

September 2008

## Is Philanthropy Going to the Dogs? Panelist

Ray D. Madoff

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### Recommended Citation

Ray D. Madoff. "Is Philanthropy Going to the Dogs? Panelist." *Hudson Institute's Bradley Center for Philanthropy and Civic Renewal* (2008).

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—EDITED TRANSCRIPT—

HUDSON INSTITUTE'S  
**Bradley Center for Philanthropy and Civic Renewal**  
AND  
**THE CHRONICLE OF PHILANTHROPY**  

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**THE NEWSPAPER OF THE NONPROFIT WORLD**

*present*



## Is Philanthropy Going to the Dogs?

Friday, September 5, 2008 ▪ 12:00 to 2:00 p.m.  
Hudson Institute ▪ Betsy and Walter Stern Conference Center

### EVENT DESCRIPTION

When Leona Helmsley died in August 2007, she left all but a few million dollars of her perhaps \$8 billion estate to the Leona M. and Harry B. Helmsley Charitable Trust, making it easily one of America's largest foundations. She also left a brief document indicating that the entire trust be used for the care and welfare of dogs.

"If it were only a matter of Leona Helmsley wasting her money, no one would need to care. But she is wasting ours, too," wrote Boston College Law School professor **RAY MADOFF** in a July 9 *New York Times* op-ed. Rather than pay estate taxes of \$3.6 billion to the government, Helmsley has stipulated that the money be held in trust for perpetuity. Madoff argues in her op-ed that "the law should not encourage people to tie up their resources – and ours – for all time." (description cont'd on next page)

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Indiana University professor of public affairs and philanthropic studies **LESLIE LENKOWSKY** suggests that Helmsley may have been trying to support animal welfare as a heretofore neglected charitable cause compared to, say, child welfare – and that Congress and the American people give her that right. “In a society that values individual rights, philanthropy gives those with such differing views opportunities to act on them constructively, regardless of what others may think,” he wrote in *The Chronicle of Philanthropy*’s August 21 issue.

On September 5, Hudson Institute’s Bradley Center for Philanthropy and Civic Renewal and *The Chronicle of Philanthropy* welcomed Professors Madoff and Lenkowsky, along with Georgetown University’s **PABLO EISENBERG** and Hudson Institute’s **JUDGE ROBERT BORK** (participating by telephone) to discuss the fundamental questions Helmsley’s bequest raises about donor intent, social justice, and the public interest. *The Chronicle*’s **STACY PALMER** moderated the discussion.

## PROGRAM AND PANEL

12:00 p.m.

Welcome by Hudson Institute’s **WILLIAM SCHAMBRA**

12:10

Panel discussion

**RAY MADOFF**, Boston College

**LESLIE LENKOWSKY**, Indiana University

**PABLO EISENBERG**, Georgetown University

**JUDGE ROBERT BORK**, Hudson Institute (by phone)

**STACY PALMER** (moderator), *The Chronicle of Philanthropy*

1:10

Question-and-answer session

2:00

Adjournment

## FOR FURTHER INFORMATION

THIS TRANSCRIPT WAS PREPARED FROM AN AUDIO RECORDING and edited by Krista Shaffer. To request further information on this event or the Bradley Center, please contact Hudson Institute at (202) 974-2424 or send an e-mail to Krista Shaffer at [Krista@hudson.org](mailto:Krista@hudson.org).

## RECOMMENDED READING

- “Dog Eat Your Taxes?” by Ray D. Madoff, *New York Times*, July 9, 2008
- “Should a Big Bequest Go to the Dogs?” by Leslie Lenkowsky, *Chronicle of Philanthropy* issue dated August 21, 2008
- “Vision of Philanthropy: The Challenge to Foundation Trustees” by Pablo Eisenberg, a speech to the annual meeting of trustees of the Northern California Grantmakers, March 8, 1988
- “Raising Some \$25 Trillion Questions” and “New Giving Reflects Old Priorities” by Pablo Eisenberg, *Chronicle of Philanthropy*, December 16, 1999 and March 9, 2000
- “Interpreting the Founder’s Vision” by Robert H. Bork, in [\*Donor Intent\*](#) (Philanthropy Roundtable, 1993), pp. 3-13

Copies of these essays can be accessed via the Bradley Center’s web page for this event, online at: [http://www.hudson.org/index.cfm?fuseaction=hudson\\_upcoming\\_events&id=600](http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=600)

## PANEL BIOGRAPHIES

**Robert H. Bork** served as Solicitor General from 1973 to 1977; acting Attorney General from 1973 to 1974; and Circuit Judge of the U. S. Court of Appeals for the District of Columbia Circuit from 1982 to 1988. He was nominated by President Ronald Reagan to the position of Associate Justice of the Supreme Court of the United States on July 1, 1987. Confirmation was denied by the Senate on October 23 of that year. In February 1988 he resigned as Circuit Judge and joined the American Enterprise Institute from which he resigned in November 2003. Judge Bork served as the Alexander M. Bickel Professor of Public Law at Yale Law School from 1962 to 1981 with time off to serve as Solicitor General. He is currently a professor at the Ave Maria School of Law in Ann Arbor, Michigan and the Tad and Diane Taube Distinguished Visiting Fellow at the Hoover Institution. Judge Bork is the author of two New York Times bestsellers: *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (1996), reissued with an afterword (2003) and *The Tempting of America: The Political Seduction of the Law* (1990). He also authored *The Antitrust Paradox* (second edition 1993). His most recent book, *Coercing Virtue: The Worldwide Rule of Judges* (2003), examines judicial activism and the practice of many courts, national and international, that decide matters not committed to their authority. He has written numerous magazine, newspaper, and law review articles.

**Pablo Eisenberg** is currently a senior fellow at the Georgetown Public Policy Institute. Prior to his coming to Georgetown in January 1999, he served for twenty-three years as executive director of the Center for Community Change, a national technical assistance and advocacy organization working with low income and minority organizations and constituencies throughout the country. Eisenberg served two years in the U.S. Army and over three years in Africa as a foreign service officer with the U.S. Information Agency. He then spent two years as program director of Operation Crossroads Africa before going to work as director of Pennsylvania Operations for the Office of Economic Opportunity (OEO) in Washington, DC. He subsequently became deputy director of the OEO's Research and Demonstration division. After leaving OEO, he served as deputy director for field operations at the National Urban Coalition. After almost five years with the Coalition, he worked as a freelance consultant for a variety of nonprofit organizations and foundations. Eisenberg has published many articles and chapters of books and has been a regular columnist for *The Chronicle of Philanthropy* for the past seventeen years. His book, *Challenges for Nonprofits and Philanthropy: The Courage to Change*, was published by the New England Press and Tufts University in December 2004.

**Leslie Lenkowsky** is director of graduate programs at the Indiana University Center on Philanthropy. He was formerly the chief executive officer of the Corporation for National and Community Service, and is a leading scholar on America's civic and philanthropic traditions. Before joining the Bush Administration, he was professor of philanthropic studies and public policy at Indiana University/Purdue University at Indianapolis. From 1990 to 1997, Lenkowsky was president of the Hudson Institute, a major public policy research institution. Among his other positions, he has served as president of the Institute for Educational Affairs, deputy director of the United States Information Agency, and research fellow at the American Enterprise Institute.

**Ray Madoff** is a professor at Boston College Law School where she teaches trusts and estates, estate and gift, tax, estate planning, and a seminar on immorality and the law. She is the lead author of *Practical Guide to Estate Planning* (CCH), and has written in a wide variety of areas involving property and death. Her current project is a book exploring the legal treatment of the dead, called *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press). Prior to teaching, she was a practicing attorney for ten years in New York and Boston. Professor Madoff is a member of the American Law Institute, an Academic Fellow of the American College of Trusts and Estates Counsel and the Chair of the Donative Transfers Section of the American Association of Law Schools. She also serves on the Board of Directors of the ACTEC Foundation.

**Stacy Palmer** is editor of *The Chronicle of Philanthropy*, the leading national publication of nonprofit affairs. Palmer played an instrumental role in founding the newspaper in 1988 and in the development of its internet site. Previously, she was editor of the government and politics section of *The Chronicle of Higher Education*.

# PROCEEDINGS

WILLIAM SCHAMBRA: My name is Bill Schambra. Krista Shaffer and I work for the Bradley Center for Philanthropy and Civic Renewal here at Hudson Institute. It's my honor to welcome you to today's panel discussion, based on Leona Helmsley's legacy, entitled "Is Philanthropy Going to the Dogs?"

I should note that we originally tried to schedule this event for August, whereupon the title was to have been "Dog Days for Philanthropy?" (Laughter.) Mrs. Helmsley's own dog, as you know named "Trouble," may figure into our own conversation today. Perhaps the Bradley Center had a premonition of this event several years ago when it published Peter Frumkin's monograph, *Trouble in Foundationland*.<sup>1</sup> (Laughter.) Okay, I'll stop now – but it was irresistible!

It's a particular pleasure to co-host this event today with *The Chronicle of Philanthropy* following last year's very successful co-hosted event featuring a discussion of political engagement by nonprofits between DC Central Kitchen's Robert Egger and *The Chronicle's* Pablo Eisenberg.<sup>2</sup> At the Bradley Center we pride ourselves on staging these sorts of conversations, bringing together representatives from a full range of disciplines, experience, and political views to discuss pressing questions before the sector. We post audio and video recordings as well as transcripts of the panels on our web site (at <http://pcr.hudson.org>), but please be sure to let us know if you'd like to attend our sessions in person (by signing up online or e-mailing Krista Shaffer at [Krista@hudson.org](mailto:Krista@hudson.org) – because all are invited, and you are indeed rewarded with the mythical gift, the free lunch.

Happily for the foundation and nonprofit world, its journal of record, *The Chronicle of Philanthropy*, also does its best to provoke discussion and debate in a world that seems determined to avoid anything other than the most amiable and empty chatter about "learnings" and "partnerings" and collaborations. We are fortunate to have with us today as this panel's moderator the editor of *The Chronicle*, Stacy Palmer. Stacy played a key role in founding the newspaper in 1988, and in the development of its web site. Previously she was editor of the government and politics section of *The Chronicle of Higher Education*.

Our panelists today – and this will not be the order in which they appear, but I will just go down the list you have on your chairs – include Professor Ray Madoff of Boston College Law School, an authority on trusts, estates, and foundations; Les Lenkowsky, now director of graduate programs at the Indiana University Center on Philanthropy and frequent contributor to the pages of *The Chronicle of Philanthropy*, but best known to us here as a former president of Hudson Institute – welcome back, Les! Next we have Pablo Eisenberg, another frequent *Chronicle* contributor, long-time director of the Center for Community Change, and a senior fellow at the Georgetown Public Policy Institute; and finally, Judge Robert Bork. Judge Bork has served as

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<sup>1</sup> Peter Frumkin, *Trouble in Foundationland: Looking Back, Looking Ahead* (Hudson Institute, 2004), available online at <https://www.hudson.org/Bookstore/itemdetail.cfm?item=56401>.

<sup>2</sup> "Should Nonprofit Organizations Play an Active Role in Election Campaigns?" held on August 9, 2007. The complete transcript is available at [http://www.hudson.org/index.cfm?fuseaction=hudson\\_upcoming\\_events&id=421](http://www.hudson.org/index.cfm?fuseaction=hudson_upcoming_events&id=421)

solicitor general and acting attorney general of the United States, and as circuit judge in the US Court of Appeals for the District of Columbia. He is today also a distinguished fellow at Hudson Institute.

I will now without further ado turn things over to Stacy Palmer. Stacy?

STACY PALMER: Thank you all for being here. I am delighted to be able to host these panelists; it's particularly fun for me because I do a lot of my work with Pablo and Les by computer and telephone, and so to have them here in person is a special delight.

There's no better time to be talking about these issues, obviously, than in the midst of a presidential campaign where we'll be talking a lot about what is the role of private organizations and the role of government. I think those are some of the key issues that this bequest raises, and everybody has a very different point of view on that.

We're going to start off with Judge Bork talking about some of his concerns about what's raised by all of the debate touched off by this bequest. Ray Madoff will continue, and then Les and Pablo will talk about some of their concerns. Then they'll talk among themselves a little bit, and we'll open up the floor to all of your questions, which I'm sure you have a lot of – we've had a lot of comments flowing into our e-mail address; we had solicited comments. Most people wanted to know whether this debate would happen, whether it wasn't about the dogs. So we'll talk about that issue as well.

So, let's open with Judge Bork.

JUDGE ROBERT BORK: Richard Posner in his blog said that there are three interesting questions in this matter: Why would a person leave so much money to dogs? Should such bequests be permitted by law? And should charitable bequests be subject to estate tax rather than exempt from it, as they are now?<sup>3</sup> Maybe I can cast some light on the first two questions, at least.

I think the furor over the Helmsley bequest is in large part due to the fact that Leona Helmsley was intensely unpopular. One of the comments to Posner's blog was, "Why should we honor the bequest of some crazy lady?" And the fact is that she got very bad press.

I want to speak to what I knew of her and throw some light on why she did what she did. I feel some gratitude toward Leona Helmsley because I was one of the few and maybe the only lawyer who failed to get her out of prison whom she did not denounce in public. The silence about my deficiencies I appreciate.

It's easy to say that the whole thing was irrational, and that such bequests should not be allowed. But you have to remember Leona Helmsley's background. She was married to Harry Helmsley, and she was convicted of tax evasion and went to prison. There was tax evasion in the scheme, but it was not Leona Helmsley's; it was the consensus of the attorneys that the tax evasion was done by Harry, her husband. Leone Helmsley was a woman with an eighth-grade education. She

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<sup>3</sup> Richard Posner, "Should Dogs Get \$8 Billion from the Helmsley Estate?" *The Becker-Posner Blog*, July 13, 2008, accessed on September 25, 2008 at [http://www.becker-posner-blog.com/archives/2008/07/should\\_dogs\\_get.html](http://www.becker-posner-blog.com/archives/2008/07/should_dogs_get.html)

did not understand what was happening to her. But she got very bad press: She was called the “Queen of Mean.” If you recall, at one point they asked her if she paid taxes, and she responded that she didn’t pay taxes – “The little people paid taxes.” Well, that was played up as a statement that the ordinary citizen paid taxes and she didn’t had to, which was nonsense, because she paid heavy taxes. What she meant was – it’s quite clear – that the accountants paid the taxes, and she didn’t have to bother herself with it. Maybe she shouldn’t have called the accountants “little people,” but that’s not a crime, either.

But when it came around time to indict somebody, Harry was deathly ill – he was dying, and they could not put him on trial. So they indicted Leona, as I said, because she was unpopular and because they wanted a high-profile prosecution at tax time. At least that’s the way I see it, and other attorneys saw it.

The difficulty with her trial was that the government used perjured testimony – we thought that was quite clear. The accountant who was in charge of her matters was in effect keeping two sets of books, and we had argued – and I think that we were probably right – that the government should have known that it was using perjured testimony. That, of course, would have entitled her to a new hearing. But the judge came up with a rationale that was quite astonishing. He did not deny that there was perjury, that there were two sets of books. He did not deny that the prosecution should have known that it was using perjured testimony from this accountant. But he said that it didn’t matter because the government did not initiative the perjury. They might have known that they were using perjured testimony, but they did not initiative it.

Now that, if you think about it, is an astounding doctrine, because what it means is that a witness can come to a prosecutor and say, I’m about to go in there and lie my head off to get you a conviction – and as long as the prosecutor doesn’t urge him on, the prosecutor can go ahead and use the perjured testimony. This is preposterous, but it’s the way Leona was treated in court, and she stayed in prison. I think it’s one of those cases in which a certain kind of defendant just cannot win. It would have been terribly unpopular to turn her loose, so that rationale – which does not hold water at all – was used to keep her in prison.

Now, at that point Leona really didn’t have any friends except Harry, I think. When Harry died, she was alone. And I think the reason she gave the bequest to the dogs was that she didn’t really have any other friends. She was a very lonely lady, and very confused about what had happened to her. She didn’t know why people were doing these things to her.

But be that as it may, coming to Posner’s second question of whether such bequests should be allowed, I think the opposition to allowing such a bequest reflects a socialist impulse. During her lifetime, she could have spent that money or established homes for dogs all over the country and nobody would have said anything. No question about it. In fact, we allow all kinds of questionable or controversial bequests – to fund abortion clinics, for example. I suppose you could fund one to save the polar bears and nobody would say anything.

But the fact is, it was her money. She got pleasure out of knowing that the money would be used to benefit dogs after she died. Why that’s an improper motivation, I don’t know. After all, people talk as if the money disappeared. The money doesn’t disappear. The dogs don’t eat the money.

What happens is, an infusion of cash of that size creates employment across the country. The money invested. Now, you may wish that it were invested in some other way, but it's not evil to pay people to take care of dogs.

We saw what happened before with that kind of an impulse, the socialist impulse. There was a time when people thought it was shameful that rich people should have such huge yachts, and they slapped a luxury tax on the yachts. The result was that fewer yachts were built, and I suppose that billionaires felt inconvenienced, but a lot of boat builders were thrown out of work until they got rid of the luxury tax.

So what you're talking about here is not money that disappears. You're talking about money that is invested in a range of assets which do some good, which do not do anything harmful. And why she shouldn't be allowed to have the pleasure in her own lifetime of knowing that that kind of good that she wanted would be done, I do not know. So my answer to the second question is, of course you allow charitable bequests, and you should not interfere with this one. And that concludes what I have to say.

STACY PALMER: Terrific. Thank you very much. We're going to have Professor Madoff next, and I think she'll address the questions of: Is it our money or her money? What happens when there is a tax subsidy for this kind of bequest?

RAY MADOFF: Thank you very much – and this is a perfect set-up because although we didn't plan it in advance, it is true that I'm going to be talking not just about the tax issue, but also about yachts.

It is tempting to look at the Leona Helmsley bequest of \$8 billion for the care of dogs as just another example of an exercise of the eccentricities of the super-rich. There is her gift of \$12 million for the care of her own dog Trouble, and her arrangement to have her grave steam cleaned each year – that is also in the Helmsley will. Other examples of eccentric expenditures of the super-rich include five-hundred-foot yachts that are too large to fit into many harbors, multi-million dollar watches, and using dollar bills for gift-wrapping. No doubt it is tempting to look at the Helmsley bequest with bemusement as another example of the foibles of the wealthy. Moreover, any quibbling with this type of spending has the appearance of jealousy or pettiness – or in the words of one e-mail I received in response to the op-ed I wrote on this subject (in *The New York Times*, July 9, 2008; see the recommended reading list, above, for details and a link), “Stop being jealous of rich people and get a life.” (Laughter.) I'm certainly aware of that.

However, this view misses an important distinction between the Helmsley dog bequest and the five-hundred-foot private yacht. While both involve extravagant expenditures by the wealthy, the private yacht is paid for solely by the person buying it, while a significant portion of the Helmsley dog bequest – like other philanthropic bequests – is subsidized by US taxpayers. The reason that I say this is because charitable gifts – both during life and at death – are examples of tax expenditures. They are functionally the same as other expenditures by the government – like payments for Medicare and Medicaid, early childhood education programs, or weapons defense programs. The difference is that unlike these traditional government expenditures that are subject to the democratic legislative process, the tax expenditures under the charitable deduction are not.

The Leona Helmsley bequest affords us the opportunity to consider whether in these challenging financial times it is appropriate for the federal government to continue to give wealthy taxpayers a blank check on the federal budget.

That's what I'd like to be focusing my comments on today.

I think that it is worth a few minutes to talk about this concept of the tax expenditure, as it is easily misunderstood. To some people this may be a familiar concept, but I suspect that for many, it sounds strange – as if somehow its proponents are suggesting that all property belongs to the government, and only allows private ownership at its sufferance. However, the tax expenditure concept is the best way we have of fully understanding government expenditures.

So as I mentioned, sometimes the government gives money directly – direct expenditures for the benefit of individuals, like food stamps for poor people or picking up the tab for early childhood education. However, government expenditures can be made exactly the same way through the tax code. So when the tax code grants a benefit for money spent on purchasing a fuel efficient car – they provide credits for it – it is the same as if the government were assisting in the purchase of the car by contributing to the cost of purchase. Similarly, the home interest mortgage deduction is the same as a direct expenditure by the federal government to assist people paying their mortgages.

Not all deductions are tax expenditures. Some are necessary to more accurately reflect the tax base – and for people who are interested in this topic, I am more than happy to talk about that after the general comments. The important point is that anyone interested in understanding where government resources are being spent must be equally mindful of tax expenditures as well as direct expenditures.

The other point I want to make is that this tax expenditure concept applies irrespective of one's political perspective, as savings on tax expenditures could be used to provide lower tax rates for everyone. Indeed, this was the model used to implement Reagan's Tax Reform Act of 1986, when he cut out tax expenditures and replaced them with lower rates. So this isn't a political issue, this issue of the tax expenditure.

Okay – back to the charitable deduction. The charitable deduction for both income and estate and gift tax purposes is another example of a tax expenditure. It acts as a matching grant from the government to a charity of a person's choice. So if a person contributes \$100 to the Red Cross and receives a tax deduction worth \$35, this is functionally the same as if the person gave \$65 of his own money to the Red Cross and directed the federal government to give \$35 of its money to the same cause. It's a matching grant program.

In the case of Leona Helmsley, it lays bare the fact that her \$8 billion gift for the dogs is really only a gift of \$4.4 billion by Helmsley and a gift of \$3.6 billion from the rest of us. How I got that number is, basically, that that \$8 billion would have otherwise been subject to the estate tax, which is imposed now at about a 45 percent rate.

However, describing the Helmsley bequest as a tax expenditure is not the end of the story. After all, it might be an appropriate expenditure. Saul Levmore, dean of the University of Chicago Law School, has argued that the charitable deduction is a valuable tax expenditure because it provides good information to the government regarding which charitable programs it ought to support. He likens it to the check-off on tax returns for financing elections. You know, the question of, do you want your money to go here? Only this one is even better because people are actually putting up their money themselves for these causes. So the donor's gift to the Red Cross tells the government to support the Red Cross, too.

However, I would like to spend the remainder of my time focusing on what I think are some significant problems with what I will now refer to as this "charitable matching grant program."

First, it is a government expenditure that is only available to the charitable donations of the very wealthy; for income tax purposes it only applies to those taxpayers who itemize their deductions, and for estate tax purposes it only applies to individuals with assets greater than \$2 million.

Moreover, the wealthy do not serve as very good proxies for Americans as a whole because the types of bequests that the wealthy make are very different gifts from the ones made by other Americans. In this week's *Chronicle of Philanthropy*, there's an interesting chart showing the different types of bequests that are made by different groups.<sup>4</sup> While most Americans direct their charitable dollars to religious organizations – which one could argue raises its own concerns about the charitable deduction, but we'll leave that aside – wealthy Americans are far more likely to give their charitable dollars to either education or their own private charitable foundation, like Leona Helmsley did. She directed her \$8 billion to the Harry and Leona Helmsley Charitable Trust. Each of these beneficiaries raises significant concerns about the appropriateness of the charitable deduction matching grant.

First of all, let's talk about education. Undoubtedly, education plays an important role to all sectors of society – but a recent study by Professor Miranda Perry shows that a disproportionate number of bequests of the wealthy are likely to go to a small number of selective, socially prestigious schools. Perry looked at all estate tax returns for one year, and she saw that 23 percent of all education bequests reported on estate tax returns went to 25 colleges and 10 elite prep schools. Now, it seems to me that it is unlikely that the population as a whole would support federal matching grants for the hundreds of millions of dollars donated to Harvard University while so many public schools are failing to meet the needs of the larger population.

The other common recipient is the private foundation. And here is my second point of concern regarding the Helmsley bequest. Private charitable foundations are the most common recipients of charitable dollars under estate plans. And I guess I'll take part of the blame for that myself; as a professor of estate planning, I know that it is often the case that wealthy people go to their lawyers and say they are interested in charity, and their lawyers say, set up a perpetual private

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<sup>4</sup> Suzanne Perry, "Paying It Forward – and Back," *The Chronicle of Philanthropy*, September 4, 2008. Charts attached to this article include "Where Charity Dollars Go" and "Big Donations: A Snapshot." Link (subscription required): <http://philanthropy.com/premium/articles/v20/i22/22000601.htm>

foundation. So, I will take the blame where it falls. But it should also be said that private foundations can accomplish a lot of good and have accomplished a lot of good.

The problem is that the law governing private foundations has been far more concerned with preserving their perpetual existence than in serving their charitable goals. We see this in the 5 percent rule, the fact that private foundations are only obligated to spend 5 percent of their assets each year, and the fact that those expenditures include foundations' administrative expenses such as trustee fees, which can be substantial – even 1 or 2 percent of that 5 percent. Legislation was introduced in 2003 that would have required foundations to give all of the 5 percent to charities, but that was subject to some very heavy lobbying and that legislation didn't pass.<sup>5</sup>

Well, what's wrong with perpetuity – isn't something that's good now good forever? The problem with perpetual private foundations is that they divert resources from the problem that the donor knows about so that they're available to address the unknown and unknowable problems of the future. They are based on a false promise of immortality to their donors. As Judge Bork in his writings rightly points out, it's far more common for a foundation mission to shift over time. But I would argue that this shift isn't just common – it's inevitable. None of us is so smart that we can make intelligent decisions about the allocation of resources four hundred years from now. So it makes sense that these things would shift.

Some of the most effective donors have rejected this false promise – Julius Rosenwald, John Olin, and the Gates Foundation have all more effectively addressed the problems of their time by limiting their own terms.

Okay, what is to be done? One possible response is to limit the types of organizations that can qualify as charitable organizations. This was American law through most of the nineteenth century, when courts looked askance at people trying to establish perpetuities for whatever charitable goal they felt was appropriate. Courts were constantly rejecting these charitable trusts. However, I think that would be a mistake. I for one am uncomfortable with choosing between art museums and food banks, and even more uncomfortable in having the government involved in that kind of line drawing.

That being said, there is a difference between allowing these thousand points of light, and giving wealthy taxpayers a blank check on their right to direct federal assets toward them. We are simply not so flush as a nation that we can afford this type of luxury. Therefore, I propose that there should be a cap – either dollar amount or fixed percentage of the estate – on the amount of the charitable deduction for estate tax purposes. Such a cap already exists for income tax purposes, and I think that it should be extended for estate tax purposes as well.

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<sup>5</sup> The Bradley Center held a panel discussion with Rep. Roy Blunt (R-MO), Peter Frumkin, and Dorothy Ridings on this legislation, entitled "A Cost of Giving Adjustment? Should Administrative Expenses Be Excluded from a Foundation's Qualifying Distributions?" on June 17, 2003. A complete transcript can be found online at [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=2908&pubType=HI\\_Speeches](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=2908&pubType=HI_Speeches) (last accessed September 25, 2008). In addition, Pablo Eisenberg, along with Christine Ahn and Channapha Khamvongsa, authored the 2003 study *Foundation Trustee Fees: Use and Abuse* (The Center for Public and Nonprofit Leadership, Georgetown Public Policy Institute), which highlights excessive administrative expenditures. This study can be found online at [http://cpnl.georgetown.edu/doc\\_pool/TrusteeFees.pdf](http://cpnl.georgetown.edu/doc_pool/TrusteeFees.pdf) (last accessed September 25, 2008).

Second, the law should stop encouraging the false promise of immortality to donors. It should impose higher spending obligations on private foundations, even at the expense of their perpetual existence.

I want leave you with the words of Julius Rosenwald, the greatest philanthropist no one ever heard of because he was so opposed to perpetual giving – so I feel I need to do my part to at least keep him alive.

I am certain that those who seek by perpetuities to create for themselves a kind of immortality on Earth will fail, if only because no institution and no foundation can live forever. If some men are remembered years and centuries after the death of the last of their contemporaries, it is not because of the endowments that they created. The names of Harvard, Yale, Bodley, and Smithson, to be sure, are still on men's lips. But the names are now not those of men, but of institutions. If any of these men strove for everlasting remembrance, they must feel kinship with Nesselrode, who lived a diplomat but is immortal as a pudding.

(Laughter.)

Thank you.

LESLIE LENKOWSKY: Thank you very much, Stacy. I am really indebted to the Hudson Institute, *The Chronicle of Philanthropy*, and most of all Mrs. Helmsley for giving me an opportunity to do something I have rarely had a chance to do in my career, which is to defend something that's popular—man's best friend. I look forward, of course, to a similar request on behalf of motherhood or apple pie, and promise you that I will rise to the defense of those as well.

(Laughter)

I've written on the Helmsley bequest in *The Chronicle* (issue dated August 21, 2008; see recommended reading list, above, for details and a link), and I'm not going to spend a lot of time summarizing; it seems to me this issue boils down to four major questions, the first of which is whether or not Mrs. Helmsley's gift was really a whimsical gift.

Professor Madoff has referred to the democratic process as a vehicle for allocating public assets. And of course the democratic process did indeed operate in this case. It approved quite consciously animal welfare as a proper charitable activity worthy of the tax benefits that we're talking about today.

Now it needn't have done that. In fact, up until the law was amended in 1918, there was a lot of dispute as to whether or not animal welfare was a charitable purpose. As I said in my *Chronicle* column, what really changed the Congress's mind on this was the fact that a lot of our concern for protecting children actually initiated with animal welfare societies. You can go on the website today of the American Humane Association (<http://www.americanhumane.org>) and you'll see that they still have two divisions – one for protecting animals, and the other for protecting children. In the early history of child protection agencies, the animal welfare groups

were the major driving force. So Congress decided it wanted to offer tax exemptions for organizations that were – in the terms of the time – “saving children,” to exclude those that were preventing cruelty to animals would have been as a practical matter impossible.

In any case, it’s worth putting the Helmsley bequest into little perspective. It’s hard to get a good number on this, but one estimate is that Americans spend \$50 billion dollars annually on pet care. If you assume a 5 percent payout rate from Mrs. Helmsley’s bequest, that would come to something less than \$500 million dollars a year, or somewhere in the neighborhood of a few percent of total we spend. And by the way, three quarters of dog owners give medicines to their dogs, and – well, until I started this research, I had *no idea* what sorts of expenses –

(Laughter.)

Well, I had some idea from personal experience; obviously, ours was fairly typical. So the Helmsley bequest in terms of money going to help animals – and that’s just in the United States – is actually relatively a small portion of the total.

A reference was made, of course, to Head Start, on which we spend approximately \$8 billion – some twenty times more *annually* than the Helmsley Foundation will yield for helping dogs. Of course, Head Start is just one of many programs. When I was in office, we tried to count them. We came up with over three hundred programs run by the federal government trying to aid disadvantaged children. So the amount we spend on “preventing cruelty to children,” so to speak, far exceeds what we spend on pet care – and I am not even counting the spending by other foundations and nonprofit organizations. So you could make a pretty good case that Mrs. Helmsley’s gift was not a whimsical one.

But okay, what about in general? Should we be concerned that others receiving tax deductions might be making whimsical gifts? Well, you can’t rule that out. But if so, the important point is, it’s not just gifts by the very rich or gifts to create foundations that we should be focusing on. Last year, Americans gave to charity some \$300 billion, resulting in close to \$50 billion in tax deductions. Now to be sure, it is only itemizers who are eligible to claim tax deductions, but an awful lot of people – at least a quarter of all American households – are itemizers.

Gifts to create foundations like Mrs. Helmsley’s were not the most common charitable gifts. In fact, our estimate is that last year, about \$25 billion was given explicitly to create foundations. If we assume that everyone was in the 45 percent estate tax bracket, which is probably not the case, that means the tax expenditures just for gifts to create foundations come about \$12 billion, or roughly one quarter of the total amount of tax deductions in the federal budget. That’s not a small number. But of course if you are really worried about whimsical gifts, the question to ask is, what are we doing with other 75 percent? To focus on the money given to foundations is to look at the smaller piece of this pie. And incidentally, foundation giving last year exceeded \$30 billion, which even on the assumptions I use would be about three times the cost of the tax deductions for the gifts to create new foundations.

The third question: In any case, should we be putting limits on what foundations can do? In an article in this week’s *Chronicle*, Suzanne Perry reports that in fact, Congress is now considering

whether the limits on foundations, which are stricter than the limits on other kinds of charitable activities, should be extended to the other charitable activities as well.<sup>6</sup> Among the limits that we place on foundations, foundations may be tax exempt, but they pay a tax—it's called an excise tax. We talked earlier about the payout rate; foundations are required do spend a certain amount each year. There are restrictions on ownership of assets. There are limits on whom they can support; foundations cannot give a grant to an individual unless they have gotten prior approval for a fellowship program. They can only give grants to public charities; mutual aid societies and other kinds of nonprofit organization that may be providing public benefits cannot receive foundation grants directly. And there are also prohibitions on gifts for certain kinds of purposes, most notably for political activity. Foundations are not supposed to be supporting any kind of political activity – a prohibition that is probably honored in the breach.

Now we have been debating for quite a long time whether or not to change some of these rules. We have not been exclusively concerned with maintaining the perpetuity of existing foundations. Payout, as we have just heard, has been debated; but if 5 percent is too low, what is right? How do you balance the desirability of spending currently with the value of saving money for issues or problems or even opportunities that occur in the future? We have been also spending a lot of time talking about limiting the lifetime of foundations. One of the major proponents of this – more recently than Julius Rosenwald – was Senator Al Gore, Sr., who in debating the Tax Act of 1969 reminded the members of the Senate that charitable organizations existed in the Roman Empire and by 65 BC had become powerful politically as well as economically; and because so many of these participated in Catiline's conspiracy, Cicero persuaded the Senate to dissolve them as contrary to public policy. "*O tempora o mores!*"

(Laughter.)

And this issue, as we've also heard, has growing interest. Some interesting examples include the case of the Olin Foundation,<sup>7</sup> Atlantic Philanthropies, and the Gates Foundation. The important point is, there is nothing in the law to prevent a foundation from limiting its lifetime. There are arguments pro and con. But right now any donor who wishes to limit the lifetime of his foundation – and growing numbers appear to be doing so – can.

In any case, lifetime limits don't really deal with the problem of whimsical gifts. Are gifts less whimsical if the principal has to be spent as well as the income over a shorter period rather than a longer period of time? And what about other types of endowments? Are gifts to law school endowments whimsical considering how much the average lawyer makes in the United States? And if so, should we require law schools to spend down or have a payout rate? Now, you may think that this is an example I've made up – and it partly is, but in fact Congress will be having a hearing as early as next week on whether or not the endowments of colleges and universities should be subjected to a payout rate.

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<sup>6</sup> Suzanne Perry, "Paying It Forward – and Back," *The Chronicle of Philanthropy*, September 4, 2008. Link (subscription required): <http://philanthropy.com/premium/articles/v20/i22/22000601.htm>

<sup>7</sup> On December 8, 2005, the Bradley Center held a panel discussion on the work of the Olin Foundation, which had recently closed up shop. The discussion featured John J. Miller's, author of *A Gift of Freedom: How the John M. Olin Foundation Changed America*. A complete transcript can be found at this link: [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=3883&pubType=HI\\_Speeches](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=3883&pubType=HI_Speeches) (last accessed September 25, 2008).

Finally, if we were to provide additional restrictions, of course there would be other risks, the most important of which is the possibility of less philanthropy. We have studied why people give an awful lot at Indiana University's Center on Philanthropy and elsewhere, and let me tell you that people are not just motivated by tax benefits. Most households, after all, don't get any tax benefits anyway; they don't itemize! Even if you look at high-net-worth households, they will tell you that eliminating estate taxes, which will solve the problem of the deductibility of bequests, will not change their giving plans.

But people are sensitive to tax considerations, especially upper-income folks. They often affect the timing and amount of gifts. The best known example of this was Ted Turner's supposedly spontaneous gift to the United Nations Foundation, which was carefully calibrated to a certain piece of legislation in Congress that enabled him to deal with a big capital gains problem he had.

We also know that what drives giving is a sense of the values that donors hold – what we call their expressive purposes. People have ideas about what serves the public interest. They want to use their wealth on behalf of this vision, however strange it might seem to others of us. Now, the idea that a country could have multiple and competing notions about the public interest is not an easy one to grasp. In most countries, in much of recorded history, it hasn't been grasped. Machiavelli told of the execution of a philanthropist in Roman times precisely because the more desirable way to serve the public interest would be through the senate. Most countries, if not directly, impose tight controls. Nonprofit organizations and philanthropists have to operate with government approval. That is not the case in the United States. Here, our vision of the public interest is a pluralistic one. With apologies to Chairman Mao, we believe it is desirable to let a thousand flowers bloom. And we do this in a variety of ways, some through the federal system, but importantly for today's discussion, through philanthropy. We believe this encouragement of philanthropy to be an important source of innovation and experimentation, of our ability to accommodate the interests of all sorts of different people – including dog lovers – regardless of what the majority of us might believe. And philanthropy also allows for continuous renewal of our civic energy as we are always encouraged to think not about what is in our own self interest, but what might also be in the public interest.

The problem with the remedies being discussed today is that they run the grave risk – for no conceivable gain – of diminishing philanthropy.

PABLO EISENBERG: Thank you, Stacy.

First, I'd like to thank Hudson Institute's Bradley Center for being one of the few organizations not only in the Washington area but throughout the country that is raising the important issues – not only about philanthropy but about nonprofit sector. When you look at our so-called infrastructure organizations that support, ostensibly, nonprofits and foundations, you see a group of organizations that have absolutely no intellectual curiosity or ferment. The Council on Foundations, the regional associations of foundations (RAGs), Independent Sector, and others clearly are not interested in the big issues that face America's future as related to nonprofits and philanthropy.

And the academic world – with a few exceptions of course, Les (Lenkowsky) – is not interested in any of the big issues. Their concern is with the minutia of the operations of foundations and nonprofits: management style, fundraising, how to improve services. They are not raising the tough, big issues that in fact Dr. Madoff has raised in her op-ed (in *The New York Times*, July 9, 2008; see the recommended reading list, above, for details and a link).

I do not want to talk about poor Mrs. Helmsley today, nor do I want to talk much about donor intent. Suffice it to say, what's good for the goose is good for the gander. If someone says, gee, a donor can't give to dogs, he can also say that donors can't give to poor people, or to social services. The question of limits, however, is a reasonable one to put on the table.

Rather, what I'd like to do is to raise the big issues that I believe all of us should be raising in terms of what happens in the next twenty-five to fifty years.

First, are American taxpayers getting their money's worth from philanthropy, the question that Dr. Madoff raised in her opinion piece. The second would be, is the enormous future intergenerational transfer of trillions of dollars from wealthy people to both foundations and charities a help, or will it be a hindrance to democracy and democratic institutions?<sup>8</sup> Can we in fact democratize foundations? In foundations, as you know, we have the most elitist organizations in this country, run by for the most part very wealthy people, a sort of a reversion to the Marie-Antoinette/Louis XVI days where we had basically *noblesse oblige* dealing with the most crucial public issues. Can that governance be changed? Should we pay out to nonprofits and the public a greater amount of money from capital assets of foundations? And finally, does philanthropy perpetuate or at least maintain the huge inequities in our society? Does it favor the wealthy as opposed to poor and working people who have the greatest needs? Let me just focus a little on each of them. And by the way, I don't have any answers to these questions. But the important thing is that these questions ought to be raised and debated, which they have not been, with few exceptions.

Is the public getting its money's worth – that is, the tax payer? I think there are indications that they are not fully getting their money's worth. If you recall the Filer Commission and what it stated as the primary purpose of philanthropy, it said that philanthropy's purpose is meeting the most urgent public needs. Now, take a look at our most urgent public needs today: poverty, low-income people, jobs, economic insecurity, environmental pollution, rural disinvestment, and on and on and on. And if you try and match them to the priorities that foundations put on these urgent public needs, you'll find an enormous mismatch. So are we meeting our nation's most urgent public needs? I think not.

The issue of trustee fees has been raised by Dr. Madoff as an important part of the 5 percent that foundations are obligated to pay out each year. By my guess, based on studies that have been done so far including one we did at Georgetown on 1998 data, some \$350 million to \$400

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<sup>8</sup> For information on the concept of the intergenerational transfer of wealth, see "Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for a Golden Age of Philanthropy" by John J. Havens and Paul G. Schervish (Boston College Social Welfare Research Institute – now called the Center on Wealth and Philanthropy, October 1999). This landmark study can be found online at [http://www.bc.edu/research/cwp/meta-elements/pdf/m\\_m.pdf](http://www.bc.edu/research/cwp/meta-elements/pdf/m_m.pdf) (last accessed September 25, 2008).

million a year of foundation money goes to trustees who comprise the wealthiest and most highly professional people in the country – in short, people who do not need trustee fees to do charitable work. Most of us serve on nonprofit boards and do charity by volunteering. We don't get paid for that. Why should the wealthiest in the country be paid to serve on foundation boards and thereby squander that huge amount of money that could be going out to support needy nonprofits and good service organizations throughout the country?

The tax boondoggle which donors call “fractional giving” is another example of tax dollars being wasted to give the privileged few an extra bonus – by giving their art to museums over time, which effectively allows them to keep their art at home.

The payout, which is the purpose of foundations – that is, how to provide money for needy nonprofits, is not only limited to 5 percent, it includes an enormous amount of staff expenditures, lawyers' fees, accounting fees, purchase of buildings, rental of buildings. That may be one of the reasons that if you go to many big foundation offices, you'll find luxurious quarters with beautiful vistas – unnecessary to do foundation business. And yet that's another instance of the squandering the public's money. Estate contributions that Dr. Madoff has mentioned serve some good purposes, but perhaps it's time to put a limit on how many charitable contributions can come from this source.

Let me talk about the rapid growth of huge foundations, what I call the mega-foundations because of that impending transfer of wealth. When you look at the Gates Foundation and the Wal-Mart folks, we see mega-foundations that are worth \$50 billion or \$60 billion. If in fact there is going to be transfer of enormous wealth – it has been estimated at \$30 trillion to \$40 trillion – we are likely to see the growth of a huge number – fifty, one hundred – of these mega-foundations with assets of \$50 billion to \$100 billion. And who will they be run by? Two or three family members, as is this case with the Gates Foundation. In short, what we are saying is that in a democracy we will be entrusting this huge amount of money, these individual assets which in many cases are much greater than the budgets of all but a few countries throughout the world, to two or three family members without the benefit of a political process, without the benefit of public discussions. Is that good for democracy? Does that help the way we run things in this country? I suggest not. And I think we all ought to think about that.

What can be done? Well, for one thing, we could invoke anti-trust and split big foundations into smaller sizes. We could demand that they be sunsetted, as the Gates's have said they are going to do, but over a period of twenty or thirty years – not necessarily fifty years. We could require that unless they sunset, they add non-family members to foundation boards, thereby giving them greater representation from the public and a much more rational process for their decision making.

In short, I claim that there is a danger to American democracy should we have 75, 100, or 150 of these countervailing institutions that are not democratic in nature.

As I mentioned, we have a governance system of foundations made up of the most elite people in our country. It is not surprising that the priorities of the foundation world are skewed to established institutions of higher education, health, and culture, and *away* from those who need

them most: low-income people, people of color, the disabled, women and youth at risk, et cetera. It's not surprising why these priorities exist. It is because it's determined by an unrepresentative groups of folks who govern our foundation world.

Can we do something about it? It's very difficult to come up with answer, other than keeping the pressure on these foundations to broaden their governance basis. But I think that's going to have to be done. And they are going to have to be more diversified.

Twenty-five years ago, many of us claimed that the real problem was that there were not enough people of color and women on the boards of foundations. Well, that's changed. There are lots of women and not an adequate number but still lots of people of color on foundation boards, and they haven't changed one wit. They still fund the same priorities. And the issue is no longer just gender and race; it's class. When you look at all of these foundation boards, you are hard put to find anybody who represents working America: union people, school teachers, community organizers, small business people, anybody except the very upper classes. As I said, the answer is not simple, but we all ought to think about how to change that.

We do not pay out enough money to really give the tax payers their money's worth. Five percent, which includes in many cases 1 to 1.5 percent for staff costs, is just a lamentable amount given today's needs, particularly of nonprofits in this economy, many of which are going down the tubes. It is not adequate, and there is no reason on Earth other than opposition of foundations themselves – and particularly the Council on Foundations, which has adopted as its eleventh commandment “Thou shall not increase the payout rate” – not to increase the payout rate to at least 6 or 7 percent in grants. That would mean some \$10 billion to \$15 billion in additional money for the coffers of nonprofits of all stripes. And if one thinks about how to channel more money into low-income, needy organizations and advocacy groups, right now the only way is to have – regardless whether it's trickle-down or not – a greater amount available, which will trickle down to those organizations that are primarily left out of the picture.

Finally, the question of perpetuating inequities. It's a very hard issue to tackle. Les (Lenkowsky)'s Indiana University put out figures on the giving patterns of wealthy people making over \$1 million in donations in 2004 and 2005. If you look at them, almost all of the money went to schools of higher education, hospitals and medical centers, and somewhat less to culture and arts institutions. *No* money went to grassroots organizations, to reproductive rights organizations, to local community health centers, to domestic violence centers, even to social service organizations working with the United Way. Very little actually, surprisingly, went to national organizations like the Red Cross or the national United Way. When you look at all the grants went to higher education, only two actually were targeted to scholarships for needy kids. And as the amount of money given away by very wealthy people expands almost exponentially these days, less and less of a proportion of needy recipients will get that money, thereby expanding the inequities in philanthropy. Several forums ago it was mentioned that maybe two thousand foundations have sprung up in wealthy school districts to give money to supplement the budgets in these already wealthy districts.<sup>9</sup> No such foundations, or few foundations, have arisen

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<sup>9</sup> The forum mentioned is “Taking Philanthropy Seriously,” a Bradley Center panel discussion with William Damon held at Hudson Institute on March 22, 2007. The transcript is online at (link below)

in poorer or really destitute school districts. Again, this is an instance where philanthropy perpetuates the inequities in our system.

So we therefore have to ask – constantly – who gets the benefits of philanthropy. If you look at the priorities of philanthropy over the past forty years, very little has changed. Only a sliver of the pie continues to go to the neediest in our country, while the *huge* majority of funds continues to go to those established institutions that I’ve talked about. There are no easy answers to these five questions, but I think it’s incumbent on all of us to keep asking them, searching for questions, searching for answers, and hopefully stirring a debate so we can focus on what’s happening to the future of philanthropy.

Thank you.

(Applause)

STACY PALMER: Thank you very much for all of those comments. You all gave us so much food for thought, it’s going to be hard to know where to jump in. But I would really like to know whether you all would like to have a chance to address each other’s comments before we open it up to the audience.

LESLIE LENKOWSKY: I guess I would just like to point out that it’s easy in these discussions to use “philanthropy” interchangeably with “foundation giving.” Foundation giving is about one in eight dollars of the total amount that Americans give to philanthropy. The bulk of giving comes across the spectrum, although there has been some shift upwards in the income distribution in recent years. But by and large we estimate that on the order of 80 percent of all American households give something philanthropically, and much of that is given locally to the kinds of organizations where people live, where they work, and from which they benefit – including organizations especially through the religious sector that are in fact helping the needy. So when we look at foundation giving, we’re looking at a very small piece of the pie, and even within foundation giving there are some important differences between very large foundations of the sort Mrs. Helmsley’s bequest will create and the vast bulk of foundations which have assets of less than \$1 million.

RAY MADOFF: I have two responses to that. One is that first of all, although I agree with you that charitable giving plays a big role for a lot of people in terms of the federal contribution to it, a lot of times it doesn’t touch that type of day-to-day giving that many people do. But the other thing is, I do think that these small foundations raise their own issues, because there has been some interesting work done about orphaned trusts. People are encouraged to set up these perpetual foundations for all sorts of purposes – in the name of a loved one or in their last wills. This money is now being held by law firms and trust offices, and it is being directed to the alma maters of the trustees. So I’m not sure that these smaller foundations don’t raise their own issues as well.

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[http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=4599&pubType=HI\\_Speeches](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=4599&pubType=HI_Speeches) (last accessed September 25, 2008). See in particular the remarks of Rob Reich on p. 13.

And I guess I would agree with you also that this isn't just a problem of private foundations. We have a rising senior in high school and I've been touring colleges – and to call them country clubs would be to make country clubs seem much nicer than they are. I've never seen anything like this going on at universities. Private museums. Saunas. Spas. All with federally subsidized money.

PABLO EISENBERG: Well, back to Les' comments, I should point out that while an enormous amount of private giving goes to churches, the majority of that giving goes for sacerdotal purposes and not for the benefit of their constituents or for needy folks. The same could be true of United Ways that spend maybe \$3 billion or \$4 billion a year, and until at least recently most of that money never went to grassroots groups and low-income people. It mostly went to fairly safe organizations. If you look at the pattern of wealthy donors – not just your average Joe who gives a few bucks here and there – they are increasingly giving to established institutions and groups and not to those who need it most in our society. And since their gifts are increasing every year, it widens the gap. If you look at the revenue of nonprofit organizations, you'll find that the big, established nonprofits are getting richer while the poor, local nonprofits are getting poorer – and in fact, we've seen over the past couple of years the demise of many grassroots organizations that just couldn't get a dime from philanthropy or from their own fundraising efforts.

So I think the issue of inequity and who gets the benefits is a real issue; it will continue to be a real issue; and it will become even more important in the future.

STACY PALMER (turning to the audience): Now it's your turn. We want to hear what's on your minds – and there are lots of hands up, so – let's start with you.

ASHLEY MARCH, Cato Institute: I have a question on the methodology for the research on the tax expenditures. Dr. Madoff, did you take into consideration all of the income tax paid by the hundreds of thousands of people who work for nonprofits in those jobs that philanthropy creates, in addition to income tax on trustee fees?

RAY MADOFF: You mean the \$4.4 billion cost of the federal matching grant – that one?

ASHLEY MARCH: Yes.

RAY MADOFF: No. I guess the answer is, I didn't take that into account. The income taxes paid on the salaries earned? I think that you're right, in that an analysis capturing the whole universe of everything as one thing leads to another is difficult to do.

ASHLEY MARCH: I do think, though, that that needs to be taken into consideration.

LESLIE LENKOWSKY: It's also important to point out that there are about ten million people in the nonprofit sector workforce. When I first started in this field, as an employee of a nonprofit I did not have to pay Social Security taxes. That changed with the 1986 reform. So to Ms. March's point, all ten million of them are paying Social Security tax, which we know is a fairly substantial amount of tax these days. The numbers I was quoting – Ms. March, if you were

asking that about tax expenditures – are actually reported every year in the federal budget. In the supplement to the federal budget there is a special study where they estimate the value in terms of lost revenue to the federal treasury.

ASHLEY MARCH: The other question I had just in terms of the difficulty supporting various social services, as a fundraiser I can tell you that individuals are very, very reluctant – not just wealthy individuals but across the board – to support that kind of institution because they rightly perceive it as a function of the government. Government actions have made that perception possible. So the question might be, if government were to get out of the social service business, what would philanthropy do?

PABLO EISENBERG: If the government were to get out of the social service industry, philanthropy wouldn't know what to do because it doesn't have anywhere near the money to substitute for that big chunk of federal money, and as you know, it's part of third-party government. The government chose to contract out or outsource many of its services to nonprofits because they felt that they could do it more efficiently and more effectively – although in some cases they were wrong – than government was able to do. But philanthropy has relatively small potatoes compared to the feds, and therefore social services would ratchet down and many of them would go out of business.

MARTIN MORSE WOOSTER, author of *The Great Philanthropists and the Problem of "Donor Intent"* (Capital Research Center, 3<sup>rd</sup> edition in 2007): First, I want to just quickly say that lots of people know who Julius Rosenwald is; I've quoted the paragraph Professor Madoff has quoted at least seven times, most recently for the Manhattan Institute.

My question is actually on perpetuity. Professor Madoff, if Mrs. Helmsley had left her money with a term limit, would you find it as objectionable? I gather that you are more concerned about the idea that this was a perpetual trust for animal welfare rather than, say, a one-time grant comparable to Joan Kroc's grant to the Salvation Army.

RAY MADOFF: My primary concern is with the expense of the charitable deduction and the appropriateness of it. My concern with perpetuity is, when you look at what you're getting for this money, it is a mistake as a society for us to be supporting these organizations existing in perpetuity. It's really a subpoint. My primary point is about the tax subsidy, and I think you're not getting very much for it. It doesn't have to be that the market has to be flooded with \$8 billion for the benefit of dogs. I'd be far happier if the taxes were paid on that bequest, and then it were limited to three hundred years. I think that would be reasonable. I think it would still be long, but I don't think it would limit anybody's rights, in a way.

AMY KASS: This is a question for Pablo Eisenberg, really. Why do you think there is this kind of tendency to give to the big and successful organizations as opposed to the poor, small nonprofits? Do you think that there is an intentional conspiracy against the poor, or do you think that it might have something to say about the ethos that pervades philanthropy in general? Please give us some thoughts about that.

PABLO EISENBERG: I don't think it's a conspiracy. I think that a lot of people, particularly wealthy people, give to what they know. That's particularly true of the multi-billionaires from the high-tech world. They're giving primarily to education – because they have young kids; to the environment; and to the schools where they got their BA degrees or their doctorates. They are thereby copying basically the pattern of regular institutional philanthropy. So I think people give to what they know best. I think people give to what they've seen; our wealthiest donors have rarely been in a barrio, or in a ghetto, or in a tough rural area. They don't know what's going on. And therefore, their tendency is to give to the organizations they know or which they hear of because of public relations and advertisements. The United Ways, Harvard, etc.

There is also a concern about accountability that I think drives a lot of donors to go for the big names. They will give to a university regardless of how corrupt it might have been, or how much they spend on their football coaches and on their stadiums while delivering very little education, all because they think that because they're big, they're accountable. And they give to United Ways because they think that this is a nice, safe outlet regardless of how many scandals have occurred in local United Ways. It is much tougher for them to think that a food bank or a domestic violence shelter that is grassroots, often run by low-income people and working-class folks, is somehow accountable, and that their money will be well-used.

Foundations say the same things; they talk about more “bang for the buck,” but in practice it doesn't end up that way.

LESLIE LENKOWSKY: I just want to make sure that an implication to what Pablo (Eisenberg) is saying is clarified. Yes, we do know that people give to various kinds of organizations that they know, identify with, and so on. But that does not imply that their gifts benefit only them or people like them. It depends on the institution. So if I were to give a gift to a college or university that has an active scholarship program, to the degree my gift is used to benefit that scholarship program, low-income people will benefit, too. They will be the primary beneficiaries.

Now, I grant you – and I think this is a problem – that often donors put tight restrictions on their gifts, et cetera. But that's not so much a problem of philanthropy as it is a problem of fundraising. One of my complaints about many fundraisers is that their primary goal seems to be to get the bottom line as high as possible however they can, rather than to keep the legitimate needs of their institution in mind.

So I think even though wealthy people may be giving to institutions with which they are familiar, those institutions confer public benefits, including to needy people.

PABLO EISENBERG: Can I add one thing, Stacy? In this latest issue of *The Chronicle*, I wrote an article about an organization called the Highlander Center in Tennessee (“How One Charity Has Reshaped America,” in the issue dated September 4, 2008; the Highlander Center can be found online at <http://www.highlandercenter.org/>). The reason I chose to write about it was that after seventy-five years of extraordinary work – in leading the civil rights movement, the (inaudible) movement, the economic equity movement, and the social justice movement not just in Tennessee but in the South – it has a budget of less than \$1 million to do all of the work that

they've done. It's also a reflection that it's not a question of right or left, wealthy or poor. It is a question that in this case a progressive organization has gotten *squat* from progressive individual donors and progressive foundations that claim they're supporting social justice. It is an outrageous reflection of – in this case – (inaudible) donors, both individual and institutional, who for some reason just ignore this extraordinary organization – and I'm sure there are many, many other examples. And it's not that they haven't been accountable. It's not that they haven't done the right thing. It's just somehow that they've been neglected. They don't have a big name.

LESLIE LENKOWSKY: Pablo, I have no doubt at all that if you had the kind of money to do so, you would give to Highlander. But not far from Highlander, over in Kentucky, is another institution called Barea College. And Barea College has a very significant endowment – so much so that students are able to go to Barea tuition free. Now, what they do is they work as a part of their program. It is a classic example, and it's a great school. And yet it is very well-endowed. And it is known for serving the needy.

So I think, as it is with most things in philanthropy, each and every statement prompts an equal statement to the contrary.

PABLO EISENBERG: Well, let me just say –

(Laughter.)

STACY PALMER: They could go on!

PABLO EISENBERG: That's true. But there are not very many Bareas in this country.

LESLIE LENKOWSKY: There are not many Highlanders.

PABLO EISENBERG: There are lots of Highlander-type organizations, particularly in the South – grassroots organizations that have tilled the soil there with very little money. Highlander is reflective – in this case, in the progressive community – for not getting any money because it's not well known. It's local, although it has regional possibilities.

It's not as atypical as Barea.

MICHAEL LIPSKY, Georgetown University and Demos: I'd like to focus on the challenge that Professor Madoff has raised for us, which I think is a very interesting public policy question. Public policy always involves trade-offs. She is raising the question of whether there should be any limit to the subsidies to charity that individuals make, quite aside from this special case of Helmsley, which kind of excites us but is an outlier.

She said something interesting, which is that we could have a limit on the amount that would be free of taxation – that would include that tax subsidy – and then let someone continue their charitable activity, but without a subsidy from the government. I like to give the example – and this reflects my own values – that we have a public subsidy for home mortgages, which has created the country we have. But I raise the question of whether we need to subsidize people

when they have second homes. Or should we just have subsidies for the first million dollars of somebody's home, and after that they can buy as much home as they want, but they should not be subsidized for it?

So maybe I'll ask Les (Lenkowsky) this question because he is very thoughtful and he is sort of in the middle on this, if I may. Can you imagine a limit of some sort balancing the need for a charitable sector that is extremely wide-ranging and not encumbered in terms of choice and, on the other hand, the requirements for progressive taxation in this country, which does a modest amount of equalizing incomes, which is another public purpose that we have?

LESLIE LENKOWSKY: Okay, let me impact this a little bit. First of all, we do have lots of limitations on donations and on grants. I thought of something when you were talking about second homes; I hadn't thought about mentioning it before – and again, it may be something that is more honored in the breach. But it is this: You read about large salaries paid to foundation officers. There's a statute in the law – it has been in the law for over a decade, now – that is to penalize foundations or other nonprofits that provide unreasonable salaries. Now, I will be the first to tell you that the enforcement of this could stand improvement. But there is no question at all that we have those kinds of limits for those purposes. So that's one.

Secondly, the question that you ask is, well, maybe we should extend that limit so that there would be a maximum size, I think, for foundations. Okay, you could conceivably do that. But what's to stop somebody from creating multiple foundations, each of which falls under that cap that you proposed, whatever it is. You will recall, of course, that the Pew family did exactly that; what is now the Pew Foundation used to consist of seven family trusts that were essentially operated as one. Now, I'm willing to be that some of the reason for that was tax planning, even though we didn't have a law limiting it.

And then, last but not least, we are pretty clear that while tax benefits don't have a strong impact on whether or not people will give, they do affect the timing and the amount of the gift. My complaint, by the way, with the deduction in the estate tax, which can be simply and easily solved by getting *rid* of the estate tax, is that it leads people to postpone their giving until their death. The Kroc grant in some ways is a far more egregious example of a poor grant – even though it went to support the Salvation Army – than the Helmsley grant. The reason is that Mrs. Kroc had a particular idea of what she had in mind that the Salvation Army should do with this \$1.5 billion dollars or so, and it may or may not – I tend to think “may not”; officially the organization won't say – serve the priorities of the Salvation Army very well. So we can and we do make those changes.

We also ought to remember that the notion that the wealthy are somehow getting off scot free because of these tax expenditures is completely untrue. There is no way that I am aware of, and maybe Professor Madoff can correct me on this, that by making a gift to charity, at least legally, you can get rid of your tax liability altogether. To an extent, the Helmsley gift was still a liability for estate taxes above and beyond the amount of the gift. Helmsley may have done her planning to reduce that, but even when you give charitable gifts during your lifetime, you are basically reducing the amount of your income that is subject to taxes, and whatever else is there is still subject to taxes.

RAY MADOFF: No, that's actually not – I mean, you have to separate estate taxes from income taxes –

LESLIE LENKOWSKY: Inter vivos giving –

RAY MADOFF: Both gift and estate taxes, both of those kinds of transfers – one during life, one after death, are entirely exempt from tax with no limitations, for estate tax purposes and gift tax purposes.

LESLIE LENKOWSKY: Right. For a gift to a foundation, you can only give up to 30 percent –

RAY MADOFF: Yes, those are the income tax limitations. And I agree with you about the income tax. I think that the reason we have a cap on the income tax deduction is the notion that people need to contribute to the public good. In the words of Seinfeld, “We’re in a society, here!” People need to contribute to it.

One of my problems with the estate tax is that there is also a message of, you don’t have to participate. Do you really hate the government? It’s not for you? You can entirely opt out of the system by eliminating your gift in estate tax liability.

So I suppose the question I am interested in, Les, from your comments is whether you would share this notion that maybe we should have a reduced – not an unlimited – deduction for charitable donations in the estate and gift tax context.

LESLIE LENKOWSKY: No, I wouldn’t. Offering any kind of incentive for charitable giving through the estate tax leads to anomalies such as the Kroc gift. People postpone their giving until it is in the will. I’d much rather get rid of the estate tax, which will have the happy effect of getting rid of the deductibility of gifts after death as well.

I also want to point out in this context that one of the great champions of the estate tax was the philanthropist Andrew Carnegie. Now, it was not his preferred tax by any means, but in his famous essay “The Gospel of Wealth” (1889) –

RAY MADOFF: It was his preferred tax. He said it was the best of all taxes.

LESLIE LENKOWSKY: The best of all taxes, yes, but he preferred that people give their money away during their lifetime, and if they are unable to do that, it’s better to let the government take it than to give it to their children.

RAY MADOFF: You’re in favor of that?

LESLIE LENKOWSKY: Yes, I am in favor of lifetime giving.

(Laughter.)

LESLIE LENKOWSKY: I think the alternative to letting the government take it is to have no estate tax at all, if these deductions are as valuable as you say they are.

AARON DORFMAN, National Committee for Responsive Philanthropy: None of you has yet addressed the possibility of differential levels of deductibility based on the intended beneficiary or purpose of the gift. I think I did hear a consensus that no one on the panel is saying that the government should cut out the deductibility of charitable purposes that are now allowed. But what about the prospect of greater deductibility for activity that serves the poor?

(Cross talk.)

STACY PALMER: Everybody wants to answer that one!

LESLIE LENKOWSKY: As it happens, Aaron, I just reviewed a paper in an academic journal on exactly this topic. It turns out that there are a number of countries that have systems like that, as well as some states in the United States, Arizona being the most notable. Of course, the paper was more conceptual than empirical. I knew a little bit about Arizona, and there's controversy as to whether or not those differential tax rates actually increase the supply of giving or merely shift it from one thing to another thing, the thing that gets the higher rate of tax.

As long as whatever gets the higher rate of tax deduction is something you like and you think is a worthy cause that deserves philanthropic giving, you'll be happy. If not, you'll be unhappy.

RAY MADOFF: As a tax lawyer, I would be loathe to have that type of system because it is so subject to gaming. I would be concerned about how one could do it in a way that would really accomplish the goal. I do think we could do it from the other end. England has adopted new charities laws that require more charities to act more in the public service. So for example, it's not enough that you be an educational institution; you have to actually be providing scholarships and serving underserved populations. And I guess I would rather see, to the extent regulation occurs, regulation that way than in trying to say, this cause is better than that cause. Because it's all in the details.

PABLO EISENBERG: Les, your ex-senator from Indiana proposed a bill that would have provided special incentives for giving to organizations that took up poverty issues.

LESLIE LENKOWSKY: Senator Coats.

PABLO EISENBERG: That's right. Except that he excluded advocacy groups, organizing groups, and more activist organizations from those incentives. Well, that never went through, partly because the definition was hard to come by of who qualified and who didn't qualify. A number of states gave special incentives for corporate giving to community development corporations, and there was some furor about why community development corporations should be singled out, because some of them were good but some of them were not so good. Anyway, it's a political issue, and I don't think it will happen because it's so difficult to design.

LESLIE LENKOWSKY: I was president of Hudson Institute when Senator Coats made the proposal, and I vividly remember talking to the senior staff then, saying that if this comes to pass, I'm going to propose that we change our name "Hudson Institute for the Study of Poverty and Anything Else Congress Thinks Desirable."

I agree that there's a gaming problem here, but it's not just the donors or the recipients that might game the system. It's Congress. It's the legislature. They'd inevitably face pressure to say, "We like this but we don't think much of that." Hypothetically, they might say that all of these groups that are trying to help illegal immigrants are violating the law, and therefore donations to groups that help illegal immigrants will no longer be allowed a tax deduction, or will get some low tax deduction. Lots of people – even a majority of Americans, I would be willing to bet – would favor something like that. But of course, and leaving aside what anyone might think on the issue of illegal immigration, the whole point about our philanthropic system, as I suggested earlier, is that if organizations think we ought to be aiding illegal immigrants, we want to enable them to do so.

STEVE TELES, Johns Hopkins University: One conclusion I've got is that at least on the actual topic of this panel, it seems like there's pretty good agreement that trying somehow to control philanthropy on the basis of the form or the intent is a dry hole as a legal or political matter. It's almost impossible to conceive of a rule that either would have its intended effect or wouldn't have so many negative downsides or potential for political gaming that it wouldn't be worse than the benefit you would get. If we just put that all aside as being essentially impossible, and anything Congress might do along those lines – the only desirable effect might be to actually put pressure without the intent of actually producing legislation, which is one reason why Congress sometimes hold hearings and proposes legislation. They don't intend to pass anything. They intend to put some pressure on people to do something in the absence of legislation.

How might we actually try and get leverage over the character of gifts in the absence of legislation? What kinds of mechanisms in a free society – not just in a democratic society, to contrast with Mr. Eisenberg, but in a *free* society – might we have for trying to at least increase deliberation around whether donors ought to be giving \$8 billion for dogs, or more gifts for poverty. What kinds of things are we not doing now that we might be able to do in the absence of the coercive mechanisms of government?

PABLO EISENBERG: Well, in the first place, we ought to have a discussion about it. There ought to be debate. These questions ought to be raised. And the institutions that are supposed to be dealing with these issues are silent, namely, the trade associations in the philanthropy and nonprofit sector. No one is looking at the future. They're dealing with petty issues. What Hudson Institute's Bradley Center has done over the past five years – and what very few other organizations are doing – is in fact trying to raise those issues. I might plug Aaron Dorfman and the National Committee for Responsive Philanthropy; they are trying to raise those issues of equity. Why are low-income people and advocacy groups being relatively neglected in the philanthropic process? So I think the debate, the discussion has to take place, and one would hope that there would be leadership on the part of support organizations, which I'm sorry to say there is not.

LESLIE LENKOWSKY: We have seen some examples of this recently. These Congressional hearings on payouts from endowments have clearly produced a result of the sort you were suggesting. Harvard, Princeton, and other schools with large endowments have adopted new policies aimed at eliminating costs for people who meet certain income thresholds.

Another way – one of the oldest, in some regards; it goes back to Benjamin Franklin – is the matching grant. The idea is that by providing funds but only partially providing them for a particular activity, one induces – in theory, at least – induces donors to match that gift and provide support in whatever direction it is that the public sector might favor. There are at least two problems with that. First of all, government doesn't much like it because if something is worth doing, it's worth somebody else paying for it. And secondly, the nonprofit sector doesn't much like doing that because donors aren't very happy at all when a nonprofit in their community says, look, if you make a grant of  $x$  thousand dollars, we will get an equal amount from government. This usually creates a good dilemma for most donors.

PABLO EISENBERG: Well, one problem we haven't talked about is the oversight and policing of the entire nonprofit sector, which is right now the job of the Internal Revenue Service and states' attorneys general – the later of course having very little or no money, with a few exceptions like California, New York, and maybe Pennsylvania. The IRS has done a stinking lousy job of overseeing the sector. In big cities like Dallas, Houston, Chicago, and even here in Washington, you have a group of nonprofit hospitals that are two-tiered; they provide different levels of care – certainly access, but also care – for those who can afford it and for those who are on public assistance or no assistance whatsoever. Congress knows about it. Senator Grassley continues to hold hearings and to issue letters. I haven't seen him initiate legislation that would in fact look at these nonprofit hospitals and say, if you're going to be a nonprofit, you're going to have to give  $x$  percent to charity – not the 1.3 percent that the Chicago Medical Center gave, but rather 4 or 5 percent – if you want to retain your nonprofit status. The IRS has kept quiet about these things.

Les (Lenkowsky) said that the IRS was not being stolid in enforcing excessive compensation. That's not the word – they've done *nothing* to enforce that. There are hundreds and hundreds of cases both in nonprofits and in foundations which could be looked at by IRS, but they choose to look the other way.

Also, self-dealing. There is an anti-self-dealing provision in the regulations dealing with foundations, but there is a huge loophole which enables anybody to run a truck through it. Nothing is being done either by the nonprofit sector or the Congress – Grassley's committee – to champion the closing of the loophole. And that's in many cases a waste of taxpayer money.

So, how do you get an oversight and enforcement system that in fact can clamp down on some of the excesses going on in our sector? They need more money, for example. And they need a congressional mandate to do it, which they haven't yet received.

LESLIE LENKOWSKY: Pablo (Eisenberg) is talking about what used to be called the Charity Care Standard – that hospitals in order to maintain tax exemption needed to devote a certain amount of their care to needy people. That was changed, though. And one of the reasons it was

changed was the advent of Medicare and Medicaid, which provided support for needy people with regard to their health expenditures, their many imperfections notwithstanding. Today, the standard is a much broader one; it's called the "community care standard." Hospitals are required to show that they provide community benefits – so, things like a wellness clinic, and anti-obesity clinic, whatever. This includes in many communities hospital-based foundations, which are meant to satisfy that. Now, about whether they're doing enough, not doing enough, reasonable people can differ. But it is not a poverty care standard anymore.

PABLO EISENBERG: It is not a poverty care standard technically, but in fact the Senate – Grassley and others – has indicated that that standard has to change, and now they're –

LESLIE LENKOWSKY: Let 'em –

PABLO EISENBERG: What's that? Oh, I agree with that – but, I mean, they're doing nothing. Now, in terms of nonprofit hospitals creating foundations, there are maybe twenty-five hospitals that are called "tithing hospitals." These are nonprofits that agree to spend 10 percent of their so-called profits, or surpluses, on the community. And a number of these groups, including South Bend Memorial Hospital, which has the biggest foundation in northern Indiana, is giving \$6 million a year to the community. So what's happening to the other \$54 million that is surplus? Is it going for charity care? Is it doing good for the community? I doubt it. There is an awful lot of money that is being made by nonprofit hospitals that is not going, I think, to charity care, which I think should be the measure of their gaining nonprofit status.

BERNARD UNTI, Humane Society of the United States: Naturally, we hope that all of the money will go to help dogs, and we detect very little hostility to that proposition on the panel!

(Laughter.)

BERNARD UNTI: But my question speaks more beyond that to leverage. We also hope that the Helmsley bequest will influence and have an impact on other foundations in terms of shifting their priorities towards animal protection related areas like the environment, because we find, candidly, that foundation philanthropy support for animal welfare is extremely poor in comparison to the other sectors, and I wonder if any examples come to any of the panelists' minds of recent philanthropy, new philanthropy, et cetera that has had that kind of impact on reshaping the priorities of more lengthily established foundations.

EDITOR'S NOTE: A letter to the editor penned by Mr. Unti and his colleague Andrew Rowan appeared in the September 18 issues of *The Chronicle of Philanthropy*. In it, they wrote, "Human society has a fundamental interest in a strong and vital nonprofit sector devoted to the welfare of animals, just as humankind derives tremendous benefits from the presence and the service of companion animals. Investments in animal protection enhance the goals of a good, compassionate, and healthy society. We need more, not less, philanthropy in this sector, something that Leona Helmsley, like Doris Duke before her, evidently understood."

LESLIE LENKOWSKY: I think that Gates' interest in malaria research has had a big influence on other funders. It's a two-edged sword, though, because there are funders who will say, well, if Gates is interested in it, why should we put any money in it? They're so wealthy.

With regard to animal welfare, you probably know but others may not know that there is another big player in this field now, a fairly recent foundation called the Gordon and Betty Moore Foundation, funded by the Intel people. They came on the scene within probably the last ten years, and are devoting substantial amounts to animal welfare.

BERNARD UNTI: Mr. Duffield of Maddie's Fund is planning to dump in a lot, too.

TIM WALTER, Association of Small Foundations: Pablo (Eisenberg), thank you for not pointing to my organization earlier in your infrastructure attack!

(Laughter.)

TIM WALTER: Just a couple of things, though, from a perspective standpoint. One is, Pablo, you did talk about the Gates Foundation and their assets being equivalent to a bunch of small countries, but that sort of mixes assets and income, and we need to be very careful. You're not the first person to do that. The budget of the Gates Foundation doesn't actually place them anywhere in the Fortune 500 even after the Buffett gift. So one of the things that that points out to us is, I think, the importance and the iconic value of philanthropy and giving in the country. The other thing I want to remind us of is that the public charity system really is at the foundation of what we're talking about here. And the public charity system and the public means test that goes into public charities is one of the most profoundly democratic institutions in this country. It allows citizens to come together, and it doesn't take an act of Congress to get something going like the Highlander Center, which I'm an old supporter of.

So we then need to look at the elegance of the system as we build up the private philanthropy and the private foundation system. I would bet that probably 90 to 95 percent of the money that comes out of private foundations and certainly out of individual donations gets ten piped through that public charity system. And we need to remember that foundations are really not an endpoint but just a stopping-off point, and I think the questions around payout and perpetuity point to that. But we've lost the bigger picture of the larger system.

The last thing I'll point out here about this is – and I'm not trying to make Gates seem like a small foundation, but they actually are, in the spectrum of –

(Laughter.)

TIM WALTER: – and they're a donor to ASF, but what I want to point out is: if we think about it in terms of GDP in the country, 99.9 percent of the GDP in this country is not related to giving by the foundations. Essentially 0.1 percent of GDP is from the largest foundations, and another 0.1 percent is from smaller foundations. There's just a huge amount of spending in the country in social good that is done through other means. But that tiny percentage occupies so much of our time and our thinking about who we are and who we are to be as a country and as a society. We

need to recognize that compared to the value of what we've done, how much more is left to come really is much, much larger than where we are today.

So I really appreciate the ability for you all to raise these questions, and Pablo (Eisenberg), I do hope that at some point you'll start offering some answers! We don't have that much longer with you in the public sphere, and I want to start hearing some of these answers from you as well.

(Laughter.)

PABLO EISENBERG: I'm not going to offer these answers today! But I think these answers will depend on a real struggle in the discussions that should be taking place – it's not just one person's quick answer.

I should mention that regardless of the large size of the public sphere that you talk about, foundations hold a special place because they can provide innovation, risk taking, new ideas, and scientific research that are hard to find in other places. Even if it's a small percentage of all of the money that's available, it should have a special place in our attention, given its nature. I think that's one of the great values of philanthropy.

LESLIE LENKOWSKY: Well, far be it from me to accuse Pablo of not being progressive enough, but I will.

(Laughter.)

LESLIE LENKOWSKY: I find it interesting – I've been talking to a lot of these new social entrepreneurs, and in saying that I'm lumping a whole bunch of people under that title. You read so much about it today, and they're doing so many interesting things. One thing they all have in common is, they are not waiting for foundations. They think there are much better ways to develop funding for innovation, including through business investment, and therefore you are seeing a variety of hybrid organizations being created. So as long as I am not doing fundraising, I would argue that it may very well be that foundations as we know them are relics of an ancient age more familiar to Julius Rosenwald than they will be to people fifty to seventy-five years from now.

JULIANA GERAN PILON, Institute of World Politics: I think it behooves us, given that we are at Hudson Institute, that I ask a question about political correctness and giving. I will address it to Les (Lenkowsky) because this is less about money as such, it's about the kind of giving. I also want to thank you, Pablo (Eisenberg), for speaking up for small groups. I'm grateful because indeed, the larger groups are better known, and it is more politically correct to assist the groups that are already politically correct. And there is success in success.

One of the problems, of course, with giving to conservative organizations and other kinds of unpopular organizations, but specifically conservative ones, is that as the Capital Research Center for instance has aptly and very professionally pointed out, often corporations and individuals pay off their enemies. And so in order to shut them up, sometimes they give them money. My question is, what kinds of incentives can you think of, Les, short of anonymous

giving whereby you can shield yourself against attack by simply not mentioning who you are, but other than, what kinds of incentives would you recommend for encouraging giving to unpopular and specifically conservative organizations like Hudson Institute – although I think that Hudson is doing relatively well but perhaps could be doing far better. And obviously this would also spill over into other kinds of unpopular or less popular groups.

LESLIE LENKOWSKY: I usually charge \$500 a day for that kind of advice, so don't expect to get it for free.

(Laughter.)

LESLIE LENKOWSKY: But I will say that you raise a very important general point, which has come up here. And that is, are foundations really as innovative and risk-taking as they purport to be?

Pablo has looked at this primarily from the point of view of helping low-income people and the needy, but that's of course not the only way to look at this. My favorite example – well, the last time I was here at Hudson Institute, we had a big debate on philanthropic support for educational choice efforts.<sup>10</sup> Senator McCain devoted a paragraph or two last night to talking about educational choice. But despite a study that suggested otherwise, it's pretty clear that philanthropic support for things like vouchers and even charter schools has been slow in coming.

Now, you could argue that that may be because the proof is slow in coming that these are effective – and that's fair enough. But you could also say that about lots of other things that the philanthropic world does support. So, there are problems here.

And again, I don't think these are issues of principle. I think that people should be allowed to do with their money what they wish, and if a donor has reached a conclusion or has delegated to staff members who have reached the conclusion that educational choice or anything else that might be unpopular is not very effective, that's their choice. I'm not going to argue with it, other than to tell them that they're wasting their money.

PABLO EISENBERG: Well, there is a certain sense that as the courts follow the elections, so does philanthropy – so things might get worse for conservatives if we have an Obama victory, although I'm not sure.

One of the primary indicators of Les' point about the lack of risk-taking and the lack of innovation is the fact that the foundation world has not been willing to support a whole range of watchdog organizations that looks at a variety of sectors. I'm not picking just on corporate America, but if you look at corporate America, there isn't one serious watchdog organization that looks at how they function except one, The Corporate Library (<http://www.thecorporatelibrary.com/>), which is a very mild, nice newsletter. And the reason it is

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<sup>10</sup> “Choice Grants: Foundations and the School Choice Movement,” a Bradley Center panel discussion held on December 14, 2007. A complete transcript can be found online at [http://www.hudson.org/index.cfm?fuseaction=publication\\_details&id=5368&pubType=HI\\_Speeches](http://www.hudson.org/index.cfm?fuseaction=publication_details&id=5368&pubType=HI_Speeches) (last accessed September 25, 2008.)

that small is that even for such a mild approach, not one foundation has been willing to put a dime into it, and therefore it has to sell newsletters to make a living. One could look at what could be an analog of the National Committee for Responsive Philanthropy in the nonprofit world. Why isn't there a tough organization that will oversee accountability and other issues in how nonprofits operate. The same thing goes for unions. The same thing goes for a whole range of organizations where there are no watchdogs.

We've seen how important a few whistleblowers have been for federal accountability in government agencies. It's indicative of where mindset of many foundations is. They need to get tougher. They need to take more risks. And they need to be more innovative.

STACY PALMER: I'm afraid our time is up, but you all have asked such great questions that we could probably go on all afternoon. I want to thank you, our audience, for those terrific questions, but mostly thank our panelists for stimulating so many questions and such good debate. Thank you so much.

(Applause.)