OTHER LEGAL ISSUES AFFECTING NONPROFIT ORGANIZATIONS*

by

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Introduction

This paper addresses several legal issues related to the law of nonprofit institutions that might be characterized as "other" issues, if by "other" we mean the standard and usual nonprofit issue and if we mean by "standard and usual" such issues as the justification of tax exemptions for nonprofits, issues involving the Unrelated Business Income Tax[1], charitable solicitation, board member liability and the like. This is a hard assignment. While there are a growing number of us who are fascinated by and thrive upon nonprofit law, it is not, in comparison to many other fields of law, one of enormous fertility[2]. Nevertheless I have been able to pick two such issues for exploration. One is an unqualified "other" issue - the application of the antitrust laws to nonprofits. The other issue on its face is an "other" issue -proposed changes to the treatment of nonprofit postal rates - but, on brief inspection, it will be revealed that I have used the issue to further explore attempts to change the definition of "charity," hardly an "other" issue. The last section of this paper very briefly lists several additional "other" issues that have come to my attention. We hope to hear from conference participants of other "other" issues.

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I thought before the paper proper is begun, it might be of interest if I briefly described those issues that the Nonprofit Industry Study has so far identified as among the major problems confronting New York City nonprofits. The Nonprofit Industry Study is a study of New York City's 501(c)(3) sector[3]. It will include a census of the

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1. See footnote 32 below.

2. This would at least seem to be the case if the target is issues that would be suitable for extended academic research. There are numerous legal issues of a day-to-day practical nature that occupy practicing lawyers.

3. The Nonprofit Industry Study is a three year study that was commenced in the spring of 1988. It is a joint undertaking of the Nonprofit Coordinating Committee of New York, the Fund for the City of New York and the Office of Business Development of the City of New York.

entire sector[4] and a survey of some 2,400 nonprofits collecting economic impact and program information. During its conduct, periodic focus groups are being held with experienced managers from the various nonprofit subsectors to identify the issues that are confronting those groups. We have so far held 7 such sessions with leaders from the following groups: social and human services (3 meetings), arts and performing arts groups (3 meetings) and local community development groups (1 meeting). While the issues spotted are not "legal" issues, they may be of some interest.

The most dramatic and pressing problem for nonprofits is in the area of personnel. This is particularly devastating for human service organizations, some of whom are experiencing turnover rates of 30-50% each year. Nonprofits have not been able to increase their salaries and benefits to compete well for staff. Comparable positions in government agencies and private industry are generally paid significantly better than in nonprofit agencies. Compounding the problem is the increasing expense of certain benefits -- particularly health insurance, which is growing at the rate of 25-40% a year. These personnel trends are only expected to get worse. We have heard stories of social work schools that have refused to post nonprofit jobs because the salary levels were below their minimum standard for graduates. At a time of increasing pressures to provide more service, some nonprofits are turning down government contracts because they cannot be sure they will be able to recruit staff to run their programs.

Contracting with the government has grown more and more complicated. Efforts to speed up payment have met with some success due to prompt payment legislation, but the process leading up to a signed contract continues to frustrate many agencies. Not only are contract requirements often unnecessarily complicated and

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4. So far as we have been able to ascertain, a census such as the Study has undertaken has never been done before. The census collected data on the address of each organization, the Code provision under which it is exempt, what it does and how many people it employs. We have determined that there are about 19,000 nonprofit operations in the City. An "operation" refers to a nonprofit site that may be separately organized or may be an affiliate of a parent group.

duplicative, but for agencies that deal with more than one funding source, there are clashing regulations regarding allowable salary levels and benefits, and rigid stipulations governing any changes in expenditures.

Nonprofit organizations have become more and more sophisticated operations to run. Many nonprofits began in the 1960's and 1970's with a clearcut issue and an earnest committed staff but no particular administrative or management expertise. At the moment, the average nonprofit is still run by a director who has a liberal arts degree and little or no training in management. This same director has to supervise a staff of anywhere from 2 to 500, understand a variety of computer software programs, write proposals and decipher government contracts, hire accountants and judge the quality of their work, manage relationships with a board of directors, maintain an office, etc. The job requirements are demanding and the conditions are only getting tougher as city and state budgets are reduced and government services are cutback.

It has been evident for some time that nonprofits have enormous problems when they go to borrow money. Banks are unwilling to advance money to nonprofits for cash flow purposes. There are few foundations which will make such a loan. Small loans are often considered unprofitable by banks and letters of credit are expensive and regulated. It is difficult for nonprofits to secure acceptable collateral.

It is also becoming apparent that there is another serious dimension to this lack of capital opportunities and that is the neglect of nonprofit facilities. A recent study by the Energy Conservation Facilities Management Corp. confirms this observation. Rarely do government contracts include any provision for maintenance expenses. We would like to be able to further refine the borrowing needs of nonprofits in our surveys.

Nonprofits are having a tough time competing for scarce foundation and corporate dollars, but there are two troubling trends that we have been hearing in our discussions which are exacerbating this funding problem. An increasing number of City agencies are now competing for foundation and corporate dollars. Because there is less money available to fund city programs, creative public managers have decided to set up separate nonprofit subsidiaries which can fundraise the same as any

501(c)(3). Arts organizations, in particular, are finding that this is making it harder for them to hold their own with funders. On another front, private businesses are moving into areas that have been the traditional bailiwick of nonprofits -- such as recreation, child care, some areas of medical care, etc. This private competition is eroding just those areas of service which have helped to subsidize "unprofitable" areas. Nonprofits have managed to survive the ups and downs of funding fads and fading public support because they have been able to creatively balance one "losing" program against others. This ability to maneuver between programs is becoming more difficult as competition increases.

II

Antitrust

> "There is no doubt that anti-price fixing laws apply to the nation's colleges and universities.[5]"

A Justice Department investigation of possible collusion to fix tuition prices, salaries and scholarship awards in higher education has sent shock waves through a number of major universities and has forcefully raised the question of the application of the antitrust laws to nonprofits. Although some research has been done on this question[6], the engines are now firing up in a number of legal departments and law

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5. Wall St. Jrnl., September 4, 1989, at A1, col. 1.

6. See Greenblatt, American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.: Vicarious Liability Equalizes the Treatment of Business Enterprises and Non-profit Associations Under Antitrust Law, 38 U. Miami L. Rev. 741 (1984); Comment, Nonprofit Associations are Subject to Antitrust Liability for Acts of Their Agents with Apparent Authority, 60 Wash. U. L. Q. 1487 (1983); Curran, Volunteers ... Not Profiteers: The Hydrolevel Myth, 33 Cath. U. L. Rev. 147 (1983); Freedman & Smith, Nonprice Competition by the Monopolist Under Section 2 of the Sherman Act: A

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firms and the issue is one that deserves further dispassionate academic treatment.

The facts must still be developed, but it seems likely that university administrators share information about proposed tuition hikes and salary raises. Whether this is done in a covert manner or quite openly is far from clear. This exchange of information is, of course, quite different than agreeing to tuition levels, etc. It is well known and quite open that each year over 20 financial aid officers from elite schools meet to review the applications of students who have applied for financial aid to establish uniform levels of financial need. It also seems to be the case that it never occurred to most university administrators that they may have been running afoul of the antitrust laws. Most of them, without ever thinking about it, just assumed that they did not.

For many the Supreme Court in National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U. S. 85 (1984) (hereinafter referred to as "NCAA") disposed of the question when it said in a footnote referring to the Sherman Act, "There is no doubt that the sweeping language of section 1 applies to nonprofit entities." I would, however, venture to suggest that the question is not quite settled. Most of the cases from which this proposition is drawn involve trade association nonprofits designed to benefit the members of the associations[7]. None of them

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6.(...continued)
Dialogue, 14 U. Toledo L. Rev. 469 (1983); Bartlett, United Charities and the Sherman Act, 91 Yale L. J. 1593 (1982); First, The Business of Legal Education, 32 J. Legal Educ. 201 (1982); Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802 (1981); Rose-Ackerman, United Charities: An Economic Analysis, 28 Public Policy 323 (1980); First, Competition in the Legal Education Industry (II): An Antitrust Analysis, 54 N. Y. U. L. Rev. 1049 (1979); and First, Competition in the Legal Education Industry (I), 53 N. Y. U. L. Rev. 311 (1978).

7. The first case cited was Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Goldfarb involved a challenge to a minimum fee schedule that was imposed by a local bar association upon its lawyer-members. Among other things, the bar association argued that it was exempt from section 1 of the Sherman Act on the grounds that "competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community." Id. at 786. The court rejected this "classic basis traditionally advanced
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addressed the question in the context of public benefit nonprofits coming together to engage in an activity challenged as anti-competitive that was designed to further their public benefit goals. The term "public benefit nonprofits" refers to the myriad of section 501(c)(3) nonprofits. While the NCAA case involved universities, all section 501(c)(3) organizations, the activity challenged had little to do with carrying out the schools' underlying educational mission other than the need to raise funds to enable them to reach their goals[8]. Indeed, the Court noted, in the footnote referred to above,that the trial court found "that the NCAA and its member institutions are in fact organized to maximize revenues." Where the goal of an organization is not to maximize revenues but rather to advance the public interest, perhaps a different analysis applies.

Section 501(c)(3) public benefit nonprofits, as is well known, are those nonprofits which pursue charitable purposes and charitable purposes include the relief of poverty, the advancement of education and religion, the promotion of health and governmental purposes and any other purpose the accomplishment of which is

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7.(...continued)
to distinguish professions from trades." It noted in a footnote that: "The reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in [a report of the bar association on the minimum fee schedule] states:'The lawyers have slowly, but surely, been committing economic suicide as a profession.'" Id. The second case was American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U. S. 556 (1982). There a nonprofit trade association issued a report declaring that a device marketed by one of the firms in its industry was unsafe. The report has been written by a senior officer of a company which was attempting to keep the new product off the market. Neither of these cases comes close to raising the issue in terms of public benefit nonprofits.

8. A recent study by the General Accounting Office of NCAA statistics found an appallingly low graduation rate among football players at Division I-A schools. This suggests that athletic goals might be counter to the primary educational goals of NCAA members. N.Y. Times, September 10, 1989 at A1, col. 1. It may be that some universities value athletic more than intellectual excellence. A recent report in the Times notes that "...John Thompson, the basketball coach at Georgetown University, earned $317,133 last year, while The Rev. Timothy S. Healy, who was then Georgetown's president, was paid $185,000." N.Y. Times, September 20, 1989, at B10, col. 3.

beneficial to public. The key is that they primarily advance public interests and do not advance private interests as is usually the case with a for-profit enterprise. The essential economic nature of public benefit nonprofits was eloquently described by William Baumol and William Bowen back in 1965:

> Nonprofit organizations as a group share at least two characteristics: (1)they earn no pecuniary return on invested capital and (2) they claim to fulfill some social purpose. These two features are not wholly independent. Any group which sought to fulfill no social purpose and earned no financial gain would presumably disappear from the landscape. Moreover, its goals themselves often help explain why no money is earned by such an organization. While an automobile producer may take pride in the quality of his cars, he is much less likely to regard product quality per se as an ultimate objective of the enterprise than is the head of a nonprofit organization. Nor is the auto producer likely to be nearly as concerned about the social composition of his clientele. . . . Nor is it just the quality aspirations that the social goals of the nonprofit enterprise contribute to its financial difficulties. The concern of the typical nonprofit organization for the size and composition of its clientele often causes operation revenue to be lower than would be the case if services were priced to satisfy a simple profit-maximization goal. Since such a group normally considers itself to be a supplier of virtue, it is natural that it should act to distribute its bounty as widely as possible. The group is usually determined to prevent income and wealth alone from deciding who is to have priority in the consumption of its services. It wishes to offer its product to the needy and the deserving - to students, to the impecunious, to those initially not interested in consuming them, and to a variety of others to whom high prices would serve as an effective deterrent to consumption.

Is it too late in the day or too naive to ask whether core activity by public benefit nonprofits constitutes "trade or commerce" under section 1 of the Sherman Act[9]? One commentator notes that "today virtually any activity of a kind regularly engaged in for financial gain will be characterized as 'commerce' in the constitutional

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9. In a case involving a Sherman Act challenge to a rule by a college accreditation agency that forbade accrediting schools run on a for-profit basis, Judge Bazelon concluded that the Sherman Act was not aimed at "the noncommercial aspects of the liberal arts and learned professions." Marjorie Webster Junior college, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc., 432 F.2d 650 at 654 (D. C. Cir.1970) .

sense."[10] Perhaps the following question should be explored: does "trade or commerce" include any activity that realizes financial gain although that is not its primary purpose or does it only include those organizations whose primary purpose is to realize financial gain? It seems fairly clear that the Sherman Act has as a major purpose the protection of the consumer[11]. It also seems likely to be the case that what the Congress had in mind when it enacted the Sherman Act were standard commercial transactions involving profit maximizing sellers and buyers. Did Congress intend as well to reach nonprofit organizations whose primary purposes are not to make money but to provide public benefits? There may be values of social importance sought by public benefit nonprofits to which the application of the ends of fostering competition makes little sense.

Before advancing with this train of thought, some consideration should be given to the health care market, an area fecund for antitrust cases and one where the issue of nonprofit status has been addressed although not decisively.

As noted, an enormous number of antitrust cases have arisen in the health care area. Many of them involve arrangements by groups of doctors - sometimes organized into nonprofit trade associations and sometimes simply a coalition of practitioners. Hospitals are also parties but there appears to be relatively little discussion of the relevance of their nonprofit structure. There were, however, two federal district court hospital merger cases decided earlier this year where the issue is discussed. In one a violation was found, U. S. v. Rockford Memorial Corporation and SwedishAmerican Corporation, 1989-1 Trade Cases Para. 68,462 (N.D. Ill.) (hereinafter "Rockford

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10. Lawrence Sullivan in his text book cites United States v. National Association of Real Estate Boards, 339 U. S. 485, (1950) at 490-91 for the following proposition: " ' Trade or commerce [covers any] occupation, employment or business carried on for the purpose of profit or gain'". L. Sullivan, THE LAW OF ANTITRUST, 708 (1977). Later in the text Sullivan states "If there is a dollar to be made, it's trade or commerce." Id. at 709.

11. The Court in NCAA quotes an earlier case to the effect: "'Congress designed the Sherman Act as a "consumer welfare prescription."' Reiter v. Sonotone Corp., 442 U. S. 330, 342 (1979)"

Memorial"). In the other, the merger was allowed, U. S. v. Carilion Health Service, 707 F. Supp 840 (W. D. Va. 1989) (hereinafter "Carilion"). The factual findings of the two courts were opposite in two significant respects. In Rockford Memorial, the court found that the geographic market in question was narrower than that advanced by the defendants and that it was restricted to inpatient care. In Carilion, the court found a wider geographic market than that urged by the government and that the market included both inpatient and outpatient services. Rockford Memorial gives a fairly lengthy treatment to the question of the defendants' nonprofit status. The court rejected the claim that the hospitals' nonprofit status would prevent them from acting competitively or that they had no motivation to act anti-competitively[12]. First, it noted that "non-profit status has not deterred other courts from finding anti-competitive activity and anti-trust violations"[13], citing U. S. v. North Dakota Hospital Association, 640 F. Supp. 1028 (D. N. D. 1986) (hereinafter "North Dakota Hospital") and Hospital Corporation of America v. F. T. C., 807 F. 2d 1381 (7th Cir 1986) (hereinafter "HCA"). Both of these cases are discussed below. Next the court considered the view that nonprofit decisionmakers are not moved by the end of personal gain, and

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12. Here is how the court reworded the hospitals' position on the subject. In particular, the defendants contend that they have no incentive to act anti-competitively because their decision- makers cannot personally gain from the monopoly profits derived from the exercise of market power. The defendants maintain that anti-competitive activity occurs when a decisionmaker, specifically a decisionmaker with an ownership interest in a company who will share in the monopoly benefits garnered by his or her firm through anti-competitive activities, has a personal stake in the financial performance of his firm. The defendants conclude that such an incentive exists in for-profit companies but not in not-for-profit companies. The defendants explain that decisionmakers in not-for-profit companies cannot "personally" benefit from monopoly profits since monopoly profits garnered by a not-for-profit company cannot be distributed to anyone, let alone corporate decisionmakers. Instead, any excess of revenues over expenses must be farmed back into the firm's operation or transferred to an affiliate. The defendants conclude that without a chance to share in the firm's surplus, a not-for-profit decisionmaker will not steer the firm into anticompetitive action. Id. at 60,543.

13. Id. at 60,543

concluded that this made no difference.

> Similarly, a not-for-profit company's fund balances, enlarged through monopoly profits, are a means to an end. The end may not be the personal wealth of the decisionmaker but could be for an objective held in nearly as great esteem. The not-for-profit decisionmaker may desire more money for a new piece of equipment or to hire a new specialist or for a better office, salary or title, or just to keep the firm afloat in particulary lean or dangerous times....Simply put, decisionmakers need not be solely interested in the attainment of profit to act anti-competitively[14].

Among the pernicious effects of collective action, the court noted that the hospitals might stymy cost containment action by third party payers including the efforts by such payers to perform utilization reviews or preadmission screening. In addition, the court noted that the hospitals might resist third party payers' attempts to lower reimbursement rates or grant discounts. Further, "[t]hrough a collusive exercise of market power the hospitals in the relevant market could also eliminate 'quality' competition that has been a major drain on the hospitals' budget[s]," referring to the acquisition of new equipment and services. Finally, the court rejected the view that because the board members of the hospitals were aligned with consumer interests they "could not act anti-competitively since they owe a fiduciary duty to the community, and hence the consumers, to provide quality care at the lowest price." It noted that in the past the defendants had colluded together to prevent a third party payer from exacting reimbursement rates lower than existing ones.

> "Reacting to market pressures, the hospitals' managers perceived the new Blue Cross reimbursement formula as a threat to its goals and chose to collude against Blue Cross despite the effect of such collusion on health care consumers' premiums...This overt example of past collusion in the relevant market is instructive in determining whether the defendants will hesitate to act anti-competitively in the future when their objectives diverge from the objectives of consumers."

The court in Carilion, after having found that the merger in question would be procompetitive, emphasized just this last point in finding that the hospitals' nonprofit status militated in favor of finding their combination reasonable.

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14. Id.

> Defendants' boards of directors both include business leaders who can be expected to demand that the institutions use the savings achieved through merger to reduce hospital charges, which are paid in many cases by employers, either directly or through insurance carriers.

While the court recognized that Section 1 of Sherman Act has been found to apply to nonprofit entities, citing NCAA, Goldfarb and American Society of Mechanical Engineers, it noted that those cases "do not address nonprofit entities' charitable activities.[15]"

Posner's 1986 opinion in HCA involved the challenge under section 7 of the Clayton Act of the acquisition by the Hospital Corporation of America of two other hospitals. Hospital Corporation of America is the largest for-profit hospital chain in the United States. The issue was whether as a result of the merger, the acquiring firm, HCA, would be better able to cooperate with the other leading competitors in the relevant market and thus promote conditions for reducing output and raising prices. In considering a number of factors that might or might not facilitate collusion, Posner addressed the point that some of the hospitals in the market were nonprofit entities. He concluded that this would make no difference.

> The adoption of the nonprofit form does not change human nature[16], as the courts have recognized in rejecting the implicit antitrust exemption for nonprofit enterprises.[17]...Nonprofit status affects the method of financing the enterprise (substituting a combination of gift and debt financing for equity and debt financing) and the form in which profits (in the sense of the difference between revenue and costs) are distributed, and it may make management somewhat less beady-eyed in trying to control costs.

North Dakota Hospital involved an agreement amongst a group of nonprofit hospitals to resist giving discounts to a third party payer. The agreement was suc-

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15. "Without deciding whether defendants' nonprofit status should exempt their merger from section 1 scrutiny, the court concludes that their nonprofit status weighs in favor of the merger's being reasonable."

16. Posner cited Clark, Does the Nonprofit Form Fit the Hospital Industry? 93 Harv. L. Rev. 1416, 1447, 1465 (1980).

17. Citing NCAA.

cessfully challenged under section 1 of the Sherman Act as being an agreement in restraint of trade. No mention of the defendants' nonprofit status was made in the opinion. The court recognized that a principal purpose of the agreement was to prevent the shifting of costs from one group of patients onto other patients and other payers that would occur if the hospitals were forced to give discounts[18]. Although the court noted that the motive behind the agreement might have been "laudable",

> Antitrust law does not permit the court to consider whether defendant's agreement, although anticompetitive, is in the public interest because it was intended to prevent one consumer of their services from receiving a benefit at the expense of all other consumers.

Many section 501(c)(3) nonprofits do not operate in the market in the usually understood sense of that term. Some provide their services without charge and many of those which do exact a charge, set their prices considerably below the cost of the services they provide. For example, it is well understood that the tuition charged by many schools is considerably below the cost of educating individual students. The level and nature of the goods and services provided by these public benefit nonprofits would likely be significantly different if left to be determined solely by market forces. While "the achievement of the largest bundle of desired outputs from the available bundle of resources" may be a principal goal of antitrust policy and of the free market, it is fairly clear that this is not the principal goal of many public benefit nonprofits. Milton Handler has stressed "that while competition has its virtues, there are many other values in life that are of social importance." I would argue that the values pursued by the public benefit nonprofit sector are included in these "other" values. It has become common to mark off the social activities of human beings into several sectors, the market sector, the government sector and the nonprofit sector. For most purposes the aims of antitrust policy apply cogently only to the market sector.

To further our understanding of the issues involved, let us consider the case of a public benefit nonprofit that runs a school. Its annual operating budget is financed

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18. The hospitals provided services to Indians for which they were reimbursed by the Indian Health Service. Indian Health Service had pressed for discounts.

in the following manner:

Tuition	-	40%
Endowment Income	-	15%
Annual contributions	-	15%
Government Contracts	-	30%.

The school joins with the 5 other schools in the district and they agree to raise their tuition by 5%. Also, each year the admission officers of the schools get together to exchange information on the level of need of their applicants. At the end of this process, they establish various levels of need for various levels of family income and wealth. All of these schools provide financial aid on the basis of need alone and these levels of need determined at the annual meeting become a baseline for making scholarship awards. How does one analyze this arrangement in antitrust terms?

1. The arrangement constitutes price fixing.
2. The arrangement was entered into not to produce higher profits for the owners of the school.[19]
3. Even though tuition will be raised, the students will still be paying far less than the cost of their education.
4. It is not likely that the arrangement will reduce output. These schools operate for the purpose of educating some preconceived numbers of people. If raising tuition was likely to have the effect of reducing the number of students, these schools would not likely do it. Further, the group is likely to be determined to prevent income and wealth alone from deciding who is to have priority in the consumption of its services. They are likely to have substantial financial aid programs, and even though tuition will be raised, sufficient funds will remain available for scholarships.
5. Those who pay tuition will have less to spend on other things and consequently their bundle of desired outputs will be reduced. Even so, they will be

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19. The schools have no owners. They are managed by their boards as fiduciaries for the public.

receiving services at a price substantially below cost.

6. Fixing the price charged students may remove a financial incentive for cost containment and pursuing efficiency aggressively.

7. The exchange of information to establish levels of need is likely to be procompetitive as it puts each school in a better position to make award decisions.

8. The effect of the arrangement is to preserve the status quo amongst the 5 schools. The mix of students they each receive will not be influenced by tuition differentials. All other things being equal, they will have about the same amount of money with which to pay faculty salaries as before and so there should be relatively little faculty migration. No one school will get the jump on a larger library collection or bigger and fancier machines. Are the educational goals of these schools better served by the avoidance of the kind of competition suggested above?

Perhaps the schools' key motive in agreeing to tuition levels is to avoid competition for certain classes of students. If one or two schools, which were for example particulary well endowed, kept their tuition charges well below the others and offered very generous scholarships, it is likely that they would end up matriculating most of the students in these classes. This would no doubt be financially beneficial to these students, but what would the effect be on all the students at the other schools that will no longer have the benefit of working with students from the special categories? Might the social values of distributing these special students more evenly throughout the schools offset any disadvantage in terms of economic efficiency? Who is best situated to make these judgments - an economist or economist-judge focused narrowly on the values of economic efficiency or educators?

Governments are exempt from the antitrust laws, although they can be notoriously inefficient. Why is this? In part, it may be because we understand their goals to be the protection and advancement of the public interest alone; governments are not meant to advance anyone's private interest. Also, perhaps, it is because government provides what economist call "public goods," goods which by definition do not trade

in the free market place. Might not the same reasons that support a government exemption from antitrust laws also support an implicit exemption for public benefit nonprofits?

Perhaps when nonprofits reach a certain size they become aptly subject to the antitrust laws. As nonprofits become larger they, by definition, command more significant control over society's resources and the value of having them manage these resources in an optimum way becomes more important. Moreover, as nonprofits become larger the pressures for institutional survival and enhancement may make it difficult for their managers to maintain a public interest perspective. Finally, as Kaysen and Turner have noted, a significant goal "to which antitrust policy is directed is the creation of a desirable distribution of social power among business units by changing the relative positions of 'large' firms and 'small' firms in the economy. This goal is broader than that of limiting the market power of firms, since it aims at what we have called social power broadly defined, rather than economic power in particular markets." Might not similar considerations apply to large nonprofits?

Perhaps if people were convinced that the boards of nonprofits were fiercely devoted to fulfilling their fiduciary duty to the public and that this obligation took clear precedent over such concerns as assuring that their institutions remained viable even though it perhaps no longer made sense for some of their organizations to exist, they would feel at ease about an implicit exemption for public benefit nonprofits. If we were convinced that the decisions taken by nonprofit managers, which from an economic standpoint seemed inefficient, were not made to advance some goal internal to the institution, such as more prestige or comfort for the employees, etc., but rather were made solely with the public's interest in mind, we might not so readily question the suggestion that the antitrust laws should not apply to nonprofits. Should there be some kind of a test of the bona fides of public benefit nonprofits? As nonprofits expand into certain areas, such as unrelated business or lobbying, which are limited by the law, the question arises in some people's minds as to whether they still are operating as "pure" public benefit nonprofits. It may be that our understanding of what we mean when we think of pure public benefit nonprofits

would be considerably advanced by viewing them through the glasses of an antitrust lawyer-economist.

Let it be assumed that any attempt to find an implicit exemption for public benefit nonprofits would fail. The next question would be whether, because public benefit nonprofits are distinguishable from businesses, it would follow that whatever the nature of the arrangement challenged, the Rule of Reason and not the per se rule would apply[20]. It is unclear that in a naked price fixing case, as in the instance of schools agreeing on tuition levels, this would be the response a court would give. In explicitly deciding "that it would be inappropriate to apply a per se rule to this case," the Court in NCAA noted that its decision was not based "on the fact that the NCAA is organized as a nonprofit entity."[21] If, however, the special nature of public benefit

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20. Sullivan summarizes these two rules as follows: "There have been two basic approaches in the application of Section 1. The first is known as the rule of reason, the second as the per se doctrine. The rule of reason calls for a broad inquiry into the nature, purpose and effect of any challenged arrangement before a decision is made about its legality. The per se doctrine labels as illegal any practice to which it applies, regardless of the reasons for the practice and without extended inquiry as to its effects." L. Sullivan, THE LAW OF ANTITRUST, 153 (1977). Practices to which the per se rule applies included horizontal price fixing, vertical price maintenance, some group boycotts, tying arrangements and horizontal market division.

Interpretations of the per se rule have swung from formulations suggesting that any efficiency achieved by a practice would remove it from per se scrutiny no matter how small or how easy it might be to achieve the same ends in a less anticompetitive manner, to those that are so broad as to reach almost any arrangement "which tampers with price" (United States v. Socony-Vacuum Oil Co., 310 U. S. 150, at 221 (1940)). Recent Supreme Court decisions have worked out a more pragmatic and policy grounded approach to the per se rules. While the rule of reason is usually thought of as a pro-defendant rule, recent cases have shown that this is not always the case. Further there is some suggestion that the Court is moving to develop a modified rule of reason inquiry to avoid having to use a full rule of reason inquiry in non-per se cases. These developments are nicely treated in Goldschmid, Horizontal Restraints in Antitrust: Current Treatment and Future Needs, 75 Calif L. Rev.925 (1987).

21. It refused to apply the per se rule on the ground that the case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all." The kind of restraints that the Court recognized as justifying

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nonprofits persuaded a court to apply the Rule of Reason, the question would then arise as to whether, in passing on a challenged activity, the interpretation of the Rule of Reason that takes into account social values extrinsic to those aimed at by the antitrust laws (See, L. Sullivan, Law of Antitrust 175-182, 186-189 (1977[22]) might be considered. Sullivan rigorously opposes such a view. If some such view were adopted for applying the Rule of Reason to public benefit nonprofits, there are certainly abundant worthy social reasons to consider as weighing against the values sought by promoting competition. If, however, the Rule of Reason was applied as it may have been interpreted by the Court in National Society of Professional Engineers v.United States, 435 U. S. 679, (1978) no such extrinsic values would be admitted into consideration. This case involved a challenge to a rule of the Society which made as a condition of membership the agreement of individual engineers to refuse to negotiate with a prospective client until that client has selected an engineer for a particular project. In discussing the Rule of Reason, the Court noted that "...the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest..."[23] The court gave some recognition to the "learned profession" defense suggested in the Goldfarb

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21.(...continued)
cooperative efforts included such rules as ones requiring that athletes must not be paid and must be required to attend class.

22. Sullivan suggests that if Board of Trade of the City of Chicago v. United States, 246 U. S. 231 (1918) and Appalachian Coals Inc. v. United States, 288 U. S. 344 (1933) are : "[r]ead for all they are worth,...they suggest the appropriateness of a wide inquiry, one which invites a balance to be struck by the court between alternative social goods without more explicit guidance than the concept of the public interest." Id. at 181-82.

23. Id. at 692. The Court noted that the Society had invoked the Rule of Reason to argue, "that its restraint on price competition ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior." Id. at

case[24] but concluded that the case at hand, involving a total ban on competitive bidding, was a far cry from fitting within any protection afforded by that defense. It went on to rule that to avoid being found violative of section 1 a showing would have to be made that the challenged practice was procompetitive. National Society prescriptions are severe. If applied to public benefit nonprofits challenged under section 1 for restraint of trade, only a showing that the challenged activity was procompetitive would save it.

Justice Blackmun in his concurring opinion objected to such a narrow reading of the Rule of Reason. He was concerned that certain valuable ethical rules would not be left standing under such a construction[25].

> In acknowledging that "professional services may differ significantly from other business services" and that the "nature of the competition in such services may vary"....but then holding that the ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services.

If there is an argument in favor of leaving elbow room for professional services and if we agree that most professional services today are occupations whose members, in the

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24. "We adhere to the view expressed in Goldfarb that, by their nature professional services may differ significantly from other business services, and accordingly, the nature of the competition in such services may vary." id at 696. Footnote 17 in Goldfarb reads: "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." Goldfarb v. Virginia State Bar, 421 U. S. 773 at 788-89 (1975).

25. He mentioned "[a] medical association's prescription of standards of minimum competence for licensing or certification... [and a] bar association's regulation of permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation." Id. at 701-702.

same way as any business persons, are largely motivated by self rather than public interest, would it not follow with all the more force that such an argument should be made for public benefit nonprofits?

III

Postal Rates

The Consolidated Omnibus Reconciliation Act of 1985 contained a provision directing the Postal Rate Commission to conduct a study to make recommendations for reducing the revenue forgone appropriation by changing the eligibility for non-profit mail which advertises goods and services[26]. In June of 1986, the Commission published its Report to Congress: Preferred Rate Study[27] which devoted considerable attention to this question. Briefly, the rates for eligible mail are set so eligible mail does not have to contribute to the overhead costs of the Postal Service. Annual appropriations by Congress make up the resulting revenue shortfall and this call on the Treasury is referred to as the "revenue forgone" appropriation[28]. For fiscal 1990 full-funding for the revenue forgone appropriation would be close to $760,000,000.

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26. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, section 15,103, 100 Stat. 82, 330-31 (1986). More precisely the direction referred to preferred mail which "advertises or promotes the sale of, recommends the purchase of, or announces the availability of any article, product, service, insurance, or travel arrangements." Id. at 331.

27. U. S. Postal Rate Commission, Report to the Congress: Preferred Rate Study, (1986)[hereinafter Report].

28. The Postal Reorganization Act of 1970, in addition to doing away with the Post Office, attempted to put the new Postal Service on a businesslike basis. Each class of mail was to bear its attributable costs (direct and indirect costs which could be attributed to that class) as well as its share of the Postal Service's overhead. Preferred mail, however, was exempted from having to set rates at a level that would pick up its share of the overhead. This amount is paid for by taxpayers through the revenue forgone appropriation.

The Senate, however, introduced a provision which would reduce such appropriation by $30 million based on barring nonprofit rates for third-class mail "which advertises an article or product, travel, financial, insurance, or any other service unless such article, product, or service relates directly to the primary purpose of the mailing organization which qualifies it for reduced rates... or is provided by members of the mailing organization or persons for whose benefit the mailing organization was established."[29]

The Report describes the rules presently in effect on advertising for preferred mailers as follows:

> Currently, the only requirement for eligibility is that the organization as a whole fit into a particular category: educational, religious, scientific, and so on. It may use the preferred rate for anything it chooses to mail in the particular class - regardless of the commercial or advertising orientation of the mailpiece or its relationship to the mission of the organization.[30]

The Report's general recommendation on the eligibility question was to

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29. A recent Legislative Alert from the Nonprofit Mailers Federation dated September 29, 1989 noted that the revenue forgone appropriation for fiscal 1990 will not be reduced and that "[i]n addition to agreeing with the House to appropriate full funding for nonprofit rates, the Senate conferees also gave up their language to restrict certain types of mailings from eligibility for third class nonprofit rates. In return, the House conferees agreed to direct the U. S. Postal Service to prepare a report 'which includes an accounting of the amount of appropriated [postal] funds used to support commercial advertising purposes.' The Postal Service must also make specific recommendations 'to eliminate this abusive practice.' The report is due on February 1, 1990."

30. Report, supra note 2, at 24-25. "Current law extends both second- and third-class nonprofit rates to religious, educational, scientific, philanthropic agricultural, labor, veterans' and fraternal organizations. See 39 U. S. C. section 3926(a)(1) (1982)." Kielbowicz & Lawson, Reduced-Rate Postage For Nonprofit Organizations: A Policy History, Critique, and Proposal, 11 Harv. J. of Law & Policy 347, note 2, at 347 (1988) [hereinafter Kielbowitz & Lawson].

> make substantial relation between the activity or the thing advertised and the subsidizable purpose of the eligible organization the basis of entitlement of any advertising mailing to preferred rates.[31]

The Report made express reference to the Unrelated Business Income Tax (UBIT) provisions of the Internal Revenue Code ("Code") in adopting its "relatedness" theory[32].

In making more specific its rules on advertising for third- class nonprofit mail, the Report recommended that so far as the advertising of products goes, only products actually manufactured by the organization should be eligible for preferred rates. As an introduction to this recommendation, it supposed the case of an organization formed to provide benefits to the elderly that accomplished its purposes by mailing a complete range of nonprescription drugs and medical appliances on a discount basis to those over the age of 65. While the Report conceded that the "philanthropic purpose of the entity is incontestible,"[33] it found flawed a rule that would find this activity sufficiently related to the entity's purposes to qualify it for preferred rates.

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31. Id. at 26. For nonprofit second-class mail, however, it recommended "a rule that would eliminate any subsidy of advertising matter." Id. at 34.

32. Id. at 25. The UBIT provisions of the Code are found at sections 511-514. Very briefly, a tax is imposed on the net income generated by a trade or business carried on by an otherwise exempt nonprofit which trade or business is not substantially related to the organization's exempt purpose. See B. Bittker, Vol 4 FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, 103-1 - 103-27 (1981) and Simon, The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in THE NONPROFIT SECTOR, 67, 91-93 (W. Powell ed. 1987). "Trade or business is 'related' to exempt purposes, in the relevant sense, only where the conduct of the business activities has causal relationship to the achievement of exempt purposes (other than through the production of income); and it is "substantially related," for purposes of section 513, only if the causal relationship is a substantial one. Thus, for the conduct of trade or business from which a particular amount of gross income is derived to be substantially related to purposes for which exemption is granted, the production or distribution of the goods or the performance of the services from which the gross income is derived must contribute importantly to the accomplishment of those purposes." Treas. Reg. section 1.513-1(d)(2)(1959).

33. Id. at 39.

> The flaw is most probably in the diffuseness of the causal relationship between this kind of activity and the achieving of the entity's primary purpose. The advertisement and sale of an article commercially available through other sources may advance that purpose, but is not necessary to it. Moreover, the more closely the sales activity approaches an ordinary commercial transaction the less causal connection it has with the organization's purpose.[34]

A similar rule was recommended for the provision of services[35] except that travel, insurance and financial services were excluded altogether from protection. Insurance was found to be "intuitively not an eleemosynary activity."[36] The same conclusion applied to travel "in its pure state"[37] and to financial services.

> When a travel or insurance arrangement is purchased, it benefits the purchaser in the same way as any other consumer good or service.... Services in general, on the other hand, may well include activity that benefits more than just the purchaser or recipient.[38]

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34. Id.

35. The Report noted that most services were different from products "because of the prima facie relatedness of many kinds of services. There are few instances, among the current categories of eligible nonprofit bodies, of a product being related to the organization's purpose, but many organizational categories are defined wholly or partly in terms of the particular service." Id. at 41. The Report then gave the example of education.

36. Id. at 43.

37. Travel "in its pure state" refers to travel "not engaged in for the sake of health, education, or some other purpose to which travel is a necessary adjunct." Id. at 44. The Report recognized that an argument could be made for protecting travel aimed at the carrying out of the organization's eleemosynary purposes, but rejected making an exception for such arrangements on administrative grounds. The Report noted, however, that no such argument could be made for insurance: "Insurance, on the other hand, does not normally subserve any additional purpose; it is bought for its own sake." Id. at 44.

38. Id. at 44. From the beginning of preferred treatment for nonprofit mail there has been the notion that certain publications benefit more people than the senders and receivers. The benefit, usually thought of as the dissemination of information, was thought to extend to the community as a whole. See Kielbowicz & Lawson, supra note 27 at 359.

(continued...)

In its analysis of the application of its "relatedness" theory to third class non-profit mail, the Report, as described above, makes some points that so far as is known have not yet been expressly raised under the UBIT provisions. First, the advertising of an article which may advance an organization's purpose "but is not necessary to it" would not qualify for preferred rates. In the case supposed, the article was not necessary to the organization's purpose because it was commercially available through other sources. The criterion of necessity could easily go beyond this example and introduces a major extension to the relatedness rules of UBIT.

Second, the Report concludes that "the more closely the sales activity approaches the ordinary commercial transaction the less causal connection it has with the organization's purpose."[39] However, it is hard to see how just because an article is commercially available, its sale may not be related to an organization's purposes. What emerges then is that what really seems to have bothered the Commission is "commerciality" per se. It is fairly clear that the specter of unfair competition lies

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38.(...continued)

One is reminded of the debate between the American Library Association (ALA) and the Information Industry Association (IIA) over the public's access to government information. IIA appears to believe that information produced by the government should be contracted out to the private sector for dissemination. ALA, on the other hand, believes that such privatization greatly increases the cost of dissemination and that the government should do it. A recent paper, seemingly prompted by the legislative activity occurring in connection with the reauthorization of the Paperwork Reduction Act, by the chair of the ALA Legislation Committee, states the issue as follows:

> While the library community regards government information as a public good, IIA considers it a public asset -- a commodity. ... IIA members are -- understandably interested in selling only that government information that may be profitable. But government information has public and societal value -- not simply economic potential. An informed citizenry is a public good -- essential to a functioning democracy. The value of information cannot be judged solely on the basis of what users are able and willing to pay for it.

Schuman, Making the Case for Access:ALA Needs You! (1989) (unpublished paper, American Library Association.)

39. Id. at 39.

behind the Commission's concerns about commerciality.[40]

This focus on commerciality is shown in some of the Report's other recommendations for third class mail. Insurance, "pure" travel and financial services are not eleemosynary activities. In its analysis of these services, the Report makes an interesting distinction. It seems to suggest that an ordinary consumer good or service benefits only the purchaser or recipient whereas the provision of a good or service that would be considered non-commercial "benefits more than just the purchaser or recipient."[41] In distinguishing insurance from "related" travel services, the Report, as noted above, states: "Insurance, on the other hand, does not normally subserve any additional purpose; it is bought for its own sake."[42] While it does not make the point explicitly, the Report would seem to be suggesting here that if the provision of a good or service benefits others in addition to their direct recipients, i.e., benefits the public at large, they may qualify for preferred treatment. Benefiting the community as such is, of course, the key ingredient in the definition of charity for both trust and federal income tax purposes. The additional purpose that the Report requires be subserved would seem to be the charitable purpose of benefiting the public.[43]

The work of a nonprofit organization formed to pursue an incontestable charitable purpose, say the relief of the homeless, may be divided into two broad categories. First would be efforts directed toward the accomplishment of the substan-

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40. In discussing why preferred treatment should not be accorded to the organization that sold nonprescription drugs to the elderly, the Report noted that while the "philanthropic purpose of the entity is incontestible,...still, the potential unfair competition raised by the program is so troubling as to suggest something wrong with the rule." Id. at 39.

41. Id. at 44.

42. Id. at 44.

43. However, whether the provision of insurance to a nonprofit group that enables it to provide its services which benefit the community as a whole in turn should be understood as benefiting the community as a whole, remains an open question.

tive purpose for which the organization was formed such as finding homeless individuals and urging them to seek shelter, counseling and administering to them, developing low income housing, etc. Second are all those activities that are sometimes referred to as infrastructure tasks such as fund-raising, budgeting and accounting, payroll, establishing personnel policies, investing excess funds, securing adequate insurance coverage, etc. Both types of work are equally important for an organization in accomplishing the purposes for which it was formed. As noted above, the Nonprofit Industry Study has found the lack of adequate infrastructure skills on the part of many nonprofits to be a major problem facing the City's nonprofit sector. Few would doubt that this is a problem nationwide. A wide variety of groups have been established during the last decade that address this problem. They include membership organizations of nonprofit groups that supply their members with infrastructure services and technical assistance support groups that provide training in infrastructure skills[44].

The Report's position on commerciality would seem to suggest that the provision of services to aid nonprofit organizations with their infrastructure efforts would not be a preferred activity. Thus, the logic of the Report appears to produce the conclusion, for example, that the provision of investment services or a computer system would not "normally subserve any [charitable] purpose." Investment services and a computer system would be bought for their own sake and would not be used, for example, in directly helping the homeless. That an organization would not be able to help the homeless without an adequate infrastructure would not seem to change the conclusion under the Report's logic.

Raised here is the fairly old debate between the position which holds that if an

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44. My group, the Nonprofit Coordinating Committee of New York, is one such group. A recent conference in San Francisco, funded by the Ford Foundation and the Hewlett Foundation, brought together about 20 such groups from all over the country. At the end of the conference, they constituted themselves as the National Council of Nonprofit Associations. Much of what these groups do is to provide their members with infrastructure-type
services.

activity is not inherently charitable, educational or religious it should not qualify for preferred treatment and the position which holds that an activity essential to the functioning of a charitable organization is itself charitable. This distinction has bedeviled the development of tax law for some time. The Service has fairly consistently ruled that the provision of routine administrative, managerial and consulting services on a cost basis exclusively to organizations exempt under section 501(c)(3) is a trade or business carried on for profit and is not an exempt activity.[45] Where such services are provided below cost, however, by virtue of that fact, they have been held to be charitable.[46] Further, where the service directly aids the exempt purposes of the organizations, such as the operation of a computer system to assist universities in the exchange of educational and scientific information, it has been held to be exempt.[47]

The Code contains two limited exceptions to this rule. First, a cooperative hospital organization which provides such services as data processing, billing and collection, purchasing, printing, industrial engineering and clinical services to two or more hospitals exempt under section 501(c)(3) will be treated as a charitable organization exempt under section 501(c)(3). Section 501(e). Second, an organization comprised solely of educational organizations (which normally maintain regular faculties and curricula and are exempt under section 501(c)(3)) formed to invest the funds of its members is also exempt under section 501(c)(3). Section 501(f). The implication is that organizations formed to perform like services for other kinds of section 501(c)(3)s would not be exempt.

The lead case in this area is B. S. W. Group[48] which held that an organization formed to offer consulting services to nonprofit groups (but not all tax-exempt

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45. Rev. Rul. 72-369, 1972-2 C. B. 245; Rev. Rul. 69-528 1969-2 C. B. 127.

46. Rev. Rul. 71-529, 1971-2 C. B. 234.

47. Rev. Rul. 74-614, 1974-2 C. B. 164; Rev. Rul. 81-29, 1981-1 C. B. 329.

48. B. S. W. Group, Incorporated v. Commissioner of Internal Revenue, 70 T.C. 352 (1978).

groups) at a fee slightly over cost would not be pursuing an exempt activity. The consulting services were primarily in the area of policies and programs for rural development, vocational skills training, alternative housing, etc.[49] B. S. W.'s exclusive function was to find independent consultants and researchers and bring them together with client organizations. The Court found that "[t]his aspect of petitioner's service is not inherently charitable, educational or scientific."[50] The Court did observe, however, that it would be "sympathetic to petitioner if the record showed that the research conducted by the independent consultants in fact furthered exclusively exempt purposes."[51] It is hard to know whether the Court is making a distinction between a commercial and an exempt purpose or between an infrastructure and substantive purpose.

As part of the Tax Reform Act of 1986, Congress added section 501(m) to the Code[52]. Under this provision an organization otherwise exempt under section 501(c)(3) will lose its exemption if a substantial part of its activities consists in providing commercial-type insurance. Commercial-type insurance generally is any insurance of a type provided by commercial insurance companies."[53] An exception is made for the provision of insurance substantially below cost to a class of charitable recipients[54]. In June of 1987, Gabriel Rudney in testimony before the Subcommittee on Oversight of the Committee on Ways and Means of the U. S. House of Representatives proposed that section 501(m) be amended to cover all commercial-type activi-

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49. "A large part of petitioner's attention will be directed towards youth groups, women and their reentry into the work force, and minority business and vocational training and placement." Id. at 354.

50. Id. at 359.

51. Id.

52. P. L. 99-514, section 1012(a) (1986)

53. House Committee Report on P. L. 99-514.

54. Charitable recipients include those who would be members of a charitable class under present law.

ties of public-benefit nonprofits. Rudney suggested that Congress had found that UBIT's relatedness test "had not resolved adequately the competitive advantage issue in the sale of commercial-type insurance by nonprofits.[55]" In the case of Blue Cross and Blue Shield, the major target of section 501(m), it was pretty clear that the sale of insurance was related to its exempt purposes. Rudney supposed that

> In enacting section 501(m), the Congress ignored in part the "relatedness" test and viewed the insurance activity of public-benefit nonprofits as an activity whose nature and scope is inherently commercial rather than charitable.[56]

Consequently, he proposed that the "Subcommittee consider extending the 'scope and nature' test of section 501(m) to all commercial-type activities of ... public benefit nonprofits."[57]

While the battle over UBIT is quiet at the present time and it seems clear that the principle of "relatedness" will be kept in the application of the UBIT provisions[58], as shown above, other similar issues may be heating up in the area of postal rates[59]. The Senate amendment to the Treasury-Postal Appropriations bill referred to above would require that an item advertised relate "directly to the primary purpose" of the exempt organization which qualifies for reduced rates. While we have no indication of the nature of such a direct relation criterion, it is clear that it would be narrower than the "substantially related" test of UBIT. Perhaps it would pick up the Report's notion

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55. Hearings Before the House Subcomm. on Oversight of the Comm. on Ways and Means, Serial 100-26, 100th Cong., 1st Sess. 985, at (1987).

56. Id. at .

57. Id. at .

58. In his draft report describing unrelated business income tax recommendations for consideration by the Subcommittee on Oversight, Chairman Pickel explicitly recommended the retention of the substantially related test for purposes of UBIT.

59. This battle has been contested since at least the publication of the Report. Colleagues at the Alliance of Nonprofit Mailers inform me that OMB is eager to limit the eligibility of nonprofit groups for preferred rates and will almost certainly press the issue in the future.

that the sale and advertisement of a product must be necessary to the purposes of an organization and not merely advance those purposes as would be the case if the product was commercially available. Perhaps it would fall in line with the view that the furnishing and advertising of any services that are not inherently charitable would not qualify for preferred status, a view which if elaborated usually explains that if services are commercial they are not inherently charitable. And services tend to be characterized as commercial if they are provided by for-profit concerns in the free market.[60]

What should be of particular note to observers of the development of nonprofit law, is that we have here another sortie aimed at narrowing the definition of charitable purpose. Landmarks along the way have included the Pemsel case[61] where the House of Lords rejected the claim that the definition of charity should be restricted to helping the poor; the Eastern Welfare Rights Organization case[62] which held that a hospital could qualify as charitable even if it provided services to those who could afford to pay; and New York City's attempt in the late 1970s and early 1980s to construe the terms charitable and educational for purpose of the Real Property Tax so narrowly as to have excluded private museums and organizations like the American

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60. Recently a related issue has come up under the program-related investment provision of section 4944 of the Code. Section 4944 imposes a tax on amounts invested "in such a manner as to jeopardize the carrying out of any exempt purpose" (section 4944(a)(1)) and excepts from these strictures any investment "the primary purpose of which is to accomplish one or more of the purposes described in section 170(c)(2)(B)" (section 4944(c)). Considerable effort has been required to persuade the IRS that a loan to an organization that will operate a liability insurance risk retention pool exclusively for 501(c)(3) nonprofits falls within the exception. The IRS initial position appears to have been that unless the investment directly furthered a 170(c)(2)(B) purpose, it would not qualify for the exception, and that the provision of liability insurance through a mechanism that would assure a stability of prices, and very likely lower prices, than available on the commercial market would not constitute the direct furthering of a charitable purpose. A favorable private letter ruling was finally issued last summer to the pool.

61. Commissioners for Special Purposes of Income Tax v. Pemsel, (1981) A. C. 531.

62. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U. S. 26 (1976).

Civil Liberties Union[63].

What may be of particular interest is the suggestion that "commerciality" be made the key ingredient in fashioning the definition of "charity." Is it possible to give any coherent content to the term "commercial"? If it is construed to mean any activity which supports itself, then it would include nonprofit private schools and performing arts groups as well as health care facilities. If some sort of a qualitative notion is used that relies upon an activities similarity to services that are furnished on a commercial basis, then all of the infrastructure services that are provided by nonprofits to nonprofits would be non-preferred. Those who push for a narrower definition of charity seem to think that an activity is not charitable unless it relies on contributions.[64] Would it be good policy to back away from the public benefit test and emphasize the donative element? If an activity is run on a nonprofit basis and provides services to the community as such, why should the fact that it earns most of its keep by charging fees make any difference?

IV

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63. See, P. Swords, CHARITABLE REAL PROPERTY TAX EXEMPTIONS IN NEW YORK STATE (1981). More recently the issue has come up very sharply in the proposals of the Committee to Improve the Availability of Legal Services that would require mandatory pro bono work from all practicing lawyers in the State of New York and would limit the work that lawyers could do to qualify to services to the poor and organizations that serve the poor. "...[La]wyers' pro bono services to organizations dedicated to sheltering the homeless would satisfy the obligation, but services to groups working to save the whales would not." Committee to Improve the Availability of Legal Services, Preliminary Report to the Chief Judge of the State of New York (1989). The Committee was appointed by Chief Judge Sol Wachtler and is made up of 22 distinguished members of the New York bar and chaired by Victor Marrero.

64. Rudney advances the following thought as an argument in favor of his proposal: "It would encourage more dependence on donations and the fundraising process to support the exempt mission." Rudney, supra note , at .

This section of the paper very briefly lists several other "other" issues that have come to my attention. As mentioned above, it is hoped that Conference participants will be stimulated to bring to our attention additional "other" issues.

1. At hearings this summer before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce, it was proposed that the Federal Trade Commission extend its jurisdiction to include nonprofits. The FTC which, among other things, investigates and prosecutes consumer fraud infractions, currently has jurisdiction only over commercial activities. The hearings focused on complaints arising from charitable sweepstakes conducted by the Virginia fund-raising firm of Watson & Hugley. At the hearings, William MacLeod, the FTC's Director of the Bureau of Consumer Protection, stated: "The Commission is concerned that we not engage in overregulation of charities, to the effect that fewer resources are available for these good works." A host of federalism-type issues would seem to be raised by this proposal.
2. It is well known that very few claims are asserted against the board members of nonprofit organizations. Available evidence suggests that of the few claims that are asserted, most of them involve employment termination cases. Useful research might be undertaken to determine what laws these claims are advanced under and whether some of the substantive and procedural protection that are usually thought to shelter nonprofit board members might be inapplicable in these cases.
3. In fairly recent times there has developed a new phenomenon: court ordered payments of adjudicated fines to charities. Frequently what happens is that class action claims are brought and won, under environment laws, for example, and a considerable portion of the claimant class never shows up to collect. The court will then pay over the funds left over to a charitable organization. Some research has been begun on

the issues raised by these dispositions[65] but more attention would likely be helpful.

4. Recent criminal sentences have included mandated payments of fines to charitable organizations and the provision of services to charitable organizations. These dispositions would seem to raise a host of issues. Would the payments be deductible? Does the use of "involuntary volunteers" raise any constitutional questions? Would these arrangements undermine the spirit or image of volunteerism? Who is liable for injuries caused by these volunteers or to these volunteers?

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65. See P. Tractenberg, A Report to the Ford Foundation on Equitable Trusts, (1988).