

A PIG IN A PYTHON: HOW THE CHARITABLE RESPONSE TO SEPTEMBER 11 OVERWHELMED THE LAW OF DISASTER RELIEF

ROBERT A. KATZ*

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INTRODUCTION

The terrorist attacks of September 11, 2001 ("9/11") inspired an unprecedented amount of charitable giving while imposing extraordinary burdens on the charities that received these gifts. It is generally thought that donors outperformed charities at their respective tasks. An estimated two-thirds of American households donated money to charities engaged in 9/11 relief,¹ and thirty-five of the largest donee charities raised almost \$2.7 billion.² The response

1. *AMERICA GIVES: Survey of Americans' Generosity After September 11*, Center on Philanthropy at Indiana University, available at <http://www.philanthropy.iupui.edu/AmericaGivesReport.htm> (last visited Oct. 5, 2002) (In a telephone survey conducted from October 22 to November 28, 2001, 65.6% of 1304 adults reported that they or their households had contributed money for 9/11 victims.).

2. U.S. General Accounting Office, *September 11: More Effective Collaboration Could Enhance Charitable Organizations' Contributions in Disasters*, GAO-03-259 at 7-8 (Dec. 2002) [hereinafter U.S. GAO, *September 11 Report*], available at <http://www.gao.gov/new.items/d03259.pdf> (last visited Feb. 14, 2003). By comparison, the 1995 bombing of the Murrah Federal Building

of donors was widely hailed as evidence of the American people's virtue and resilience. Some of the most prominent charities receiving these gifts, on the other hand, were criticized for not getting aid to victims fast enough, and for allegedly attempting to use donations for purposes unrelated to 9/11 relief, contrary to their own representations and their donors' intentions. "It has now become something of a scandal," wrote a *Wall Street Journal* columnist two months after the attacks, "that so little of [the American people's] benevolence has been disbursed. The givers are asking how this could be."³ This Article undertakes to answer that question from a legal perspective: What underlay the allegations of delay, disloyalty and misrepresentation? What did the charitable response to the attacks reveal about charity law? How, if at all, did the 9/11 experience affect this body of law, and how should it?

In many matters, the charities' problems were logistical rather than legal. Some organizations were simply not prepared for the tasks of collecting, accounting, committing, and distributing enormous sums of money in short order. The Salvation Army, for example, invited 9/11 victims to send it their household bills, and promised to pay their creditors directly. In order to manage the rush of bills, however, the charity needed to mail 1500 checks a day. Its technology for processing and writing checks, unfortunately, could initially produce only 100 checks a day.⁴ As a result of unpaid bills, hundreds of families received late notices threatening cancellation of essential services, insurance policies, and even eviction.⁵

Yet some charities' difficulties went beyond mere logistics. These originated in part, this Article argues, in two latent tensions within the legal regime that govern charitable organizations in general, and disaster relief organizations ("DROs") in particular. Charities hold donations in trust or a trust-like arrangement whose terms are set by the donors and charities within the parameters established by charity law. This arrangement can be strained when donors demand or expect charities to act in ways that exceed the bounds of what is legally charitable. Another clash can occur when donors ask a charity to act at odds with its broader mission or principles. The outpouring of gifts to DROs following 9/11 exposed both these tensions on a grand scale.

The rules for disaster relief mirror what most people want and expect DROs to do most of the time. DROs typically deliver emergency goods, services,

in Oklahoma City yielded \$45 million in donations, and Hurricane Andrew, which struck southern Florida in 1992, inspired donations of around \$110 million. *Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse, Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 107th Cong. 2 (2001)* [hereinafter Greenwood hearing (after the subcommittee's chairman, U.S. Representative James Greenwood (R-PA))].

3. Daniel Henninger, *Wonder Land: Charity Begins at Home, Ends Up Nowhere*, WALL ST. J., Nov. 16, 2001, at A12.

4. Diana B. Henriques, *Charity Overwhelmed in Bid to Meet Attack Victims' Bills*, N.Y. TIMES, Jan. 5, 2002, at A1.

5. *Id.*

shelter, and other forms of in-kind relief. Such aid can be provided to all who suffer distress under the circumstances, regardless of their overall financial condition.⁶ Stricter rules apply, however, when DROs make monetary payments to victims for intermediate and longer-term needs.⁷ Generally speaking, such payments may only be made to ensure that a victim can procure the basic necessities,⁸ and only after a specific assessment of the applicant's need.⁹ After a very large, dramatic or high-profile disaster, some donors display uncommon generosity in their willingness and capacity to give. On such occasions, DROs may receive more money than is required to satisfy basic needs, and face pressure to spend everything raised on that particular disaster's victims.¹⁰ Yet a DRO's managers¹¹ cannot succumb to this pressure without violating the legal bar against using charitable dollars to bestow private benefit.¹² Deciding how to dispose of the surplus can place these managers in a difficult position, one laden with legal and ethical challenges.

The controversies involving 9/11 relief followed one of two basic trajectories based on the type of charity involved: whether it was created solely to assist victims of 9/11 (a.k.a. "9/11-specific" or "disaster-specific" DROs), or to help the victims of certain categories of recurring disasters and emergencies (a.k.a. "general" or "multi-disaster" DROs). Both types of entities struggled to meet simultaneously the demands of donors, victims, the broader public, interested officials and charity law. Among 9/11-specific charities, the problems were most severe for those created exclusively for the families of firefighters, police officers, and other fallen rescue workers. These groups raised the most money per victim, and thus faced the greatest risk of making legally excessive payments. The Twin Towers Fund, for example, raised at least \$440,640 for each of the 438 uniformed and other official personnel killed at the World Trade Center

6. See *infra* notes 118-21 and accompanying text.

7. See *infra* notes 122-32 and accompanying text.

8. DROs usually provide in-kind relief, Rob Atkinson has observed, "under circumstances when there can be little doubt that the recipients would use monetary payments to buy precisely the same kinds of basic goods and services, if they were available." Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C.L. REV. 501, 524 (1990). Conversely, DROs can make monetary payments under circumstances when victims can buy the types of goods and services that DROs typically provide in-kind, and to victims who will undoubtedly use the cash to make such purchases, as opposed to, say, luxury goods.

9. Victoria B. Bjorklund, *Reflections on September 11 Legal Developments*, in SEPTEMBER 11: PERSPECTIVES FROM THE FIELD OF PHILANTHROPY 26 ("if donors did not want charities to administer aid by determining relative need, donors could instead give relief funds to private trusts managed by banks or mutual fund managers"; private trustees would not be so constrained).

10. See, e.g., *infra* notes 200-16 and accompanying text.

11. I use the term "managers" to refer collectively to both the charity's governing body (trustees in a charitable trust, the board of directors in a charitable corporation) and its officers (executive director, chief financial officer, etc.).

12. See *infra* notes 88-105 and accompanying text.

("WTC").¹³ The New York Firefighters 9-11 Disaster Relief Fund raised at least \$418,000 for each of the 347 fire department personnel killed at the WTC.¹⁴ In the months following the attacks, these charities feared that they could not disburse everything raised without violating charity law principles.¹⁵

General DROs engaged in 9/11 relief included the American Red Cross and two union-run "widows' and children's funds" for the families of fallen firefighters and police officers. Unlike 9/11-specific charities, these entities did not unequivocally promise to spend everything raised after the attacks on 9/11 victims, and many of their donors did not expressly restrict their gifts to that purpose. In these circumstances, issues involving donor intent became murkier. General DROs bore the added burden of reconciling their 9/11 relief activities with broader missions to treat similarly situated victims of different disasters in an even-handed manner. On some level, these organizations' moral identities were threatened by the prospect of providing one disaster's victims with vastly more aid per capita than similarly situated victims of other disasters. Each type of DRO thus faced a distinct dilemma: 9/11-specific DROs wondered if they *could* spend everything raised on 9/11 relief, while general DROs wondered whether they *had* to. The dilemma faced by 9/11-specific charities was not resolved until Congress intervened, *deus ex machina*, by expressly authorizing them to assist victims without regard to financial need.¹⁶ Some general DROs concluded that they did not; others concluded that it would be wise to do so, even if the law did not require this.

This Article proceeds as follows: Part I discusses principles of charity law relevant to our analysis, especially the distinction between charitable versus benevolent but legally non-charitable purposes, the bar against private benefit, the rules governing the disposition of surplus funds, and the special principles that apply to disaster relief activities. Part II examines the legal challenges that confronted some 9/11-specific charities as they tried to disburse large sums to relatively few victims. Part III relates explores the experiences of several general charities that sought to use some post-attack donations for purposes other than 9/11 relief. The concluding section considers how these events may affect the charitable response to future high-profile disasters.

I. BOUNDED GENEROSITY: LEGAL LIMITS ON A CHARITY'S ABILITY TO ASSIST DISASTER VICTIMS

DROs operate within a legal framework derived from the common law of charitable trusts, key principles of which have been carried over into the state law of nonprofit corporations and the federal law of tax-exempt organizations. This

13. *Twin Towers Fund*, at <http://www.twintowersfund.org> (last visited Feb. 22, 2003).

14. Tom Seessel, *The Philanthropic Response to 9/11: A Report Prepared for the Ford Foundation* 41 (Aug. 2002), available at http://www.fordfound.org/publications/recent_articles/philanthropic_response.cfm (last visited Feb. 12, 2003).

15. See *infra* notes 236-40 and accompanying text.

16. See *infra* notes 273-83 and accompanying text.

section examines some key principles of this body of law (a.k.a. “charity law”) and how they apply to disaster relief activities.

A. Charitable Trusts and the Duty to Honor Donor Intent

The typical trust is created when one party (a.k.a. the settlor or donor) transfers or donates property to a second party, a trustee, for the benefit of a third, the beneficiary.¹⁷ The primary duty of any trustee is to carry out the terms of the trust insofar as these are lawful and communicated to the trustee.¹⁸ The settlor typically but not always spells out these terms in written instructions that accompany the gift.¹⁹ By accepting the gift, the trustee obliges itself to comply with the settlor’s instructions as transmitted. A somewhat different rule holds when the trustee appeals to the public for contributions. Absent additional instructions from the settlor, the trust’s terms are contained in the trustee’s representations and the circumstances surrounding the gift.²⁰

The private trust and the charitable trust are the two most familiar types of this arrangement: they share many features, but differ in some key respects. To be valid, a private trust must benefit definite persons whose identities are either presently known or ascertainable within the period set by the Rule Against Perpetuities.²¹ That rule sets the outer limits on a private trust’s duration—roughly a century.²² A charitable trust, by contrast, typically benefits

17. The settlor and the trustee can be the same person; this occurs when a settlor declares himself trustee of specific property for the benefit of another without transferring the property to someone else to serve as trustee. PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 75-76 (2d ed. 1994). I focus exclusively on trusts involving three parties.

18. RESTATEMENT (SECOND) OF TRUSTS § 4 & cmt. a; § 169; § 379 & cmt. a (1957) (“The trustees of a charitable trust . . . are subject to duties . . . to administer it solely in the interest of effectuating the charitable purposes . . .”); SCOTT ON TRUSTS § 164.1 (William F. Fratcher ed., 4th ed. 1986) [hereinafter SCOTT]; L.A. SHERIDAN, KEETON & SHERIDAN’S THE MODERN LAW OF CHARITIES 349 (4th ed. 1992); JEAN WARBURTON & DEBRA MORRIS, TUDOR ON CHARITIES 245 (8th ed. 1995).

19. See, e.g., LSU Foundation, *Certificate of Donor Intent* (form for donor to specify and confirm purpose of donation), available at <http://www.fas.lsu.edu/AcctServices/forms/far/certintent.pdf> (last visited Oct. 16, 2002); see also Indiana University Foundation, *Policies/Procedures, Donor’s Intent—Policy Governing the Application of* (in construing donor intent, “[i]nterpretation shall be based primarily on any legal documents received, including but not limited to a will, trust, gift agreement or court order.” Other probative sources may include: past correspondence from donor, notes from telephone or in person conversations with the donor, or correspondence from donor’s family, attorney, executor, etc.), available at <http://iufbusiness.iu.edu/admin/policies/Policy-Governing-the-Application-of-Donors-Intent.html>.

20. See, e.g., *Loch v. Mayer*, 100 N.Y.S. 837, 841-42 (Sup. Ct. 1906).

21. HASKELL, *supra* note 17, at 173-76. In its common law formulation, the rule holds that no future interest in property is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest. *Id.* at 174.

22. Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1112, 1114 & n.8 (1993).

an open-ended class of persons or the public generally, and can last indefinitely.

Charitable trustees violate their duties by failing to spend a donor's gift in accordance with the gift's instructions so long as these are feasible and legally charitable.²³ Breach can occur when trustees impound funds that they are obliged to spend to the beneficiaries' advantage.²⁴ It can also occur when trustees use funds restricted for one purpose to advance another purpose without first obtaining judicial approval²⁵ or, in some circumstances, the donor's consent.²⁶ Trustees who fail to use gifts for the represented purpose may also be liable for fraud, misrepresentation, or false advertising.²⁷

Although private and charitable trustees have comparable duties, the mechanisms for enforcing these duties differ. In the typical private trust, only the beneficiary can bring suit to enforce the trustee's duties.²⁸ A charitable trustee's duties, by contrast, are usually enforced only at the suit of the state attorney general.²⁹ Although the public is ostensibly the charitable trust's ultimate beneficiary, it is thought that permitting any citizen to bring an enforcement suit would produce frequent, unreasonable and vexatious litigation.³⁰ Parties that can demonstrate a "special interest" in the trust's performance (i.e., one distinct from the generic citizen's) can also maintain a suit to enforce it.³¹ A party can establish such an interest by, *inter alia*, demonstrating that she is entitled to receive a direct benefit under the trust's terms.³² This is easier to do where the

23. WARBURTON & MORRIS, *supra* note 18, at 245 & nn.90-91.

24. RESTATEMENT (SECOND) OF TRUSTS § 182 (1957). *See also* Greenwood hearing, *supra* note 2, at 40 (Spitzer) ("if a[charitable] entity . . . were merely letting funds sit in a bank account without being distributed at all, [the state attorney general's office] of course, would take appropriate action").

25. WARBURTON & MORRIS, *supra* note 18, at 245.

26. *See, e.g.*, Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995 (Conn. 1997) (under section 7(a) of the Uniform Management of Institutional Funds Act, an institution can release a restriction the donor imposed in his gift instrument with the donor's written consent).

27. *See, e.g.*, N.Y. EXEC. LAW § 172-d(2) & (3) (consol. 2002) (prohibiting charities from making false or materially misleading statements or using false advertising while soliciting for charitable donations); Marcus v. Jewish Nat'l Fund, 557 N.Y.S.2d (App. Div. 1990) (charities may be sued for false advertising under general business code); 73 AM. JUR. 2d *Subscriptions* § 17 (1974) (to sustain a charge of fraudulent charitable solicitation, it must be shown that the solicitor misrepresented a material fact related to the subject matter of the gift).

28. RESTATEMENT (SECOND) OF TRUSTS § 112 (1957).

29. *See* BOGERT'S TRUSTS AND TRUSTEES § 411 (rev. 2d ed. 2001) [hereinafter BOGERT'S]; RESTATEMENT (SECOND) OF TRUSTS § 391 (1957). A trustee or director can also bring an action against the other trustees or directors to enforce a charitable trust or on behalf of a charitable corporation; JAMES FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 259 (2d ed. 2000).

30. BOGERT'S, *supra* note 29, § 411.

31. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. c (Tentative Draft No. 2, 1999).

32. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1957).

trust defines its immediate beneficiaries with precision.³³ For example, if a charitable trust is created to benefit the poor members of a particular church, any member of the church meeting this description has standing to sue the trustees.³⁴ A donor generally lacks standing to sue unless she expressly retains it in the terms of her gift. Alternatively, the donor may reserve a right of reverter, which enables her to regain possession of the gifted property if the donee breaches the trust.³⁵

Some have argued that limited standing results in too little supervision of charities. Because many charitable trusts produce diffuse benefits such as world peace and clean air, no discrete person can demonstrate a *special interest*. As for attorney general supervision, “[s]taffing problems and a relative lack of interest in monitoring nonprofits makes [such] oversight more theoretical than deterrent.”³⁶ Yet this is not necessarily or always a bad thing. Lax enforcement of donor restrictions can give trustees the leeway to use a charity’s resources more efficiently, equitably or creatively—breach of trust notwithstanding.³⁷ Consider a charity that solicits funds for victims of disaster A. If it raises \$100 million for this purpose, the trustees may violate their trust by unilaterally holding \$1 million in reserve for future disasters. Even so, the attorney general may not object if she concludes that this action on balance serves the public interest.³⁸ In this case, her passivity may be a virtue.

In the United States, donors tend to use nonprofit corporations to manage and administer charitable gifts.³⁹ There is some ambiguity and even confusion as to

33. *Id.*; BOGERT’S, *supra* note 29, § 414; SCOTT, *supra* note 18, § 391.

34. RESTATEMENT (SECOND) OF TRUSTS § 391 cmt. c (1957).

35. Some donors expressly reserve a right of reverter, which enables them to regain possession of the donated property if the donee breaches the terms of the gift. Such donors can thereby establish a special interest in the donee’s compliance. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997).

36. FISHMAN & SCHWARZ, *supra* note 29, at 257.

37. In determining whether a charity’s alternate but legally unauthorized use of a gift is on balance more efficient, one must factor in the negative effects of breach on the willingness of people to contribute to that charity in the future, or to charitable organizations in general. This is an act-utilitarian inquiry. A rule-utilitarian would argue that “experience shows that it doesn’t pay to break a promise. Donors will lose confidence in the organization, the cause will suffer for loss of financial support, and the public good for the greatest number will not be well served.” ALBERT ANDERSON, *ETHICS FOR FUNDRAISERS* 53 (1996). A non-consequentialist would reject the entire inquiry as amoral: The charity has an ethical duty to keep its promise to the donor. *Id.*; *see also* Atkinson, *supra* note 22, at 1111 (stating that control over donated assets should ultimately be placed in the hands of each donee charity’s directors, subject neither to legally enforceable donor control nor to judicial modification on efficiency grounds; this approach would strengthen the independence of the nonprofit sector, and thereby promote pluralism and diversity in society).

38. *See, e.g., Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 107th Cong. 55-56 (2001) (statement of Eliot Spitzer, New York State Attorney General).

39. BOGERT’S, *supra* note 29, § 362.

whether the corporate recipient is a formal “trustee,”⁴⁰ and the extent to which trust principles apply to gifts not denominated as “trusts.”⁴¹ Whatever the arrangement is called, however, a charitable corporation that receives a gift for a particular purpose, must generally apply the property to that purpose,⁴² at least in the first instance.⁴³ Even when a corporation receives an outright or unrestricted gift, it can only use the property to advance the organization’s purposes or mission as set forth in its charter and by-laws.⁴⁴ In either case, the gift restrictions are enforceable at the suit of the attorney general.⁴⁵

B. *The Charitable Enterprise*

To be legally charitable, a nonprofit organization must advance a charitable purpose, benefit a charitable class, and avoid bestowing excessive benefits upon private parties. These rules restrict the charity’s lawful aims and activities and command its directors’ compliance.⁴⁶

1. *Charitable Purposes.*—Trust law distinguishes charitable trusts from private trusts, which can advance any purpose that benefits the beneficiary⁴⁷ and is not illegal or against public policy.⁴⁸ The charitable trust, by contrast, must promote purposes that the common law deems sufficiently and suitably beneficial to the general public.⁴⁹ This “public benefit” requirement reflects the view that

40. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 348 (1957); SCOTT, *supra* note 18, § 348.1 (“The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee . . . It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.”).

41. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 348 (1957); SCOTT, *supra* note 18, § 348.1 (“The question is in each case whether a rule that is applicable to trustees is applicable to charitable corporations, with respect to unrestricted or restricted property. Ordinarily the rules that are applicable to charitable trusts are applicable to charitable corporations, as we have seen, although some are not.”)

42. SCOTT, *supra* note 18, § 348.1.

43. I say “in the first instance” because different rules may govern the disposition of surplus from specific-purpose gifts to charitable corporations as opposed to charitable trusts. See *infra* notes 151-52 and accompanying text.

44. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1957); BOGERT’S, *supra* note 29, § 362 & n.17. This is known as the “duty of obedience.” DANIEL KURTZ, BOARD LIABILITY: A GUIDE FOR NONPROFIT DIRECTORS 21, 84-86 (1988).

45. RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. f (1957).

46. FISHMAN & SCHWARZ, *supra* note 29, at 231 (“A nonprofit corporation and its directors and officers have the responsibility to comply with the law”) (citation omitted).

47. RESTATEMENT (THIRD) OF TRUSTS § 27 2001(2) (Tentative Draft No. 2 1999) (“a private trust, its terms, and its administration must be for the benefit of its beneficiaries”); UNIFORM TRUST CODE § 404(c) (2000).

48. See, e.g., UNIFORM TRUST CODE § 404 (2000).

49. Like private trusts, charitable trusts also may not pursue purposes that are illegal or violate established public policy. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

“charitable trusts are a drain on social resources and must therefore justify themselves on a societal level.”⁵⁰ Special privileges accorded charities include the ability to endure indefinitely⁵¹ and, in most cases, favorable tax treatment.⁵²

Although legally charitable purposes often entail providing goods and services to “needy people who cannot pay for [the] benefits received,”⁵³ this is not a prerequisite.⁵⁴ Charitable purposes have traditionally been grouped under four headings: (1) relieving poverty; (2) advancing education; (3) advancing religion; and (4) promoting certain “other purposes beneficial to the community, not falling under any of the preceding heads.”⁵⁵ Relieving human suffering and distress generally qualifies as a charitable purpose, even when it involves benefiting people who are not financially needy, such as providing free counseling to all victims of a terrorist attack. The relief of suffering and distress might be classified as either the broader category to which poverty relief belongs, or as an instance of “other beneficial purposes.”⁵⁶ The Treasury Department regulations and the IRS seem to hold the former position.⁵⁷

On the traditional view, writes Rob Atkinson, charitable entities can benefit the public in two main ways: “by providing goods or services that are deemed to be inherently good for the public,” (e.g., education, health care); “or by delivering ordinary goods or services to those who are recognized as being especially needy,” (e.g., food and shelter to the poor or otherwise disadvantaged).⁵⁸ A nonprofit elite prep school that charges the same astronomical tuition to all comers is an example of the former; its charitable

50. Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291, 303 (1984).

51. See *supra* note 21 and accompanying text.

52. Trusts that qualify as “charitable” under the common law generally—but not necessarily—qualify for federal advantages. See *infra* notes 72, 501-02 and accompanying text.

53. BLACK’S LAW DICTIONARY (7th ed. 1999) (defining “charitable”).

54. CARL ZOLLMAN, *AMERICAN LAW OF CHARITIES* 135 (1924) (quoting *Pashal v. Achlin*, 27 Tex. 173, 199 (1863)) (“[a]lthough the relief of the poor, or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity, this is not so in view of the law”).

55. See *Comm’rs of Income Tax v. Pemsel*, A.C. 531, 583 (1891) (per Lord MacNaghten) (identifying four principal divisions of charity); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 (1983) (noting that Lord MacNaghten’s “restatement of the English law of charity . . . has long been recognized as a leading authority in this country”).

56. Compare ELIZABETH CAIRNS, *CHARITIES: LAW AND PRACTICE* 3 (1988) (citing *McGovern v. Att’y Gen.* (1982) Ch. 321 (Slade, J.)) (the relief of poverty should be regarded as a subdivision of a wider class of charitable purposes “comprising the relief of human suffering and distress generally”), with D.W.M. WATERS, *LAW OF TRUSTS IN CANADA* 584-85 (2d ed. 1984) (trusts that aim to relieve deprivation and want without excluding the rich from its benefits should be categorized under the heading of other purposes “beneficial to the community”).

57. See Treas. Reg. § 1.501(c)(3)-1 (defining the term “charitable” as used in I.R.C. § 501(c)(3) to include “[r]elief of the poor and distressed or of the underprivileged”).

58. Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 402 (1997).

status is unaffected by the fact that poor people are effectively excluded from attending.⁵⁹ One can restate this two-pronged approach to charitable status in terms of Abraham Maslow's "hierarchy of needs" theory.⁶⁰ Maslow famously posited five levels of human needs: (i) physiological, such as the need for food, water and warmth;⁶¹ (ii) safety, especially during times of emergency;⁶² (iii) social acceptance and belonging;⁶³ (iv) esteem;⁶⁴ and (v) "self-actualization."⁶⁵ The higher level needs, he argued, are "less urgent subjectively," and generally cannot be met until the lower level needs are satisfied.⁶⁶ Nonprofits that exist solely to satisfy basic physiological and safety needs tend to be charitable in the ordinary or generic sense of relieving poverty, suffering, and distress. Nonprofits that cater to our higher-level needs for personal growth and fulfillment are apt to be per se charitable as advancing "education," religion, etc.⁶⁷

Critically, a trust can be legally *non-charitable* even though it promotes the happiness and well being of many or most of the public. This is especially true of the trusts that distribute cash or ordinary goods without considering the recipients' financial needs, and without advancing education, religion, or any other per se charitable goal.⁶⁸ Such trusts are sometimes referred to as "benevolent," as opposed to "charitable."⁶⁹ So, for example:

[I]f a large sum of money is given in trust to apply the income each year in paying a certain sum to every inhabitant of a city, whether rich or poor, the trust is not charitable, since although each inhabitant may receive a benefit, the social interest of the community as such is not thereby promoted.⁷⁰

59. See RESTATEMENT (SECOND) OF TRUSTS § 371 cmt. c (1957).

60. ABRAHAM MASLOW, MOTIVATION AND PERSONALITY (1954).

61. *Id.* at 35.

62. *Id.* at 39.

63. *Id.* at 43-59.

64. *Id.* at 45.

65. "Self-actualization" describes a person's need to be and do that which she was born to do, e.g., "A musician must make music, an artist must paint, and a poet must write." *Id.* at 46.

66. *Id.* at 98.

67. Educational institutions, for example, provide instruction that improves or develops a person's capabilities, Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(a) (2002), thereby advancing one's "self-actualization."

68. BOGERT'S, *supra* note 29, § 379 & n.4. See, e.g., *Shenandoah Valley Nat'l Bank v. Taylor*, 63 S.E.2d 786 (Va. 1951) (trust to pay a monetary sum directly to elementary school children each year at Easter and Christmas time neither advanced education nor relieved poverty and was not charitable); *In re Gwyon*, 99 L.J. Ch. 104 (1930) (trust to provide knickers for all boys between the ages of ten and fifteen in a particular district, regardless of financial need); *In re Pleasants*, 39 T.L.R. 675 (1923) (trust to provide a pennyworth of sweets for all boys and girls under the age of fourteen within a certain parish was not charitable).

69. SCOTT, *supra* note 18, § 398.1.

70. RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. f (1957).

Under the common law, naked and indiscriminate altruism does not warrant the special advantages that accrue to charitable trusts.

The Internal Revenue Code ("IRC" or the "Code") draws upon the common law definition of "charitable" without necessarily adopting it wholesale.⁷¹ The Code provides special tax advantages to organizations that are organized and operated primarily for one or more of eight purposes enumerated in IRC 501(c)(3).⁷² This list is familiar and includes "religious, charitable, scientific, . . . literary, or educational purposes."⁷³ Section 501(c)(3) of the Internal Revenue Code exempts qualifying entities from paying corporate income tax on their net earnings (including interest earned on cash donations), and section 170 lets these entities' donors deduct contributions from their income taxes.⁷⁴

2. *Organized to Benefit a Charitable Class.*—A charitable trust not only advances a legally charitable purpose, it does so for the benefit of the public-at-large or a sufficiently important section of the public, a.k.a. a "charitable class."⁷⁵ A trust that seeks to relieve poverty or promote education is not charitable if it also "serv[es] what amount to private trust purposes."⁷⁶ This occurs, for example, when the persons whose poverty is relieved or education promoted are pre-selected persons or the settlor's friends, family members or descendents.⁷⁷

Although charitable trusts typically benefit an indefinite, open-ended class of persons (e.g., the victims of boating disasters), this is not required. They can sometimes benefit a definite or closed group of persons.⁷⁸ A particularly close question is presented by trusts to relieve the poverty or distress of a group whose members are known and fixed from the beginning and will not change. This is typically true, most notably, of trusts to aid the victims of a particular flood, fire, or tornado (e.g., the victims of "the burning of the excursion steamer *General*

71. Galston, *supra* note 50, at 297-99.

72. IRC § 501(c)(3) (2000); I.R.C. § 501(c)(3) imposes two other requirements, not relevant here: "No substantial part" of the organization's activities may consist of "carrying on propaganda, or otherwise attempting, to influence legislation," and the organization must "not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office."

73. *Id.*

74. *Id.*; I.R.C. § 170 (2000). There is no deduction for gifts to entities organized and operated for the purpose of testing for public safety, an exempt activity under I.R.C. § 501(c)(3).

75. CAIRNS, *supra* note 56, at 20.

76. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (Tentative Draft No. 2, 1999).

77. *Id.* § 28 cmt. f.

78. RESTATEMENT (SECOND) OF TRUSTS § 375 (1957); BOGERT'S, *supra* note 29, § 363; *cf.* Jackson v. Phillips, 96 Mass. 539, 556 (1867) ("A charity, in a legal sense, may be more fully defined as a gift . . . for the benefit of an *indefinite* number of persons . . .") (emphasis added) (Gray, J., future Associate Justice of the U.S. Supreme Court). Judge Gray's statement regarding the indefinite nature of the beneficiary class was not essential to that case, which turned on whether the proposed trust's purposes were legally charitable.

Slocum, on June 15, 1904”).⁷⁹ As Bogert, a leading treatise on trusts, has observed, “the persons who suffered physical injury or lost property as a result of this [particular disaster] are likely to be easily discoverable. In a relatively short time the trustees of the fund can ascertain the names and addresses of all the members of the class.”⁸⁰ Under black letter law, the *charitableness* of such a trust turns on whether its beneficiaries are sufficiently numerous “so that the community is interested in the enforcement of the trust.”⁸¹ There is no bright-line rule as to how many beneficiaries it takes to turn a private class into a charitable one; it is a “question of degree,”⁸² and “a matter of judgment as to the existence or nonexistence of a public, community or social interest.”⁸³ Bogert concludes inconclusively that

each court should decide for itself whether the size of the class to be aided is such that there is a general public interest in the execution of the trust, or whether the relief is so limited in amount as to make it solely a matter of the interest of the individual sufferers.⁸⁴

The IRS is similarly vague as to how many persons a disaster must devastate before the victims comprise a charitable class for federal tax purposes.⁸⁵ The easy cases lie at the extremes. The IRS would deny 501(c)(3) exemption to an entity created to assist “a few persons injured in a particular fire.”⁸⁶ By contrast, the residents of 100,000 homes damaged or destroyed in a hurricane are a charitable class, even if one could name every intended beneficiary at the outset.⁸⁷

3. *Entity Cannot Provide Excessive Private Benefits.*—In addition to aiding a sufficient number of persons, a charity cannot provide too much aid relative to the charitable goals that it ostensibly advances. Stated differently, a charity must

79. See, e.g., *Loch v. Mayer*, 100 N.Y.S. 837, 838 (Sup. Ct. 1906).

80. BOGERT’S, *supra* note 29, § 363, at n.23.

81. RESTATEMENT (SECOND) OF TRUSTS § 375 (1957).

82. *Id.* cmt. a.

83. BOGERT’S, *supra* note 29, § 363 at n.22.

84. *Id.*

85. Ruth Rivera Huetter & Marvin Freidlander, *Disaster Relief and Emergency Hardship Programs*, in EXEMPT ORG. CONTINUING PROF’L EDUC. TECHNICAL INSTRUCTION PROGRAM FOR FY 1999 219, 226 (1999) (“organizations formed for assisting victims of disasters where a significant portion of the community is affected, are less susceptible to being formed for the benefit of a limited class, even though the number of potential beneficiaries may be fixed.”). The IRS published this article in the annual Continuing Professional Education (CPE) course book that it provides to its agents, which is publicly available and well known to tax practitioners as a source of guidance.

86. *IRS, Disaster Relief: Providing Assistance Through Charitable Organizations* (advanced text of a special IRS publication), Sept. 17, 2001 [hereinafter *Disaster Relief* (advanced text)], reprinted in 34 EXEMPT ORG. TAX REV. 98, 99 (Oct. 2001).

87. *Id.* at 100.

actually operate to “serve[] a public interest rather than a private interest.”⁸⁸ This means at a minimum that the organization’s insiders—its founders, managers, members, or others in a position to control it—do not unduly benefit from its income and assets.⁸⁹ This is known variously as the bar against “private inurement”⁹⁰ or the “nondistribution constraint.”⁹¹ More broadly, an exempt organization cannot provide excessive benefits to *any* private entity or individual, including organizational outsiders.⁹² This is known as the “private benefit” doctrine.⁹³

Judge Richard Posner contrasts the concepts of private inurement and private benefit in *United Cancer Council, Inc. v. Commissioner*.⁹⁴ That case appealed the United States Tax Court’s ruling that net earnings of the United Cancer Council, Inc. (“UCC”), a self-described nonprofit organization, had inured to the benefit of an insider. This ruling was unusual because the alleged insider was not a UCC director, officer, founder, or other fiduciary, but a for-profit firm that the UCC had hired to provide fundraising services. The arrangement was amiss, the IRS claimed, because the firm kept 92% of what it raised on the UCC’s behalf. The IRS argued that this contract was so one-sided that “the charity must be deemed to have surrendered the control of its operations and earnings to the [firm].”⁹⁵ The Seventh Circuit sensibly rejected the private inurement claim on grounds that the contract between the UCC and the fundraiser had been negotiated at arm’s length, such that the firm was not an insider. It remanded the case for a decision on whether the UCC was operated for the fundraiser’s private benefit.

Judge Posner connects the private benefit bar to the duty of care, which requires charitable fiduciaries to take steps to prevent their organization’s assets from being dissipated.⁹⁶ The prohibition against private inurement, by contrast,

88. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990).

89. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 428 (7th ed. 1998).

90. I.R.C. § 501(c)(3) (2002) (“no part of the [exempt organization’s] net earnings . . . inures to the benefit of any private shareholder”); *United Cancer Council, Inc. v. Comm’r*, 165 F.3d 1173, 1174 (7th Cir. 1999) (interpreting “any private shareholder or individual” to mean an insider of the charity).

91. Henry B. Hansmann, *The Role of Non-Profit Enterprise*, 89 *YALE L.J.* 835, 838 (1980). Hansmann identifies this as the essential characteristic of nonprofit organizations.

92. See HOPKINS, *supra* note 89, at 460-62; Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 1990) (“An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders *or individuals*.”) (emphasis added).

93. See, e.g., *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053 (1989) (a school that trained individuals for careers as political campaign professionals was not charitable, even though it advanced education, because it substantially benefited the private interests of the Republican Party, where nearly all of the school’s graduates served Republican entities or candidates).

94. 165 F.3d 1173 (7th Cir. 1999).

95. *Id.* at 1175.

96. *Id.* at 1180.

inheres in the duty of loyalty, which prohibits fiduciaries from looting the organization's resources for their personal gain. The private benefit bar offers a "route for using tax law to deal with the problem of improvident or extravagant expenditures by a charitable organization that do not, however, inure to the benefit of insiders."⁹⁷ It might apply, Judge Posner opined, if the "UCC was so irresponsibly managed that it paid [the firm] twice as much for fundraising services as [the latter] would have been happy to accept for those services."⁹⁸ In that case, 50% of the firm's fee would be "the equivalent of a gift."⁹⁹ "Then it could be argued," Judge Posner concluded, "that UCC was in fact being operated to a significant degree for the private benefit of [the fundraiser]."¹⁰⁰

The private benefit doctrine need not be limited to contracts for consideration between a charity and an input supplier, as in *United Cancer Council*. It can also apply when an entity distributes extravagant aid (or "outputs") to beneficiaries, as suggested by *Ashton's Charity*.¹⁰¹ This 1859 English case involved a testamentary trust to pay a rotating group of six almswomen an annual sum of £6 each, plus an equal share of the profits produced by certain property. A settlor who died in 1728 created the trust. After 130-odd years, some of its property was sold for £6000.¹⁰² The court was asked how to dispose of the £6000: must it be distributed to the almswomen, as the trust's terms appeared to require? "I apprehend," the judge answered, "that the additions to the increase of almswomen *must have some limit*. [I]f this money were divided amongst the almswomen, they would thereupon cease to be almswomen," and become "persons from a higher rank . . . receiving a considerable income."¹⁰³ The court nominally located this limit in the settlor's intent: turning almswomen into wealthy gentlewomen "would not have the effect intended by the testatrix, but would destroy her object."¹⁰⁴ This assessment of the settlor's intent may or may not be accurate. Why, for example, would bestowing great wealth upon a half-dozen indigents necessarily *destroy* the settlor's intent which, after all, entailed improving their financial condition? It is more certain, by contrast, that the proposed payouts to the almswomen were extravagantly excessive relative to the charitable purpose they ostensibly advanced.¹⁰⁵

97. *Id.* at 1179 (dictum).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Re Ashton's Charity*, 27 Beav. 115.

102. *Id.*

103. *Id.* at 118, 119 (emphasis added).

104. *Id.* at 119.

105. Using the English doctrine of prerogative *cy pres*, the judge directed that the £6000 be used for a Church of England school. *Id.* at 120. See also RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. h (1957). Although this seems quite distant from the settlor's apparent intent, it was at least legally charitable—unlike the alternative of distributing the £6000 to the six almswomen.

C. Disaster Relief as a Charitable Activity

Disaster relief is a charitable activity because it aims to alleviate human suffering.¹⁰⁶ The harder questions involve the legal parameters for providing such relief under charitable auspices. More specifically: (1) Who are the appropriate recipients of such aid, and what are the appropriate criteria for allocating aid among them?; (2) At what point must a charity stop helping the victims of a particular disaster, either individual or collectively?; (3) When does disaster relief become a private benefit?; (4) If a disaster relief organization raises too much money, what happens to the surplus funds?

1. *The Disaster Relief Organization.*—The archetypal disaster relief fund or organization (“DRO”)¹⁰⁷ is a nonprofit corporation under state law and tax exempt under I.R.C. § 501(c)(3).¹⁰⁸ It is eligible to receive tax-deductible contributions under I.R.C. § 170 and funds its activities primarily through donations.¹⁰⁹ It is governed by a board of directors that selects its own successors.¹¹⁰ This formal independence is important because the law calls upon directors to resist demands by donors, beneficiaries, and others to act in legally noncharitable ways.

Within the universe of DROs, the most important distinction for our purposes is between general and disaster-specific charities. The general DRO serves an indefinite or open class of individuals, which consists of current and future victims of certain types of recurring disasters. It envisions waves of disaster victims in succession over time, and its spending pattern reflects this time

106. RESTATEMENT (SECOND) OF TRUSTS § 375 cmt. I (1957); BOGERT’S, *supra* note 29, § 379; SCOTT, *supra* note 18, § 375.2 & n.43; SHERIDAN, *supra* note 18, at 164; Huetter & Friedlander, *supra* note 85, at 220 (“Generally, disaster relief organizations are exempt under IRC 501(c)(3) as organizations formed for the relief of the distressed”); Catherine E. Livingston, *Disaster Relief Activities of Charitable Organizations*, 35 EXEMPT ORG. TAX REV. 153, 153 (Feb. 2002) (citing Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended 1990)).

107. A DRO can be organized as a freestanding organization or as a separate disaster relief fund within an organization that serves broader purposes. For convenience, I will refer to both as “DROs.”

108. The entity could also be incorporated under federal law, or structured as a charitable trust or unincorporated association under state law.

109. These donations can be analogized to third-party beneficiary contracts between the donors and the DRO. The person who contributes to the American Red Cross, writes Professor Hansmann: is in effect buying disaster relief. And the Red Cross is, in a sense, in the business of producing and selling that disaster relief. The transaction differs from an ordinary sale of goods or services, in essence, only in that the individual who purchases the goods and services involved is different from the individuals to whom they are delivered.

Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 61 (1981) (footnotes omitted).

110. Hansmann refers to such nonprofits as “entrepreneurial,” and contrasts them with “mutual” nonprofits governed by directors selected by the donors, members, purchasers of goods and services, and/or beneficiaries. Hansmann, *supra* note 91, at 841.

horizon. If the general DRO has an endowment, it may elect to use only the income to pay for its current relief operations. If supported through contributions, it will try to raise more money than what is needed to pay for current relief operations in order to have cash on hand to cover future operations without delay.¹¹¹ By contrast, a disaster-specific (or single-disaster) DRO exists to help the victims of a particular disaster. It typically spends all its assets soon after of the disaster to which the organization responded.¹¹²

Disaster-specific DROs vary in how precisely they define their class of potential beneficiaries. At one end of this spectrum is the charity that defines its mandate so broadly or with so much discretion that no one can claim an entitlement to assistance. Consider the charity formed to benefit “victims” of 9/11—a class that could potentially include anyone who experienced any economic or emotional distress as a result of the attacks. At the other end of the spectrum is the charity created to benefit the surviving spouses and children of those killed on 9/11 and only them. The more precisely a charity defines its intended beneficiaries, the more it looks like a private trust, whose beneficiaries can sue the trustees for fiduciary breach. The child of a 9/11 fatality, for example, has a “special interest” in a 9/11 survivors’ fund’s operations, and thus standing to maintain suit.¹¹³

2. *Targeting Relief to the Needy and/or Distressed.*—The DRO’s target audience is disaster victims who lack the basic necessities as a result of the disaster’s ravages. DROs typically do not provide superior or per se charitable goods such as education, religion, and culture. Rather, they deliver more prosaic goods and services designed to meet the basic physiological and security needs of people whom a disaster has rendered needy. DROs can provide victims with either the necessities themselves (in-kind aid) or the financial wherewithal to obtain them. More specifically, IRS officials advise, DROs “may provide loans or grants in the form of funds, services, or goods to ensure that victims of a disaster have the basic necessities such as food, clothing, housing (including household repairs), transportation, and medical assistance (including psychological help).”¹¹⁴

To qualify as charitable, DROs must meet both procedural and substantive

111. See Hansmann, *supra* note 109, at 72-75 (nonprofit organizations have more difficulty raising capital than for-profits because of their inability to issue equitable ownership shares; as a result, they must rely more heavily on accumulated net earnings in order to finance expansion of their operations in response to increased demand).

112. As of October 31, 2002, the New York Firefighters 9-11 Disaster Relief Fund had distributed over 99% of the \$161 million it collected. U.S. GAO, *September 11 Report*, *supra* note 2, at 31-32. The American Red Cross’ Liberty Fund planned to disburse 90% of the almost \$1 billion it raised by the first anniversary of the attacks. Stephanie Strom, *Families Fret as Charities Hold a Billion Dollars in 9/11 Aid*, N.Y. TIMES, June 23, 2002, at A29. The Twin Towers Fund intends to close by the end of 2003. Telephone Interview with Carolyn C. Cavicchio, Deputy Director, Twin Towers Fund (July 9, 2002).

113. See *supra* notes 31-34 and accompanying text.

114. Huetter & Friedlander, *supra* note 85, at 219.

criteria: They must have in place some means for assessing the neediness of aid applicants; and the aid provided must rationally relate in kind and quantity to the needs it allegedly addresses. “The type of aid that is appropriate to relieve distress in a particular case depends on the individual’s needs and resources.”¹¹⁵ As federal regulators note elsewhere, “[A] person whose temporary need arises from a natural disaster may need temporary shelter and food but not recreational facilities.”¹¹⁶ Additionally, “[t]he ideal amount of aid is that which is necessary and sufficient to restore victims to a level where they can be productive, self-sufficient members of the community.”¹¹⁷

In helping victims, a DRO can generally dispense in-kind assistance more liberally and with less means-testing than cash payments. There are many reasons why a disaster victim with a comfortable net worth might warrant a DRO’s in-kind assistance, especially in the midst of a disaster and its immediate aftermath. In dire circumstances, a person’s financial condition may be “useless in the absence of opportunity to purchase the needed supplies.”¹¹⁸ A DRO can thus rescue both Gilligan and Thurston Howell, III, for example, from a sinking S.S. Minnow without inquiring into their ability to pay.¹¹⁹ Once on land, the DRO can continue to provide certain in-kind services to both regardless of their financial resources. The most common example of this is counseling in its many varieties:

Evidence of financial need is not necessary when providing nonmonetary assistance such as counseling and other supportive services to individuals in distress. For example . . . providing individual and group counseling to widows to assist them in legal, financial, and emotional problems caused by [the] death[s] of their husbands qualifies as charitable.¹²⁰

People require a certain amount of mental and emotional well-being in order to

115. *Id.*

116. Treas. Reg. § 1.170A-4A(b)(2)(ii)(E) (2002).

117. Huetter & Friedlander, *supra* note 85, at 219.

118. ZOLLMAN, *supra* note 54, at 135-36 (citing *Kronshage v. Varrell*, 97 N.W. 928 (Wis. 1904)).

119. See Bjorklund, *supra* note 9, at 16; *Disaster Relief* (advanced text), *supra* note 86, at 100 (a person “requiring [rescue] services is distressed irrespective of the individual’s financial condition.”).

120. Huetter & Friedlander, *supra* note 85, at 227 (citing Rev. Rul. 78-99, 1978-1 C.B. 152) In Rev. Rul. 78-99, the IRS affirmed the 501(c)(3) exempt status of an entity that provided free counseling to widows to help them deal with the loss of a spouse and to inform them about available benefits and services, on grounds that it was operated for educational purposes. There seems no reason why the Service could not have affirmed the exemption on grounds that the entity’s services helped relieve distress due to personal tragedy. See, e.g., Treas. Reg. § 1.170A-4A(b)(2)(ii)(D) (2002) (defining a “needy person” as someone who lacks “the necessities of life, involving physical, mental, or emotional well-being, as a result of . . . temporary distress”) (emphasis added).

be productive, self-sufficient members of the community. Mental and emotional counseling are especially appropriate after major disasters, which can cause those involved to suffer trauma and distress. Back on shore, both Thurston Howell and Gilligan can receive free mental health counseling to help them cope with their ordeal.¹²¹

As the calamity recedes, a DRO must increasingly differentiate among disaster victims based on their financial condition—especially with respect to financial assistance. Once victims have the opportunity to purchase the needed supplies, those in decent financial shape can satisfy their basic needs on their own. Once Thurston Howell can access his assets, he ceases to be an appropriate recipient of a charity's financial assistance. Even before that moment, he is a better candidate for a loan than an outright gift, as he suffers from a cash-flow problem rather than overall financial distress. The same might be true for Gilligan: Even if his bank account is currently empty, he may have adequate shipwreck insurance. In that case, a loan can tide him over until the insurance company sends a check.¹²²

Critically, a DRO cannot make cash payments to people merely because of their involvement in a disaster, nor can it transfer funds to someone “without regard to meeting the individual's particular distress or financial needs”; such transfers, in the IRS's view, would constitute excessive private benefit.¹²³

The IRS directs DROs to employ a three-step process before distributing aid to applicants.¹²⁴ First, the agency must have in place a needy or distressed test—a set of criteria by which it can objectively make distributions to individuals who are financially or otherwise distressed.¹²⁵ Second, the DRO must determine that an applicant meets its “needy or distressed” test before dispensing aid, that is, it “must make a specific assessment that a recipient of aid is financially or otherwise in need.”¹²⁶ Third, the agency must generally keep adequate records and case histories to support the basis upon which assistance is provided.¹²⁷

The formality and thoroughness of the requisite inquiry varies with the

121. See Bjorklund, *supra* note 9, at 16.

122. Huetter & Friedlander, *supra* note 85, at 227 (“An organization may elect to extend loans to persons covered by insurance, with the requirement that the recipient repay the loan when the insurance proceeds are received provided insurance is sufficiently adequate so that repayment of the loan does not cause further personal hardship”).

123. *Id.*

124. This is the IRS's gloss on the law. Although “relief of the poor and distressed” is a charitable purpose under federal tax law, neither the Code nor its implementing regulations expressly require charities to verify an aid applicant's poverty or distress before dispensing assistance. Livingston, *supra* note 106, at 154.

125. *Disaster Relief* (advanced text), *supra* note 86, at 100.

126. *Id.*; IRS, *Disaster Relief: Providing Assistance Through Charitable Organizations* (final text) 7, available at http://www.irs.gov/pub/irs_pdf/p3833.pdf (last visited Mar. 4, 2003) [hereinafter *Disaster Relief* (final text)].

127. *Disaster Relief* (advanced text), *supra* note 86, at 9-10; see also Rev. Rul. 56-304.

circumstances. Generally speaking, a DRO can be more lax in distributing short-term aid in the midst of a disaster or immediately thereafter—especially for non-monetary forms of assistance. During the immediate stages of a relief effort—typically the first forty-eight hours¹²⁸—“only a minimum of information would generally be required to be collected from recipients,” such as “a brief description of loss suffered, and the type and amount of assistance needed”¹²⁹

“After immediate critical needs have been satisfied,” however, “complete and appropriate documentation for providing aid to satisfy long term needs must be maintained to demonstrate the charitable nature of the relief”¹³⁰—especially for cash payments or subsidies. The IRS advises DROs to undertake a full-blown financial needs assessment before, for example, providing a family with enough funds to pay for three to six months of housing.¹³¹ The requisite inquiry into the applicant’s financial condition may be quite extensive, and some may find it intrusive. Long-term financial aid awards, IRS officials have advised:

[S]hould be made on findings of financial hardship based on a determination that the potential recipient’s available cash, assets that can be disposed of without causing further personal hardship, and anticipated cash flow (income, insurance proceeds, etc.) from all sources can reasonably be expected to be insufficient to provide for timely retirement of existing obligations and basic needs.¹³²

3. *Disaster Relief and Tort Compensation Compared.*—One can better appreciate charitable disaster relief by comparing it to compensatory damages in tort. Any alteration in the status quo that injures people or their property may be an appropriate occasion for DROs’ volunteer payments and for the tort system to require them. One key difference lies in the baseline or yardstick each scheme uses to determine the appropriate amount. The tort system permits an injured person to obtain a monetary award for the *entire* loss in value she has suffered as a proximate cause of another person’s breach of a legal duty. Charity law, by contrast, contemplates smaller awards but in a wider set of circumstances. Its

128. See, e.g., LONDON BOROUGH OF CROYDON, SOCIAL SERVICES DEPARTMENT, CARING RESPONSE PLAN 7 (Oct. 2001) (defining the first forty-eight hours after a disaster as the “immediate response” stage and the most critical), available at http://www.croydon.gov.uk/csdept/security/Caring_Response_Plan.doc (last visited Feb. 9, 2003).

129. Huetter & Friedlander, *supra* note 85, at 228.

In most cases, records containing basic information such as names, addresses, telephone numbers, social security numbers, a brief description of loss suffered, and the type and amount of assistance needed and granted should be maintained. However, in some emergency circumstances, it may be sufficient merely to provide assistance to the distressed without even obtaining this minimal information provided there is some recordation concerning the uses to which the funds were put.

130. *Id.*

131. *Disaster Relief* (final text), *supra* note 126, at 7.

132. Huetter & Friedlander, *supra* note 85, at 227.

relief is narrower because it authorizes DROs to respond to loss only insofar as it leaves people without basic necessities or the wherewithal to obtain these. It is broader because it authorizes assistance whenever people experience hardship, regardless of fault. This includes cases where no party was obliged to prevent the hardship, where the liable party does not compensate the victim fast enough to stanch the suffering, or where the victims caused their own misfortune.

Compensatory damages in tort law aim to fully indemnify the victim of a legal wrong.¹³³ The damage award should approximate the difference between victim's well-being in the pre- and post-tort world, insofar as this loss can be: (1) measured in money (e.g., lost earnings, bodily injury, pain and suffering); and (2) attributed to the tortfeasor. She can obtain compensation regardless of the magnitude of the loss and whether it has left her distressed.

By contrast, DROs cannot make payments to people simply because a disaster has caused them some harm. Consider the person whose uninsured, unoccupied vacation home has been destroyed by a hurricane. Although he has incurred a loss, "it does not follow that the person is therefore distressed and needy."¹³⁴ A person whose primary residence has been destroyed is a stronger candidate for assistance, especially during the hurricane and immediately afterwards. Even here, however, there are limits to how much aid, if any, a charity can provide. A DRO, the IRS advises, "does not have to make an individual whole, such as by rebuilding the individual's uninsured home destroyed by a flood, or replacing an individual's income after the person becomes unemployed as the result of a civil disturbance."¹³⁵ More pointedly, a DRO *cannot* restore a victim to the pre-disaster world where doing so provides him with more than what is required to relieve his distress and meet his basic needs: disaster relief is not insurance.¹³⁶

For example, rebuilding an individual's luxury estate would serve a private rather than a public interest where meeting the individual's basic needs may be limited solely to providing temporary housing. Similarly, grants to replace lost income rather than to meet basic living needs would generally be viewed as serving personal and private interest.¹³⁷

The difference between tort law and charity law can also be seen in how each treats payments the victim receives from other sources for the same harm. Under tort law, if a victim receives compensation for the tortfeasor-inflicted harm from another source (e.g., governmental benefits, first-party insurance, private charity, etc.), such payments cannot be deducted from the damages that he can otherwise collect from the tortfeasor.¹³⁸ This principle, known as the "collateral source

133. See, e.g., *Portee v. Hastava*, 853 F. Supp 597, 618 (E.D.N.Y. 1994).

134. Huetter & Friedlander, *supra* note 85, at 227.

135. *Disaster Relief* (final text), *supra* note 126, at 8.

136. *Kronshage v. Varrell*, 97 N.W. 928, 930 (Wis. 1904).

137. Huetter & Friedlander, *supra* note 85, at 227.

138. BLACK'S LAW DICTIONARY, *supra* note 53, at 256-57 (defining "collateral source rule").

rule," sometimes permits the victim to be made whole several times.¹³⁹ Unlike the tort system, DROs generally should consider the help a disaster victim receives from other sources.¹⁴⁰ If it were to ignore collateral sources, the charity would favor victims better able to help themselves to the detriment of those who need more help. This is perverse and contrary to a DRO's mission.

D. How Charity Law Disposes of Surplus Disaster Relief Funds

"You can never be too rich or too thin," says the wag. As a financial matter, this maxim is true for many general DROs: they can generally expect future instances of the type of disasters they were created to relieve. A short-term plethora of unrestricted or redeployable gifts can almost always be put to good use, sooner or later. Disaster-specific DROs, by contrast, respond to one-time events that affect a finite number of persons and whose effects diminish over time. It is thus possible for them to raise more money than required to ensure that all the victims of a particular event have or can obtain the basic necessities. General DROs can face a similar problem when they receive too many gifts restricted to a particular disaster. These possibilities raise a number of questions: What constitutes a surplus, what is to be done about it, and who decides?

1. *What Happens to the Surplus?*—If the gift's terms do not address the issue of surplus, the law must provide a default rule. There are at least three ways to dispose of these excess funds, apart from simply refunding the balance to the donors. In theory, the law attempts to discern what the donor actually wanted or would likely have wanted to happen. In practice, the law tends to impute to the donor certain preferred accounts of her intentions.

a. *Three possibilities.*—If a charity achieves a donor's aims without consuming her entire gift, then the surplus presumptively reverts to the donor or those claiming under her (i.e., her heirs or devisees) via a resulting trust¹⁴¹—that is, unless a court determines that the donor "properly manifested an intention" that no such trust should arise.¹⁴² More specifically, no resulting trust arises if the donor indicated that the surplus should be: (1) redirected to a different but closely related charitable purpose, but one not necessarily pursued by the same

139. This outcome can be justified on grounds that, inter alia, an alternate rule would reduce the potential tortfeasor's incentives to take care, thereby increasing the future incidence of injury.

140. This is the Red Cross' official policy. See American Red Cross, "Plan for Application of Remaining Designated Funds, 1997 DR-344 and DR-345, Minnesota and Red River Valley Floods" 1 (June 5, 1998) (on file with author) ("Red Cross relief is provided to sustain human life, reduce the harsh physical and emotional distress that prevents victims from meeting their own basic needs, and promote the recovery of victims *when such relief is not available from other sources.*") (emphasis added).

141. See Annotation, *Rights and Remedies in Respect of Claimed Surplus Over the Amount Necessary to Carry Out the Expressed Purpose of a Charitable Trust*, 157 A.L.R. 903, 906 § II.b (1945).

142. RESTATEMENT (SECOND) OF TRUSTS § 432 (1957).

donee;¹⁴³ (2) used by the same charity (presumably a multi-purpose entity) for a different corporate purpose, but one not necessarily related to the settlor's designated purpose (other than the fact that the same organization pursues both); or (3) used to enrich the donor's intended beneficiaries in a benevolent but legally non-charitable manner.¹⁴⁴

(i) *Use surplus for a related charitable purpose: the cy pres doctrine.*—When a donor creates a charitable trust for a single charitable project, the common law traditionally presumed that she intended to aid that specific project “and nothing else.”¹⁴⁵ If that aim was achieved without exhausting the gift's assets, the court presumed that the donor wanted or would have wanted the balance refunded.¹⁴⁶ This presumption was overcome if the settlor was found to have manifested a “general charitable intention.”¹⁴⁷ Even though such a donor seeks to advance a particular object, her “paramount or overriding intention” is to advance “the charitable purpose of which the particular object set out . . . is merely one mode of furtherance.”¹⁴⁸ The donor's purpose was simply one means to a larger charitable end, or one species in a genus of charitable purposes. In redirecting the surplus, a court selects a goal as near as possible to the donor's original one. This approach is reflected in the name of this doctrine or equitable power—*cy pres*, from the Norman French term “*cy pres comme possible*,” or “as near as possible.” The donor, it is thought, would have preferred this result (had she considered the matter) to the alternative—refunding the gift to herself or her successors in interest.¹⁴⁹

The modern approach to *cy pres* presumes, in principle or in practice, that the donor had “a general charitable intention” unless she expresses otherwise.¹⁵⁰ This approach is grounded firmly in policy: Where the evidence regarding the donor's intent is equivocal, speculative or non-existent, charity law favors an interpretation that keeps the gift's assets flowing in charitable channels, where

143. *Id.*; *see id.* § 432 & cmt. a (applying *cy pres* doctrine to the case of surplus in a charitable trust).

144. *See id.* § 432 cmt. b.

145. BOGERT'S, *supra* note 29, § 436.

146. *See, e.g.,* *Holmes v. Welch*, 49 N.E.2d 461, 463 (Mass. 1943).

In the present case the testator gave no indication that his bounty was not to be limited to the purposes provided for by the will. No intent appears to have any part of the trust fund devoted to any other charitable purpose. Under these circumstances the *cy pres* doctrine does not apply, and any surplus must be held on a resulting trust for the heirs or next of kin of the testator.

147. RESTATEMENT (SECOND) OF TRUSTS § 399 (1957).

148. WATERS, *supra* note 56, at 624.

149. *See* *Howard Sav. Inst. v. Peep*, 170 A.2d 39, 43 (N.J. 1961) (asking whether the donor had a general versus specific charitable intent is “just another way of asking ‘would [the donor] have wanted the trust funds devoted to a like charitable purpose, or would he have wanted them withdrawn from charitable channels.’”).

150. RESTATEMENT (THIRD) OF TRUSTS § 67 cmt. b (Tentative Draft No. 3, 2001); EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS § 575 (1974).

they will presumably generate more public benefit than if returned.

(ii) *Let the same charity retain the surplus for another corporate purpose.*—When a donor gives to a single-purpose charitable trust, any surplus, generally speaking, must either be returned to the donor or her successors or be redeployed to a closely related purpose via cy pres. When the donee is a multi-purpose charitable corporation, by contrast, there is sometimes another option: the corporation may be permitted to use the surplus for other corporate purposes, i.e., treat it as an unrestricted gift.¹⁵¹ This differs somewhat from a classic cy pres approach in which the donor is deemed to have embraced a larger general charitable purpose and merely specified a particular means of advancing it. Here the donor is deemed to have embraced a certain organization and merely designated a specific project it pursued. In the first instance, the charity must apply the gift to the specific project designated by the donor. If the charity completes this project with spare funds, however, then courts may assume that the donor wanted (or would have wanted) the same organization to be able to use the surplus for other organizational purposes.¹⁵²

(iii) *Use surplus to enrich the same beneficiaries.*—A third way to distribute a charitable trust's surplus is to transfer it to a private trust for non-charitable purposes. To achieve this result, the settlor must “properly manifest[] an intention that if there should be a surplus remaining after the performance of the charitable trust the trustee should hold the surplus . . . upon a valid private trust”¹⁵³ Here then is a two-step approach for settlors whose “paramount or overriding intention” is to create a fund the entirety of which will be used to benefit a definite group of disaster victims and *only* them. As a first step, these donors can fund a disaster-specific charitable trust that will terminate when all the victims' basic needs have been met. If and when that occurs, any surplus can then be “gifted over” to a private trust to benefit the same group of victims without regard to their financial need or distress. This private trust, for example, could simply give each victim or victim's estate an equal share of the balance. This approach permits at least some donations—the ones received and disbursed up until the point basic needs are fully met—to be distributed under charitable auspices. This arrangement permits the pre-surplus donors and donee charity to obtain favorable tax treatment.¹⁵⁴

Something like a gift-over from charity to non-charity occurred in *Doyle v. Whalen*,¹⁵⁵ which involved funds raised after an 1886 fire that destroyed most of

151. RESTATEMENT (SECOND) OF TRUSTS § 400 cmt. c (1957); see also *id.* § 431 cmt. e; *Attorney-General v. Rector and Churchwardens of Trinity Church*, 91 Mass. (9 Allen) 422 (1864).

152. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 432 cmt. b (1957).

153. *Id.*

154. To be valid, such “gift overs” must be certain to occur within the period of the Rule Against Perpetuities. *Id.* § 401 cmt. g. Disaster-specific relief trusts invariably satisfy this requirement, as all their beneficiaries—the victims of a disaster that has already occurred—are alive (i.e., lives in being) when the trust is created.

155. 32 A. 1022 (Me. 1895). For background on this fire, see <http://fis.com/eastport/visitors.html> (last visited Sept. 23, 2002).

Eastport, Maine.¹⁵⁶ That catastrophe inspired spontaneous gifts exceeding \$38,000 to benefit the victims. The donors' overarching intention, the court concluded, was to benefit the sufferers of this fire and no one else.¹⁵⁷ The monies were received by an informal group of town leaders, who believed that they were administering a charitable fund "for the relief of actual suffering and distress caused by the fire."¹⁵⁸ After spending only \$3000, the trustees determined that they had fully accomplished the fund's purpose. In their own words, they "had relieved every instance of distress then existing in Eastport, according to their best knowledge and belief, which had resulted from said conflagration."¹⁵⁹ These trustees then began using the balance to assist other poor people in town (i.e., to "support paupers")—even if their plight was unrelated to the fire.¹⁶⁰ Some fire victims challenged the trustees' actions, and asked the court to appoint a receiver to distribute the alleged surplus to members of this class.

In its decision, the Maine Supreme Court chastised the trustees for failing to manage the fund "in the spirit of helpful beneficence and liberality contemplated by the charitable donors."¹⁶¹ The donated sums need not be entirely or irretrievably imposed with a charitable trust, as the trustees thought. Once the victims' immediate distress was relieved, the court concluded, the donors likely would have wanted the surplus to be used to repair or indemnify the victims' uninsured losses. At that point, the balance would become "a private trust for the benefit of the sufferers by the fire."¹⁶²

b. Divining a donor's wishes for disposing of surplus.—How does a court ascertain whether a charitable donor manifested an intention to disclaim any surplus in favor of one of the three alternatives discussed above? Consider the surplus in a trust created by a single settlor pursuant to a written instrument. The court first examines the language of this instrument as interpreted in light of all the circumstances.¹⁶³ It may also hear other evidence bearing on the donor's actual or probable preferences.¹⁶⁴ Even with a single settlor, however, the search

156. *Doyle*, 32 A. at 1024.

157. *Id.* at 1026 (the donors' "bounty was distinctly limited to a specified class of persons then in being. As stated in some of the [donors'] letters, it was 'for the benefit of the sufferers by the fire.'").

158. *Id.* at 1025.

159. *Id.* at 1023.

160. *Id.*

161. *Id.* at 1026.

162. *Id.* at 1025. The court raised and rejected the possibility of returning the surplus after the gifts' charitable purposes had been achieved. Although "[t]his would have been the obvious equity of the situation," it was too impracticable to carry out given the small size of most of the donations and anonymity of many donors. *Id.* at 1025-26. It did not address the possibility of returning donations to those donors who *could* be identified, which suggests that it never seriously contemplated refunds.

163. RESTATEMENT (SECOND) OF TRUSTS § 412 cmt. a (1957); SCOTT, *supra* note 18, § 431.

164. *See, e.g.*, IND. CODE § 30-4-3-27 (1998) (codifying common law cy pres doctrine permits a settlor's heirs to "present evidence to the court of . . . the heir's . . . opinion of the settlor's

for intent is seldom simple. As one commentator has written, “the donor generally fails to foresee the possible failure of his particular purpose.”¹⁶⁵ The intent sought is thus hypothetical and counterfactual: How would the donor have wanted the surplus distributed had she considered the question at all and under the current circumstances? In most cases, another commentator writes, a court will lack sufficient information about a testator’s preferences “to construct an individualized model of how that person’s desires and beliefs would change in the circumstances before the court.”¹⁶⁶

Divining an individual donor’s intent becomes even harder for gifts received in response to a broad-based solicitation campaign. Such campaigns characteristically generate a large number of modest gifts relatively few of which may be accompanied by a written instrument.¹⁶⁷ Depending on the number of donors and the size of their gifts, ascertaining how each donor wanted or would have wanted any of the surplus distributed could cost more than the total amount raised. For anonymous donors,¹⁶⁸ it may simply be impossible to determine their preferences.¹⁶⁹ In light of these obstacles, courts look primarily to the terms contained in the charity’s solicitation to the public,¹⁷⁰ which constitute each solicited gift’s “instrument” in the main or its entirety.¹⁷¹ They will examine, for example, the charity’s solicitations “by advertisements, posters, announcements on television or radio, or even by the oral statements of collectors or sponsors.”¹⁷² These terms are critical, it has been explained, because “when donors entrust

intent”).

165. FISCH ET AL., *supra* note 150, § 575, at 439.

166. Vanessa Laird, Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine*, 40 STAN. L. REV. 973, 999 (1988).

167. See, e.g., *Loch v. Mayer*, 100 N.Y.S. 837, 840 (Sup. Ct. 1906) (“Few donations [to relief fund for victims of General Slocum disaster] were accompanied with writing of any kind, and no such writing . . . states with any attempt at precision the terms of the trust.”).

168. This is a common occurrence. See, e.g., *id.* at 838 (“a large part of [donations to fund to relieve victims of General Slocum disaster] came from donors unknown to the [trustees], whose identity cannot now be determined”).

169. Donors who give anonymously would seem to convey a relative lack of interest in reclaiming a portion of any surplus.

170. See, e.g., *In re North Devon and West Somerset Relief Fund Trusts*, [1953] 2 All E.R. 1032 (ascertaining donor intent by analyzing the terms of the appeal by which the subscriptions were invited); *In re Gillingham Bus Disaster Fund* [1957] Ch. 300.

171. See, e.g., National Conference of Commissioners on Uniform State Laws, Uniform Management of Institutional Funds Act § 2(6) (definition of “gift instrument” includes “the terms of any institutional solicitations from which an institutional fund [i.e., a fund held by a charitable institution for its exclusive use, benefit, or purposes] resulted”) (draft, Nov. 2002); *Loch*, 100 N.Y.S. at 842 (an instrument creating a charitable trust need not be in writing, but may consist of the body of language, expressions, or conduct that express the intent that originally created and defined the trust).

172. WARBURTON & MORRIS, *supra* note 18, at 633; Elizabeth Cairns, *Appeals and Fund Raising*, PRIV. CLIENT BUS. 1994, at 2, 126-32.

their gifts to the fundraisers [i.e., the charity's trustees], they assume the money will be used for the purpose stated in the appeal. The terms of the appeal are taken to represent the donors' intention in making the gifts."¹⁷³

Restricted gifts to a multi-purpose charitable corporation entail another set of interpretive possibilities and complexities. If the corporation accomplishes the original purpose without exhausting the gift, the surplus might remain in the charitable stream in one of two ways: (a) a court could redeploy it to a substantively related purpose via *cy pres*, perhaps by transferring it to another charity; or (b) the corporation may treat the excess funds as unrestricted and use them for other corporate purposes. In this situation, common law courts appear more likely to conclude that the donor would have preferred the second option.¹⁷⁴ The fact that the settlor chose to give to charity, says the Second Restatement, suggests "that the settlor intended that if the trust should fail it should be empowered to use the property for its general purposes."¹⁷⁵ The donor who wants any surplus from a gift given for a specified purpose to be judicially redeployed via *cy pres* bears the burden of expressing this preference. This burden, moreover, is surprisingly high. According to the Second Restatement:

If property is given to a charitable corporation *to be applied to one of the purposes* of the corporation, and the purpose is fully accomplished without exhausting the trust property, the court will direct the application of the surplus by the corporation to the other charitable purposes of the corporation, *unless the settlor manifested an intention to restrict his gift to the particular purpose* which he specified.¹⁷⁶

To rebut the presumption of unrestricted redeployment, the donor to a charitable corporation who seeks a more traditional *cy pres* treatment must effectively restrict her gift *twice*. She must express a desire that: (a) the charity use her gift for the specified purpose in the first instance; and (b) any surplus be used for a

173. Law Reform Commission Of British Columbia, *Report On Informal Public Appeal Funds*, at 4 (Jan. 1993), available at <http://www.bcli.org/pages/publications/lrcreports/repsum129.html> (last visited Sept. 7, 2002).

174. RESTATEMENT (SECOND) OF TRUSTS § 431 cmt. e (1957) ("If . . . the trustee is a charitable corporation it is easier to find a manifestation of intention that the trustee should keep the surplus for its general charitable purposes."); SCOTT, *supra* note 18, § 432 & N.3; Annotation, *Rights and Remedies in Respect of Claimed Surplus Over the Amount Necessary to Carry Out the Expressed Purpose of a Charitable Trust*, 157 A.L.R. 903, 909 (1945) ("The fact that the donee is itself a general charity may be a factor in showing an intention . . . to leave the surplus, or the shares of particular subscribers, in the hands of the donee for its general purposes, but such an intention is not be presumed.").

175. RESTATEMENT (SECOND) OF TRUSTS § 432 cmt. b (1957) (nature of donee organization "may although it does not necessarily indicate" this intention); *see also* RESTATEMENT (THIRD) OF TRUSTS § 8 cmt. f (Tentative Draft No. 1, 1996) ("Among the circumstances that may be of importance in determining the existence or nonexistence of an intention that the trustee may retain the property free of trust are . . . whether the trustee . . . is a charitable corporation.").

176. RESTATEMENT (SECOND) OF TRUSTS § 400 cmt. c (1957) (emphasis added).

purpose closely related to the one that she specified.

c. Federal tax law favors continued charitable use.—Under the common law, a charitable gift's surplus can be used either charitably (i.e., for a closely related charitable purpose via *cy pres*, or for the donee charity's general corporate purposes) or non-charitably (i.e., by refunding the balance to the donor or transferring it to a private trust for a definite group of beneficiaries). Federal tax law is not neutral on this point: it creates incentives for donors to permit any surplus to be used for another charitable purpose.

Under the Code, a donor generally cannot claim a charitable deduction for a contribution that consists of less than her entire interest in the donated property.¹⁷⁷ This occurs, most notably, when a donor conditions her gift on the right to reclaim any surplus that remains after the designated purpose has been accomplished: this is known as a "possibility of reverter."¹⁷⁸ Such a gift will be deductible, however, if the risk that the act or event triggering reversion is so remote as to be negligible.¹⁷⁹ Yet the risk that a disaster-specific DRO will raise too much, as history shows, is not so remote as to be negligible. For this reason, the donor who retains a reverter interest in the surplus of such gifts may not receive a charitable deduction.

This conclusion finds support in Revenue Ruling 72-194, which involved a group of taxpayers who helped finance a state-run steeplechase race to promote tourism. These sponsors agreed to advance funds that a state agency could use to pay off any debt that could not be paid out of the race's projected revenue. The agency in turn agreed to return any advanced funds it did not use. The IRS apparently concluded that there was a non-negligible possibility that the agency would be able to return some of the advanced funds. The IRS ruled that these sponsors could only deduct the sums not returned. Moreover, these sponsors could not deduct *any* portion of the advance "until such time as the net amount actually going to the State is definitely determined by a final accounting."¹⁸⁰

177. I.R.C. § 170(f)(3)(A) (2000).

178. *In re Gillingham Bus Disaster Fund* [1957] Ch. 300, 310 (J. Harmon) ("the settlor or donor did not part with his money absolutely out and out but only sub modo to the intent that his wishes as declared by the declaration of trust should be carried into effect. When, therefore, this has been done any surplus still belongs to him.").

179. I.R.C. §§ 1.170A-1(e), 1.170A-7(a)(3) (2000). The phrase "so remote as to be negligible" has been defined as "a chance which persons generally would disregard as so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction," *United States v. Dean*, 224 F.2d 26, 29 (1st Cir. 1955), and "a chance which every dictate of reason would justify an intelligent person in disregarding as so highly improbable and remote as to be lacking in reason and substance." *Briggs v. Comm'r*, 72 T.C. 646, 657 (1979), *aff'd without published opinion*, 665 F.2d 1051 (9th Cir. 1981).

180. Additional support may be found in Revenue Ruling 79-249. In that case, a board of education solicited public contributions to help construct a school building. The board told donors that if contributions fell short of a certain amount—10% of the construction costs—then no building would be built and the contributions returned. (The board also said that it would retain any surplus for general school purposes.) The IRS denied donors a charitable deduction under

2. *What Constitutes a Surplus, and Who Decides?*—A charitable gift yields a surplus when the purposes for which it was formed have been accomplished without exhausting its assets.¹⁸¹ But when is that exactly, especially in the disaster relief context? When does a distribution exceed what is necessary and sufficient to ensure that disaster victims can obtain the basic necessities? There are easy cases where the aid is extravagant, for example, if the Red Cross were to rebuild luxury vacation homes damaged by a hurricane. In most cases, however, the surplus question is open to wide interpretation and dispute.¹⁸²

Because the surplus question can be so hard to resolve, it may be more fruitful to ask when and how the question arises, who is empowered to answer it, and what are the answer's parameters. The issue can present itself in a number of settings. First, a charity's managers may conclude that a surplus exists and seek judicial instructions or sanction for redeploying the balance via *cy pres*.¹⁸³ Second, the managers may conclude that a surplus exists and unilaterally begin using the funds for another purpose, but without prior judicial approval for their action. Technically, this is a breach of trust, but the action will not be disturbed unless a party with standing brings suit. Even if such a suit is brought, the end result may be the same, breach notwithstanding. Stated differently, a court can retroactively ratify the managers' redeployment, and "such approval will be as effective as though the court had authorized the application before it was made."¹⁸⁴ Lastly, the issue can arise when the donor or her successors ask a court to declare a surplus and impose a resulting trust upon it for their benefit.¹⁸⁵

A DRO's managers decide in the first instance whether they have accomplished the charity's purpose without exhausting its assets. Under the "best judgment rule" (the nonprofit analogue to the "business judgment rule"), courts are obliged to defer to the managers' decision unless it is arbitrary, capricious, or made in bad faith.¹⁸⁶ I have found only one case in which a court

I.R.C. § 170 on grounds that the possibility that contributions would be returned was not so remote as to be negligible. No deduction would be allowed unless and until the contributions were devoted to building or for general school purposes.

181. RESTATEMENT (SECOND) OF TRUSTS § 432 (1957).

182. The Restatement (Second) of Trusts states that "[w]hether or not the trust is fully performed depends upon the extent of the purposes of the trust, which is ordinarily a question of interpretation." RESTATEMENT (SECOND) OF TRUSTS § 430 cmt. g (1954).

183. *See, e.g., Loch v. Mayer*, 100 N.Y.S. 837 (Sup. Ct. 1906). After spending approximately 27% of a \$12,622.40 fund raised to assist the victims of a steamboat fire, the fund's trustees declared "that in no case has an applicant worthy of relief been denied assistance commensurate with his or her loss, where such loss could be relieved by money." *Id.* at 838. The trustees then sought judicial guidance on how to dispose of the remaining 73%. *Id.*

184. RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. e (1959). If the court finds that the trustees breached the trust by declaring a surplus and/or redeploying its funds, then it can compel the trustees to perform the trust and to make restitution for their breach. *See id.* § 401 cmt. a.

185. *See, e.g., First Nat'l Bank of Kansas City v. Stevenson*, 293 S.W.2d 362 (Mo. 1956) (heirs sought trust's income in excess of the prescribed distribution).

186. *Holmes v. Welch*, 49 N.E.2d 461, 465 (Mass. 1943) (sustaining demurrer because

ordered a DRO to spend more money on the victims, notwithstanding the directors' declaration of surplus.¹⁸⁷ A more representative case is *Boenhardt v. Loch*, which involved a fund for victims of the General Slocum, a steamboat that caught fire in New York City's East River in 1904, resulting in the deaths of over one thousand passengers.¹⁸⁸ The complaint alleged that the trustees had breached their fiduciary duties by failing to distribute all of the funds collected to victims' families. The court refused to second-guess the trustees' decision: "[i]f the funds [raised to relieve the victims of a particular disaster] may still be expended for such relief," the court declared, "it is the duty of the trustees, and not the province of this court, to act and to exercise discretion therein and thereto."¹⁸⁹

Disaster-specific DROs also have some discretion *not* to declare a surplus, so long as the assistance provided with such funds does not result in private benefit. Even if all of the victims have adequate resources to meet their immediate basic financial needs, the charity can set aside funds to meet their possible future needs.¹⁹⁰ Determining whether to retain funds and how much to retain for such needs requires a judgment as to the financial future, and courts will generally not disturb that judgment.¹⁹¹

A DRO has the most latitude not to declare a surplus if, after meeting immediate and short-term needs, it spends the balance on in-kind assistance to victims. There seems to be almost no limit, for example, on how much it can spend on counseling to help those experiencing psychological and emotional distress attributed to the disaster.¹⁹² Eight years after the Oklahoma City

plaintiff failed to allege that trustees decided arbitrarily, capriciously, or in bad faith) (citation omitted); FISHMAN & SCHWARTZ, *supra* note 29, at 178-79.

187. *Doyle v. Whalen*, 32 A. 1022 (Me. 1895). In this case, the court removed the trustees of a disaster-specific DRO who had declared a surplus after spending only 8% of the \$38,000 collected (or \$3000). The majority found that the charitable surplus should be treated like a private trust for a definite group of victims. In a separate opinion, one judge concurred in the court's judgment because "[t]he proofs show that suffering entailed by the calamity still remains." *Id.* at 1027 (Haskell, J., concurring).

188. *Boenhardt v. Loch*, 107 N.Y.S. 786 (Sup. Ct. 1907). For more information on this disaster, see Bill Bleyer, *The General Slocum Disaster*, at <http://www.lihistory.com/7/hs743a.htm> (last visited Aug. 13, 2002); David Oats, *Disaster at Hell Gate*, QUEENS COURIER, at <http://www.queenscourier.com/spclissue/slocum/slocum1.htm> (last visited Aug. 13, 2002); and WILLIAM KORNBLUM, *AT SEA IN THE CITY* (Algonquin Books 2002), *excerpted at* <http://www.newyorkhistory.info/Hell-Gate/General-Slocum.html> (last visited Aug. 13, 2002).

189. *Boenhardt*, 107 N.Y.S. at 787. The court noted that there was no evidence of misfeasance or of malfeasance by the trustees. *Id.* The court decided the case without reaching the question of whether the disaster victim had standing to bring the suit. *Id.*

190. IRS, *IRS Releases Advanced Text of Publication on Disaster Relief*, 34 EXEMPT ORG. TAX REV. 98, 100 (2001).

191. *See, e.g., Holmes v. Welch*, 49 N.E.2d 461, 465 (Mass. 1943).

192. *Huetter & Friedlander*, *supra* note 85, at 227 (citing Rev. Rul. 78-99, 1978-1 C.B. 152 (1978)). In Rev. Rul. 78-99, the IRS affirmed the 501(c)(3) exempt status of an entity that provided free counseling to widows to help them deal with the loss of a spouse and to inform them about

bombing, for example, contributions restricted to that calamity are being used to provide mental health services to some three dozen people.¹⁹³ Similarly, some of the largest 9/11-specific DROs plan to spend many millions of dollars to alleviate the grief, stress, and trauma caused by the attacks.¹⁹⁴ Yet such expenditures can become increasingly difficult to justify over time, and indeed some 9/11 donors are already questioning the scale of such expenditures.¹⁹⁵ The phenomenon of diminishing marginal utility suggests that each additional dollar spent on counseling a given victim brings less peace of mind than the previous dollar.¹⁹⁶ If it takes \$1000 to meet a victim's basic physiological needs, for example, it might take another \$2000 to meet her need for safety, \$4000 to provide her with a sense of belonging, and so on up Maslow's hierarchy of needs. One might readily conclude that it misallocates society's disaster-relief resources to spend large sums of money (\$16,000) to enhance one victim's self-esteem, instead of satisfying the most urgent physical needs of sixteen victims of another disaster.

3. *Using Private Trusts to Distribute Surplus to Victims.*—Once a disaster's victim's basic needs have been met, charity law prohibits DROs from distributing the balance to them.¹⁹⁷ Even so, there are at least two ways to transfer excess funds to the victims.¹⁹⁸ One option, discussed above, is for donors to expressly gift over any surplus to a private trust for the same group of victims. Another possibility is for public authorities to retroactively reclassify an oversubscribed charitable trust as private. This appears to have happened with funds raised for victims of the 1886 fire in Eastport, Maine,¹⁹⁹ and more recently with an English fund created in 1981. That case warrants closer inspection because of its many parallels to 9/11 relief funds.

available benefits and services. *Id.*

193. See, e.g., Stephanie Strom, *Finding Cure for Hearts Broken Sept. 11 Is as Difficult as Explaining the Cost*, N.Y. TIMES, July 22, 2002, at B1, available at LEXIS, N.Y. Times file; *The Bombing*, CNN, at <http://www.cnn.com/US/OKC/bombing.html>. If Oklahoma City's ratio of slain victims to counseled persons were applied to 9/11 charities, then these entities would be providing counseling to approximately 643 people in 2009.

194. The September 11th Fund will spend up to \$55 million on mental health care to those traumatized by 9/11. Strom, *supra* note 193.

195. *Id.*

196. MACMILLAN DICTIONARY OF MODERN ECONOMICS 106 (David W. Pearce ed., 1992) (defining "diminishing marginal utility" as "The phenomenon whereby it is assumed that the additional utility attached to an extra unit of any good diminishes as more and more of that good is purchased").

197. *Boenhardt v. Loch*, 107 N.Y.S. 786, 787 (Sup. Ct. 1907); see also *Victims v. Funds*, 715 F. Supp. 178 (W.D. Tex. 1989) (disaster victims are not legally entitled to have all the funds raised by a charitable DRO on their behalf); Huetter & Friedlander, *supra* note 85, at 226 ("[o]nce the basic necessities [of each member of the beneficiary class] have been met," the excess funds cannot be "prorated among the victims").

198. See *supra* notes 148-49 and accompanying text.

199. See *supra* notes 150-56 and accompanying text.

On December 19, 1981, eight volunteer sea rescuers (called "lifeboatmen" in England) from the Penlee lifeboat station lost their lives attempting to save another ship's crew off the coast of Cornwall, England.²⁰⁰ This event prompted a huge outpouring of financial support for the lifeboatmen's families, which included five widows and twelve children.²⁰¹ Most contributions went to one of two funds: the Penlee Fishermen's Fund (£250,000), which was organized by the local fishermen's association,²⁰² and the Penlee Lifeboat Disaster Fund (£3.5 million), which was set up by the local government council (the "Council").²⁰³ The Fishermen's Fund was a private trust and promoted itself as such from the outset; its founders' stressed that it was simply "a collecting bowl" for the lifeboatmen's families and made no mention of charity.²⁰⁴ The monies it received were split evenly among the eight families (1/8 of total per family) quickly and with no fuss. The creators of the much larger Disaster Fund, by contrast, made conflicting statements about the entity's legal status in the first few days after they began to receive contributions.²⁰⁵ Their equivocation invited confusion and discontent among some donors.

In the immediate aftermath of the shipwreck (from December 19 until December 21), donors spontaneously sent over £16,000 to the Council.²⁰⁶ During this period, the fund lacked a formal legal structure and issued no solicitations. Three days after the disaster, on December 22, the Council issued a press release inviting contributions and declaring that "all money received will be distributed directly to families of the lifeboat crew."²⁰⁷ However, on the following day, December 23, the Council issued a second press release announcing that all monies received would be held in a charitable trust, and that "the amount of income which the trustees could legally distribute to the bereaved was limited to their reasonable needs. . . ."²⁰⁸ The Council indicated that it had already received enough to meet these needs. Even so, it was "willing and able to continue to receive [additional] donations but stressed that . . . these donations would be used for related charitable purposes."²⁰⁹ In other words, any additional gifts would be

200. John Mullen, *Ten Years After the Penlee Lifeboat Was Lost with All Hands*, GUARDIAN (London), Dec. 19, 1991, at LEXIS, Major Newspapers file. For more information on this incident, see <http://www.penlee-lifeboat.co.uk>.

201. Mullen, *supra* note 200.

202. Hubert Picarda, *Spontaneous Disaster Funds*, reprinted in ROGER W. SUDDARDS, BRADFORD DISASTER APPEAL 35 (1986).

203. Barbara Amiel, *Behind Disaster Funds Lie the Best Impulses of Human Nature, but the Minute There Is Money, Other Instincts Surface*, TIMES (London), Sept. 4, 1987, available at LEXIS, Major Newspapers file.

204. Tim Dickson, *Sweet Charity for Mousehole*, FIN. TIMES (London), Jan. 9, 1982, at 5, at LEXIS, Fin. Times file.

205. *Id.*

206. Picarda, *supra* note 202, at 35.

207. *Id.*

208. *Id.* (paraphrasing the Dec. 23 press release).

209. *Id.*

treated as surplus and redeployed via *cy pres* or *cy pres*-like principles.

The vast majority of the Disaster Fund's £3.5 million were raised after the trustees declared its charitable nature. Yet many donors apparently did not hear, heed, understand or concur with the council's second press release. Most contributors, *The Financial Times* reported, "wished *all* the cash (*however much*) to end up in the hands of the lost lifeboatmen's families."²¹⁰ These donors wanted the Disaster Fund to operate like a private trust (i.e., able to distribute aid without regard to need), but avoid being treated as such for tax purposes.²¹¹ The thought of Disaster Fund monies being taxed or diverted to other charitable purposes angered some contributors, media commentators, and members of Parliament.²¹² "A vast amount of the money given in sorrow and sympathy in pubs, clubs and on the street, raised by sponsored walks, rides, rowing, football and rugby matches, special concerts, from official societies and humble individuals . . . would go whistling into the jaws of the taxman."²¹³ To douse this firestorm, the attorney general formally classified the Disaster Fund as a private trust while at the same time exempting it from most of the unfavorable tax consequences of noncharitable status.²¹⁴ According to one observer, the attorney general's decision laid bare the Disaster Fund's true purpose: to give money "to the families as a tribute to their dead menfolk, in recognition of the way they had given their lives."²¹⁵ Because it was rewarding heroism instead of relieving need, the trustees determined that "[t]he only fair way to distribute this [money] was simply to divide it eight ways and pass it on."²¹⁶

The Penlee experience is intriguing, but is it a viable model? How readily could public officials in the United States retroactively redesignate an oversubscribed DRO as a private benefit organization, in order to avoid a need-based ceiling on the payout to victims? For entities already exempt under I.R.C. section 501(c)(3), this option is unavailable. By accepting 501(c)(3) status, these entities unequivocally and irrevocably dedicated their assets to charitable purposes and thus agreed to comply with the ban against private benefit. However, the Penlee option might be available when donors spontaneously contribute to a legal nonentity or an amorphous unincorporated association without seeking a charitable deduction. It might also apply when legally

210. Dickson, *supra* note 204 (emphasis added).

211. If the fund was organized as a private trust, it would have to pay income taxes on the interest generated by contributions, and such contributions would be subject to the capital transfer tax. Dickson, *supra* note 204.

212. Amiel, *supra* note 203.

213. MICHAEL SAGAR-FENTON, PENLEE: THE LOSS OF A LIFEBOAT 77 (Truran 2000).

214. *Lifeboat Fund Ruling Favours Dependents*, FIN. TIMES (London), Jan. 6, 1982, at 6, available at LEXIS, Fin. Times file.

215. SAGAR-FENTON, *supra* note 213, at 77-78. See also Editorial, TIMES (London), Jan. 9, 1982, reprinted in SUDDARDS, *supra* note 202, at 31 ("People gave money out of admiration for the men who gave their lives, out of pity for their families, and out of gratitude to lifeboatmen all round our coasts.").

216. SAGAR-FENTON, *supra* note 213, at 78.

unsophisticated people solicit contributions without creating or affiliating with any formal organization, except perhaps a bank account to deposit contributions.²¹⁷ In such cases, the donee's status may be sufficiently ambiguous as to permit officials to plausibly characterize or recharacterize it as private.

II. CAN WE GIVE IT ALL, AND HOW? THE PREDICAMENT OF OVERSUBSCRIBED 9/11-SPECIFIC CHARITIES

Over 300 charitable organizations raised funds for 9/11 relief, with thirty-five entities receiving the bulk of donated funds.²¹⁸ In the first two months after the attacks, the largest charities raised more than \$1.3 billion, while distributing a relatively small portion of this sum.²¹⁹ Inevitably, some victims and observers complained that charities were giving out the funds too slowly. What was the hold-up? What accounted for the gap between donations received and disbursements made?

Beyond the logistical challenges, some of the largest 9/11 DROs found themselves caught between competing legal and ethical obligations: the altruistic yet potentially noncharitable intentions of many donors, and legal limits on the entity's ability to provide financial assistance. The conflict was most severe for charities that collected very large sums to distribute to a relatively small number of intended beneficiaries. These organizations faced increasingly strident demands from donors, victims, and critics to distribute everything promptly and costlessly. The directors of some charities feared they could not simultaneously meet these demands while complying with the legal requirements to assess financial need and redeploy any surplus. The result was a logjam that deterred several major 9/11 charities from dispensing much aid, if any.²²⁰

The impasse was broken when the IRS exempted 9/11 charities from the duty to assess financial need before disbursing cash assistance.²²¹ This exemption, which Congress subsequently enacted into law, enabled these charities to escape

217. LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON INFORMAL PUBLIC APPEAL FUNDS 26, available at <http://www.bcli.org/pages/publications/lrcreports/repsum129.html> (last visited Sept. 7, 2002).

218. U.S. GAO, *September 11 Report*, supra note 2, at 2. The largest recipients of private donations include the American Red Cross Liberty Fund (over \$1 billion); the September 11th Fund (\$512 million); the Twin Towers Fund (\$205 million); the International Association of Fire Fighters' New York Firefighters 9-11 Disaster Relief Fund (\$161 million); the Citizens' Scholarship Foundation (\$113 million); the Salvation Army (\$87.7 million) (as of July 31, 2002); the Uniformed Firefighters Association (\$71 million) (as of July 31, 2002); the New York State World Trade Center Relief Fund (\$68.7 million); and the New York City Police Foundation's Heroes Fund (\$11 million). These amounts were current as of October 31, 2002, unless noted otherwise. *Id.* at 35-36.

219. David Barstow & Diana B. Henriques, *A Nation Challenged: The Charities; I.R.S. Makes an Exception on Terror Aid*, N.Y. TIMES, Nov. 17, 2001, at B1.

220. *Id.*

221. *Id.*

a tight spot.²²² The practical effect of this exemption was to permit 9/11 DROs to operate like private trusts for attack victims and to pay significantly more to families with higher pre-9/11 standards of living than those who had lived more modestly.

A. Eligibility for Relief: Defining the Beneficiary Class

DROs created exclusively for 9/11 victims used different criteria to define their intended beneficiaries. The narrowest and most definite are the funds established exclusively for families of the following groups: the twenty-three fallen members of the New York City Police Department; the 347 fallen firefighters and Emergency Medical Services (EMS) personnel who died in New York;²²³ the rescue workers who died in New York (fire, police, EMS, etc.); and those killed at the World Trade Center, the Pentagon, or on Flight 93.²²⁴ Other charities reserved more discretion from the outset to allocate aid among those harmed by the attacks. The September 11th Fund, for example, was created “to meet the immediate and long-term needs of [9/11] victims, families and communities.”²²⁵ This broad mandate enabled the charity to extend help to displaced workers and residents, rescue workers, and affected small businesses and nonprofit organizations.²²⁶ Still other charities experienced “mission creep” as the donated sums grew. When The New York Times 9/11 Neediest Cases Fund was announced two days after the attacks, its stated goal was “to help those injured in the attack or the families of those who died.”²²⁷ Within days, the fund also began focusing on lower-income workers who lost jobs.²²⁸ Within six weeks, the fund had made grants for such things as “therapeutic after-school programs for children who attend schools near the trade center site” and

222. See *infra* note 255 and accompanying text.

223. The New York Firefighters 9-11 Disaster Relief Fund has benefited survivors of 347 union members. Telephone Interview with George Burke, Assistant to the General President for Communications and Media, International Association of Fire Fighters, Washington, D.C. (Apr. 10, 2001) [hereinafter Burke Telephone Interview] (on file with author).

224. See, e.g., New York State World Trade Center Relief Fund, at <http://www.helping.org/wtc/ny/nystate.htm> (last visited July 12, 2002). Although funded with private donations, this is not a charity; the New York State Department of Taxation and Finance established and administers it. U.S. GAO, *September 11 Report*, *supra* note 2, at 35-36 & n.e.

225. A description of the Fund is available at <http://www.September11fund.org/aboutus.php> (last visited Feb. 8, 2003).

226. See *id.*

227. Aaron Donovan, *After the Attacks: Charity; How to Help the Neediest of Cases*, N.Y. TIMES, Sept. 13, 2001, at A11, available at LEXIS, N.Y. Times file; see also Editorial, *Helping the Victims*, N.Y. TIMES, Sept. 13, 2001, at A26, available at LEXIS, N.Y. Times file.

228. See, e.g., Aaron Donovan, *After the Attacks: The Neediest; Disaster May Tax Charities*, N.Y. TIMES, Sept. 14, 2001, at A13, available at LEXIS, N.Y. Times file; Aaron Donovan, *A Nation Challenged: The Neediest; Gifts from The Rich, and Lemonade Stands*, N.Y. TIMES, Sept. 18, 2001, at B8, available at LEXIS, N.Y. Times file.

community mental health more generally.²²⁹ By way of explanation, the fund's president said that "[r]eader generosity has been so great that it appears we'll be able to meet all of those direct service needs and also address larger structural needs."²³⁰

B. Tension Between Donor Intent and Legal Limits on Assistance

In the two months following the attacks, some of the most prominent 9/11 DROs seemed unable to deliver enough assistance fast enough to satisfy their constituencies and observers.²³¹ Such complaints were inevitable so long as charities distributed cash gifts under the traditional approach, namely, by assessing each applicant's ability to meet basic and immediate living expenses.²³² The IRS's guidance on disaster relief appeared to dictate this approach. On September 17, 2001, the IRS posted on its website the advanced text of a special publication on providing disaster relief through charitable organizations.²³³ This publication cautioned that "charitable funds cannot be distributed to persons merely because they are victims of a disaster."²³⁴ Rather, any disbursements "must be based on an objective evaluation of the victims' needs at the time of the grant."²³⁵ More specifically, DROs could give cash only to those who lacked adequate resources to meet their current financial and medical needs and those needs likely to arise in the immediate future. If DROs wished to provide a safety net for victims who *were* able to meet their short-term needs, they could set aside funds to meet longer-term needs if and when such needs arose.

Against this backdrop, some of the largest 9/11 DROs deferred making major

229. Aaron Donovan, *A Nation Challenged: Charity; Disaster Fades into the Past, but Generosity Does Not*, N.Y. TIMES, Oct. 27, 2001, at B10, available at LEXIS, N.Y. Times file; see also *About the 9/11 Neediest Fund*, available at <http://www.nytc.com/company/foundation/nine11.neediest.html> (last visited July 12, 2002).

230. Donovan, *supra* note 229, at B10 (quoting Jack Rosenthal, president of The New York Times Company Foundation, which administers the fund).

231. Robert Ingrassia & Michael Saul, *More Heat for UFA; Bizman Joins Protest Over 60M WTC Fund*, N.Y. DAILY NEWS, May 10, 2002, at 6 (quoting president of company that donated to firefighters charity saying that "[e]verybody gave with the intention that the money would go to the families in a timely manner. It wasn't intended to be a slow trickle out").

232. See, e.g., New York Firefighters 9/11 Disaster Relief Fund, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, Form 1023, Schedule A, Part I, 1 (Sept. 21, 2001) (on file with author) (assuring the IRS that "[t]he amounts distributed to each [eligible] family [of a fallen firefighter] will be determined on the basis of such family's needs [i.e., ability to meet basic living requirements] at the time of grant"); Burke Telephone Interview, *supra* note 223 ("We are a union. We were not equipped to do a needs-based process" in making distributions from the New York Firefighters 9/11 Disaster Relief Fund).

233. IRS, *supra* note 190.

234. *Id.*

235. *Id.*

disbursements until the legal situation was sorted out.²³⁶ As of October 28, 2001, the Twin Towers Fund had distributed none of the \$71 million it had collected for families of the uniformed rescue personnel killed in New York.²³⁷ As of November 6, 2001, the New York Firefighters 9-11 Disaster Relief Fund had distributed only a tenth of the \$63 million it had raised.²³⁸ Its initial payments consisted of a \$20,000 gift to each of the families of fallen firefighters and paramedics.²³⁹ A spokesman for the Fund stated that the Fund would refrain from making additional disbursements until it developed “criteria to ensure that the families['] humanitarian needs will be met in an manner consistent with our fiduciary duties and applicable law including the Internal Revenue Code.”²⁴⁰ This situation led to exasperation, suspicion and accusations: why were these charities sitting on all the money?

Other charities followed the IRS policy by providing cash for short-term needs based on demonstrated financial distress and by setting aside funds for long-term needs. This response mitigated, but did not eliminate, the glaring disparity between amounts donated and disbursed. The charities could only move so fast. The process of assessing need can be both labor-intensive and highly delicate: a charity may need to use trained volunteers or professionals to identify victims, sort them by relative and specific need, and match the charity’s resources to meet the most urgent needs.²⁴¹ Charity personnel may have to ask applicants some intrusive questions.²⁴² The application process invited complaints that 9/11 victims were being “victimized again” by paperwork and red tape.²⁴³ Lastly, holding back some dollars for the victims’ anticipated future

236. Susan Edelman, *Good Sams Plead with Uncle Sam for Equal Handout of WTC Charity*, N.Y. POST, Oct. 28, 2001, at 6 (“officials [of New York Firefighters 9-11 Relief Fund] fear they won’t be able to evenly distribute the remaining \$46 million without jeopardizing the fund’s tax-exempt status.”); Diana B. Henriques & David Barstow, *A Nation Challenged: The Charities; Victims’ Funds May Violate U.S. Tax Law*, N.Y. TIMES, Nov. 12, 2001, at B1; I.R.S. Notice 2001-78; 2001-50 I.R.B. 1 (Nov. 16, 2001), reprinted at TAX NOTES TODAY 223-6 (Nov. 19, 2001) (“Several charities have raised questions about the practical application of existing legal standards for distributing funds to victims of the September 11, 2001 terrorist attacks”).

237. Edelman, *supra* note 236.

238. *Id.*

239. Greenwood hearing, *supra* note 2 (remarks of Vincent Bollon, Secretary Treasurer of the International Association of Fire Fighters (IAFF)).

240. *Id.*

241. Bjorklund, *supra* note 9, at 15-16.

242. See Heutter & Friedlander, *supra* note 85, at 50 (specifying information DRO should obtain before awarding long-term financial assistance).

243. *Charitable Organizations’ Distribution of Funds Following the Recent Terrorist Attacks: Hearing Before the House Ways and Means Committee, Subcommittee on Oversight* (Nov. 8, 2001) (testimony of Eliot Spitzer, New York State Attorney General), available at 2001 WL 1400781. See also Janny Scott, *A Nation Challenged: The Paperwork; Awash in Grief After Attack, Adrift in a Sea of Paperwork*, N.Y. TIMES, Nov. 20, 2001, at A1 (describing a widow’s ordeal sorting through “the birth certificates, marriage certificate, death certificate, mortgage papers, pay stubs,

needs was unpopular because, as a general proposition, most donors expect their gifts to be used for current programs rather than placed in reserve.²⁴⁴

To speed the cash outlays, some asked that charities be permitted to operate in ways that contradicted charity law principles and IRS guidance. Most notably, some proposed that charities be permitted to give each intended beneficiary a fractional share of the total amount the charity raised (as was done with the Penlee Lifeboat Disaster Fund) or an amount based upon each surviving family's composition (e.g., a certain sum for a surviving spouse, another fixed amount for each dependent child).²⁴⁵ Even so, many found the case compelling for several reasons: to minimize administrative costs; to avoid having to return gifts which might make them foolish; and to avoid having to use gifts for other charitable purposes which would anger those donors who wished to help 9/11 victims regardless of financial need.

Donors always want charities to minimize administrative costs. After 9/11, however, many donors apparently expected such costs to disappear.²⁴⁶ Ironically, the deluge of donations that followed 9/11 may have made it costlier for charities to distribute aid using traditional approaches. As between two disaster victims, it is generally easier to identify who needs items such as food, clothing, and shelter most desperately. Unlike most relief operations, 9/11 charities seem to have raised more than enough money to meet everyone's basic physiological needs. As victims ascend Maslow's hierarchy of needs, it becomes increasingly costly to assess relative need. As between two aid applicants, it is can be difficult if not impossible to determine who needs additional esteem, love, self-actualization, etc., most urgently.

It was also argued that 9/11 charities were simply receiving "too much money . . . for too few survivors for typical guidelines to apply."²⁴⁷ Charities created exclusively for the families of rescuers were raising the most money per

correspondence, checklists, current bills and innumerable, interminable applications for help"); Transcript, *The O'Reilly Factor* (Fox News television broadcast Nov. 13, 2001) (remarks of Bill O'Reilly) ("it'd be pretty callous . . . to ask people who are just burying their husbands or wives to provide a financial statement" to justify charitable assistance).

244. See *Full Text Testimony—Wise Giving Alliance Testimony at W&M Hearing on Charitable Groups' Reaction to Terrorist*, 34 EXEMPT ORG. TAX REV. 472 (Dec. 2001).

245. Henriques & Barstow, *supra* note 236; Scott, *supra* note 243.

246. This is reflected by the fact that so many 9/11 charities promised to spend the donor's gift on direct relief. Editorial, *Honor Donors' Intent*, N.Y. DAILY NEWS, June 15, 2002, at 18 ("Nonprofits surveyed said none of the Sept. 11 money is going to administrative costs"). See also Press Release, Twin Towers Fund, Mayor Giuliani Announces First Wave of Initial Distribution to Aid Families of Uniformed Service Personnel (Nov. 9, 2001), available at http://www.twintowersfund.org/news_1109_01.html (last visited Jan. 31, 2003) ("All money raised by the Twin Towers Fund will go directly to the families of the Uniformed Service members who sacrificed their lives. A separate fund has been set up to raise money for administrative costs so that all the money donated by individuals and corporations to the relief effort will go directly to these families.").

247. Bjorklund, *supra* note 9, at 18.

victim: \$353 million by December 2001, or around \$880,000 per family.²⁴⁸ These charities were also the most concerned about the tax consequences of their disbursements.²⁴⁹ Given the other sources of aid available to such families, these charities were indeed challenged to find many intended beneficiaries in long-term financial distress.²⁵⁰ For example, the City of New York pays the surviving spouses of fallen officers a full pension equal to the decedent's lost salary,²⁵¹ a \$25,000 death benefit, and a stipend equal to one year's salary.²⁵² Children of fallen officers receive full scholarships to New York State universities.²⁵³ The United States Department of Justice makes a lump-sum payment of \$259,000 to the eligible survivors of each police and fire personnel killed in the line of duty.²⁵⁴ Lastly, the September 11th Victim Compensation Fund of 2001 ("VCF") will make an average payment of \$1.5 million to each 9/11 decedent's beneficiary, after offsets for things like insurance proceeds and pension benefits.²⁵⁵ Even with maximum offsets, the VCF will pay each eligible beneficiary a minimum of \$250,000, plus an additional \$100,000 for each surviving spouse and dependant.²⁵⁶ As a result of this compensation from collateral sources, many survivors of fallen rescuers will ultimately be better off in strictly financial terms after 9/11 than before, notwithstanding the loss of the primary breadwinner.²⁵⁷ The result has given rise to a new need, one that DROs typically do not address: financial counseling to help victim-beneficiaries manage their new-found wealth.²⁵⁸ Unless the IRS's needy and distressed test

248. Charities dedicated solely to helping police and fire families ultimately raised more than \$500 million—approximately \$1.25 million per family. Robert Ingrassia, *Police & Fire Widows to Get \$2 M; WTC Victims' Kin to Share in \$500M*, N.Y. DAILY NEWS, May 16, 2002, at 8. Families of slain civilians would generally receive much less, because the remaining funds had to be spread over a much larger number of people. David Barstow & Diana B. Henriques, *A Nation Challenged: The Families; Gifts to Rescuers Divide Survivors*, N.Y. TIMES, Dec. 2, 2001, at A1.

249. Barstow & Henriques, *supra* note 219.

250. See Edelman, *supra* note 236 (quoting Joseph Mancini, a spokesman for the New York Patrolmen's Benevolent Association: "I don't see how police and firefighters' survivors could be classified as needy. They'll be taken care of for the rest of their lives.").

251. Barstow & Henriques, *supra* note 248, at A1.

252. Ingrassia, *supra* note 248, at 8.

253. *Id.*

254. See <http://www.ojp.usdoj.gov/BJA/topics/PSOBProgram.html> (last visited July 17, 2002) (Public Safety Officer's Benefit Program).

255. David W. Chen, *Victims' Fund Announces First Awards*, N.Y. TIMES, Aug. 23, 2002, at B1. However, there will be no offsets for charitable gifts. 28 C.F.R. § 104.47(b)(2) (2003).

256. 28 C.F.R. § 104.44.

257. See Mike Claffey, *Battle Over \$60M Fund: Grieving Survivors in Clash with Firefighters Union*, N.Y. DAILY NEWS, May 9, 2002, at 5 (quoting firefighter's widow saying that "[c]ertainly, I have more money than I had, but I have a lot more troubles than I ever had. I would be glad to trade places [with those people who suggest I'm greedy for more assistance]").

258. See Lisa Fickenscher, *Fears of Money Scams Grow; Few 9/11 Families Seek Advice to Handle \$1 Billion in Payments*, CRAIN'S N.Y. BUS., Apr. 15, 2002, at 1 (experts express fear that

was relaxed, some DROs devoted solely to rescuers would likely have been unable to avoid a surplus—a true embarrassment of riches.

Needs-testing of 9/11 victims also seemed inapt on another ground: many donors contributed for reasons other than simply relieving the victims' suffering. This was especially true for charities formed solely to benefit the families of fallen rescue workers. As in the Penlee lifeboatmen's case, some donors contributed in order to honor the rescuers' heroism.²⁵⁹ Some frankly sought to enrich the survivors' financial condition as solace for, or in solidarity with, their loss. This is evidenced by the fact that many donors gave to rescuer charities even after it had become clear that this group of survivors' basic needs had been met. If their gifts helped make these families millionaires, some donors felt, then "so be it."²⁶⁰

The conflict between the donors' desires and the rules restricting their realization peaked the second week of November 2001. On November 8, 2001, the House Ways and Means Oversight Subcommittee held a hearing to investigate complaints about 9/11 charities. At this hearing, Steven Miller, Director of the IRS's Exempt Organizations Division, reiterated the IRS's position, testifying that:

Merely being present at the scene of a disaster does not establish a need for assistance Money collected even for a specific disaster must be distributed based on a determination by the charity that it is meeting the needs of disaster victims. The charity's funds cannot be distributed among the victims simply on a pro-rata basis because that method is not based on meeting individual victims' needs.²⁶¹

The day after this hearing, the Twin Towers Fund announced that it had begun distributing \$40 million to the families of 400 or so fallen uniformed personnel.²⁶² The Fund acknowledged that it was issuing these checks, which

9/11 families "have either not sought [financial] advice or are receiving it from incompetent or sources"); Michele McPhee & Robert Ingrassia, *One Widow's Struggle With Finances*, N.Y. DAILY NEWS, Dec. 2, 2001, at 7 (discussing difficulties of firefighter's widow who "had to learn how to deal with a lot of money").

259. See, e.g., Barstow & Henriques, *supra* note 248 (many Americans yearned "to reward the indisputable heroism of rescuers who marched into two burning towers"); Barstow & Henriques, *supra* note 219 (the fallen rescuers, declared Mayor Giuliani, deserved everything a generous nation wished to give to honor their heroism and sacrifice).

260. See, e.g., Henriques & Barstow, *supra* note 236 (the attitude of many donors regarding the "heroes fund" for families of slain New York City police officers was that "if it makes [the recipients millionaires], then so be it").

261. *Charities Response to Set [sic] 11: Hearings on Response by Charitable Organization to the Recent Terrorist Attacks Before the Subcommittee on Oversight of the House Committee on Ways and Means* (Nov. 8, 2001) [hereinafter *Charities Response*] (statement of Steven Miller, Director, Exempt Organizations, Tax Exempt/Government Entities Division), reprinted in 2001 TAX NOTES TODAY 218-34 (Nov. 9, 2001).

262. Henriques & Barstow, *supra* note 236.

averaged \$114,000, without assessing the recipients' needs on a case-by-case basis.²⁶³ These disbursements, city officials stated, "honor[ed] the wishes of millions of donors to reward the heroic sacrifices of so many families."²⁶⁴

In the end, the IRS's efforts to get DROs to assess victim need before disbursing and proved to be politically unsustainable.²⁶⁵ Critics accused the IRS of stopping up the pipeline of assistance from generous Americans to attack victims.²⁶⁶ This of course was not the issue: donors always had the option of making non-deductible contributions to non-exempt private trusts.²⁶⁷ The issue was whether donors could donate tax-deductible dollars to tax-exempt organizations that did not screen financial aid applicants for financial need. Critics such as *The Wall Street Journal* editorial board answered "yes" and claimed to speak for most Americans.

The IRS's philanthropy czars insisted that charities could not give money to people "merely because they are victims of a disaster" such as September 11 . . . "An affected individual generally is not entitled to charitable funds without a showing of need," the IRS's Steven Miller recently told Congress. And merely losing a lifetime partner and breadwinner doesn't qualify as enough of a "need" in IRS World.

Mr. Giuliani [creator of the Twin Towers Fund], and we dare say most Americans, evidently believe otherwise. They think Americans ought to be able to help other Americans without first making them beg

The widow of a Cantor Fitzgerald bond trader living in a \$450,000 house in the New Jersey suburbs may look wealthy. But with three kids, a huge mortgage and the family breadwinner buried in the rubble of the Twin Towers, those children had better be good athletes or they won't be going to college.²⁶⁸

A week after the hearings, the Senate unanimously added an amendment to a

263. *Id.*

264. *Id.*

265. Lee A. Sheppard, *News Analysis—Was the IRS Reversal on Charity Necessary?*, 93 TAX NOTES 1138, 1142 (Nov. 26, 2001) ("The general interest press, egged on by elected officials, loves to portray the IRS as ogres. Unfortunately, sometimes the IRS inadvertently assists them in that portrayal. November 8 was one of those days.") *Id.* at 1138.

266. *See, e.g.*, Henninger, *supra* note 3, at A12 ("None of the 9/11 charities wants to get into trouble, so the money sits until some fat bureaucrat sings").

267. Steven Miller made this point during his congressional testimony: "If members of the public want to help particular individuals, they can simply give the money directly to the victims or through an organization that is not a qualified charity." *Charities Response, supra* note 261 (prepared testimony of Steven Miller, Director, Exempt Organizations, Tax Exempt/Government Entities Division).

268. *Review & Outlook: Charity Case*, WALL ST. J., Nov. 19, 2001, at A20, available at 2001 WL-WSJ 29678257.

pending bill that would enable charities to make larger, faster, and need-blind payments to 9/11 victims.²⁶⁹ This amendment provided that:

payments made by a [501(c)(3)-exempt] organization . . . by reason of the death, injury, wounding, or illness of an individual incurred as the result of the [9/11] terrorist attacks . . . shall be treated as related to the purpose or function constituting the basis for such organization's exemption . . . if such payments are made *in good faith using a reasonable objective formula which is consistently applied*.²⁷⁰

Stung by bad publicity and anticipating a legislative "veto," the IRS abandoned its position and followed the Senate's lead. On November 16, 2001, the Service announced that such payments would be presumed charitable so long as they were "made in good faith using objective standards."²⁷¹ Having been fingered as the logjam in private relief operations, the IRS changed its policy because, as Steven Miller explained, it "didn't want to get in the middle between the beneficiaries and the charities."²⁷²

C. Congress Breaks the Logjam

In December 2001, Congress enacted the Victims of Terrorism Tax Relief Act of 2001 (the "Act").²⁷³ Section 104 of the Act provides that payments by 501(c)(3) organizations related to a person's "death, injury, wounding, or illness" in the 9/11 attacks are deemed to serve a 501(c)(3) exempt purpose if made "in good faith using a reasonable and objective formula which is consistently applied."²⁷⁴ This standard synthesizes the Senate and IRS antecedents and adds a "reasonableness" requirement. Section 104's most important effect says the committee report that accompanied it was to release 501(c)(3) entities from the requirement "to make a specific assessment of [the recipient's] need" before disbursing funds to attack survivors.²⁷⁵ The charitable conduit between donors and 9/11 victims would henceforth be unhindered by charity law's traditional

269. Victims of Terrorism Relief Act of 2001, 147 CONG. REC. S11,991-11,994 (Nov. 16, 2001) (remarks of Sen. Baucus).

270. Victims of Terrorism Relief Act of 2001, Pub. L. No. 107-134, § 104, 115 Stat. 2427, 2431 (codified at 26 U.S.C. § 501 (2002)).

271. See, e.g., Notice 2001-78; 2001-50 I.R.B. 1 (Nov. 16, 2001), *reprinted in* 2001 TAX NOTES TODAY 223-6 (Nov. 19, 2001) ("Several charities have raised questions about the practical application of existing legal standards for distributing funds to victims of the September 11, 2001 terrorist attacks").

272. Sheppard, *supra* note 265.

273. Pub. L. No. 107-134, § 104, 115 Stat. 2427, 2431 (codified at 26 U.S.C. § 501 (2002)).

274. 26 U.S.C. § 104(a) (2000) (emphasis added). The exemption also applies to payments made in connection to "an attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002." *Id.*

275. JOINT COMMITTEE ON TAXATION, 107TH CONGRESS, TECHNICAL EXPLANATION OF THE "VICTIMS OF TERRORISM TAX RELIEF ACT OF 2001 (Comm. Print 2001).

requirements.

The report of the Joint Committee on Taxation (“Committee”) expressly endorses the two methods for distributing aid proposed after 9/11. Under the first approach, a DRO can divide the money it raises by the number of relevant decedents and give each decedent’s family the same amount.²⁷⁶ This approach results in smaller per capita awards (i.e., payment per family member) for larger families. Alternatively, a charity can give each decedent’s family an amount based on the number of members or dependents.²⁷⁷ This results in equal payments for every family member irrespective of family size.

Both approaches yield arithmetically equal gifts to both rich and poor applicants alike in similarly constituted families. Other facially “objective” approaches can result in larger gifts to families that lost higher income earners. An “objective formula [which is consistently applied],” one commentator observed, “could encompass many things, like pre-existing living expenses.”²⁷⁸ Using the family’s pre-9/11 income or living standard as its lodestar, a charity might:

award aid based on the notion that those who have more get more. To say “the family that earns \$300,000 a year should get 10 times as much as the family that earns \$30,000 a year”—that would be objective in the sense that if you earn a lot of money then your expenses are high and therefore you should get proportionately more help.²⁷⁹

The Committee report initially seems to disapprove of this result, stating that:

It would not be appropriate for a charity to make pro-rata payments based on the recipients’ living expenses before September 11 if the result generally is to provide significantly greater assistance to persons in a better position to provide for themselves than to persons with fewer financial resources. Although such a distribution might be based on objective criteria, it would not, under the statutory standard, be a reasonable formula for distributing assistance in an equitable manner.²⁸⁰

Note that the report does not categorically reject distributions tied to a victim’s

276. “A charitable organization that assists families of firefighters killed in the line of duty could make a *pro-rata* distribution to the families of firefighters killed in the attacks.” *Id.* (emphasis added).

277. *Id.* (“If the amount of a distribution is based on the *number of dependents* of a charitable class of persons killed in the attacks and this standard is applied consistently among distributions, the specific needs of each recipient do not have to be taken into account”) (emphasis added). See also *Disaster Relief* (final text), *supra* note 126, at 12. “Even though payments vary between families, because the formula is based on the number of family members, the method is considered . . . objective.”

278. Sheppard, *supra* note 265.

279. Elizabeth Schwinn, *Easing of IRS Policy Lets Relief Groups Disburse Funds Regardless of Need*, CHRON. PHILANTHROPY 30 (Nov. 29, 2001).

280. JOINT COMMITTEE ON TAXATION, *supra* note 275.

pre-9/11 living expenses. Rather, it frowns upon a mechanical approach that ignores collateral sources available to victims. The widow living in the \$450,000 home should not *necessarily* receive ten times more than the widow living in the \$45,000 mobile home, as she may have more post-9/11 financial resources to draw upon in terms of savings, real and personal property, life insurance payouts, pensions, etc.

Yet the report next discusses cases where it would be appropriate for charities to give more aid to families with higher pre-9/11 expenses:

[P]ayments to permit a surviving spouse with young children to remain at home with the children rather than being forced to enter the workplace seem to be appropriate to maintain the psychological well being of the entire family. Similarly, assistance with elementary and secondary school tuition to permit a child to remain in the same educational environment seems to be appropriate, as does assistance needed for higher education. Assistance with rent or mortgage payments for the family's principal residence or car loans also seems to be appropriate to forestall losses of a home or transportation that would cause additional trauma to families already suffering.²⁸¹

In distributing aid to two families with no collateral resources, a charity can sometimes distribute more to the family whose standard of living was based on, say, a \$300,000-a-year earner ("Family A") than a \$30,000-a-year salary earner ("Family B"), when such payments shield Family A from the added stress of adjusting to a lower standard of living. This adjustment might entail such things as selling the \$450,000 house, moving to smaller quarters and transferring the children from a private school to a public school. This result is fair insofar as Family A is more vulnerable than Family B to the stress of *déclassément*: having lived at a higher level, it has farther to fall. It is unclear whether disparate payments may be maintained indefinitely, or for a limited time only in order to ease Family A's descent to a lower standard.

Lastly, is there an upper limit to how much DROs can pay to any given family under the Act, so long as the amount is determined using an objective and consistent formula? A charity complies with the Act, the IRS has advised, if it "is using objective distribution criteria that take into account all pertinent circumstances, *including the size of the amounts distributed*, to avoid impermissible private benefit."²⁸² The IRS appears to locate this spending ceiling in the Act's requirement that 9/11 distributions be "reasonable," which the IRS connects to the private benefit doctrine. That doctrine, as Judge Posner has

281. *Id.* at 12. See also Scott, *supra* note 243 (widow explaining that "it's important that we keep our home because [my deceased husband] loved this home very much. This was his dream home, and he did a lot of work here himself. He had his heart and soul in here. This is the place that makes us feel safe. And I feel like, if I leave here, I'll be leaving part of him.").

282. *Disaster Relief* (final text), *supra* note 126, at 7 (emphasis added). The IRS has stated that it interprets good faith under the Act to mean that "the charity is applying its best efforts to accomplish its charitable purpose." *Id.*

suggested, is a “route for using tax law to deal with the problem of improvident or extravagant expenditures by a charitable organization that do not, however, inure to the benefit of insiders.”²⁸³ Although the IRS has essentially declared that payments to 9/11 families cannot be extravagant, it does not appear to have enforced this principle. Given the IRS’s earlier experience in attempting to curtail the liberality of 9/11 relief, one suspects that it will not try.

D. How 9/11 Charities Distributed Financial Aid

Section 104 of the Victims of Terrorism Tax Relief Act released DROs from the duty to assess need before distributing long-term financial aid to 9/11 victims. How did charities exercise this freedom?

1. *Equal Shares Per Decedent.*—The fourth-largest 9/11 charity, the New York Firefighters 9-11 Disaster Relief Fund, elected to distribute an equal share of the total funds it collected to the named beneficiary or families of each of the 347 firefighters and EMS personnel killed at the World Trade Center.²⁸⁴ It has distributed at least \$418,000 for each decedent.²⁸⁵ The firefighters’ widows reportedly wanted equal shares in order to minimize the potential for conflict among them.²⁸⁶ The union that operates the fund, the International Association of Fire Fighters (IAFF)²⁸⁷, preferred an equal division in order to reduce its administrative costs.²⁸⁸ The simplicity of this approach enabled the to union distribute 92% of the donated sums to survivors within nine months of the attacks.²⁸⁹

2. *Payment Per Family Member.*—The third-largest 9/11 charity, the Twin Towers Fund, has made payments based on the make-up of the fallen officer’s family: \$290,000 for each surviving spouse; \$186,650 for the next of kin where there is no surviving spouse; \$107,000 for each child twenty-three or younger; and \$44,150 for each child twenty-four or older.²⁹⁰ Compared to the equal shares

283. *United Cancer Council v. Comm’r*, 165 F.3d 1173, 1179 (7th Cir. 1999) (dictum).

284. Burke Telephone Interview, *supra* note 223. By “named beneficiary,” I mean the person whom the firefighter named as the payable-on-death beneficiary of his retirement and other FDNY benefits. This was typically the surviving spouse, children, parents, or siblings, in that order. *Id.*

285. Seessel, *supra* note 14.

286. Burke Telephone Interview, *supra* note 223.

287. The IAFF represents 245,000 professional firefighters and paramedics who serve 80% of the nation’s population. Greenwood hearing, *supra* note 2, at 75.

288. Burke Telephone Interview, *supra* note 223 (stating “We are a union. We are not prepared to do a needs-based process”).

289. *See* Editorial, *supra* note 246 (complaining that more than one-third of the monies collected by the top eleven 9/11 charities had not yet been distributed, and that “[other 9/11 charities] could learn from the [IAFF] fund”).

290. Current as of December 20, 2002. *See* Press Release, *supra* note 246; Press Release, The Twin Towers Fund, Twin Towers Fund Announces Third Round of Distributions: \$103 Million to 9/11 Family Victims (June 6, 2002), at <http://www.twintowersfund.org/News.html>; Press Release, The Twin Towers Fund, Twin Towers Fund Announces Third Round of Distributions:

approach, this scheme more likely reflects each family's relative financial needs, all things being equal.²⁹¹ Younger children receive 2.4 times more than older children because they presumably depended more heavily on the decedent for support. The New York State World Trade Center Relief Fund makes this connection explicit. It provides \$7500 for every decedent's child age twenty-one or younger.²⁹² A child over age twenty-one can receive this sum only if the decedent was the source of at least 50% of his or her financial support.²⁹³

3. *Living Expenses.*—The Salvation Army undertook to pay the household bills of survivors, displaced residents, and unemployed workers.²⁹⁴ Under its guidelines, the Army paid up to \$2000 a month in rent or mortgage and up to \$750 for all other household bills (e.g., utilities, phone, insurance premiums, moving costs, minimum payment on a credit card).²⁹⁵ For displaced residents, it paid up to \$4000 of their moving costs.²⁹⁶ Such assistance was ostensibly distributed “on a need basis,”²⁹⁷ as determined by an Army caseworker. In practice, the Army generally deferred to the applicant's own assessment of his or her needs, and routinely exceeded its guidelines.²⁹⁸ In either case, the Army's scheme provided more financial assistance to people with more expensive residences (i.e., with higher pre-9/11 standards of living), but only up to a cap.

4. *Financial Need Assessed on a Case-by-Case Basis.*—Although the Act permits 9/11 charities to ignore financial need, they are not obliged to do so.²⁹⁹

Additional \$38 Million to 9/11 Family Victims (Dec. 20, 2002), at <http://www.twintowersfund.org/News.html>.

291. See, e.g., Karl Marx, *Critique of the Gotha Program*, THE MARX-ENGLES READER 530-31 (Robert C. Tucker ed., 2d. ed. 1978) (criticizing the notion of distributing to each worker an equal share of the social consumption fund on grounds that, *inter alia*, “one worker is married, another not; one has more children than another,” so that equal shares mean that “one will in fact receive more than another, one will be richer than another”).

292. Press Release, New York State Office of the Governor, Governor Pataki: Governor Announces Release of \$20 Million in WTC Relief Funds (Aug. 20, 2002), at http://www.state.ny.us/governor/press/year02/Aug20_1_02.htm.

293. *Id.*

294. Approximately 15,000 families took advantage of this offer. Chaka Ferguson, *Salvation Army Has Trouble Paying Bills for Those Affected by Sept. 11*, Associated Press State & Local Wire (Jan. 5, 2002).

295. E-mail Interview with Alfred J. Peck, Director, Social Services for Families and Adults, Salvation Army (Mar. 21, 2002) [hereinafter Peck E-mail Interview] (on file with author).

296. Press Release, Salvation Army, A Community of Unity—Salvation Army Helps WTC Victims Get Back on Their Feet (Nov. 7, 2001).

297. Peck E-mail Interview, *supra* note 295.

298. *Id.* (“Need was determined by the person asking for help.”).

299. See *Disaster Relief* (advanced text), *supra* note 86, at 8 (“Those charities providing assistance to September 11 . . . victims may use the special rule that allows for formula-based distributions without a specific need assessment. However, they do not have to use this rule when making payments. Charities can still make an assessment of need when making payments to victims, recognizing their unique circumstances.”).

One of the largest such entities, the Families of Freedom Scholarship Fund (“Scholarship Fund”), has elected to distribute aid the traditional way. The Scholarship Fund was created to provide tuition assistance to “financially needy dependants” of those killed on 9/11 or injured in the attacks and subsequent rescue and recovery operations.³⁰⁰

The Scholarship Fund, which has raised \$105 million, is a separate fund operated by the Citizens’ Scholarship Foundation of America (CSFA), a prominent general educational charity.³⁰¹ Given the prodigious sums raised, combined with the generous compensation and charity for 9/11 victims from other sources, one wonders how many needy applicants the organization will ultimately be able to identify.³⁰² Unlike other 9/11 charities, however, CSFA prepared for the possibility of insufficient or extinguished need at the outset. The Scholarship Fund’s founding instrument states that:

The [CSFA’s] Board of Directors . . . may *redirect any excess assets* of the Fund to support other postsecondary education scholarship programs of [CFSA], on the good faith determination of at least two-thirds of the directors that the needs of the [9/11] victims’ dependents have been met, or can with reasonable certainty be met with less than all of the assets of the Fund. In any event, any assets remaining in the Fund as of December 31, 2030, may be used by [CFSA] to support other postsecondary education scholarship programs³⁰³

The Scholarship Fund’s declaration is a model of foresight and forthrightness. It plans for a possible surplus and how to declare and redeploy it. It also puts an outer limit on “deadhand” control by lifting the 9/11 restriction twenty-nine years, at which point the balance becomes part of CSFA’s general program.³⁰⁴

300. Citizen’s Scholarship Foundation of America, Inc., Families of Freedom Scholarship Fund Overview, at <http://www.familiesoffreedom.org/overview.php3> (last visited Aug. 22, 2002). There are approximately 4750 children under the age of twenty-three and about 1820 spouses are eligible to apply for these scholarships. E-mail from Barbara Arnold, Vice President, Public Affairs & Communications, Citizens’ Scholarship Foundation of America (July 17, 2002) (on file with author) (citing latest data available as estimated by Stanton Group, a national actuarial firm).

301. Press Release, Citizens’ Scholarship Foundation of America, Families of Freedom Scholarship Fund Reaches Goal of \$100 Million (Sept. 4, 2002), at <http://www.csfa.org/pages/cs4ne.htm> (last visited Sept. 5, 2002). CSFA founded the Scholarship Fund in partnership with Indianapolis-based Lumina Foundation for Education. *Id.*

302. On September 4, 2002, CSFA announced that its scholarship awards for 2002 ranged from \$1000 per academic year for “students with little or no financial need” to \$28,000 for those “with greater need,” with an average award of approximately \$13,100. *Id.*

303. Families of Freedom Scholarship Fund®, *Families of Freedom FAQ*, at <http://www.familiesoffreedom.com/faq.php3> (last visited Aug. 22, 2002).

304. *Id.* For another example of a fund making express provision for a possible surplus up front, see the fund discussed in note 181.

E. Responding to and Preventing Oversubscription

By any reasonable account, some 9/11-specific DROs raised more money than required to meet their intended beneficiaries' basic needs. This precipitated a crisis when many donors—as well as victims, media commentators, and members of Congress—demanded that charities disburse everything raised, “surplus” and all, to the victims, charity law and policy notwithstanding. Congress ultimately resolved this predicament by permitting charities to “reason not the need,”³⁰⁵ so to speak, in distributing aid to 9/11 victims. What would have happened had Congress not intervened? How might this surplus situation have been avoided in the first place?

Because the largest 9/11-specific charities were 501(c)(3) entities, they could not have been formally recast as private trusts for the victims, as occurred in the Penlee Lifeboat Disaster Fund.³⁰⁶ In the absence of special legislation, 9/11-specific charities could have disposed of any surpluses by: (a) spending the balance on providing in-kind services such as mental health; (b) holding funds in reserve, to be distributed in the future as needed; (c) asking a court for instructions. If the court determines that *cy pres* applied, the surplus could be redeployed to other charitable purposes. If not, then such funds would be returned to donors insofar as they could be identified. (d) General DROs had another option—to unilaterally apply the surplus to other disaster relief operations—except for gifts whose donors expressly provided for an alternate disposition of any surplus.³⁰⁷

As for the first two options, most 9/11 victims undoubtedly preferred over in-kind services and to receive it sooner rather than later.³⁰⁸ With cash, they could procure precisely the goods and services they believed most likely to maximize their well being. Donors, motivated by unalloyed altruism, presumably wanted the same thing. One finds indirect support for this proposition from the fact that charities providing a great deal of in-kind services such as mental health care have felt more pressure than mainly cash-disbursing charities to justify this approach to their donors.³⁰⁹ September 11 charities that made immediate payouts were also able to wind up their affairs more quickly and with less overhead.³¹⁰

305. WILLIAM SHAKESPEARE, *KING LEAR* act 2, sc. 4.

O reason not the need. Our basest beggars

Are in the poorest thing superfluous.

Allow not nature more than nature needs,

Man's life is cheap as beast's

306. See *supra* note 217 and accompanying text.

307. See *supra* notes 174-76 and accompanying text.

308. See, e.g., Stephanie Saul, *Dispute Over Twin Towers Fund*, *NEWSDAY* (New York), Feb. 22, 2002, at A19 (firefighter union official opposed Rudolf Giuliani's plan to set up Twin Towers Fund with a staff of nearly a dozen and an annual administrative budget of up to \$2.25 million: “If you have \$100 million, divide it among the 400 families, pay it out, and we're done.”).

309. Strom, *supra* note 193.

310. See, e.g., Saul, *supra* note 308.

As for *cy pres*, there is no guarantee that a court would apply the doctrine, and good reason to think that it would not. The key issue is whether donors to 9/11-specific DROs preferred (or would have preferred had they thought about it) to reclaim any balance once the victims' basic needs were met, or to let these sums be redeployed to a related charitable purpose selected or approved by a court. If the donors' sole charitable purpose was to help 9/11 victims and only them, then a resulting trust of their share of the surplus should be created in their favor.

Several factors argue against applying *cy pres* here. Donors had the option of contributing either to charities formed solely to help 9/11 victims (what I have been calling 9/11-specific DROs or charities) or to general DROs that engaged in 9/11 relief as part of a wider menu of activities. Almost no 9/11-specific charity publicly discussed the possibility of raising too much money or announced a plan for disposing of any surplus. This suggests that those who gave to 9/11-specific charities *knew precisely whom* they wanted to help. Also arguing against *cy pres* is the fact that most gifts were donated either after or shortly before the advent of surplus. When a charity's purpose fails many years after it was founded ("supervening" failure), courts will more readily infer a "general charitable intent" than when the trust fails at or soon after the outset ("initial failure"). In cases of supervening failure, says the Second Restatement:

The court can fairly infer an expectation on the part of the settlor that in course of time circumstances might so change that the particular purpose could no longer be carried out, and that in such a case the settlor would prefer a modification of his scheme rather than that the charitable trust should fail and the property be distributed among his heirs who might be very numerous and only remotely related to him.³¹¹

This presumption does not apply as strongly, if at all, to those who gave to 9/11-specific charities that "failed" soon after their creation, insofar as they raised legally-excessive funds. Most such donors likely expected the charities to wrap up their work quickly and simply did not expect their gifts to be used for anything else. Lastly, because most donors to 9/11 charities are still alive, they have an option unavailable to donors whose gifts fail or yield a surplus after they die: to personally decide with full information how to spend any dollars returned to them, including the ability to spend on their personal consumption. The typical 9/11 donor would thus find the alternative to *cy pres*—a resulting trust in her favor—far more attractive than the deceased settlor.

How might the surplus predicament have been prevented? Hindsight is of course 20-20. In the immediate aftermath of the attacks, many people overestimated the number of fatalities, the attack's harm to the economy, and the imminence of additional attacks. It was also not known how much assistance the government would provide. The donors' desire to give generously under these circumstances is understandable. In accepting these donations, however, the managers of 501(c)(3) charities were obliged to consider the possibility of

311. RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. i (1959).

surplus.³¹² To avoid any misunderstanding, DROs can advise donors about the legal parameters on distributing aid, and the rules for disposing of surplus.³¹³ Armed with such information, donors can declare up front what should happen to any surplus—thereby reducing the likelihood of many headaches at the back end.

When the surpluses occurred, 9/11-specific charities could have done one of two things: (1) advise would-be donors that any additional donations would be used for other (i.e., non-9/11) charitable purposes;³¹⁴ or (2) flatly refuse to accept additional donations. No charity seems to have tried the first option. The September 11th Fund was the earliest and most prominent agency to take the second route. On January 16, 2002, it announced that it was no longer accepting donations; at that point, it had already collected \$425 million.³¹⁵ The Fund's managers, it was explained, "believe that current resources, when combined with those of the American Red Cross or other charities and of local, state and federal government, are appropriate to accomplish its goals."³¹⁶ Would-be donors were asked to redirect their contributions to other charities and causes.³¹⁷ This approach had the advantage of possibly saving the Fund the time, expense, and animosity of instituting a *cy pres* proceeding to achieve the same result.

It was not enough to simply stop soliciting potential donors for contributions, or even to ask people and institutions to stop contributing. The Red Cross pursued this first route with little success. On October 30, 2001, the agency announced that it was ceasing active solicitation" of funds for its 9/11-related

312. In order to qualify for 501(c)(3) status, an organization must have a plan for distributing its assets to another charity or public agency for an exempt purpose. 26 C.F.R. § 1.501(c)(3)-1(b)(4); CPE 1999 at 226 (disaster-specific DROs "should have a plan for distribution of excess funds at the termination of the organization's existence in a manner consistent with the dissolution requirements under IRC 501(c)(3)").

313. As a model, they could have used the Penlee Lifeboat Disaster Fund's second press release, which advised donors that "the amount of income which the trustees could legally distribute to the bereaved was limited to their reasonable needs and that any surplus income would have to be applied for other charitable purposes." Picarda, *supra* note 202, at 35.

314. In their second press release, the Penlee Lifeboat Disaster Fund's trustees stated that they were "willing and able to continue to receive donations but stressed that, although these donations would be used for related charitable purposes, the law of charitable trusts 'does not permit an unlimited distribution to the dependents of the lifeboatmen who were lost.'" *Id.*

315. The Fund has continued to accept royalties from sales of *America: A Tribute to Heroes*, a CD featuring songs from the eponymous telethon broadcast on September 21, 2001, and contributions from fundraisers approved prior to January 16, 2002. Telephone Interview with Cristina Slattery, Program and Communications Associate, September 11th Fund (Oct. 22, 2002). One year later, the telethon and associated royalties had raised \$128 million. THE SEPTEMBER 11TH FUND: ONE YEAR LATER, at http://www.september11fund.org/one_year_report.pdf.

316. Press Release, September 11th Fund, Americans Asked to Stop Sending Donations to the September 11th Fund (Jan. 16, 2002), at <http://www.september11fund.org> (last visited Feb. 12, 2003).

317. *Id.*

Liberty Fund.³¹⁸ At that point, it had already raised \$547 million in pledges.³¹⁹ Over the next ten months, however, the Liberty Fund received at least another \$453 million. The Red Cross is currently pursuing the second route: it still accepts donations specifically for 9/11 relief, but only after attempting and failing to dissuade the donor from restricting his gift for that purpose only.³²⁰

Some 9/11-specific DROs actively sought additional gifts throughout. As of November 9, 2001, for example, the Twin Towers Fund had raised \$85 million—approximately \$194,000 for each fallen rescuer's family.³²¹ If the managers knew that sufficient funds had been raised to meet the organization's charitable goals, then they should also have known that the surplus gifts could not be distributed to the families.³²² Assuming *cy pres* did not apply, these gifts would have to be fully refunded to the donors.³²³ By continuing to solicit and accept gifts under these circumstances, the managers were potentially wasting people's time.

Had the IRS policy not changed, the Twin Towers Fund and similarly-situated entities might have forfeited their 501(c)(3) exempt status and lost their donors a charitable deduction. Yet change it did. The sums donated for 9/11 relief were so massive that public authorities felt compelled to unhinge the parameters of charity law in order to let them pass through.

III. MUST WE GIVE IT ALL, AND WHY?: THE PREDICAMENT OF OVERSUBSCRIBED GENERAL CHARITIES ENGAGED IN 9/11 RELIEF

The majority of money donated after 9/11 did not go to new organizations formed solely to assist victims of the attacks. It went instead to pre-existing multi-purpose charities that provided 9/11 relief as part of a range of activities, a.k.a. "general DROs." Such entities included the American Red Cross and two "widows' and children's funds" for the families of uniformed personnel killed in the line of duty. This section examines the controversies that arose over how these three agencies handled contributions. As a foil, it looks at the hassle-free experience of the New York City Police Foundation, which collected funds for the 9/11 police officers' families.

The three agencies' experiences follow a similar pattern up to a point. Like

318. Press Release, American Red Cross, American Red Cross Names Harold Decker Interim CEO: Active Solicitation for Liberty Fund to End This Week; Board Affirms Magen David Adom Policy (Oct. 30, 2001) [hereinafter American Red Cross, American Red Cross Names Decker], available at www.redcross.org/press/other/ot_pr/011030decker.html.

319. *Id.*

320. Telephone Interview with Phil Zepeda, Senior Director, Media Relations, American Red Cross National Headquarters (July 16, 2002).

321. Henriques & Barstow, *supra* note 236. The Twin Towers Fund would ultimately aid 438 families. Press Release, Twin Towers Fund, Fund's Support of the Uniformed Heroes Now Tops \$193 Million (Dec. 20, 2002), available at http://www.twintowersfund.org/news_1220_02.html.

322. Recall that this was before the IRS changed its policy and Congress changed the law.

323. RESTATEMENT (SECOND) OF TRUSTS § 432 cmt. d (1959).

many 9/11-specific charities, they were criticized for disbursing money too slowly. Yet, the allegations against them went beyond sloth or incompetence; it included deception, disloyalty, and bad faith. When the agencies proposed to use some post-9/11 donations to help victims of other calamities (and sometimes for other purposes), critics accused them of misleading donors and misusing gifts. In each case, the agency was motivated in whole or in part by an organizational commitment to treat the victims of different calamities even-handedly.

As shown below, the legal cases that these charities misled donors or thwarted their intent is less than airtight; none of these agencies unequivocally promised to use everything raised after the attacks for 9/11 relief, and most donors did not expressly restrict their gifts for that purpose. What is more clear, by contrast, is that some of these charities' gifts to 9/11 victims violated the state common law prohibition against private benefit. Interestingly, each charity's conduct inspired a different amount of criticism, and each charity responded to its critics in a different way. After discussing each case, I consider some reasons for these variations.

A. *The American Red Cross and the Liberty Fund*

The American Red Cross ("ARC") is the nation's oldest and foremost disaster relief organization. It responds to almost 64,000 incidents a year; some are large scale, high-profile disasters, but most are residential fires.³²⁴ The charitable response to September 11 reconfirmed the Red Cross' preeminent role in disaster relief. A plurality of Americans—around 40%—used the agency "to channel their compassion" for victims of 9/11.³²⁵ It raised more money than any other charity engaged in 9/11 relief—over \$1 billion, as compared to the \$1.4 billion collectively raised by the next thirty-three largest charities.³²⁶ The Red Cross also endured the harshest censure for its handling of donated dollars, and suffered the most serious loss in public confidence.³²⁷

The agency's troubles stemmed from its decision to create a separate, stand-

324. Volunteer Services, at <http://www.redcross.org/services/volunteer/> (last visited Sept. 12, 2002).

325. Harold Decker, Some Straight Talk about Nonprofit Accountability: Talk at the June 20th, 2002 Charities Review Council Annual Forum, available at <http://www.crcmn.org/donorinfo/deckerspeech.htm> (last visited Oct. 15, 2002).

326. MSNBC.com, *An Instinctive Outpouring*, <http://www.msnbc.com/news/806336.asp> (Sept. 10, 2002).

327. In a survey of 1005 national adults conducted from April 5 to April 7, 2002, 23% of respondents said that news stories about "leaders of charities like the Red Cross mishandling donations after September 11" was one of the top one or two stories that "most undermined [their] confidence in the institution involved." This compares to 38% who were disillusioned by stories about "religious leaders like those in the Catholic Church who did not dismiss priests who abused children," and 33% by "leaders of corporations like Enron representing earnings to boost their stock prices." Hart & Teeter Research Cos., sponsored by NBC News & Wall Street Journal (Apr. 16, 2002) (available on LexisNexis).

alone fund for the donations received after 9/11, instead of depositing these into the unrestricted general fund it uses to finance all other disaster relief operations. Although created a week or so after the attacks, this new and separate fund was organized to do more than simply aid 9/11 victims; it was also supposed to help the agency prepare for and respond to future terrorist attacks. Unfortunately for the agency, information about the Fund's broader purposes was not widely publicized or reported until a month or so after September 11, 2001. By then, many people—including donors, victims, pundits, politicians and members of the public—had assumed that the fund was exclusively for 9/11 relief. The Red Cross ultimately bowed to pressure to use the fund only for that purpose, although this meant compromising its commitment to inter-disaster equity and resulted in some gifts that likely constituted private benefit under state common law principles. To avoid similar incidents in the future, the agency has implemented a new program designed to educate donors and clarify their intentions.

1. *The Organization's Mandate and Pre-9/11 Practices.*—The Red Cross was founded in 1881 by Clara Barton (1821-1912), a free-lance nurse who organized battlefield relief during the Civil War.³²⁸ In 1905, Congress officially tasked it with “carry[ing] out a system of national . . . relief in time of peace, and . . . apply[ing] that system in mitigating the suffering caused by pestilence, famine, fire, floods, and other great national calamities.”³²⁹ The agency also maintains a blood bank, which provides half of the nation's blood supply and facilitates communication between members of the U.S. Armed Forces and their families, among other activities.

The Red Cross allocates disaster relief according to need,³³⁰ a distributive principle which dictates that “needed goods” are “distributed to needy people in proportion to their neediness”³³¹ The agency also aims to respond to different disasters “in a uniform fashion using nationwide standards.”³³² Stated differently, it seeks to help similarly distressed victims of different calamities in an even-handed manner.³³³ This approach recalls Ronald Dworkin's account of

328. ROBERT H. BREMNER, *AMERICAN PHILANTHROPY* 78 (Daniel J. Boorstin ed., The Univ. of Chicago Press 1966) (1960). For its first twenty-four years, the entity was a wholly private organization. *Id.*

329. 36 U.S.C. §§ 300101, 300102 (2000).

330. *Victims v. Funds*, 715 F. Supp. 178, 180-181 (W.D. Tex. 1989) (American Red Cross' “services are provided according to need”).

331. MICHAEL WALZER, *SPHERES OF JUSTICE* 26 (1983).

332. *Business Wire, Red Cross Targets Additional \$4.3 Million for Ongoing Flood Relief*, (June 9, 1998).

333. *See, e.g.*, Greenwood hearing, *supra* note at 2, at 51 (testimony of Dr. Bernadine Healy) (“if we did it for one person [i.e., provide grants to 9/11 families to pay for immediate and short term expenses], we would do it for everybody”); Telephone Interview with Nancy Rutherford, American Red Cross Disaster Relief Associate for Communications and Marketing for Domestic and International Disasters (Mar. 27, 2002) (“If two people were in the exact same family situation and had exactly the same disaster-related needs, then we'd provide the same amount of assistance

equality as a political ideal, which entails treating all citizens with equal concern and respect.³³⁴ Felicitously, Professor Dworkin uses disaster relief to illustrate how the ideal applies in practice:

Sometimes treating people equally is the only way to treat them as equals; but sometimes not. Suppose a limited amount of emergency relief is available for two equally populous areas injured by floods; treating the citizens of both areas as equals requires giving aid to the more seriously devastated area rather than splitting the available funds equally.³³⁵

The Red Cross finances its relief activities primarily through private fundraising as opposed to government grants. Local chapters are responsible for raising funds to respond to the smaller events that occur in their areas.³³⁶ For large-scale national catastrophes, the Red Cross maintains a multi-Disaster Relief Fund.³³⁷ This Fund operates on a revolving basis: contributions inspired by past disasters help pay for future relief operations.³³⁸ This arrangement enables allows the Red Cross to respond immediately to disasters as they arise, without awaiting a new influx of donations for that particular event. On September 11, 2001, for example, the agency had approximately \$50 million on hand to finance operations.³³⁹

The Disaster Relief Fund also permits the Red Cross to honor its commitment to inter-disaster equity. “[T]he springs of charity feeding public appeals,” it has been observed, “gush or slacken in ways that are little related to the comparative needs of the recipients”³⁴⁰ In the Penlee shipwreck, for example, over £3.5 million was raised for the families of the eight lost lifeboatmen, while apparently nothing was collected for survivors of the eight lost crewmen lifeboatmen were attempting to save. “Most disasters are small and don’t garner the kind of attention that prompts people to contribute,” a Red Cross official recently declared. “*But we believe strongly that to base the scope of our service in any particular disaster to the amount of money raised for that*

to each.”).

334. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 190-91 (Harvard Univ. Press 1985).

335. *Id.* at 190.

336. Letter from Harold J. Decker, American Red Cross Interim Chief Executive Officer, to Senator Charles Grassley 32 (June 14, 2002) [hereinafter Decker Letter], available at http://www.redcross.org/press/disaster/ds_pr/020614grassleyresponse.html.

337. *Id.*

338. See generally Deborah Sontag, *Who Brought Bernadine Healy Down?*, N.Y. TIMES MAGAZINE, Dec. 23, 2001, at 76; Greenwood hearing, *supra* note 2, at 32 (statement of Dr. Bernadine Healy) (“if we have money left over from one hurricane . . . we leave it [in the Fund] and we use it for the next hurricane.”).

339. Greenwood hearing, *supra* note 2, at 33 (testimony of Dr. Bernadine Healy).

340. Editorial, TIMES (London) (Aug. 6, 1982), reprinted in SUDDARDS, *supra* note 202, at 33.

disaster is fundamentally unfair. You could say it's un-American."³⁴¹ Because the Fund's monies are typically unrestricted, they may be allocated among calamities according to the victims' relative need, rather than public sympathy or other factors the agency deems irrelevant. To this end, the Red Cross "uses the high-profile disasters to beef up general [i.e., unrestricted] disaster-relief funds."³⁴² This generates surpluses to spend on lower-profile incidents, such as "the little old lady in Philadelphia who loses her home to fire."³⁴³ This strategy is not a secret; in the past when the Red Cross has solicited for the fund following a major catastrophe, it advised would-be donors that gifts would be used "for this disaster and *similar disasters*."³⁴⁴

Although the Red Cross permits donors to restrict their disaster relief gifts to particular calamities, it discourages them from doing so.³⁴⁵ Even so, the Red Cross can usually honor the terms of disaster-specific gifts *and* respond to different disasters in a uniform way. The sum of gifts restricted to a particular disaster is ordinarily less than what the Red Cross would have spent in the absence of such restrictions. Due to the "fungibility of money," the agency's use of restricted gifts for their earmarked purpose "simply free[s] the organization to use an equivalent amount of its own funds for other purposes."³⁴⁶ On a few occasions before 9/11, however, disaster-specific donations exceeded what agency officials believed was needed to respond to that specific disaster.

After major floods struck Minnesota and North Dakota in the Spring of 1997, the Red Cross collected over \$16 million in donations specifically designated for the floods' victims. After spending more than \$11.7 million on disaster relief, the agency determined that it had "met all known disaster-caused needs in accordance with its disaster relief policies."³⁴⁷ The agency then began receiving inquiries and criticism from Minnesota's attorney general and others about the other \$4.3 million in designated funds. The Red Cross ultimately announced a plan to provide additional "*non-emergency* assistance" to address flood victims' other disaster-related needs, and "to help the region prepare for the next time flood waters threaten lives and property in the area."³⁴⁸ This included disbursements to help individuals and families pay for disaster-related moving costs, flood insurance, and household debts accumulated due to flood-related

341. Decker, *supra* note 325 (emphasis in original).

342. Sontag, *supra* note 338.

343. *Id.*

344. Greenwood hearing, *supra* note 2, at 43.

345. Decker, *supra* note 325.

346. Atkinson, *supra* note 8, at 584.

347. Press Release, American Red Cross, Red Cross Targets an Additional \$4.3 Million for Ongoing Flood Relief 1 (June 9, 1998) [hereinafter American Red Cross, Additional \$4.3 million] (on file with author); Press Release, American Red Cross, Plan for Application of Remaining Designated Funds, 1997 DR-344 and DR-345, Minnesota and Red River Valley Floods 1 (June 5, 1998) [hereinafter American Red Cross, Plan for Application] (on file with author).

348. American Red Cross, Additional \$4.3 million, *supra* note 347, at 1 (emphasis added).

unemployment.³⁴⁹

Critically, the Red Cross did *not* commit to distributing the \$4.3 million among the flood victims on any basis other than need, nor did it commit to spending the entire balance on this particular flood. Rather, the agency promised to pursue its post-disaster plan until its goals were achieved or the money ran out, whichever came first.³⁵⁰ If these goals were achieved without spending the entire \$4.3 million, then the balance would be used to respond to future disasters in the area.³⁵¹ The agency thus never relinquished the authority to declare a surplus and to redeploy it as it thought best.

2. *Liberty Fund: The Concept.*—Immediately following the 9/11 attacks, the Red Cross did what it usually does: it mobilized staff, volunteers and resources to provide “emergency mass care and assistance for individuals with urgent and verified disaster-caused needs.”³⁵² This included providing emergency food, shelter, amenities and counseling to three classes of persons: the families of the dead or missing; people made homeless or stranded by the attacks; and the rescue and recovery workers.³⁵³ Americans, too, responded in a familiar fashion—by contributing money—albeit in unprecedented amounts.

On the day of the attacks, the Red Cross received the largest number of online donations in its history—nearly one per second, bringing in over \$1 million in twelve hours.³⁵⁴ Most people who contributed at this time likely did so based on what they already knew about the Red Cross and its activities, rather than in response to a direct solicitation from the agency.³⁵⁵ Had they examined the various appeals, however, they would have heard inconsistent messages. Some of the Red Cross’ messages contained the standard formulation: donate to the general Disaster Relief Fund in order “to help those affected by this and *other disasters*.”³⁵⁶ Other communications, however, appeared to solicit funds solely

349. American Red Cross, Plan for Application, *supra* note 347, at 2.

350. *Id.* at 3.

351. *Id.* at 2, 3.

352. *Id.* (quoting *Board of Governors Policy Manual*, Part One, Section 2.6.3).

353. See American Red Cross, September 11, 2001: Unprecedented Events, Unprecedented Response—A Review of the American Red Cross’ Response in the Past Year 4 (Sept. 11, 2002) [hereinafter American Red Cross, Unprecedented Events], http://www.redcross.org/press/disaster/ds_pr/pdfs/arcwhitepaper.pdf (last visited Mar. 4, 2003).

354. News Release, American Red Cross, American Public Joins the Red Cross in Unprecedented Relief Efforts Around the Country, http://www.redcross.org/press/disaster/ds_pr/010912relief.html (last visited Sept. 16, 2002) [hereinafter American Red Cross, American Public Joins].

355. See Bjorklund, *supra* note 9, at 31; American Red Cross, Unprecedented Events, *supra* note 353, at 4 (On September 11, 2001, “The Red Cross begins taking *spontaneous* donations to help the victims of the attacks and their families.”) (emphasis added).

356. American Red Cross in Greater New York, American Red Cross Expresses Profound Gratitude as Nearly 7000 Volunteer Time and Resources (Sept. 15, 2001) (emphasis added); see also American Red Cross in Greater New York, New York Red Cross Plans Day Three of Ongoing Response To World Trade Center Tragedy (Sept. 13, 2001) (“[t]o help with this [9/11] and other

for terrorism-related relief. A press release on the national Red Cross' website, for example, invited contributions "[t]o help provide support for people in need following *this* disaster as well as emerging human needs resulting from *this* tragedy."³⁵⁷

The agency clarified its post-9/11 goals on September 20, 2001, when Dr. Bernadine Healy, then Red Cross President and CEO,³⁵⁸ sent a memorandum to all Red Cross units and chapters.³⁵⁹ An abridged version of this memo was posted the same day on the agency's national website.³⁶⁰ These communications announced the creation of a new fund called the "Liberty Disaster Fund" (a.k.a. "Liberty Fund"), that would be separate and segregated from the Disaster Relief Fund. The Liberty Fund, the memo explained, "will support the immediate and emerging efforts of the American Red Cross to alleviate human suffering brought on by the attacks of September 11."³⁶¹ Viewed in isolation, this one-sentence synopsis is ambiguous: Would Liberty Fund dollars be used solely for distress caused by these specific attacks, including distress that had yet to appear or be apprehended? Or did the term "emerging efforts" point to something broader? The rest of the memo clarifies the matter by revealing a broader set of purposes: "the Liberty Fund will support an integrated response that involves virtually all of our lines of service," including responding to attacks involving weapons of mass destruction, collecting more blood and preserving it for longer periods (a.k.a. "strategic blood reserve"), promoting public awareness of the Red Cross' principles (a.k.a. "community outreach"), and expanding services to members of the armed forces.

The Liberty Fund would serve as the Red Cross' bank account for gifts

disasters. . . .") (emphasis added); Better Business Bureau, Wise Giving Alliance report on the American Red Cross (Aug. 2002), at <http://www.give.org/reports/arc.asp> [Better Business Bureau report] (the Red Cross' 1-800 number script and the language used on its online donation site shortly after 9/11 reflected the agency's intent to use donations for other activities as well as for 9/11 relief).

357. American Red Cross, American Public Joins, *supra* note 354 (emphasis added); News Release, American Red Cross, How Americans Can Best Help Red Cross Relief Efforts, at http://www.redcross.org/press/disaster/ds_pr/010918how2help.html (last visited Sept. 16, 2002) [hereinafter American Red Cross, How Americans Can Best Help] (emphasis added); *see also* Better Business Bureau report, *supra* note 356 (quoting two public service announcements (PSAs) the Red Cross used to solicit donations after 9/11 that focused on the agency's 9/11 activities and did not mention of a broader use of such donations).

358. Dr. Healy resigned on October 26, 2001.

359. Memorandum from Dr. Bernadine Healy, to The American Red Cross Family (Sept. 20, 2001) [hereinafter Healy Memo] (on file with author). Dr. Healy created the Liberty Fund without the prior formal approval of the Red Cross' board, but the board later ratified this decision. Greenwood hearing, *supra* note 2, at 33-39 (testimony of Dr. Bernadine Healy).

360. Press Release, American Red Cross, Preserving America's Spirit: The Liberty Disaster Fund, at <http://www.redcross.org/news/ds/0109wtc/libertyfund.html> (last visited Sept. 20, 2002) [hereinafter American Red Cross, Preserving America's Spirit].

361. Healy Memo, *supra* note 359.

received on or after September 11, 2001, including gifts not expressly designated for “the Liberty Fund,” “disaster relief,” or “9/11 relief.” More specifically, all unsolicited contributions made payable simply to “The American Red Cross” from September 11 through September 30, 2001, were placed in the Liberty Fund.³⁶² All gifts for generic disaster relief received between September 11, 2001 and October 31, 2001 were also placed in that account.³⁶³

Dr. Bernadine Healy’s September 20 memo rejected concerns that the Liberty Fund might raise too much money for 9/11 relief (i.e., produce a “surplus” according to the agency’s uniform standards), and that the agency would be unable to use this surplus for other purposes. These fears were unwarranted, the memo replied, because the Liberty Fund was organized for more than just 9/11 relief and thus not restricted to that event.

This is not a “regional” disaster; it is not only about the hideous events that occurred in New York City, Pennsylvania and Pentagon. Rather this is a disaster that affects *our entire nation*, at this time and *as we look ahead*

Some have suggested that we might raise more than we need to respond to this attack on America’s spirit, liberty, and national security and that contributions should be placed in our general disaster fund. I can assure you that we will only raise more money than we need if we do less than we should.³⁶⁴

When she created the Liberty Fund, Dr. Bernadine Healy believed that future terrorist attacks against Americans were imminent,³⁶⁵ and that the United States Government was mobilizing for military action.³⁶⁶ She was summoning the agency to shift into war mode,³⁶⁷ and to do so on a scale “not seen since the world wars.”³⁶⁸ In this respect, the Liberty Fund was a “war fund.”³⁶⁹ Its monies were “restricted” in the sense that they would only be used to support agency activities

362. Better Business Bureau report, *supra* note 356.

363. American Red Cross Donor Contributions Coding Guidance (Oct. 1, 2001) (on file with author). After October 31, 2001, the Red Cross stopped depositing gifts for generic disaster relief in the Liberty Fund; thereafter, such gifts were deposited in the general Disaster Relief Fund. *Id.*

364. Healy Memo, *supra* note 359 (emphasis added).

365. Greenwood hearings, *supra* note 2, at 55; *see also* American Red Cross, Unprecedented Events, *supra* note 353, at 6 (chronology entry for Oct. 12, 2001)

366. Greenwood hearings, *supra* note 2, at 55; American Red Cross, Preserving America’s Spirit, *supra* note 360 (“our work under the Liberty Disaster Fund will [also] be about our Armed Forces Emergency Services efforts on behalf of families and service men and women in the context of military activation and response. We may also be facing possible wartime casualties, and we must have a Red Cross in full support of our military everywhere and in support of our obligations as an auxiliary to the U.S. government under the Geneva Conventions.”).

367. *Id.* at 28.

368. *Id.* at 24.

369. *Id.* at 28 (testimony of Dr. Bernadine Healy).

related to preparing and responding to anti-U.S. terrorist attacks and U.S. military action. The Red Cross retained discretion to allocate the funds among this broad set of activities as it saw fit.³⁷⁰ This understanding is consistent with the agency's use of Liberty Fund dollars to assist anthrax victims, who were also understood as casualties in the new era of terrorism.³⁷¹

Notwithstanding the Liberty Fund's broader mandate, the agency initially channeled the incoming funds towards immediate needs.³⁷² The agency was providing shelter, food, goods and social services either in-kind or through vouchers—its traditional relief activities. In addition, it began making large cash gifts to the seriously injured and to families that lost a breadwinner. This program, called the "Emergency Family Gift Program," was designed to help recipients pay for three months' worth of living expenses.³⁷³ Payments were determined on the basis of family size, rent or mortgage, and other cash flow needs such as tuition, credit card payments, and funeral expenses not otherwise covered.³⁷⁴ This program was a major departure for the Red Cross. "Normally," Dr. Healy explained, "in a hurricane or another typical natural disaster, people's homes get destroyed but their economic well-being is breadwinners. Here their homes are fine, but they lost their breadwinner."³⁷⁵

Although Dr. Healy's announcement of September 20, 2001, pointed to the Liberty Fund's broader purposes, the Red Cross seems to have done relatively little at first to publicize these, and they went virtually unnoticed by the media.³⁷⁶

370. *Id.* at 40-41 (testimony of Dr. Bernadine Healy) (with the general disaster relief fund, "if we have money left over from one hurricane, like Hurricane Floyd, we leave it in that fund and we use it for the next hurricane So, in a way this [the Liberty Fund] is similar thing, except we're limiting it to this extraordinary situation, which is a new kind of war.").

371. *Id.* at 28 (testimony of Dr. Bernadine Healy). Others shared this same perception, including Congress. The Victims of Terrorism Tax Relief Act of 2001 authorized charities to make non-need based payments related to both the 9/11 attacks and attacks involving anthrax occurring on or after September 11, 2001, and before January 1, 2002. Pub. L. No. 107-134, 115 Stat. 2427 (codified as 26 U.S.C. § 501).

372. *Id.* at 31-32 (testimony of Dr. Bernadine Healy) ("There is no question that the immediate response in the highest priority, as it always is, of the American Red Cross is to move in very quickly to assist those in need at ground zero. And we had three ground zeros, in New York, in Pennsylvania and at the [P]entagon.").

373. Yung Kim, *Red Cross Will Aid Families of Victims; American and the World*, THE RECORD (Bergen County, N.J.), Sept. 25, 2001, at A13; Greenwood hearing, *supra* note 2, at 51 (remarks of Dr. Bernadine Healy); Press Release, American Red Cross, Red Cross Estimates \$300 Million Required to Meet Immediate, Near-Term Needs Following September 11th Tragedy (Oct. 12, 2001) [hereinafter American Red Cross, Red Cross Estimates], at http://www.redcross.org/press/disaster/ds_pr/011011nearerterm.html.

374. Greenwood hearing, *supra* note 2, at 51 (remarks of Dr. Bernadine Healy);

375. *Id.*

376. A Lexis search of major newspapers in the two weeks after September 20 reveals only a dozen or so articles making substantive references to the Liberty Fund, most of which imply that the Fund would be used solely for 9/11 relief. *See, e.g.*, Elisa Ung & Patrick May, *As Aid Pours*

The agency also continued to use at least two public service announcements (PSAs) that focused solely on its 9/11 activities.³⁷⁷ On October 12, 2001, the Red Cross announced more detailed plans for spending Liberty Fund monies. This announcement included the first significant reiteration of the fund's broader purposes since September 20, 2001.³⁷⁸ As of October 12, the Liberty Fund contained \$375 million in donations or pledges. Of this, the agency proposed to spend around \$211 million on direct aid to victims and their families.³⁷⁹ The balance of the Liberty Fund was apparently deemed surplus with respect to 9/11 relief. Recalling the principle of inter-disaster equity, the \$211 million figure was later said to "reflect . . . a range of activities that is similar, though larger in scale, to what [the agency] normally does in response to disasters."³⁸⁰ Also on October 12, the agency announced its plans to spend funds on various programs

in, Charities Struggle with Distribution, HOUSTON CHRON., Sept. 27, 2001, at A4 ("the American Red Cross has set up the so-called Liberty Fund to hold the \$202 million in donations it has received since Sept. 11. The money in the Liberty Fund will be used strictly for immediate and future needs relating to the attacks, said spokeswoman Amanda Land."); Jon Yates, *Look Before Leaping to Give, Experts Say*, CHI. TRIB., Oct. 5, 2001, at 1 ("Red Cross officials have committed to spending all of the money they have received since Sept. 11—\$277 million through Wednesday—on efforts specifically related to the terrorist attacks."); Amy Sacks, *Donations Haven't Tapered Off*, N.Y. DAILY NEWS, Oct. 3, 2001, at 26 (Liberty Fund donor says "I feel wonderful to be given the opportunity to support the relief effort"); Bob LaMendola, *Check Them Out Before You Give*, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 22, 2001, at 7A (reporting that the Red Cross was putting all the money donated since 9/11 "into a separate account, the Liberty Fund, to assure the public that none of the money is going to everyday work"; donors "can feel pretty safe about giving money to" the Red Cross "for the families of terrorist victims"). I performed this search in the "Major Newspapers" database, using the terms "liberty fund" or "liberty disaster relief fund" and "red cross" and date(geq (9/11/2001) and leq (10/5/2001)).

377. See Better Business Bureau report, *supra* note 356 (in use from Sept. 12, 2001, until the week of Oct. 1, 2001) ("Shocking tragedies have occurred and America is in mourning. A long period of uncertainty and recovery awaits us all. The American Red Cross is providing lifesaving assistance including precious blood, food, shelter, and grief counseling. We honor our heroic relief workers, victims and their families. Please call 1-800 . . . to donate blood, or 1-800 . . . to offer financial support. Together, we can save a life."); Red Cross PSA script (in use from Sept. 12, 2001, through Oct. 29, 2001) ("In this time of need, the American Red Cross is profoundly grateful for your generous outpouring of support. A long period of uncertainty and recovery awaits us all. Thanks to your contributions, the American Red Cross is providing lifesaving assistance including food, shelter, grief counseling, and precious blood. We still need your help. Please call 1-800 . . . to offer your financial support for this tragedy and its emerging needs. Together we can save a life.").

378. American Red Cross, Red Cross Estimates, *supra* note 373.

379. This consisted of around \$100 million for traditional relief activities, \$100 million for the Emergency Family Gift Program, and \$11 million to repatriate the remains of foreign nationals, help their families travel to the United States, and similar needs. *Id.*

380. American Red Cross, American Red Cross Names Decker, *supra* note 318.

geared towards future terrorist attacks which seemed imminent at the time.³⁸¹ These included blood inventory (the “strategic blood reserve”) (\$50 million), relief infrastructure (\$29 million), community outreach (\$16-26 million), and services to members of the Armed Forces.³⁸² The remaining \$55 million to \$65 million would be held in reserve. The Red Cross, the announcement explained, “also has the responsibility to invest additional resources in preparedness and mitigation for present and future terrorist threats in the aftermath of what took place on September 11th.”³⁸³ It referred to these unspecified longer-term plans as a “phase II effort under the” Liberty Fund.³⁸⁴

On October 30, the Red Cross announced that it was “end[ing] the active solicitation of funds” for the Liberty Fund.³⁸⁵ At that point, the Liberty Fund contained \$547 million in donations and pledges. This sum, the agency had determined, was “sufficient to address immediate, near-term and long-range needs relating to the September 11 tragedies as well as necessary public education and terrorism preparedness actions.”³⁸⁶ From that point on, any gift for generic disaster relief would once again be deposited in the General Disaster Relief Fund, unless the donor expressly designated it for a more specific use. Since the October 12th announcement, the sums available for the Liberty Fund’s “phase II effort” had grown from \$55-65 million to \$227 million. At least some of this reserve would be used “to help people affected by . . . other terrorist events that could occur in the near future.”³⁸⁷ The availability of such reserves would enable the agency to honor its equity norm by providing the victims of future terrorist attacks with the same range of benefits as 9/11 victims.³⁸⁸ The

381. American Red Cross, Unprecedented Events, *supra* note 353, at 6 (chronology entry for Oct. 12, 2001).

382. Relief infrastructure included “telecommunications such as the toll-free nationwide hotlines now being operated by the Red Cross to provide immediate help to callers, information systems, database management, contribution processing, public information and communication, expanded audit services, accounting services and around-the-clock activation of the Red Cross Disaster Operations Center.” American Red Cross, Red Cross Estimates, *supra* note 373. Outreach entailed “services in communities across the country will be expanded to include promoting humanitarian principles such as neutrality and unity and encouraging tolerance; providing grieving and healing outreach programs; and expanding international humanitarian law efforts.” *Id.*

383. *Id.*

384. *Id.*

385. American Red Cross, American Red Cross Names Decker, *supra* note 318.

386. *Id.*

387. *Red Cross Testimony at W&M Hearing on Charitable Groups’ Reaction to Terrorist Attacks*, 34 EXEMPT. ORG. TAX. REV. 462, 463 (written statement of Michael Farley, Vice President, Chapter Fundraising to the U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Oversight, held on Nov. 8, 2001).

388. Greenwood hearing, *supra* note 2, at 41 (testimony of Dr. Bernadine Healy) (“if there were another disaster tomorrow, and we have reserves in the Liberty Fund, we would offer the very same services, the same cash grant programs, the same mental and spiritual counseling, the same social services that we have offered in new Jersey, in Pennsylvania, in New York and at the

size of the reserve, an agency spokesman said, “depends on how much money we wind up with.”³⁸⁹

3. *Liberty Fund: The Controversy.*—As public awareness of the Liberty Fund’s broader mandate grew, so did public criticism. The agency began receiving hundreds of calls from upset donors demanding their money back.³⁹⁰ TV commentator Bill O’Reilly captured the sentiment of many when he declaimed that:

after collecting more than \$550 million from generous Americans, the Red Cross now says that some of that money will not go to the families of the terror victims *even though the donated money was given specifically for that purpose*. The Red Cross apparently believes it has the right to do other things with your donations.³⁹¹

The controversy peaked the week of November 4, 2001, when New York State Attorney General Eliot L. Spitzer threatened to sue the Red Cross for fraud and breach of donor intent unless it spent the entire Liberty Fund on 9/11 victims.³⁹² That same week, two congressional subcommittees held hostile hearings to investigate the Red Cross’ handling of post-9/11 contributions.³⁹³ Whereas Mr. Spitzer alleged that the agency had broken the law, members of Congress complained that the Red Cross had acted unethically and in bad faith. They asserted that the agency was morally obliged to do what its donors actually intended or expected, regardless of whether they communicated their preferences to the agency. As one congressman told Dr. Healy:

I don’t care what it says on the back of a [Red Cross solicitation] envelope or in a PSA [public service announcement] or so forth. You

Pentagon we would offer that to this group. We’d probably—they might need to raise more money. But we would have some reserves.”).

389. Todd Wallack, *Red Cross Donations Earmarked for Future; Agency May Have Enough for Terror Victims*, S.F. CHRON., Oct. 17, 2001, at A8.

390. Todd Wallack, *Red Cross Returns Some Contributions; Plan for Relief Fund Angers Several Donors*, S.F. CHRON., Nov. 2, 2001, at A1.

391. Transcript, *The O’Reilly Factor* (Fox News television broadcast Dec. 30, 2001) (emphasis added).

392. Douglas Turner, *Spitzer Threatens Legal Action Against Red Cross if It Fails to Disburse Funds*, BUFF. NEWS, Nov. 9, 2001, at A12; Susan Edelman, *Charity Tries Kissing Up to Cross Donors*, N.Y. POST, Nov. 11, 2001, at 3. See NY CLS Exec §§ 172-d(3) & -d(4) (2002).

393. On November 6, 2001, the Oversight and Investigations Subcommittee of the Energy and Commerce Committee of the House of Representatives, chaired by James Greenwood (R-PA), held a hearing entitled “Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse.” Greenwood hearing, *supra* note 2. On November 8, 2001, the Oversight Subcommittee of the House of Representatives Ways and Means Committee held a hearing on “Charitable Organizations’ Distribution of Funds Following the Recent Terrorist Attacks,” 2001 WL 1400781 (F.D.C.H.) [hereinafter Houghton hearing]. I refer to this as the Houghton hearing after Subcommittee chair Amo Houghton (R-NY).

know that if you asked Americans where they thought the money was going to the Liberty Fund, they thought it was going to the victims of the [9/11] disaster . . .³⁹⁴

Another congressman professed that “I don’t believe anyone that wrote a check [to the Red Cross] expected that it would be used for frozen blood,”³⁹⁵ referring to the agency’s proposed strategic blood reserve. “[P]eople I know thought that the money was going to [survivors of those killed in the attacks],” reported a congresswoman. “They didn’t think it was going for the telephone systems,”³⁹⁶ she said, referring to the agency’s proposal to upgrade its relief infrastructure. The congresswoman also declared that “*every single person* who contributed to this effort has done so with the best of intentions that these funds will go to help the victims’ families of this terrible tragedy, to help the firefighters’ funds, to help all of the caregivers who’ve helped.”³⁹⁷

Despite the growing controversy, the Red Cross initially seemed prepared to follow through on its stated plans for the Liberty Fund, even after Dr. Healy’s resignation on October 26, 2001. In a letter to *The New York Times* dated November 5, 2001, the agency’s leaders defended its plan to reserve some funds for future attacks: the Red Cross’ “humanitarian mission and responsibilities under our Congressional charter require us to help people grieve, recover and *prepare for future [terrorist] events*.”³⁹⁸ In the event of future attacks, said an agency official, the Red Cross “would draw on that reserve to help those victims,” adding that “I don’t think there’s a donor in America that would object to the fact that we’re holding onto this money to help people elsewhere.”³⁹⁹ On November 6, 2001, Dr. Healy rhetorically asked a congressional subcommittee:

If 5,000 are harmed tomorrow, do we go out and ask for another billion dollars from the American public? OR do we carefully steward the money that is here [in the Liberty Fund] and make sure that we do have reserves, so that we can . . . as *equitably* deal with the next attack if there are large numbers of people, as we have the first.⁴⁰⁰

In a similar vein, an agency spokesman said that “God forbid there’s a truck bombing in Albany next week. The American Red Cross has to be prepared, and

394. Greenwood hearing, *supra* note 2, at 44 (statement of Rep. Charles F. Bass (R-NH)).

395. *Id.* at 32 (statement of Rep. Peter Deutsch (D-FL)).

396. *Id.* at 49 (statement of Rep. Diana DeGette (D-CO)).

397. *Id.* at 10 (statement of Rep. Diana DeGette (D-CO)).

398. *Red Cross and Sept. 11*, N.Y. TIMES, Nov. 6, 2001, at A20 (letter to the editor from David Mc Laughlin, chairman of the Red Cross board of governors, and Harold Decker, interim chief executive) (emphasis added).

399. Haya El Nasser, *Red Cross May Triple Aid to Victims*, USA TODAY, Nov. 6, 2001, at 2A (statement by Bill Blaul, Red Cross senior vice president).

400. Greenwood hearing, *supra* note 2, at 28 (statement of Dr. Bernadine Healy) (emphasis added). Note again the stated desire to treat the victims of different terrorist attacks in an even-handed manner.

anything less in this environment is playing a risky game.”⁴⁰¹ Donors unhappy with the agency’s handling of their gift were invited to request a refund.⁴⁰²

In the end, the Red Cross changed its original plans, which it subsequently described as “not consistent with the intent of donors.”⁴⁰³ On November 14, it announced that the Liberty Fund would be used exclusively to meet the immediate and long-term needs of 9/11 victims.⁴⁰⁴ That one day turned out to be the biggest bonanza in 9/11 fundraising. At that point, the Red Cross had planned to spend only \$200 million on its 9/11 relief efforts.⁴⁰⁵ The November 14th announcement committed everything the Liberty Fund had already raised, \$564 million, and everything that it would collect in the future, over \$364 million, to that end. In a single day, therefore, the agency effectively expanded its 9/11 budget by 400%—from \$200 million to over \$1 billion.⁴⁰⁶

4. *Preventing Future Liberty Fund Fiascos.*—Following its reversal, the Red Cross faced two new challenges: finding ways to spend \$800 million *more* than it had earlier deemed “sufficient to address immediate, near-term and long-range needs relating to the September 11 tragedies;”⁴⁰⁷ and taking steps to prevent such unhappy experiences from reoccurring.

To spend the additional sums, the Red Cross is expanding mental health services for the broader community and increasing cash payments to the attacks’ most direct victims, i.e., the seriously injured and families, dependents and heirs of those killed. The Red Cross’ additional expenditures on mental health are considerable. “No mental health program of this magnitude and with this level of coordination had been deployed before,” the agency proudly reports, “and it is already being heralded as ‘unprecedented’ by the national media.”⁴⁰⁸ The agency’s increased cash gifts are also substantial. Under its initial “Emergency Family Gift Program,” the agency offered three month’s financial support to affected families to for rent or mortgage, utilities, food, etc. After November 14, 2001, the covered period was extended to a year.⁴⁰⁹ (Tellingly, the word

401. Edelman, *supra* note 392.

402. Corey Kilgannon, *A Nation Challenged: Donations: Red Cross Offers to Refund Gifts for Sept. 11*, N.Y. TIMES, Nov. 12, 2001, at B10.

403. Letter from Harold J. Decker, American Red Cross Interim President and Chief Executive Officer, to The Honorable Charles Grassley 1 (June 14, 2002) (introducing The American Red Cross Response to Senator Charles E. Grassley’s Inquiry Letter).

404. Becky Orfinger, *Red Cross Extending Aid to Those Affected by Sept. 11 Tragedies*, American Red Cross in the News (Nov. 14, 2001), at <http://www.redcross.org/news/ds/0109wtc/011114liberty.html>.

405. As noted above, it planned to spend another \$100 million on the strategic blood reserve and other projects. It proposed to hold the remaining \$264 million “in reserve” for future needs, including responding to future terrorist attacks.

406. The Liberty Fund raised \$1.001 billion as of September 11, 2002. American Red Cross in Greater New York, *supra* note 356, at 9.

407. American Red Cross, American Red Cross Names Decker, *supra* note 318.

408. American Red Cross, Unprecedented Events, *supra* note 353, at 11.

409. *Id.* at 10.

“Emergency” was dropped from the name; it was now simply the “Family Gift Program.”) The agency is also writing checks of \$45,000 to the estate of every person killed and to those who were seriously injured or disabled on 9/11.⁴¹⁰ This is a pro rata division of assets with no means-testing.

To avoid similar incidents in the future, the Red Cross has introduced a new fundraising initiative called “Donor DIRECT,” where the latter term stands for “D(onor) I(ntent) RE(cognition), C(onfirmation) and T(rust).” This program aims to reassert the centrality of the general Disaster Relief Fund and its multi-disaster function, educate donors as to how it operates, clarify the intent of each donor regarding the use of her gift, and shield the agency from pressure to spend more than it deems warranted on any particular disaster.

As part of this initiative, the Red Cross has changed its written solicitation materials to underscore its discretion to use Disaster Relief Fund monies to respond to any domestic disaster, rather than just the particular one that may have prompted or preceded the donor’s decision to give. These solicitation materials used to ask potential donors to “help the victims of [this disaster] and *other disasters* by contributing to the American Red Cross Disaster Relief Fund.”⁴¹¹ The solicitation now states:

[y]ou can help the victims of _____ and *thousands of other disasters across the country each year* by making a financial gift to the American Red Cross Disaster Relief Fund, which enables the Red Cross to provide food, shelter, counseling and other assistance to the those in need.⁴¹²

Donors who make unrestricted gifts to the Disaster Relief Fund will be asked to confirm that they understand the leeway this affords the agency.⁴¹³ To avoid surplus issues, the Red Cross now estimates how much it expects to spend on each major or high-profile disaster according to its uniform national standards.⁴¹⁴ When it appears that contemporaneous contributions may exceed the spending target, potential donors are advised that enough money has been received for the current disaster. These persons are then encouraged to give to their local Red Cross chapter or to the Disaster Relief Fund.⁴¹⁵ The goal of this policy, the agency has explained, is “to avoid a situation where too much money is raised around a [specific] disaster which, in turn, creates an expectation that more money will be spent on its victims” relative to similarly situated victims of other

410. *Id.*

411. Press Release, American Red Cross, American Red Cross: Strengthening Disaster Fund-Raising, at http://www.redcross.org/press/diasters/ds_pr/DIRECT.pdf (last visited Feb. 8, 2003).

412. Press Release, American Red Cross, Red Cross Announces New Disaster Fund-raising Practices (June 5, 2002), at http://www.redcross.org/press/disaster/ds_pr/020605dsfunds.html (emphasis added).

413. *Id.* This confirmation policy only applies to gifts received through the Red Cross’ own solicitation channels.

414. *Id.*

415. *Id.*

disasters.⁴¹⁶

5. *Assessing the Legal Case Against the Red Cross.*—In early November 2001, New York Attorney General Eliot Spitzer threatened to sue the Red Cross unless it spent the entire Liberty Fund on the victims of 9/11. Legal action was warranted, he argued, on grounds that the Red Cross had represented to donors that these funds would be used exclusively this purpose.⁴¹⁷ This charge is not groundless. As noted above, at least two of the agency's early, pre-Liberty Fund public service announcements (PSAs) focused exclusively on the Red Cross's 9/11 relief activities, while inviting listeners to contribute to the Disaster Relief Fund.⁴¹⁸ After it created the Liberty Fund, the Red Cross did relatively little at first to publicize its broader aims. On the basis of such evidence, the Better Business Bureau's (BBB) Wise Giving Alliance determined that in 2001, the Red Cross had failed to meet the BBB's standard that charitable solicitations be "accurate, truthful and not misleading, both in whole and in part."⁴¹⁹ More specifically, the BBB found that:

(1) Many of the initial 9/11 relief appeals requesting financial donations omitted a material fact: the Red Cross initially intended to use some of these donations for broader purposes than stated in those appeals after, in the Red Cross' view, all 9/11 needs were met; (2) Appeals that did disclose the Red Cross' intention to spend funds on broader purposes did not do so in a clear and conspicuous manner that would be reasonably understood by potential donors given the circumstances of 9/11.⁴²⁰

Although this sounds damning, one must note that the BBB's standards for

416. *Id.*

417. Houghton hearing, *supra* note 393, at 51 (statement of Eliot Spitzer, New York State Attorney General).

[O]ne could argue that if [Red Cross] funds are not in fact spent for the [represented] purpose, that you have false advertising, you had a violation of consumer protection laws and a violation of certain other charitable obligations that are codified in New York State law So there is the opportunity . . . that a legal inquiry could be undertaken to try to force the Red Cross to abide by its legal obligation to spend the funds for the purposes for which they were raised and to abide by the obligations that were made in its solicitations to the American public.

See N.Y. EXEC. LAW § 172-d(3) (consol. 2002) ("no person shall . . . use . . . false or materially misleading advertising or promotional material in connection with any solicitation" and collection of funds for charitable purposes); *Marcus v. Jewish Nat'l Fund*, 557 N.Y.S.2d 886 (App. Div. 1990) (charities may be sued for false advertising under general business code).

418. Houghton hearing, *supra* note 393, at 55 (statement of Eliot Spitzer, New York State Attorney General) (where charity ran ads "maintaining that the funds would be used for the victims of September 11, one could argue that if funds are not in fact spent for that purpose, that you have a violation of consumer protection laws . . .").

419. Better Business Bureau report, *supra* note 356.

420. *Id.*

charitable solicitations exceed what the law requires.⁴²¹ In its follow-up exchanges with prospective donors, the agency helped correct any misperceptions that its PSAs may have encouraged. The PSAs asked viewers to call a 1-800 telephone number to make a financial contribution.⁴²² The people who answered these 1-800 calls, in turn, informed callers that gifts to the Disaster Relief Fund would “*help the victims of this disaster and other disasters like it.*”⁴²³ Similarly, those who visited the agency’s website were asked to “help support relief for this tragedy and other disasters” by donating to the Disaster Relief Fund.⁴²⁴ When it created the Liberty Fund, the agency publicized its broader plans for these monies at the outset on its website.⁴²⁵ The name itself—“Liberty Fund”—also conveyed a broader focus than 9/11: the fund was not called, for example, the “Red Cross September 11th Fund.” Although the Red Cross could have communicated the Liberty Fund’s broader aims more clearly, widely and sooner, it did not keep these under wraps, and they were always accessible to the attentive donor. The case for misrepresentation is thus less than compelling.⁴²⁶

In addition to misrepresentation, Mr. Spitzer accused the agency of violating its donors’ intentions.⁴²⁷ On one level, this charge is somewhat superfluous, as most Liberty Fund donors did not expressly restrict their gifts to 9/11 relief.⁴²⁸ In such cases, the law generally equates the donors’ intentions with the agency’s representations. The issue of “donor intent” thus folds into the first inquiry: what

421. For example, the BBB’s standards state that a charity’s fundraising costs should not exceed 35% of related contributions. Better Business Bureau, Wise Giving Alliance, Council of Better Business Bureaus’ Standards for Charitable Solicitations B4(c), at <http://www.give.org/standards/cbbbstds.asp>. Yet statutes that attempt to set ceilings on fundraising expenses have been repeatedly invalidated. *See, e.g.,* Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) (state law prohibiting a professional fundraiser from charging an unreasonable fee and providing for a three-tiered definition of an unreasonable fee based on percentage of donations remitted to charity unconstitutionally infringes upon freedom of speech).

422. Better Business Bureau report, *supra* note 356.

423. *Id.*

424. *Id.*

425. *See* American Red Cross, Preserving America’s Spirit, *supra* note 360.

426. For her part, Dr. Bernadine Healy told Congress under oath that “the American Red Cross, to my knowledge, has never described its [Liberty Fund] work as limited only to those . . . people who were lost on 9/11 and their [families] in New York and Pennsylvania and the Pentagon.” Greenwood hearing, *supra* 2, at 38. Rather, the agency had “from the beginning, gotten out in every way it could, and said, no, we are not the September 11 [F]und . . . , which has said repeatedly [it is] only for the victims and their families of these three attacks.” *Id.* at 43-44. Unfortunately, Dr. Healy bemoaned, “not everyone heard” this message. *Id.* at 38.

427. N.Y. EXEC. LAW § 172-d(4) (consol. 2002) (charities must apply contributions in a manner “substantially consistent” with the terms of the solicitation).

428. When the agency did receive gifts expressly restricted to a special purpose (e.g., creating a strategic blood reserve, for World Trade Center victims,), it respected these restrictions. *Id.* at 51-52 (testimony of Dr. Bernadine Healy).

were the actual terms of the Disaster Relief Fund⁴²⁹ and the Liberty Fund, and what did the agency communicate to its donors?

Yet on another level, Mr. Spitzer may have been arguing that: (1) the actual, subjective intent of Liberty Fund donors was to benefit 9/11 victims only;⁴³⁰ and (2) the Red Cross understood this—even if donors did not explicitly communicate their desires to the agency.⁴³¹ If so, one might ask “so what?” The donors’ actual, subjective intentions regarding the donee’s use of their gifts are, by themselves, legally irrelevant: the Red Cross was obliged to follow these intentions only insofar as they were externally expressed and communicated to it.⁴³² One can assert this, moreover, without denying that a charity is, generally speaking, ethically obliged (and politically advised) to cleave to its donors’ actual but under-articulated wishes.

Alternatively, Mr. Spitzer may believe that given all the circumstances, the donors did in fact communicate their intentions to the Red Cross, and that the agency was obliged to honor these intentions even if they diverged from its own representations. Here one might point to the prodigious increase in gifts the Red Cross received after 9/11 as evidence that these donors intended to benefit 9/11 victims and *only* them. In the terminology of rhetoric, this assertion is known as *post hoc ergo propter hoc*, or “after this therefore because of this.” Yet such a claim is both empirically and legally flawed. The desire to help 9/11 victims undoubtedly motivated many if not most of the Red Cross’s donors to some

429. Recall that only some of the gifts deposited in the Liberty Fund were actually designated for the “Liberty Fund.” This is of course true of gifts made before the Liberty Fund was created, but not only them.

430. Greenwood hearing, *supra* note 2, at 33 (statement of Eliot Spitzer, New York State Attorney General) (“When people were writing their checks for \$100, \$200 or \$10,000 and sending them in response to the PSAs that the Red Cross was running, *they believed* victims were going to get that money. I speak now as [a] New Yorker and I also speak for the victims in Pennsylvania [and] the victims in Virginia[. T]hey are supposed to get this money. This is not for [the Red Cross’s organizational] continuity and it’s not for reprogramming [by the agency for other purposes.]”) (emphasis added); Houghton hearing, *supra* note 393, at 41 (statement of Eliot Spitzer, New York State Attorney General) (“those who gave to the Red Cross in the aftermath of September 11 *intended unambiguously* that those funds be used for the victims of September 11”) (emphasis added); *id.* at 47 (statement of Eliot Spitzer, New York State Attorney General) (“people gave [to the Red Cross] thinking those funds were going to benefit the victims[of 9/11]. You’ve got to use those funds to benefit the victims and not future contingencies, not amorphous issues that may arise in the future.”).

431. Houghton hearing, *supra* note 393, at 39 (“What is [legally] relevant is what did they [the donors] intend when they sent that money in [to the Red Cross]. I believe that the Red Cross understood what they intended. That intent was that this money go to the victims of September 11”) (statement of Eliot Spitzer, New York State Attorney General).

432. AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 23 (4th ed. 1987) (“For practical reasons [the trust settlor’s] undisclosed state of mind is regarded as immaterial. In the interest of accuracy, therefore, it is necessary in dealing with the creation of a trust and the terms of the trust to speak not of the settlor’s intention but of his manifestation of intention”).

extent. Yet this cannot fully explain the intentions of every donor. There are many reasons why people may have given, and each donor may have had a variety of reasons for doing so. For some people, the attacks may have reminded them of the general need for robust multi-disaster DROs. Others may have wished to help 9/11 victims, but only to meet their basic needs, not to enrich them. To honor such donors' intentions, the Red Cross should have stopped its 9/11 relief operations once basic needs were met.

Although the "after this therefore because of this" account of donor intent is factually incomplete, one might nonetheless wish to posit it as a rebuttable presumption. The rule might go something like this: When a general DRO receives supra-normal contributions following a high-profile disaster, it is legally obliged to spend these sums on that particular disaster, even if (1) the organization did not represent to donors that it would do this, and (2) the donors did not explicitly restrict their gifts to that use, unless (3) the donors expressly authorized the DRO to spend their gifts on other disasters and for other purposes. If so, such a rule should be rejected, and not simply because it would be difficult to administer.⁴³³

A charity is free, of course, to follow its donors' perceived wishes, even if the donors have not expressly communicated these to the agency. The Salvation Army, for example, used all unspecified "disaster relief" gifts received between September 11, 2001 and December 31, 2001, for its 9/11 relief operations.⁴³⁴ Yet general DROs should remain formally free to use gifts motivated by one disaster to finance other relief operations—that is, barring express donor instructions to the contrary. This regime gives a charity more leeway to allocate funds efficiently and equitably among the various disasters to which it responds. For similar reasons, attorney generals should think twice before contesting a DRO's reallocations.⁴³⁵ Changing the current regime to make it more accountable to donors' formally underarticulated wishes may also be unnecessary because non-legal sanctions work tolerably well at punishing charities and managers who flout such wishes, as the Liberty Fund fallout vividly illustrates. Allegations that an agency has violated donor intent can harm the organization's larger fundraising efforts and public relations.⁴³⁶ Such charges can also tarnish a charitable manager's personal reputation for honesty.⁴³⁷

433. What, for example, is the baseline and time frame for assessing whether a DRO's contributions following a given disaster are "supra-normal"?

434. Telephone Interview with Lt. Col. Tom Jones, Directory of National Community Relations and Development, The Salvation Army (Mar. 27, 2002). The Army divided such checks 3-to-1 between its New York and the Pentagon relief activities. *Id.* Recall too that the Red Cross voluntarily deposited into the Liberty Fund every gift for unspecific "disaster relief" that it received between September 11, 2001 and October 31, 2001. *See supra* notes 362-63 and accompanying text.

435. *See supra* notes 37-38 and accompanying text.

436. FISHMAN & SCHWARZ, *supra* note 39, at 271.

437. *See* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 320 (1988).

B. Uniformed Personnel Widows' and Children's Funds

The Red Cross was the most visible general DRO that sought to use post-9/11 donations for other purposes. Two other general DROs were also accused of engaging in the same behavior: survivor relief funds run by New York City's police officer and firefighter unions, respectively. No such charges, by contrast, were leveled against the New York City Police Foundation, which also disbursed funds to families of officers killed on 9/11.

1. *The Patrolmen's Benevolent Association's Widows' and Children's Fund.*—Twenty-three officers of New York City Police Department were murdered in the terrorist attacks at the World Trade Center. In the months following 9/11, donors contributed \$14 million to a pre-existing charitable fund run by the New York City police union.⁴³⁸ Of the three funds discussed in this section, this one inspired the most heated and prolonged controversy.

The Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") represents police officers in labor negotiations with New York City.⁴³⁹ In 1980, the PBA created the PBA Widows' and Children's Fund⁴⁴⁰ ("PBA Fund" or "Fund").⁴⁴¹ The PBA Fund's mission is "to provide aid and assistance to the widows, widowers and family survivors of [PBA-member] police officers slain in the line of duty."⁴⁴² Prior to 9/11, the Fund's resources and activities were modest. In FY 2000, for example, the Fund raised approximately \$165,000 in contributions, and had accumulated approximately \$189,000 in assets.⁴⁴³ It served about one hundred eligible families,⁴⁴⁴ and spent around \$98,500 in scholarships, recreation, and holiday events.⁴⁴⁵

In the months after the terrorist attacks, the PBA Fund received

438. Leonard Levitt, *Two Sept. 11 Families Sue PBA, Say Millions Have Been Held Back*, NEWSDAY (New York, N.Y.), July 24, 2002, at A17.

439. Some members of the PBA have lobbied to change its name to the gender-neutral "Police Benevolent Association of the City of New York, Inc." These efforts have been unsuccessful to date. William Van Auken, *Honoring Moira Smith PBA to Take "Men" Out of Union Label*, CHIEF CIVIL SERV. LEADER, Mar. 22, 2002, at <http://www.nycpba.org/press-ch/02/ch-020322-name.html> (last visited Aug. 29, 2002).

440. Its legal name is "PBA Widows & Orphans Fund, Inc." See Form 990, the PBA Widow's & Orphans Fund, Inc., Internal Revenue Service, Return of Organization Exempt from Income Tax, for Fiscal Year Ending June 30, 2000 [hereinafter PBA Widows & Orphans Fund Form 990], available at http://www.guidestar.org/2000/132/949/2000_132949036_1_9.pdf.

441. The PBA's directors serve as directors of the PBA Fund. *Id.* at Part VII, question 52.

442. *Id.*

443. *Id.* On September 11, 2001, it had approximately \$330,000 on hand. David Barstow, *Police Families Demand a Say in Handling of Benefit Fund*, N.Y. TIMES, Mar. 9, 2002, at B3.

444. *In re Estate of John William Perry, Deceased, Affirmation in Support of Petition to Compel, Surrogate's Court of the State of New York, County of New York (July 2002)*, at 3 [hereinafter Perry, Affirmation in Support]

445. PBA Widows & Orphans Fund Form 990, *supra* note 440.

approximately \$14 million in donations.⁴⁴⁶ The Fund initially used its existing machinery to handle the new gifts; it did not create a separate account for the post-9/11 donations. Even so, the donors of approximately \$8 million⁴⁴⁷ (57% of the total) expressly restricted their gifts' use to benefit 9/11 families, indicating so on the check or in accompanying correspondence.⁴⁴⁸ The PBA ultimately created a special account for the 9/11-restricted gifts, the sum total of which was divided evenly among the families of the 23 fallen police officers—around \$350,000 apiece. Much of the remaining \$6 million was distributed to the families of other officers, i.e., those killed in the line of duty before and after 9/11.⁴⁴⁹ Unlike its gifts to 9/11 families, the union expressly justified its assistance to pre-9/11 widows on the basis of the recipients' financial distress. Some of these widows, a union official said, "are so poor they can't afford health benefits."⁴⁵⁰

Family members of three of the twenty-three police officers killed on 9/11 subsequently brought actions challenging the PBA's allocation of post-attack donations.⁴⁵¹ They argued that the remaining \$6 million should also be distributed to the twenty-three 9/11 families, even though the donors did not expressly restrict their gifts for this purpose. They justified this demand on two grounds: (1) "the realities of the extent of [the PBA Fund's] previous historical fund-raising efforts"⁴⁵² and (2) the Fund's "targeted website solicitation."⁴⁵³

A lawyer representing the three families said that before 9/11, "[t]he only money in the PBA fund . . . was enough to fund a Christmas party and a barbecue."⁴⁵⁴ The great disparity between the Fund's pre and post-attack donations, he claimed, demonstrated that post-9/11 donors intended their gifts to benefit 9/11 families only. We have seen this before: it is the "after this

446. Levitt, *supra* note 438.

447. *Id.*

448. Perry, Affirmation in Support, *supra* note 444, at 4.

449. See Patrolmen's Benevolent Association of the City of New York, Inc., *Donations*, <http://www.nycpba.org/donations.html> ("The widows and children of all officers killed in the line of duty are eligible beneficiaries of the PBA Widows and Childrens Fund.") (last visited Aug. 29, 2002). The PBA does not seem to have considered the possibility of dividing the entire \$14 million evenly among the families of all its fallen members.

450. Levitt, *supra* note 438.

451. See *In re* Application of Margaret McDonnell and Frank J. Dominguez, Affidavit of Jayne Conroy in Support of Application to Examine Records and for an Accounting to Aid in Commencing an Action Against Patrolmen's Benevolent Association of the City of New York, Inc., at n.4 (filed in the Supreme Court of the State of New York, County of New York, on July 10, 2002) [hereinafter Affidavit of Jayne Conroy]; Perry, Affirmation in Support, *supra* note 444. Ms. McDonnell lost her husband Brian, Mr. Dominguez lost his brother Jerome, and Patricia Perry lost her son John William Perry in the World Trade Center attacks.

452. Affidavit of Jayne Conroy, *supra* note 451. The PBA has refused to reveal how much money it has collected since January 30, 2002. *Id.* at para. 11.

453. *Id.* at 3 n.4.

454. Stephanie Saul, *Disputes Linger Over 9-11 Donations*, NEWSDAY, May 9, 2002, at A16.

therefore because of this argument” discussed above.⁴⁵⁵ These families also alleged that the PBA Fund’s website misled donors into thinking that their donations would go to 9/11 families only. The PBA solicited donations to the Fund on two different pages on its Internet website. The first page represented the Fund as assisting the families of all New York City police officers killed in the line of duty. Entitled “To Our Fallen Comrades,” it listed the names of officers killed both on 9/11 and afterwards, and contained a link to a list of officers killed before the attacks.⁴⁵⁶ At the bottom of the page was the name “PBA Widows & Childrens Fund.” The second page connected gifts with distributions to 9/11 families. It was titled “Attack on America” and contained a graphic of the Statute of Liberty. The center of the page consisted of a testimonial from a Dallas police detective named Joe Thompson who “grew up in the Bronx.”⁴⁵⁷

Thompson is returning to his hometown . . . with a \$15,000 check for the families of New York City police officers killed in the attacks on the World Trade Center [He] will present the check to the New York Police Department [sic] Widow’s and Children’s Fund. “This is the quickest way to get family members financial assistance,” said Detective Thompson.

The survivors of two 9/11 officers brought an action in a court of general jurisdiction regarding the PBA’s alleged “failure to disburse and properly account for their [the families’] proportionate shares of the . . . Post-9/11 Donations.”⁴⁵⁸ They sought an order directing the PBA to produce all documents on how the donations were distributed, and requested an independent accounting of this distribution. The New York Attorney General moved to intervene and for dismissal of the action “as unwarranted, unnecessary and potentially harmful to beneficiaries of the [PBA] Fund and to charity in general”⁴⁵⁹ A third plaintiff sought similar relief in probate court, alleging that the PBA “has converted for its own use the assets of the intended beneficiaries” of the post-9/11 gifts to the Fund.⁴⁶⁰

In December 2002, New York courts dismissed both actions. In the first case, the judge found that the plaintiffs had failed to present any evidence of fraud or fiduciary breach by PBA Fund managers, and refused to let plaintiffs use

455. See *supra* note 433 and accompanying text.

456. Patrolmen’s Benevolent Association of the City of New York, Inc., *To Our Fallen Comrades*, <http://www.nycpba.org/memorial.html> (last visited Apr. 17, 2002).

457. Patrolmen’s Benevolent Association of New York City, Inc., <http://www.nycpba.org> (last visited Apr. 16, 2002) (The solicitation read “All donations for the PBA Widows and Childrens Fund should be sent to” the address listed).

458. Affidavit of Jayne Conroy, *supra* note 451.

459. *Matter of McDonnell*, N.Y.L.J., Dec. 18, 2002, at 23 (paraphrasing the attorney general).

460. *In re Estate of John William Perry, Deceased*, Petition to Compel Discovery of Property, Surrogate’s Court of the State of New York, County of New York (July 2002) (on file with author).

discovery in the hopes of finding such evidence.⁴⁶¹ In the second case, the probate court found that it lacked jurisdiction because the monetary relief sought would be paid directly to the deceased officer's survivors instead of to his estate.⁴⁶² In both cases, the judges noted that the Attorney General's office had looked into the Fund's records and found nothing amiss.⁴⁶³

2. *Uniformed Firefighter's Association Widows' and Children's Fund.*— Since its inception, the Uniformed Firefighter's Association of Greater New York Local 94 ("UFA" or "Union") has provided assistance to the families of New York City firefighters who died in the line of duty.⁴⁶⁴ In 1980, the UFA formalized this practice by creating the UFA Widows' and Children's Fund ("UFA Fund" or "Fund").⁴⁶⁵ The Fund's purpose is "to accept donations to be used [to] relieve the need of the widows, children and dependents of the members of the UFA . . . who died or shall die in active service."⁴⁶⁶ Before 9/11, the Fund had modest resources. In fiscal year 2000, it received around \$163,000 in contributions, and had assets worth around \$832,000.⁴⁶⁷ Its programming budget that year was \$164,000, which paid for an annual Christmas party and scholarships to dependents.⁴⁶⁸

Shortly after the attacks, the UFA and two other firefighter associations formed a new entity whose sole purpose was to raise money for the families of members killed in attacks—the New York Firefighters 9/11 Disaster Relief Fund.⁴⁶⁹ The creation of this 9/11-specific fund did not stop the public from deluging the pre-existing UFA Fund with donations after 9/11. In its promotional

461. *Matter of McDonnell*, *supra* note 459.

462. Mike Claffey, *Judges Toss Suits Over 9/11 PBA Fund*, *Daily News*, Dec. 19, 2002, at 42.

463. *Id.*; *Matter of McDonnell*, *supra* note 459.

464. UFA History—Representing NYC's Firefighters, at http://ufalocal94.org/pages/rep_nycc_ff.html (last visited Aug. 24, 2002).

465. See UFA History—Widows' & Children's Fund, at http://www.ufalocal94.org/pages/widows_childrens_fund_hist.html (last visited July 8, 2002). The Fund is organized as a nonprofit corporation under New York State law, and shares the same board of directors with the UFA.

466. Stephanie Strom, *Families Upset as Fire Union Denies Them Fund Benefits*, *N.Y. TIMES*, May 12, 2002, at 29 (quoting UFA Fund's by-laws). The Fund's 990 Form describes its key activity as "award[ing] scholarship grants to dependents of the [UFA] who died in line-of-duty circumstances." Form 990, the UFA Fund's IRS Return of Organization Exempt from Income Tax, for Fiscal Year Ending July 31, 2000, at 14 [hereinafter UFA Widow's and Children's Fund Form 990], available at <http://documents.guidestar.org/2000/133/047/2000-130047544-1-9.pdf>.

467. UFA Widow's and Children's Fund Form 990, *supra* note 466, at 1.

468. In fiscal year 2000, the UFA Fund spent 46% of its year's resources on the annual Christmas party. *Id.* at 1-2.

469. New York Firefighters 9/11 Disaster Relief Fund, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, Form 1023, Schedule A, Part I, 1 (Sept. 21, 2001) (on file with author). This charity is a joint project of the UFA, the fire officers union's New York local, and the International Association of Firefighters (IAFF). International Association of Fire Fighters, *IAFF Establishes Charity Fund*, <http://daily.iaff.org/fund.htm> (last visited Aug. 24, 2002).

materials for the UFA Fund, the union's website stated that donations would be "distributed to the families of our fallen firefighters."⁴⁷⁰ As of December 2, 2001, the UFA Fund had received \$29 million, prompting its treasurer to say that "[w]e have been taken care of"⁴⁷¹ Yet the Fund continued to receive and accept donations, ultimately raising \$70 million. This amount is 429 times the Fund's income in FY 2000 and 84 times its assets.

The UFA initially planned to use the entire \$70 million to help the surviving spouses, children and dependents of *every* UFA member killed in the line of duty, with no additional payouts for all families.⁴⁷² More specifically, the Union proposed to make an initial lump-sum payment of \$20,000 to the surviving spouse of every fallen member, followed each year by a payments of \$3000 until the widow's death.⁴⁷³ Disbursements would also be made to members' children and dependents.⁴⁷⁴ From the UFA's perspective, this approach was consistent with two key principles that the Union never forgets those members who made the "supreme sacrifice," and that no member's sacrifice is morally (or financially) more worthy than another's.⁴⁷⁵ The UFA did not intend to make any payments to the parents, siblings and other survivors of the 97 single firefighters who died on 9/11 without children or dependents.⁴⁷⁶ This exclusion, the UFA argued, was dictated by the Fund's by-laws, which provided that the donations were for "widows, children and dependents."

Some 9/11 families argued that this proposal violated donor intent in two respects.⁴⁷⁷ First, those who contributed to the UFA Fund actually intended to benefit only the families of 9/11 firefighters, for the same reason advanced in the PBA Fund case: "after this therefore because of this."

The fact that the UFA Widows and Children's Fund has raised so much money since September 11—more than 75 times the amount that is ordinarily in the fund—is proof that the donors intended the money to go

470. Seessel, *supra* note 14, at 42.

471. Barstow & Henriques, *supra* note 248, at 1A.

472. Thomas LaMacchia, *Caring for Our Own: Funds Route Money to Our Widows and Children* (Feb. 2, 2002), at http://ufalocal94.org/firelines/2002/fl_feb_02/fl_feb_02_funds_4_widows.html.

473. Ingrassia & Saul, *supra* note 231.

474. Under the original plan, each child was to receive \$3000 per year until the age of twenty-four, and then a final payment of \$50,000. *Id.*

475. Telephone Interview with Michael Block, General Counsel, UFA (May 11, 2002) [hereinafter Block Interview] (on file with author).

476. Seessel, *supra* note 14, at 42 (ninety-seven single firefighters died on 9/11).

477. See, e.g., New York FD/PD Widows Support, Discussion Board, UFA's Widows' and Children's Fund, at <http://www.emerginglobe.com/nyfd> (last visited May, 28, 2002) (entry posted by JoeH on April 7, 2002: 10:25:39 PM) (arguing that UFA cannot dispose of donations to the UFA Fund "as they see fit. The money belongs to the families of the firefighters that died on September 11 [P]eople gave to assist the families of September 11 firefighters exclusively.")

to the families of September 11 victims.⁴⁷⁸

Second, the Union's website misled donors into thinking that their donations would benefit 9/11 families exclusively,⁴⁷⁹ when in truth it would not do so unless the donor specifically requested it.⁴⁸⁰ Furthermore, some third parties advised potential donors that the UFA Fund was exclusively for 9/11 families.⁴⁸¹ Although such utterances cannot be ascribed to the Union,⁴⁸² they provide more evidence of what the UFA fund's donors likely thought they were supporting. For all these reasons, the Union was obliged to spend the entire \$70 million on 9/11 families, a duty it would breach by diverting even some of the monies to other families.

The Union's proposal was also improper, some 9/11 families argued, because the donors intended to benefit the families of both married and single firefighters, i.e., to provide help, "*regardless of the hero firefighter's marital status.*"⁴⁸³ These donors believed the Fund would do so, it was explained, because the UFA's website simply said that donations would be "distributed to the families of our fallen firefighters," without defining the term "family." Given this silence, donors reasonably concluded that the Fund would also benefit the parents, siblings, or other next of kin of single, childless firefighters killed on 9/11 ("single 9/11 heroes").

Of these two claims—(1) that the UFA Fund's donors intended to benefit 9/11 families only; and (2) they also intended to benefit the next of kin of single 9/11 heroes—the second seems harder to sustain. Although the UFA's website included text that donations would go to 9/11 families (but not necessarily only them), it did not state that aid would go to anyone other than surviving spouses

478. Saul, *supra* note 454, at A16.

479. Block Interview, *supra* note 475.

480. Claffey, *supra* note 257 (attorney for 9/11 families claims that UFA had misled donors because only a small portion of the fund—monies given expressly for families of Sept. 11 victims—was distributed immediately).

481. See, e.g., http://www.networkforgood.org/911/donate/fire_fighters.html ("The Uniformed Firefighters Association of Greater New York has created the UFA Widow's and Children's Fund in response to the tragedy that has gravely affected the nation and its fallen brothers") (last visited Aug. 24, 2002). One site stated that "that "[a]ll monies in the [UFA] fund go directly to benefit the widows and children of the fallen fire fighters of the World Trade Center Tragedy. . . ." Run for America, *Fund Descriptions*, <http://www.runforamerica.com/events/2001/RunForAmerica/fundDescriptions.asp> (last visited Aug. 24, 2002).

482. That is, unless it can be shown that the Union knew about such utterances and took no steps to stop or correct them.

483. AP State & Local Wire, *Some Firefighters' Families Upset Over Union Charity Plan, Lawyer Says* (May 9, 2002). Families of 9/11 victims also complained that the UFA Fund was not distributing the collected funds fast enough. See, e.g., Claffey, *supra* note 257 (lawyer for families of 9/11 victims asserts that "[d]onors from all over the country gave to provide immediate help to the families of hero firefighters. They surely did not want their money held in union coffers for years to come.").

and children. In any event, the fund's name—the UFA Widows' and Children's Fund—should have notified would-be donors as to the identity and limited scope of the beneficiary class. Yet 9/11 families ultimately dropped the first claim, and maintained the second, especially (perhaps unsurprisingly) relatives of the ninety-seven 9/11 heroes. The UFA's plan, their lawyer charged, violated “the *obvious* donor intent” to help the families of married and single 9/11 heroes alike.⁴⁸⁴

The Union initially resisted this demand on the basis of principle and precedent.⁴⁸⁵ The Fund had never been used to benefit the parents and siblings of unmarried firefighters. Doing so here would violate the Union's norm of evenhandedness by treating the survivors of single 9/11 heroes better than the kin of single firefighters killed on other occasions. The parents of unmarried 9/11 firefighters invoked a different equality norm: all 9/11 heroes were equally deserving regardless of marital status. “My son is just as dead as a married man who is dead,” said one mother.⁴⁸⁶ The union's failure to give her any portion of the Fund amounted to his “being devalued as a hero.”⁴⁸⁷ This appeal elided the issue of whether the next of kin actually suffered financial distress as a result of losing a son or sibling: “It's not a question of immediate need,” said another mother. “It's a question of fairness.”⁴⁸⁸

In early May 2002, an attorney for 9/11 families accused the UFA of “illegal conduct” in handling the Fund, and asked Eliot Spitzer, the New York State Attorney General, to intervene.⁴⁸⁹ The Union also asked Spitzer to become involved “in order to avoid litigation and unnecessary acrimony.”⁴⁹⁰ The Attorney General's office apparently did not object to the Union's plan to use

484. AP State & Local Wire, *supra* note 483; Claffey, *supra* note 257.

485. Block Interview, *supra* note 475. UFA officials also argued that they lacked authority under the Fund's bylaws to make payments to parents and/or siblings of fallen firefighters. The UFA may have been estopped from asserting this, however, because it had already accepted and distributed some gifts to all 9/11 families when the donors expressly requested this. *See* Strom, *supra* note 466.

486. *Id.*

487. Ingrassia & Saul, *supra* note 231 (quoting Dee Ragusa, whose son, Michael, was a firefighter in Engine Co. 279 killed in the attacks).

488. Ingrassia, *supra* note 248 (quoting Joan Molinaro). At least one relative did attempt to justify payment on the basis of financial need. The rather strained and speculative nature of this attempt shows why most avoided it. *See* Strom, *supra* note 466 (Mother of slain firefighter asks “How do they [the UFA] know that we didn't depend on him, that we didn't have plans to buy property with him or a house or a boat? How do they know that? I have not been able to work a day since Sept. 11. I have been devastated and destroyed by my son's death. Does that make me not dependent on him?”).

489. Claffey, *supra* note 257.

490. Saul, *supra* note 254; *see also* Seessel, *supra* note 14 (quoting full-page ad that the UFA sponsored in the May 19 issue of *The New York Times*, which stated that, *inter alia*, the dispute over its use of post-9/11 donations was being resolved “in consultation with the Charities Bureau of the New York State Attorney General's Office”)

some post-9/11 gifts to help “historic widows.” At the same time, the office seems to have sided with the single 9/11 heroes’ families that Fund monies should be distributed to them. Under the final plan announced in mid-July, 2002, the UFA promised to pay \$50,000 immediately to the spouse of every married firefighter ever killed in the line of duty and an additional sum every year thereafter for the remainder of the spouse’s life. Also, the Union would make a single payment of \$50,000 to the single 9/11 heroes’ next of kin, but on this point, the Union departed from its equality norm, as it would pay nothing to the families of single firefighters who died in other fires on other days.

3. *The New York City Police Foundation Heroes Fund.*—The New York City Police Foundation, Inc. (the “Foundation”) is a 501(c)(3) municipal nonprofit organization that accepts tax-deductible contributions to the New York City Police Department (“NYPD” or “Department”), and spends these monies to support the Department’s activities.⁴⁹¹ Among other projects, it equips officers with bullet-resistant vests, offers rewards to people who help solve violent crimes, maintains the NYPD mounted and canine units, and runs programs designed to reduce the incidence of suicide among officers.⁴⁹² It ordinarily has little contact with the families of fallen NYPD officers, and prior to 9/11 did not make cash distributions to them.⁴⁹³

In FY 2000, it received \$1.9 million in donations.⁴⁹⁴ After the attacks, it set up a segregated fund called the Heroes Fund whose stated mission was “to meet the emergency needs of the NYPD and its personnel.”⁴⁹⁵ Approximately \$10 million in donations was raised, \$1.8 million of which donors expressly earmarked for the families of the fallen officers.⁴⁹⁶ The Foundation used this amount to make payments to a suitable survivor, such as a spouse, domestic partner, children, or dependants.⁴⁹⁷ The balance has been used to support departmental projects such as counseling, buying new bullet-resistant vests, establishing a DNA investigation center, and purchasing protective gear for rescue workers.⁴⁹⁸ Although it distributed less than 20% of the Heroes Fund to the families of 9/11 police heroes, the Foundation has received no complaints from these families—only “extremely kind letters of thanks.”⁴⁹⁹

491. New York City Police Foundation’s Internal Revenue Service Form 990, Return of Organization Exempt from Income Tax, for Fiscal Year ending June 30, 2001 [hereinafter NYCPF Form 990], available at <http://documents.guidestar.org/2000/132/711/2000-1327-1-9.pdf>

492. New York City Police Foundation brochure (Mar. 2001) (on file with author).

493. *Id.*

494. NYCPF Form 990, *supra* note 491.

495. See New York City Police Foundation, at <http://www.nycpolicefoundation.org/> (last visited Aug. 29, 2002).

496. *Id.*; E-mail from Lori Wilson, Director of Programs, New York City Police Foundation (July 29, 2002) (on file with author).

497. New York City Police Foundation, *supra* note 495.

498. *Id.*

499. *Id.*

C. *Exploring the Connections Between Donor Intent and Private Benefit*

All the four charities discussed in this section share something in common: each planned to use only some of the donations received after 9/11 to aid the victims of that day's attacks. Yet only three of these entities—the Red Cross and the two union-run widows' and children's funds—were subsequently accused of misrepresenting their charitable goals and violating their donors' intentions. Each case, moreover, incited different amounts of public indignation and official scrutiny to which the impeached organizations responded in different ways. What accounts for such varied responses to relatively similar conduct? How illicit or damnable was the conduct at issue, and how redemptive or praiseworthy were the charities' responses to their critics? To these questions I now turn.

1. *Demands to Honor Donor Intent Produced (More) Private Benefit.*—Mr. Spitzer charged the Red Cross with using Liberty Fund dollars for unsolicited purposes and braking faith with its donors. The appropriate remedy, he believed, was a court order directing the agency to spend the entire fund on 9/11 victims. This cause of action was objectionable on several grounds. First, it second-guessed the agency's determination that it had relieved the victims' disaster-related distress—a matter over which DROs have broad discretion.⁵⁰⁰ Second, it strong-armed the Red Cross into distributing long-term financial aid to 9/11 victims who were not financially needy and thus violating the bar against private benefit.

As noted above, 501(c)(3) exempt purposes are not necessarily identical to common law charitable purposes and vice versa.⁵⁰¹ For this reason, Section 104 of the Victims of Terrorism Tax Relief Act vividly demonstrates why this is so. Section 104 modifies the criteria for tax exemption under IRC 501(c)(3) on a one-time basis. More specifically, it authorizes 501(c)(3) entities to provide what would otherwise be impermissible assistance to 9/11 victims—long-term payments unrelated to need—without compromising their federal tax advantages.⁵⁰² Section 104 does not purport to alter the criteria for “charitable” designation under state common law, nor would federalism principles permit it to do so. As compared to legislators, common law courts have less leeway to suspend long-standing charity law principles to accommodate—popular sentiment in a single, emotionally-charged case.⁵⁰³

500. See *supra* notes 183-93 and accompanying text. Greenwood hearing, *supra* note 2, at 32, 34 (testimony of Dr. Bernadine Healy) (“We worked with them [i.e., the families of those killed on 9/11] vigorously. Everything that we thought we could do, everything that was within our mission we did . . . We exercise judgment, some people may not agree with some of the categories of use [of Liberty Fund dollars] that we have outlined. But, we have experience in these areas and exercised our judgment in the best interest of what we thought was wise and caring stewardship of these precious resources.”).

501. See *supra* note 72 and accompanying text.

502. See *supra* notes 273-83 and accompanying text.

503. This is not to say that courts never do this, although they will not present the results as such. See my discussion of the majority decision in *Doyle v. Whalen*, *supra* notes 156-62 and

Of course, the fact that state authorities can invoke common law charitable principles to curtail private benefit permissible under federal law does not mean that they will. Until Congress intervened, the IRS was advising 501(c)(3) entities to make payments to 9/11 victims on the basis of an objective, case-by-case assessment of their financial need.⁵⁰⁴ Whereas the IRS's advice to DROs would have reduced the risk of private benefit occurring, the New York Attorney General's actions likely had the opposite effect. In response to denunciations and threats from Mr. Spitzer (among others), the Red Cross ultimately distributed \$45,000 to the estate of each 9/11 decedent, regardless of the heirs or devisee's financial needs. These "estate gifts" will be dwarfed by the \$1 million-plus awards that the typical survivor will receive from the federal government's Victim Compensation Fund. Some recipients may also include "laughing heirs," a wills-and-estates term to describe an heir distant enough to feel no grief when a relative dies and leaves a windfall.⁵⁰⁵ The Attorney General also pressed the UFA Widows' and Children's Fund into paying \$50,000 to the parents, siblings or other next of kin of single firefighters killed on 9/11. As compared to the surviving spouses and children, these relatives are less likely to have been financially dependent on the single heroes' income. These relatives, moreover, have already received \$418,000 from the IAFF Fund and \$186,650 from the Twin Towers Fund in addition to the Victim Compensation Fund award.

Note the dynamic and its irony: To deflect relatively inconclusive allegations of misrepresentation and disloyalty to donor intent, the Red Cross and the UFA made payments that by any reasonable account violated the bar against private benefit.

2. *Explaining the Different Reactions to Similar Conduct by Different Charities.*—Whatever the legal verdict on the Red Cross' conduct, it was not all that different from what the other multi-calamity charities did. All used post-9/11 contributions for non-9/11 purposes, even though some of their solicitations focused primarily on 9/11 relief, and their donors' actual, subjective intentions were as open to speculation as the Red Cross'. The Liberty Fund compares rather favorably to the New York City Police Foundation's post-9/11 Heroes Fund. As between a "Liberty Fund" and a "Heroes Fund," by its very name, the latter connotes a more singular focus on direct relief to survivors of 9/11 victims. Yet the Heroes Fund paid out only 18% of the donations it received to 9/11 families—neither more nor less than what its donors had expressly designated for that purpose. The Red Cross, by contrast, originally planned to use over 56% of the Liberty Fund to provide direct relief for 9/11 victims.⁵⁰⁶ This was more than what its donors had expressly restricted for that purpose.

Although the four charities initially approached 9/11 relief in similar ways, each experienced different amounts of pressure to spend all post-attack

accompanying text.

504. See *supra* notes 233-35 and accompanying text.

505. BLACK'S LAW DICTIONARY, *supra* note 53, at 728 (defining "laughing heir").

506. This 56% figure refers to the Liberty Fund's balance as of October 12, 2001. See *supra* notes 378-80 and accompanying text.

contributions on 9/11 relief, and each responded to its critics in a different manner. At least three factors help account for these variations: the nature of the potential beneficiaries, the relationships among the different classes of potential beneficiaries, and the political incentives of public officials.

The Red Cross originally planned to divide Liberty Fund monies between two groups: those harmed on 9/11 and those harmed or at risk from harm in future attacks. The former group consists of a relatively manageable number of identified individuals, each with a large financial stake in the Liberty Fund's assets. The latter group consists of potentially everyone living in the United States and Americans overseas, and each member's current stake in the Liberty Fund is minuscule: it equals the probability of being injured or killed in a future terrorist attack, multiplied by the present value of any payment that he or his survivors would receive. As between actual versus hypothetical or statistical victims, it is much easier for the former to organize to demand Liberty Fund aid. In addition to this collective action problem, Americans not directly harmed by 9/11 (i.e., potential Red Cross beneficiaries) felt tremendous sympathy for the victims. They were willing to forgo their individual stakes in the Liberty Fund to promote the victims' well being.

Contrast the Liberty Fund with the two union-run widows' and children's funds. Their managers considered allocating post-9/11 donations among at least three groups: surviving spouses and children of union members killed on 9/11; widows and children of members killed before 9/11 (a.k.a. the "historic widows") and in the future; and the surviving parents, siblings, or next of kin of single 9/11 heroes. Unlike the victims of future terrorist attacks, however, the historic widows were not abstractions: they were real people living on fixed pensions not adjusted for inflation,⁵⁰⁷ some of whom were "in desperate need of support."⁵⁰⁸ It was much easier for 9/11 families to empathize with the historic widows and vice versa.⁵⁰⁹ It is not so surprising, then, that the vast majority of 9/11 families—now financially secure if not prosperous from other sources—were willing to "share" post-9/11 contributions with the historic widows, even though it meant less money for themselves.⁵¹⁰ It helped too that there were relatively few historic widows of firefighters—around 106⁵¹¹—as compared to the 344

507. William Murphy, *Aid for Families of Pre-WTC Heroes*, NEWSDAY, Apr. 5, 2002, at A6.

508. LaMacchia, *supra* note 472.

509. This sense of community was reflected in expressions of empathy by pre-9/11 widows for 9/11 widows, notwithstanding the disparities in aid each received for their respective losses. *See, e.g.*, Michele McPhee & Robert Ingrassia, *Heartbroken Families to Receive \$1M in Aid*, N.Y. DAILY NEWS, Dec. 2, 2001, at 6 ("One widow who lost her firefighter husband in [the line of duty in] 1997 said she felt good about the tremendous outpouring of aid for the Trade Center uniformed victims' kin. "I don't feel left out. I realize past widows didn't get that kind of money, but I'm happy for them. It's never easy to lose your husband.").

510. Only three of twenty-three families of New York City police officers killed on 9/11 demanded that the PBA Fund spend all post-9/11 donations on the 9/11 families. "Most of the 23 families are embarrassed by this [litigation]," a Union official said. Levitt, *supra* note 438.

511. *Id.*

firefighters killed on 9/11. A larger number would have made it costlier and thus less attractive for 9/11 families to let others participate.

Lastly, it is reasonable to ask why the New York Attorney General threatened to sue the Red Cross unless it used everything raised after 9/11 for direct relief to attack victims, but not the unions and the Police Foundation. Similarly, why did Mr. Spitzer permit the unions and the Police Foundation to finance victim payments using only those dollars that donors had expressly restricted for that purpose, but not the Red Cross? Here, one might note that the attorney general's post is an elected office, and that the Red Cross was allocating monies between 9/11 victims—a large percentage of whom were New Yorkers—and future victims of terrorism, a large, diffuse and abstract group. The disputes between local unions and 9/11 families, by contrast, dealt with allocating dollars among real and compact groups of very agitated (understandably so) New Yorkers. A state official could thus not get involved without running the risk of offending at least one group of constituents. To reduce that risk, the prudent politician would likely seek resolutions that split differences and avoided humiliating any party. Additionally, the political costs of challenging local union leaders, a powerful force in New York politics, are considerably higher than going after the Red Cross, which is legally barred from engaging in substantial lobbying or any electoral politics.⁵¹²

CONCLUSION

The outpouring of charitable contributions following 9/11 not only strained the logistical abilities of many DROs, it also overwhelmed key parts of the legal regime that governs them. Some of the largest charities engaged in 9/11 relief received more donations than they could pass onto victims without enriching them, as opposed to simply relieving their suffering. Such distributions, if made, would violate the bar against bestowing excess benefit on private interests. At the same time, these charities were either unwilling or unable to return the surplus sums that could not be used for the solicited or intended purposes. They resembled a python that has swallowed an oversized pig it can neither digest nor expel.

The bar against private benefit, which originated in the common law of charitable trusts, has been incorporated into the federal law of tax-exempt organizations. By enacting Section 104 of the Victims of Terrorism Tax Relief Act, Congress essentially waived this bar for 501(c)(3)-exempt DROs engaged in 9/11 relief. It freed such entities to make payments without regard to actual need. These distributions could make victims financially whole or even better off, so long as they were calculated “in good faith” on the basis of consistent, objective, and “reasonable” criteria. Section 104 enabled the deluge of post-9/11 donations to pass through the charitable conduit with relatively few obstructions.

Several multi-disaster, general DROs sought to resolve the surplus problem

512. IRC 501(c)(3).

in a different way—by using some post-9/11 gifts for purposes other than providing direct relief to 9/11 victims. The union-run funds looked backwards: they wished to help the survivors of earlier members whose line-of-duty deaths inspired fewer donations. The Red Cross looked forwards: it wished to build its capacity to help the victims of future terrorist attacks. Either way, spreading the dollars more widely seemed both more sensible and fairer. Yet in attempting to avoid one set of hazards, these charities crashed into another: the wrath of donors (as well as officials, victims, commentators and others) demanding that everything raised after 9/11 be spent on the victims of those specific attacks. These parties invoked another key principle of charity law: that charitable donations be used for the purposes for which they were solicited and/or given.

Section 104 did not abrogate the state common law prohibition against private benefit; at most, it authorized one class of nonprofit organizations to enrich private interests without forfeiting their federal tax advantages. Even so, state officials did not block DROs from making payments that enriched some 9/11 victims. To the contrary, several DROs were pushed into making at least some unlawful distributions, in order to duck relatively weaker allegations that they had misrepresented their purposes or violated donor intent.

The charitable response to September 11 was singular in very many ways. How will this experience affect the conduct of DROs? The answer may depend upon the type of DRO involved. In the future, general DROs will seek ways to enhance their leeway to reallocate resources among operations, and avoid being pressured into spending more on a particular disaster than they deem warranted. To this end, they may follow the example set by Red Cross' new Donor DIRECT initiative, which more conspicuously notifies donors that unrestricted donations might be used for other purposes, discourages them from making disaster-specific gifts, and informs them when enough funds have been raised for a particular relief operation.

The recent past may have taught disaster-specific DROs a very different set of lessons. For some, the ideal such entity operates like a private trust but enjoys the tax advantages of charitable status. Its managers have the freedom to aid a definite group of beneficiaries regardless of need, to enrich them if resources permit, under the auspices of a tax-exempt organization that is eligible to receive tax-deductible contributions. The 9/11 experience suggests a strategy for achieving this result: in the wake of a major calamity, managers of disaster-specific DROs should try to raise as much money as they can without worrying if it will be too much. If a surplus does arise, then the interested parties (the DROs themselves, their donors and intended beneficiaries) can lobby public officials to waive the "private benefit" bar in their particular case. When emotions run high and are widely shared, these officials may be loath to interpose themselves between donors and the objects of their altruism.

The charitable response to the September 11 attacks revealed much about the politics and public relations of donative surplus, but exposed no great or unpardonable flaw in charity law's method of handling this situation. Even so, dissatisfaction with the performance of disaster relief organizations may prompt some to seek deep changes in bedrock charity law principles. To avoid that possibility, perhaps the better course was to let this pig to pass through the

python, so to speak, such that the legal framework would readily resume its prior shape, and avoid being permanently distorted. In that way, a hard case will not have made bad law.

