class. But a bit of statistical background gives a useful preview of the landscape, a baseline of information on the size of the nonprofit sector in terms of number of people employed, volume of goods and services produced, and the amount of assets within the Third Sector's control, all preferably both in absolute terms and relative to other sectors. It is also useful early on to see the relatively greater role of nonprofit organizations in certain industries, as a prelude to a more general discussion of their role.[4]

2. History. This statistical snapshot is even more effective if it can be

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4. See, e.g., Rudney, The Scope and Dimensions of Nonprofit Activity, in **The Nonprofit Sector** 55 (W. Powell ed. 1987).

presented as the most recent frame in a cinematic presentation that includes some footage from the history of the nonprofit sector. At the most general level, Holmes's proverbial page of history helps account for why the sector is where it is, generally in terms that are long on data and, if not short on theory, at least eclectic as to notions of cause. The historical survey reveals changes in both the size of the sector as a whole and its importance in different industries, facts that any general theory of nonprofits must address. Even a brief historical survey also tends to show changes in attitudes toward the nonprofit sector, with the possibility of presenting dissenting views. Opponents of private foundations have always been varied and vociferous, and more recently both the recipients of donative nonprofits' largess[5] and the for-profits with whom commercial nonprofits compete[6] have joined the chorus of criticism. Together they tend to correct some students' implicit, and often deep-seated,[7] assumption that nonprofits are inherently and invariably good.

To underscore this latter point, Harvey Dale suggests including "abusers" as well as dissenters. To give a perspective on the nonprofit sector that is "not only richer (in statistics, history, and policy) but more skeptical and 'balanced,'" he recommends that

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5. See, e.g., The Donee Group, Private Philanthropy: Vital and Innovative or Passive and Irrelevant, 1 **Commission on Private Philanthropy and Public Needs, Research Papers** (1977) [hereinafter **Filer Commission Papers**].

6. See, e.g., **Off. of Advoc., U.S. Small Bus. Admin., Issue Alert: Unfair Competition with Small Business** (1986); **Off. of Advoc., U.S. Small Bus. Admin., Unfair Competition by Nonprofit Organizations with Small Business: An Issue for the 1980s** (1984).

7. In his comments on an earlier draft of this paper, Harvey Dale pointed out that

> I found the [nonprofits] course quite different from any other I have taught, over the last 15 years, in the power of the students' predispositions. It was much harder to get them to think critically, because the pictures or paradigms they brought with them to class were too one sided.

Letter from Harvey P. Dale to Robert E. Atkinson 1 (October 8, 1989) [hereinafter Dale letter].

> a few carefully chosen case studies, from more current events, might be useful, if (a) they can be sketched out without too much detail or investment of time, (b) they are clear enough to challenge oversimplified portraits of the sector (whether "good" or "bad"), and (c) they can be used frequently enough, later on in the course, to refresh skepticism and promote rigor. As both Darth Vader and Yoda would agree, it is important to study the dark side of The Force.[8]

Along the same lines, John Simon enlivens his nonprofits course with informal but fairly frequent "show and tell" news items on nonprofits.

3. Comparative perspectives. Just as a statistical snapshot of the American nonprofit sector and a brief survey of its history are useful to set the stage, it would probably also be helpful to take a longer look backward in the Anglo-American tradition and even to pan out across the nonprofit sector in other cultures -- western and non-western, industrialized and developing.[9] But as the focus broadens to include other cultures and lengthens to include more of the past, it becomes difficult to give a meaningful amount of detail. These constraints may make it impractical to include anything other than American history in the introductory material, and the domestic scene itself probably has to be painted with a fairly broad brush. But the insights of comparative work can be brought in at particular points throughout the course, some of which I will indicate in what follows. Whenever these insights can be imported, they are useful not only for their own merits, but also for keeping the contemporary American scene in perspective.

4. Theories of the Role of Nonprofit Organizations.

What I have in mind here is turning from predominantly factual and descriptive statistical and historical surveys to a consideration of efforts to explain the origins and functions of nonprofit organizations with a greater degree of generality. I am inclined

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8. Dale letter, supra note 7, at 1-2.

9. See, e.g., James, The Nonprofit Sector in Comparative Perspective, in **The Nonprofit Sector** 397 (W. Powell ed. 1987). Note also that the theme for Independent Sector's 1990 Spring Research Forum is "The Nonprofit Sector (NGOs) in the United States and Abroad: Cross-Cultural Perspectives."

to give pride of place to what I call the emerging orthodoxy, what James Douglas calls the "twin failure" theory.[10] That is, of course, the theory that explains the nonprofit sector as arising to meet demands for goods and services that tend to be undersupplied by both the private, for-profit sector on the one hand[11] and the public, governmental sector on the other.[12] This theoretical model is immensely powerful as a modeling exercise, as a means of bringing a wide range of data into focus and perspective. Beyond that, the explanatory framework provided by the twin failure theory is an important backdrop for discussion of normative issues about how the nonprofit sector ought to be treated by government.

The twin failure theory is not, however, without its weaknesses. For one thing, it is essentially a demand side account, an account of why consumers of certain goods and services tend to prefer nonprofit suppliers. It sheds much less light on why suppliers choose the nonprofit form. Nonprofit entrepreneurs do not have to take vows of poverty or chastity, but their gratification is almost certainly of a different quality, and often in a lesser quantity, than that of their counterparts in the other sectors. It is instructive to ask, as did a recent study of the motivations of nonprofit entrepreneurs, "If not for profit, for what?"[13] And it is not only instructive because nonprofits are inherently interesting; it also sheds interesting light on the governmen-

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10. **J. Douglas, Why Charity?** 160 (1983).

11. The standard nontechnical, law-oriented account is Hansmann, The Role of Nonprofit Enterprise, 89 **Yale L.J.** 835 (1980). Hansmann summarizes other accounts in Hansmann, Economic Theories of Nonprofit Organizations, in **The Nonprofit Sector** 27 (W. Powell ed. 1987).

12. See Weisbrod, Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy, in **The Economics of Nonprofit Institutions** 21 (S. Rose-Ackerman ed. 1986).

13. See **D. Young, If Not for Profit, for What: A Behavioral Theory of the Nonprofit Sector Based on Entrepreneurship** (1983); Young, Entrepreneurship and the Behavior of Nonprofit Organizations: Elements of a Theory, in **The Economics of Nonprofit Institutions** 161 (S. Rose-Ackerman ed. 1986); see also **J. Douglas**, supra note 10.

tal and for-profit spheres. For another thing, being based on neo-classical economics, the twin failure theory tends toward reductionist assumptions about human motivation and tends to ignore non-efficiency considerations of public policy.

It is easier, unfortunately, to point out deficiencies in the dominant economic model than it is to present useful supplementary models from other disciplines. Maybe I just haven't looked hard enough, or in the right places.[14] But I suspect that cross-pollinization between law and other social science disciplines is less great in this, the era of Law and Economics, than it has been in other eras -- than it was, say, in the heydays of Sociological Jurisprudence or Legal Realism or the Law and Society movement. Moreover, as James Douglas has pointed out with respect to the explanatory theories of political scientists,[15] there is less agreement among scholars outside the field of economics, in part because there is less agreement about the criterion of assessment. Other disciplines lack a single yardstick analogous to economists' concept of efficiency.[16]

On the other hand, the very diversity of viewpoints in other disciplines that makes their perspectives difficult to present within the confines of a nonprofits course may, paradoxically, be just the right antidote to the monolithic tendencies of economic theory. These other theories may be more receptive to different assumptions about human behavior at the descriptive level and more open to different desiderata at the normative level. With respect to motivation, they may be more attentive to the role -- or at least the possibility -- of altruism; with respect to policy goals, they may be more inclined to address not just economic efficiency, but political pluralism and diversity,

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14. Promising veins that I have by no means mined out are **J. Van Til, Mapping the Nonprofit Sector: Voluntarism in a Changing Social Economy** (1988), **J. Douglas,** supra note 10, and **C. Milofsky, Not for Profit Organizations and Community: A Review of the Sociological Literature** (Yale University Institute for Social and Policy Studies Program on Nonprofit Organizations Working Paper No. 6, 1979).

15. Douglas, Political Theories of Nonprofit Organization, in **The Nonprofit Sector** 43 (W. Powell ed. 1987).

16. Douglas, supra note 10, at 43-44.

social solidarity and community, economic justice and wealth redistribution. If so, the value of bringing them into the course would warrant substantial costs.

In a sense, the items covered in this initial survey are not legal issues. But legal issues emerge from and play themselves out against the factual background, and theories of the nonprofit sector tend, explicitly or implicitly, to be the foundations on which the responses to these issues are erected.

II. Legal Issues Proper.

The law's interaction with nonprofit organizations occurs across a wide spectrum, ranging from the extreme negative pole of general prohibition, to the active discouragement of particular activities, through more neutral matters like defining basic nonprofit structures and regulating core nonprofit activities, to affirmative steps like exempting nonprofits' income from taxation, relaxing other generally applicable laws in their favor, encouraging private citizens to support them, and providing them direct governmental subsidies.[17] In discussing legal issues that should be included in a law school course on nonprofits, I will start in the middle of the spectrum, move to the more positive pole, and then to the more negative. Finally, I will address several sets of issues that cover the entire spectrum.

A. Enabling and Monitoring Law.

1. Constitutive role. At the most basic level, the law provides the forms of organization in which nonprofit activities are conducted. Some attention must be given to the three basic forms -- trusts, unincorporated associations, and nonprofit corporations, to the ways in which they differ, and to the relative merits and limitations of each.

2. Fiduciary standards. Here I have in mind the most general set of

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17. The notion of governmental activities vis-a-vis nonprofits as lying along a spectrum comes from **J. Douglas**, supra note 10, at 131-32. For particular functions of corporate law and tax law as to nonprofits, I have borrowed from Ellman, Another Theory of Nonprofit Corporations, 80 **Mich. L. Rev.** 999, 1001-04 (1982) and Simon, The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in **The Nonprofit Sector** 67 (W. Powell ed. 1987).

value-based rules that are designed to ensure that nonprofits perform their designated purposes and serve their respective constituencies. In the context of tax law, John Simon usefully distinguishes this "policing function," the monitoring of nonprofits in their core activities, from what he calls the "border patrol function," the purpose of which is keeping them on the reservation.[18] A central issue here is whether standards for nonprofit corporation directors and officers should be more like those of their counterparts in for-profit corporations or those of their antecedents in charitable trusts.[19]

Beyond its own merits, this debate sheds light on two very broad issues. First, barely below the surface of this debate are differences of opinion about the origins and roles of nonprofits; to a large extent, different views about where regulators should set fiduciary standards reflect underlying differences of opinion about how nonprofits are internally constituted and, as a consequence, how well they can police themselves.[20] Second, and more broadly, consideration of fiduciary roles in the nonprofit context affords an occasion to reconsider the basis of more commonly encountered fiduciary duties of, for example, for-profit officers and directors and private, as opposed to charitable, trustees.

In the subcategory of charitable nonprofits, issues of fiduciary duty are especially well defined. Here the different regimes applicable under federal tax law to public charities and private foundations are not only of great importance to practitioners; they also offer illustrations of the tension policy makers face between broad good faith standards and narrow per se rules. And they present a live political debate. At least

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18. Simon, supra note 17, at 68.

19. See, e.g., Stern v. Lucy Web Hayes Nat'l Training School for Deaconesses and Missionaries, 381 F. Supp. 1003 (D.C.D.C. 1974). Logically allied to the discussion of these duties themselves are the matters of who is potentially liable for their breach and whether they can insure against such liability, matters that would be appropropriately addressed at this juncture if time permits.

20. Cf. Ellman, supra note 17; Hansmann, Reforming Nonprofit Corporation Law, 129 **U. Pa. L. Rev.** 497, 515 (1981).

since the Filer Commission's report, there has been discussion, sometimes warmer than at present, about whether the stricter private foundation standards should be extended to other charities.[21]

3. Regulation of solicitation. In some ways, this is a fairly specialized topic. But solicitation is at the center of what some nonprofits do, both as a means of finance and as a means of proselytizing for their causes. Moreover, the regulation of solicitation nicely poses some critical jurisdictional issues, in particular the problem of Balkanization, and illustrates a significant effort to address that problem, the National Association of Attorneys General uniform statute project. There is also recent evidence here of the tendency of federal tax law to insinuate itself at every point in the regulation of nonprofit activities.[22] Finally, the tricky First Amendment issues raised by efforts to regulate solicitation have forced the Supreme Court itself into the debate on the advocacy activities of nonprofits, a debate that involves important issues of both public policy and constitutional law.[23]

B. Government Policies Affirmatively Favoring Nonprofits.

Here we turn from enabling and implementing laws to laws that more actively encourage nonprofits. This is what John Simon, speaking with particular reference to tax law, calls the "support function."[24] Positive governmental favors toward nonprofits tend to loom largest in the tax law advantages of exemption and deductibility, but

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21. See Commission on Private Philanthropy and Public Needs, Commentary on Commission Recommendations, in **Filer Commission Papers**, supra note 5, at 3, 25-26. Harvey Dale has pointed out that the suggestion of higher standards for public charities resurfaced recently in a report by the Internal Revenue Commissioner's Task Force. Dale Letter, supra note 7, at 2.

22. See I.R.C. § 6113 (1988).

23. See Riley v. National Fed'n of the Blind, Inc., 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). An extensive post-Riley assessment of charitable solictation is about to be published by research students at N.Y.U.

24. Simon, supra note 17, at 73-84.

merit at least some discussion in other areas as well.

1. Exemption. Inextricably linked with the decision to grant an organization specially favored legal status is the identification of some characteristic that warrants this treatment. At the highest level of generality, the question is what is required for favored status, beyond the definitional requirement that net revenues not be distributed to controlling individuals? One might focus on how the additional requirements differ with each favor; for pedagogical purposes I prefer to focus on the requirements for one set of favors, those in the tax field. In the tax field these requirements are especially well fleshed out, and similar issues arise in other areas. Moreover, tax law explicitly borrows in this regard from the law of charitable trusts, adding further depth and breadth.

In focusing on special favors in the tax field, it is useful to distinguish between mutual benefit organizations and public service organizations.[25] With respect to the latter, the basic additional requirement is public benefit, and thus the critical question is what forms of public benefit count. Here everyone gets to choose her own favorite expository vehicle; mine is to deal with "educational." To show how crassly the concept of public benefit can be gerrymandered, I begin with the case of the eighteenth century Jewish testator whose bequest to establish a synagogue was converted under the doctrine of cy pres to fund a church.[26] From there I move into those

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25. I borrow these two categories from Bittker and Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 **Yale L.J.** 299 (1976). In my perusal of syllabi, I found that several others use this division at various points in their treatment of nonprofits. By employing it here, I do not mean to suggest that the differences between the two categories always outweigh the similarities, either for descriptive or normative purposes. Hansmann, for example, tends to see the similarities as more significant with respect to both tax law and nonprofit corporate law. Hansmann, supra note 20 (arguing for a single form of nonprofit corporation with uniform fiduciary standards generally corresponding to those traditionally applied to public service organizations).

26. Da Costa v. De Pas, 1 Amb. 228, 2 Swanst. 487 (1754).

classic examples of British eccentric paternalism, the Shaw wills cases,[27] then dwell a bit on the slippery distinction the courts and the Service have tried to draw between education and advocacy in cases involving controversial contemporary issues like gay rights,[28] radical feminism,[29] and racism.[30]

These last three topics explicitly raise an important corollary question, whether an accepted public benefit like education can be so tainted by a public bad like racial discrimination as to disqualify it from favorable treatment. The answer of the Bob Jones case is, of course, a resounding yes; the intriguing question that remains is the present, and appropriate, limit of the public policy constraints.

Educational organizations also raise a second corollary to the public benefit issue, whether the provision of a public benefit must involve an element of wealth redistribution to qualify for favored treatment. Though this question seems to have been answered negatively as to education, it still crops up in practice in other areas,

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27. In Re Shaw's Will Trusts, 1 All E.R. 49 (Ch. 1952) (recognizing Ms. Shaw's testamentary trust for improvement of the Irish people in such matters as elocution and deportment); Public Trustee v. Day, 1 All E.R. 745 (Ch. 1975) (refusing to recognize George Bernard Shaw's testamentary trust to promote the Shavian alphabet).

28. See, e.g., Grant v. Brown, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974); Rev. Rul. 78-305, 1978-2 C.B. 172.

29. Big Mama Rag, Inc. v. United States, 494 F. Supp. 473 (D.C.D.C. 1979) (denying radical feminist journal exempt status under § 501(c)(3) as an educational organization), rev'd, 631 F.2d 1030 (D.C. Cir. 1980) (invalidating Treasury Regulation defining "educational" for purposes of § 501(c)(3) exemption).

30. Bob Jones University v. United States, 461 U.S. 574 (1983) (holding that "educational" organizations under § 501(c)(3) must not violate fundamental public policy against racial discrimination); National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983) (upholding denial of educational status to racist periodical under regulation invalidated in Big Mama); Rev. Proc. 86-43, 1986-2 C.B. 729 (stating Service's position on "advocacy" organizations in the wake of Big Mama and National Alliance).

which is itself enough to make it a matter of continuing theoretical concern.[31]

With respect to mutual benefit nonprofits, economic theory is quite helpful in explaining why some goods and services are provided mutually rather than on a for-profit basis. Less clear, and equally worthy of discussion, is why the tax code favors the mutual production of some goods and services but not others. Within the favored categories of mutual organizations are a host of narrower questions -- the particular-services-for-members prohibition in the trade association area and the more general problem of allocating expenses attributable to transactions with nonmembers, to name but a few.

The academic discussion of the rationale for income tax exemption, in particular the three-way debate between the traditional subsidy theorists, Bittker and Rahdert's technical definition theory,[32] and Hansmann's economically-oriented capital formation theory,[33] brings a measure of order to the Code's rather chaotic exemption categories. Beyond that, the debate not only draws upon explanatory theories of the role of nonprofits; it also involves important normative issues about what that role should be, and how and whether it should be governmentally supported.

2. The Charitable Deduction. By focusing on the tax system's encouragement of philanthropy, I am consciously -- and somewhat uncomfortably -- letting the tax tail wag the dog. Any time that could be spared for some of the very good, and fairly rapidly growing, literature on philanthropy itself would be well spent.

With respect to the charitable deduction, a measure of technical background is essential. The distinction between a charitable gift and a purchase continues to

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31. These two corollary questions -- the issue of violating public policy and the issue of redistribution -- are at the core of what Simon calls the equity function of nonprofit tax law. See Simon, supra note 17, at 84-88.

32. Bittker and Rahdert, supra note 25.

33. Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 **Yale L.J.** 54 (1981).

bedevil the Supreme Court,[34] and that issue ties in nicely with the policy basis for the deduction. Certainly the intricate § 170 machinery merits mention: its percentage limits, its separate rules for different classes of donated property and donee organizations, and its elaborate regime for gifts in trust. But for my money, the higher metaphysics of matters like deferred giving are best left to specialized estate planning seminars.[35]

The time saved in the general nonprofits course is well spent on policy analysis on two fronts. The first is the rationale for the deduction itself, in particular, whether it is merely a technical artifact of the proper definition of taxable income[36] or whether it is an affirmative subsidy of philanthropy.[37] The second, and closely related, policy debate is about alternative means of publicly supporting philanthropy, means that may be either fairer or more cost-effective than the current deduction.[38] Here it may be useful to consider alternative approaches, perhaps borrowing from interna-

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34. United States v. American Bar Endowment, 477 U.S. 105, 116-18 (1986); Hernandez v. Commissioner, 490 U.S. ___, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

35. Alternatively, the overly inquisitive can be referred to a number of technical guides that are at once reliable and largely self-explanatory. See, e.g., **Arthur Anderson & Co., Tax Economics of Charitable Giving** (10th ed. 1987).

36. See Andrews, Personal Deductions in an Ideal Income Tax, 86 **Harv. L. Rev.** 309 (1972).

37. See Gergen, The Case for a Charitable Contributions Deduction, 74 **Va. L. Rev.** 1393 (1988).

38. See Brannon & Strnad, Alternative Approaches to Encouraging Philanthropic Activities, in 4 **Filer Commission Papers**, supra note 5, at 2361. Some writers have suggested replacing the charitable deduction with a system of direct matching grants. See McDaniel, Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems, 11 **B.C. Indus. & Com. L. Rev.** 867 (1970); McDaniel, Federal Financial Assistance to Charity: An Alternative to the Tax Deduction, 55 **Mass. L.Q.** 243 (1970); Stone, Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy, 20 **U.S.C.L. Center Tax Inst.** 27 (1968); Surrey, Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance, 84 **Harv. L. Rev.** 352, 392 (1970) (citing Stone and McDaniel). See infra p. 19.

tional comparisons.

3. Direct governmental grants. One possible alternative to the charitable deduction, matching grants, brings us to a highly significant but until recently relatively neglected aspect of the support function. Though the practical importance of governmental grants to nonprofits certainly needs to be underscored,[39] a practical problem with discussing grant programs in detail is that they tend to vary considerably among industries, in their mechanics and probably also in their policy justifications.

4. Other Special Breaks for Nonprofits. In addition to income tax exemption, nonprofits enjoy advantages under a wide range of other law at both the state and the federal level. Though here again, as in connection with grant programs, the very multiplicity makes detailed treatment difficult in a general course, students at least need to be apprised of the fact that special treatment raises different issues in different areas of the law. As Harvey Dale puts it, these other special breaks often follow in the wake of the great 501(c)(3) battleship without much attention to whether they belong there.[40] Perhaps a manageable comparison would be between income tax exemption and local ad valorem property tax exemption.

C. Marginal Areas.

The kinds of regulation I have described so far have to do with monitoring the way nonprofits cultivate their own gardens; the regulation that is the subject of this section, what John Simon calls "the border patrol function," is designed to keep them down on the farm. In these areas nonprofit activity is denied advantages available to others, is rigorously circumscribed, or is forbidden outright. This generally occurs when nonprofits try either to influence government on the one hand or to engage in profit-motivated activities on the other; the respective roles of government here have

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39. The work of Lester Salamon in this area has been especially significant. See, e.g., **L. Salamon & A. Abramson, The Federal Budget and the Nonprofit Sector** (1982); Salamon, The Results are Coming In, **Found. News**, Jul.-Aug. 1984, at 16-23; Salamon & Abramson, Nonprofits and the Federal Budget: Deeper Cuts Ahead, **Found. News**, Mar.-Apr. 1985, at 48-54.

40. Dale letter, supra note 7, at 3.

thus been aptly described as "patrolling the government border" and "patrolling the business border."[41] Addressing these border patrol issues raises fundamental questions about the proper roles of the three sectors and about the appropriate modes of their interaction.

1. Entrepreneurial activities of nonprofits.

Here again, there is a temptation, and probably a tendency, to let the tax tail wag the dog, to concentrate on the unrelated business income tax (UBIT) system and to slight or ignore the underlying phenomenon of enterprise in the nonprofit sector. But even in courses where the primary focus is the tax side, there is something to be gained by stepping back a bit and looking on the one hand at the recent data on enterprise in nonprofits, particularly as a response to Reagan budget cuts,[42] and on the other hand at the recent theoretical work on cross-subsidization.[43] This is also an interesting area in which to spend some time on the evolution legal doctrine. The United States Supreme Court got into the act early on, in the Trinidad[44] case, and the development from that very limited opening for nonprofit enterprise to the full-blown "destination of income" test shows the extent to which the role of the courts in this area has been as much extrapolation from as interpretation of the basic statutory scheme. And, of course, the 1950 Act shows a logical legislative response -- some would say a desirable corrective -- to judicial lawmaking.

Turning to UBIT proper, there is an infinity of technical detail, in the basic definition of UBIT, in exemptions from the tax, and in the allied areas of unrelated debt-financed income and feeder organizations. There is also a virtually new field of sophisticated structural stuff -- partnerships and joint ventures with for-profits, for

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41. Simon, supra note 17.

42. See supra note 39 (citing works of Lester Salamon).

43. See, e.g., **E. James, Cross-Subsidization by Non-Profit Organizations: Theory, Evidence, and Evaluation** (Yale University Institute for Social and Policy Studies Program on Nonprofit Organizations Working Paper No. 30, 1982).

44. Trinidad v. Sagrada Orden, 263 U.S. 578 (1924).

example.

Once again, however, I am inclined to err on the theoretical side, particularly because the theoretical issues here tend to be hardy perennials. Ever since the Congressional debates on the 1950 Act, discussion has tended to follow a sometimes eccentric orbit around the twin foci of efficiency and fairness. On the efficiency side, there is increasing clarity about the issues, though not yet about the answers.[45] On the fairness side, rhetoric still predominates, a problem that is more likely to be remedied in the mutually respectful atmosphere of law school classrooms than in the rather different air of Congressional committee chambers.

2. Political activities of nonprofits.

In the enterprisory activities of nonprofits, we see them jostling their neighbors in the for-profit sector; in their political activities, we see a parallel phenomenon on the governmental frontier. Of course, interaction between nonprofits and government is implicit in all the regulatory topics we have touched upon, but there the direction of impact is primarily from government to nonprofit. In the political activities of nonprofits, the initiative reverses as nonprofits try to influence government. The three primary focuses -- litigation, lobbying, and electoral campaigning -- are treated quite differently for federal tax purposes, and once again the federal tax law looms large. Also, particular kinds of nonprofits are treated differently in each area. At the risk of slight overstatement, it is safe to say that the involvement of charities in all three activities has been more suspect and that the involvement of private foundations has been the most suspect of all. An overarching question is therefore why, especially when the suspicion has been less with respect to not only for-profits, but also other kinds of nonprofits.

Litigation. In the matter of litigation, the advent of public interest law firms has allowed charitable organizations to step out of the traditional areas of poverty, civil

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45. See, e.g., Hansmann, Unfair Competition and the Unrelated Business Income Tax, 75 **Va. L. Rev.** 605 (1989); Rose-Ackerman, Unfair Competition and Corporate Income Taxation, 34 **Stan. L. Rev.** 1017 (1982); Bittker & Rahdert, supra note 25, at 319-26.

liberties, and civil rights law into a realm of litigation no longer defined in terms of particular substantive problems. Instead, the permissible goal is stated in more opened-ended terms of representing in matters of broad public concern any interest unable to secure counsel in the ordinary market for legal services. Economic notions of public goods and free-riding are useful in defining these relatively content-free parameters, which the Service has had difficulty identifying.[46] More generally, the widely accepted role of charities in public policy oriented litigation serves as a striking contrast to the far more restricted role allowed charity in influencing the explicitly political branches of government.

Legislative activity. The long-running debate on the wisdom of the lobbying restrictions applicable to charities clearly bears on the broader societal role of nonprofits.[47] Moreover, it is a debate that has assumed Constitutional dimensions.[48] And, as the Treasury's continued efforts to promulgate acceptable implementing regulations indicate, the statutory limits on lobbying are still a technical snarl and a political minefield. A particularly frustrating and important problem is the difficulty of distinguishing lobbying activity from legitimate public education efforts without unduly chilling the latter.[49] Perhaps most significantly from both a practical and a pedagogical perspective, the debate on lobbying seems to turn much more on entrenched politics than on reasoned analysis, a point of which law students occasion-

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46. Houck, With Charity for All, 93 **Yale L.J.** 1415 (1984).

47. See Clark, The Limitation on Political Activities, 46 **Va. L. Rev.** 439 (1960).

48. See Regan v. Taxation with Representation, 461 U.S. 540 (1983). TWR also affords an opportunity -- or, perhaps, creates an obligation -- to discuss the Supreme Court's position on whether the tax exemption is a subsidy or something else -- to compare, for example, the of-course-its-a-subsidy approach of TWR with the except-when-it-isn't finesse of Walz v. Commissioner, 397 U.S. 664 (1970) (upholding New York City real property tax exemption of religious organizations against Establishment Clause challenge).

49. McGovern, Accettura, & Skelly, The Revised Lobbying Regulations--A Difficult Balance, 41 **Tax Notes** 1425 (1988).

ally need to be reminded even in the post-Realist era. Particularly enlightening in this connection, and certainly important from a practical standpoint, is the history of trade association lobbying activities and the deductibility of lobbying expenses by for-profits as ordinary and necessary business expenses, a history that initially parallelled that of the charitable lobbying restrictions, then veered off toward much more favorable treatment.

Political campaign activity. Many of the policy issues in the area of political campaign activity overlap those of lobbying. Here, of course, the penalty of over-stepping the bounds is more severe, and thus the location of the line between the forbidden and the permitted all the more practically significant.[50] Here also is an opportunity -- or a temptation -- to digress into the realm of section 527 political organizations and federal election law.

D. Broader Issues and Over-Arching Themes.

Several important sets of legal and allied issues do not fit nicely into the categories of government/nonprofit interactions I have outlined above. Some of these issues, like the transnational comparisons I mentioned early on, are probably best interjected at appropriate points along the spectrum of government/nonprofit interactions. Others may work best as separate syllabus headings, or perhaps as

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50. See Association of the Bar v. Commissioner, 858 F.2d 876 (2d Cir. 1988) (denying (c)(3) status to Bar of the City of New York on account of its judicial candidate evaluations). A more interesting -- and far more politically charged -- line of cases here is that in which private parties have challenged the Internal Revenue Service's exemption of the Roman Catholic Church on the grounds that the Church engaged in forbidden political activity and excessive lobbying. See Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y.), certification denied, 552 F. Supp. 364 (1982); Abortion Rights Mobilization, Inc. v. Regan, 603 F. Supp. 970 (S.D.N.Y. 1985), rev'd, In Re U.S. Catholic Conference, 58 U.S.L.W. 2150 (2d Cir. 1989); Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986), aff'd, 824 F.2d 156 (2d Cir. 1987), rev'd, U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988), vacated, In Re U.S. Catholic Conference, 58 U.S.L.W. 2150 (2d Cir. 1989). The issue of political activity has so far taken a back seat to procedural wranglings over standing and discovery, but, from a pedagogical perspective, this may provide an opportunity to inject some of the overarching "jurisdictional" issues that I discuss below in Section II(D)(1).

separate courses.

1. Jurisdictional issues. Under this heading I lump together a set of issues that are jurisdictional in several senses, from the most mundane matters of territorial authority to the most jurisprudential questions of institutional competence. These include questions of whether federal or state regulation is more appropriate; whether standards should be set legislatively, judicially, or administratively; and whether violations should be policed by public agencies, by nonprofits themselves, by the market, or by private attorneys general. Each of these sets of issues, but especially the last, points to a basic question: On whose behalf do nonprofits operate? And this question, in turn, brings us back to the fundamental rationales for the nonprofit sector and its various components.

2. Religious organizations. Perhaps because they implicate special clauses of the Constitution, perhaps because they trade in people's deepest hopes and darkest fears, religious organizations are treated differently from their sibling nonprofits at numerous points along the spectrum of government/nonprofit interaction -- sometimes better, and sometimes worse. Efforts to limit or police their activities create problems under the Free Exercise Clause; efforts to promote those activities risk running afoul of the Establishment Clause. In part as a result of these constitutional concerns, some religious organizations are subject to a more lenient reporting and auditing regime under federal tax law, some of their disputes cannot be adjudicated in the civil courts, some of their purposes are at the outer range of tolerable eccentricity, some nonprofit corporation statutes treat religious organizations as sui generis, and some of their most widely accepted activities have been difficult to subsidize directly. Some of these differences offer enlightening, even enlivening, contrasts with other nonprofits in a general course on nonprofits. But the systematic discussion of other distinctive aspects of religious organizations, particularly those grounded in constitutional law, are perhaps best left to other courses, if only because of time and space constraints.

3. Ethical issues. I have saved for last my personal -- not to admit idiosyncratic -- favorite among miscellaneous categories. The study of nonprofits

offers an opportunity to discuss ethical issues across a wide front on two basic levels, the personal and the systemic. On the first level, the lawyer engaged in nonprofit work invariably encounters senile clients, often in immediate control of massive resources that are still emotionally, though no longer legally, theirs; clients whose charitable inclinations and familial obligations are not entirely compatible; and clients, both entities and individuals, who have no regard for the spirit of the law and little more for its letter. At the systemic level, the study of nonprofits presents an equally wide range of ethical issues: the redistributionist role of nonprofits, particularly charities, and the effect of tax exemption on overall progressivity; the contrast, if not conflict, between economic efficiency and other standards of social good; the responsibilities and risks of paternalism. Bridging these two levels of analysis, the individual and the systemic, is a broader question: whether nonprofit organizations and their advisors should take a narrow view toward the bottom line, or a perspective limited only to the organizations' own missions, or should look toward doing good in a more general sense, actively accepting responsibility for the full consequences of their actions. This issue has had an especially thorough airing in the literature of ethical investing. For present purposes, this question returns us to the role of our students in the nonprofits sphere. They may be, if only by default, the best informed consciences of the nonprofit community, which, in turn, may serve a similar role in society at large.

Conclusion

One of the last books I read before going off to college was Kenneth Clark's Civilisation, which an aunt had given me for my eighteenth birthday. In the first chapter, "By the Skin of Our Teeth," Clark describes how, in the windswept wastes of the western British isles, monastic communities of Celtic scholars nurtured the thin flame of Classical culture through the Dark Ages, a task later taken up by the Medieval universities. He might also have mentioned the roughly contemporaneous role of the Diaspora synagogues and, later, yeshiva. More recently, we have seen how non-governmental, nonprofit organizations in Eastern Europe, from the Roman Catholic Church in Poland to jazz groups in Czechoslovakia, have helped keep the

light of the West alive behind the Iron Curtain. Perhaps in our own time, in our own culture, nonprofit organizations are performing a similar civilizing function that is too close, or too familiar, for us to appreciate fully. To my mind a fundamental job of the nonprofit course is to inform law students -- and remind ourselves -- of this role, with all its responsibilities and all its opportunities.