

# PLURALISM AS A PUBLIC GOOD

## Introduction

This paper argues that the pluralism afforded by the charitable nonprofit sector in America is a public good in itself. By charitable nonprofits, I refer to those nonprofits described under § 501(c)(3) of the Internal Revenue Code. Briefly, there are two tests to measure whether a particular group is a charitable nonprofit. One is what might be thought of as a negative test: charitable nonprofits must not violate the nondistribution constraint.<sup>1</sup> Two meetings ago Harvey Dale covered this subject very well. The other is a positive test: charitable nonprofits must pursue a purpose, the accomplishment of which is beneficial to the community. This paper concentrates on aspects and implications of the positive test.

The definition of the term “charity” is grounded in the law of charitable trusts.

The Restatement of the Law of Trusts, an authoritative body of opinion relied upon by many courts, defines charitable purposes as including the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes and other purposes, the accomplishment of which is beneficial to the community.<sup>2</sup>

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<sup>1</sup> The nondistribution constraint is the central component of most states’ definitions of a nonprofit organization as well as being an important part the exemption definition under § 501(c)(3). It briefly holds that to be eligible for nonprofit status an organization may not improperly benefit private individuals. It may pay its employees a decent wage and its suppliers whatever the market will bear for their products and services, but it cannot distribute any of its assets so as to improperly benefit private individuals such as by paying excessive compensation or buying an asset from a board member at a price above its market value.

<sup>2</sup> See Restatement (Second) of Trust § 368 (1958). The Restatement picked this definition up from the definition of charitable purposes laid down by Lord MacNaughton in *Commissioner for Special Purposes of Income Tax v. Pemsel*, (1891) A.C. 531. In 1959 the Internal Revenue Service adopted the *Pemsel* and Restatement definition for purposes of Federal income taxes in its Treasury Regulations by noting that the term “charitable” is used “in its generally accepted legal sense”. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

The first thing to notice is the expansiveness of the formulation “any purpose the accomplishment of which is beneficial to the community.” This opens the legal definition of charity to including many differing kinds of nonprofit organizations pursuing many differing goals and purposes rather than one more or less particular goal, as for example the provision of charity where the term charity is narrowly construed. In my opinion, no one has better captured this idea than the late Justice Powell in his concurring opinion in the *Bob Jones*<sup>3</sup> case. In *Bob Jones* the issue before the Supreme Court was whether a school that prohibited interracial dating could qualify for a §501(c)(3) tax-exemption. The court ruled that an organization that enforced a rule that was against fundamental public policy could not be a charity since as a matter of charitable trust law a group that violates fundamental public policy cannot be advancing the public’s interest and therefore cannot be a charity. While Powell agreed with the majority’s finding that schools that are racially discriminatory are not eligible for 501(c)(3) status, he rejected what he believed the majority opinion took as general matter to be the critical question in determining whether an individual organization is eligible for tax-exempt status, namely, whether the benefit it provides would be taken by all to be an obvious public benefit. What troubled Powell was:

... the element of conformity that appears to inform the Court’s analysis. The Court asserts that an exempt organization must ‘demonstrably serve and be in harmony with the public interest,’ and must not act ‘affirmatively at odds with [the] declared position of the whole government.’ Taken together these passages suggest that the primary function of a tax-exempt organization is to act on behalf of the government in carrying out governmentally approved policies. In my opinion, such a view of § 501(c)(3) ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, nonprofit groups receive tax exemption because ‘each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous pluralistic society.’ Far from representing an effort to reinforce any perceived ‘common community conscience,’ the provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life. Given the importance of our tradition of pluralism, ‘[t]he interest in preserving an area of untrammelled choice for private philanthropy is very great.’<sup>4</sup>

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<sup>3</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).

<sup>4</sup> *Id.* at [ ].

In a marvelous footnote Justice Powell identifies from the IRS list of exempt organizations a number of groups whose purposes sharply diverge, including: American Friends Service Committee, Inc. vs. Committee on the Present Danger; Friends of the Earth Foundation vs. Mountain States Legal Foundation; National Right to Life Educational Foundation vs. Planned Parenthood Foundation; Scientists and Engineers for Secure Energy vs. Union of Concerned Scientists.<sup>5</sup> The list, of course, could be updated and greatly expanded.

Thus, each charitable nonprofit must be organized and operated to accomplish a public good, but the definition of public good is extraordinarily broad. Charitable nonprofits in fact pursue a plurality of public benefits and many conflict. My thesis is that the very pluralism of our charitable nonprofit system is itself a public good. In the first part of this paper I describe what I mean by defensible pluralism. In the second part I describe the pluralism of America's charitable nonprofit sector. In the third part I argue my thesis that this pluralism is itself a public good. And in the last part I briefly explore some of the implications of my thesis.

## I

In this part of the paper I describe two accounts of pluralism. One is Isaiah Berlin's theory of what I will call objective pluralism and the second is John Rawls' account of what I will call epistemological pluralism. Both accounts I find convincing and accordingly refer to each as an account of defensible pluralism.

Before summarizing Berlin's and Rawls' views, I begin with a simple description of pluralism and make some general comments. Pluralism is a doctrine which holds that there may be many conceptions of the good life which in some sense are all true or that in fact there are many such conceptions and it cannot be convincingly established that any

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<sup>5</sup> Id. at [ ].

one is right or wrong, true or false. In many cases these conceptions conflict with one another and there is no overarching truth that determines which ones are valid or that reconciles or arranges them by priority.

In this paper I will for the most part be discussing moral pluralism. I believe there are three general types of such pluralism operating on three moral levels: personal, interpersonal and social. Personal pluralism takes up such questions as how I should lead my life as an individual. What should my spiritual life consist of and what is my relationship to any transcendent being? Should I work hard or should I lead a life of leisure? Should I lead a life of the mind and strive to appreciate the higher realms of beauty or should I lead a more hedonistic life of mindless pleasure? Interpersonal pluralism takes up such questions as how I should treat my neighbor. Or how should I relate to my family? How should I be as a teacher? And finally social pluralism addresses the question of what kind of a society we should have together. While these three moral spheres obviously interact, I believe they are reasonably distinguishable. I will return to these distinctions in Part II below. This paper focuses largely on social pluralism.

#### A.

The first category of defensible pluralism to be examined will be called objective pluralism. It has been adumbrated most convincingly by the late Isaiah Berlin, and I have found its clearest explanation in his article “Alleged Relativism in Eighteenth-Century European Thought.”<sup>6</sup>

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<sup>6</sup> “Alleged Relativism in Eighteenth-Century European Thought” is included in I. Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*, Henry Hardy (ed.), Princeton (1990). [Hereinafter Alleged Relativism].

In an article about Johann Gottfried Herder in a note added shortly before he died, Berlin comments that “[a]t various points in this essay I describe Herder as a relativist.” He then addresses any misunderstanding the use of the term “relativist” may cause by noting: “Essentially in the present study of Herder I sometime use ‘relativism’ not to mean a species of ethical or epistemological subjectivism, as the term has very often been misunderstood, but to refer to what I have elsewhere identified, I hope more perspicuously, as objective pluralism, free from any taint of subjectivism.” See I. Berlin, *The Proper Study of Mankind*, (New York 1997), p. 390.

Berlin asserts that life affords "... a plurality of values, equally genuine, equally ultimate, above all equally objective; incapable, therefore, of being ordered in a timeless hierarchy, or judged in terms of some one absolute standard."<sup>7</sup> Berlin contrasts his theory of objective pluralism with relativism which affirms that there are no objective values and that men are "wholly bound by tradition or culture or class or generation to particular attitudes or scales of values which cause other outlooks or ideals to seem strange and, at times, even unintelligible."<sup>8</sup> Central to his description of relativism is the claim that men have no control over their beliefs and attitudes (many of which are unconscious), that they are conditioned by their place in the social system, etc., and that they cannot possibly understand other belief systems.

A species of relativism is what might be called subjectivism which holds that matters of value are simply the result of ungrounded preferences or taste. Here is how Berlin describes this approach (although he refers to it as relativism):

I take it to mean a doctrine according to which the judgment of a man or group, since it is the expression or statement of a taste, or emotional attitude or outlook, is simply what it is, with no objective correlate which determines its truth or falsehood. I like mountains, you do not; I love history, he thinks it is bunkum: it all depends on one's point of view.<sup>9</sup>

What is key here, although Berlin does not expressly say so in the article, is that those who make such subjective judgments cannot give reasons for them. Similarly, relativism contends that moral positions and values are held not as the result of reasoned choice, but because we are conditioned by cultural factors of which we are unaware and which render us incapable of understanding values other than our own.

In contrast, objective pluralism maintains that reasons can be given for the many differing, genuine values and that those who hold different values can understand other

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<sup>7</sup> Alleged Relativism, p. 79.

<sup>8</sup> Alleged Relativism, p. 82. Elsewhere he describes relativism as upholding "a theory of ideology according to which the ideas and attitudes of individuals or groups are inescapably determined by varying conditioning factors, say, their places in the evolving social structures of their societies, or the relations of production, or generic, psychological or other causes, or combinations of these." Id., p. 77.

<sup>9</sup> Alleged Relativism, p. 80.

values. Berlin contends that if we “are sufficiently imaginative and try hard enough,” we can conceive how other values are “intelligible ends of life for human beings” and that, while such values may be incompatible with ours, they reflect “ways of life which, no matter how different from our own, normal men could find it natural to pursue.”<sup>10</sup> Value judgments do have objective correlates. While Berlin does not say it, one might understand these objective correlates as arising because two or more persons understand the reasons underlying different value systems, that is, such reasons are intersubjectively verifiable and thus are objective correlates. Life affords a plurality of values. They are different; many are rivalrous and many are incommensurable: but they are all in some sense true.<sup>11</sup> They command the allegiance of different groups of people and there is no higher and overarching truth that ranks or measures them that would justify one such group claiming that their truth ought to be embraced by all.<sup>12</sup>

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<sup>10</sup> Berlin’s subject is the history of ideas and so much of his focus is on understanding the ideas held by men in earlier periods. He bases much of his essay on the works of Vico and Herder, earlier historians of ideas. He urges us, as they did, to exercise our imaginative powers to the utmost to enter into the minds and sympathize with the thoughts of men who lived in different times and different circumstances and come to understand their values and ends which, while different than ours, are ends which are open to humans to pursue.

<sup>11</sup> Values are not true in the way facts or mathematical propositions are true. Nevertheless when we affirm a moral value, it seems right for us and in that sense true. As suggested above, there are convincing and defensible reasons for affirming these values but, unlike facts or mathematical propositions, they are conceptual in nature. In the brutal world of Homer’s Greece the virtues strength and bravery made sense. For those who have accepted the teachings of Maimonides, Christ or Buddha, the more passive and humble virtues these teachings espouse make sense. But these two value systems conflict. They can rarely be combined. They are incommensurable. But they seem true to their adherents, and it is fair to say they are “equally genuine, equally ultimate and above all equally objective.”

<sup>12</sup> While the point is not central to my thesis, perhaps one should not leave a discussion of Berlin’s views of pluralism without mentioning his belief that the pluralism of ends for men produces inevitable losses. We cannot be both law professors and concert violinists. Here is an extended quote from Berlin on the subject:

[S]ince some values may conflict intrinsically, the very notion that a pattern must in principle be discoverable in which they are all rendered harmonious is founded on a false *a priori* view of what the world is like. If I am right in this, and the human condition is such that men cannot always avoid choices, they cannot avoid them not merely for the obvious reasons which philosophers have seldom ignored, namely that there are many possible courses of action and forms of life worth living, and therefore to choose between them is part of being rational or capable of moral judgment; they cannot avoid choice for one central reason (which is, in the ordinary sense, conceptual, not empirical), namely that ends collide; that one cannot have everything. Whence it follows that the very concept of an ideal life, a life in which nothing of value need ever be lost or sacrificed, in which all rational (or virtuous or otherwise legitimate) wishes

How might we account for the plurality of values? What follows is speculative. Different people are convinced by different reasons which support different value systems. Our natures are not fixed and so we are not all persuaded by reasons which support the one truth. We are confronted by a diversity of worthwhile forms of life and for each of them good reasons may be found. These reasons may conflict and there is no master reason to rank them.<sup>13</sup> John Gray argues that Berlin conceived of humans as choice-making and thus self-creating beings.<sup>14</sup> We are forced to make choices among a plurality of rivalrous and frequently incommensurable goods.<sup>15</sup> Reason does not move us

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must be capable of being truly satisfied – this classical vision is not merely utopian, but incoherent. The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament. I. Berlin, "Introduction," *Four Essays on Liberty* (Oxford, 1969), p. li. [Hereinafter FEL]

<sup>13</sup> Since many goods and values are incommensurable, there can never be good reasons to justify ranking them.

<sup>14</sup> Most of the ideas that are suggested in the rest of the above paragraph are taken from the final chapter of John Gray's book *Isaiah Berlin*. See J. Gray, Chapter 6, *Isaiah Berlin* (Princeton 1996).

<sup>15</sup> Several times I have said that values are incommensurable. What does this mean? It means at least that there is no common currency by which two conflicting values can be weighed to determine which one should prevail. For example, if liberty is being weighed against equality, is it possible to look to utility as common currency of comparison? Many would reject utility as a common currency and, to take a standard case, not accept the sacrifice of the liberty of one or a few to bring about a greater degree of equality among the many and presumably an increase in total aggregate happiness. They would believe, as do I, that utility is one value and liberty another and equality a third and that they are very different and that no one of them can stand as a final court of appeal when they are in conflict with one another. At the extreme, incommensurability of values might be taken to mean that the conflicts between values can never be resolved and that no rational assessment is ever possible about what the final outcome of the conflicts should be. But, of course, these conflicts are resolved. They cannot, however, be resolved by pure analysis and reason. A choice has to be made. And there will be a loss of some value when the choice is made, and it will not be possible to say that by some common measure the gain for one value is somehow greater than the loss of the other.

Some (Ronald Dworkin, for example) argue that by giving preference to equality a greater amount of liberty results. Berlin was always very resistant to this kind of reductionist move and insisted that equality is one value and liberty another. In his great essay on liberty Berlin says:

Liberty is not the only goal of men. ... To avoid glaring inequality or widespread misery I am ready to sacrifice some, or all, of my freedom: I may do so willingly and freely: but it is freedom that I am giving up for the sake of justice or equality or the love of my fellow man. I should be guilt-stricken, and rightly so, if I were not, in some circumstances, ready to make the sacrifice. But a sacrifice is not an increase in what is being sacrificed, namely freedom, however great the moral need or the compensation for it. Everything is what it is: liberty is liberty, not equality or fairness of justice or culture or human happiness or a quiet conscience. FEL, p.125.

towards one ideal conception of the good (and of the public good) as the Enlightenment philosophers thought. We are faced with many goods, all intelligible, and must finally without the guarantee of some ultimate truth make a radical choice among these goods based on such reasons as appear most convincing. Finally, for many over a long lifetime, different choices may be made as new reasons become persuasive. We are self-creating and self-transforming.

Are there some values and ends for Berlin which cannot be accepted? While he believes there are many objective ends, he asserts “their variety cannot be unlimited, for the nature of men, however various and subject to change, must possess some generic character if it is to be called human at all.”<sup>16</sup> If an end or value cannot be understood as being recognizably human, it is not to be accepted. Thus, there are limits to pluralism and arguments can be stopped over such questions as whether slavery or racism or the violent subjection of women, etc., are acceptable.<sup>17</sup>

## B.

The second category of defensible pluralism is what I will call “epistemological pluralism.” Because the most important moral questions are deep and complex and because our cognitive ability is limited, we are unable to grasp definitive, comprehensive and final truth. We may believe our views are true, but because of our cognitive limits we may be wrong, and, because the beginning of wisdom is to recognize our cognitive

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Bernard Williams in his “Liberalism and Loss” captures Berlin’s point very well when, after describing how some would object to a radical administration outlawing private schools, he imagined what Berlin might have said to the objectors:

Isaiah said to them, “You are right – there was a cost in liberty, but no one can have everything. The democratically elected government is advancing equality and social justice, and those values may well be advanced by this, but there is a cost in liberty.” B. Williams, “Liberalism and Loss,” eds. R. Dworkin, M. Lilla and R. Silvers, *The Legacy of Isaiah Berlin*, (New York 2001), pp. 100-101

<sup>16</sup> Alleged Relativism, p. 80

<sup>17</sup> This opens an endless subject of debate (what is human and who is to say?), but Berlin’s point is fair enough and while virtually everyone will agree that there are some limits to pluralism and while it may be virtually impossible to attain any kind of universal agreement on what those limits are, one can differ on those limits and still accept that there is a pluralism of valid and acceptable moral values and ends.



limits, if such wisdom is attained, we remain aware at some level that we may be wrong. Consequently, we are disposed to accept a plurality of truths since there is no final way of knowing which one is true or which ones are not true or whether several are true but incommensurable.

I believe that something similar to what I have referred to as epistemological pluralism is suggested by what John Rawls in his latest book, "Justice as Fairness,"<sup>18</sup> calls the "fact of reasonable pluralism." Rawls finds in a democratic society such as ours a diversity of conflicting and irreconcilable, and yet reasonable, comprehensive moral, religious and philosophical doctrines. Briefly, these comprehensive doctrines aim at answering the large questions of how we should lead our lives and what kind of a society we should have and in many cases their prescriptions are intended to apply to everyone (although many will not accept any particular comprehensive doctrine).<sup>19</sup>

Rawls believes that the fact that there are profound and irreconcilable differences in citizens' reasonable comprehensive religious and philosophical conceptions of the world

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<sup>18</sup> J. Rawls, *Justice as Fairness* (Harvard 2001). [Hereinafter *Justice*]. This book is in effect a restatement of his "A Theory of Justice," rectifying faults he has found with that work since its publication in 1971 and aiming "to connect in one unified statement the conception of justice presented in *Theory* and the main ideas found in my essays beginning with 1974." *Justice*, p. xv.

<sup>19</sup> While Rawls does not provide much detail in explaining what he means by comprehensive doctrines, it appears that any such doctrine would implicate all three levels of morality. Rawls gives utilitarianism, perfectionism and intuitionism as examples of comprehensive doctrines. There is no need to describe for the readers of this paper what utilitarianism means. In his *A Theory of Justice* Rawls observes that perfectionism is a teleological theory that directs society "to arrange institutions and to define the duties and obligations of individuals so as to maximize the achievement of human excellence in art, science and culture." J. Rawls, *A Theory of Justice* (Harvard 1971), p. 325. In his latest book in a footnote he states that "Perfectionism in one form holds that these values are so great as to justify society's allocating to them whatever is necessary to sustain them, barring severe adverse consequences." *Justice*, p. 152 note 25. This doctrine would seem to demand the full commitment of its adherents in all aspects of their life. They should, for example, strive in their own life to achieve cultural excellence and support collective (i.e., government) action to support such excellences. Perfectionism would not concern itself with the necessity of fairly regulating the distribution of social advantages, and its goals would likely trump many of the basic liberties, if necessary to achieve such ends. Rawls defines intuitionism as a doctrine that holds there is an irreducible number of first principles for which there is no higher criteria to order and "which have to be weighed against each other by asking ourselves which balance, in our considered judgment, is the most just." J.

and in their views of the moral and aesthetic values to be sought for human life – which fact is what he refers to as the fact of reasonable pluralism<sup>20</sup> -- is an inevitable and permanent feature of a society with free institutions.<sup>21</sup> Rawls goes further and affirms that “a continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power, with all of its official crimes and inevitable brutality and crudities, followed by the corruption of religion, philosophy and science.”<sup>22</sup>

How does Rawls account for the fact of reasonable pluralism? He begins by rejecting relativism and skepticism.<sup>23</sup> Rather he postulates for the sources of reasonable disagreement what he calls the burdens of judgment, namely, that among reasonable persons there “are many obstacles to the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life.”<sup>24</sup> In footnote 25

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Rawls, *A Theory of Justice* (Harvard 1971), p. 34. We simply strike a balance of what seems most nearly right to us. Id.

<sup>20</sup> He notes that “[a]ny political conception has a view of the political and social world and relies on certain general facts of political sociology and human psychology.” *Justice*, p. 33. The fact of reasonable pluralism is one such fact.

<sup>21</sup> “Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable yet reasonable compressive doctrines will come about and persist, should it not already exist.” *Justice*, p. 34.

<sup>22</sup> Id. He calls this the fact of oppression. In the passage cited, he continues: “In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve the shared religious beliefs. The same holds, we suppose, for any comprehensive philosophical and moral doctrine, even secular ones. A society united on a form of utilitarianism, or the moral view of Kant or Mill, would likewise require the oppressive sanctions of state power to remain so.” Id.

<sup>23</sup> He observes that there are several possible explanations for the fact of reasonable pluralism. “We might suppose that most people hold views that advance their own more narrow interests; and since their interests are different, so are their views. Or perhaps, people are often irrational and not very bright, and this mixed with logical errors leads to conflicting options. But these explanations are too easy, and not the kind we want. We want to know how reasonable disagreement is possible, for we always begin with an ideal theory. Thus we ask: how might reasonable disagreement come about?” Id., p. 35. Further on, Rawls argues that the fact of reasonable pluralism “must not be understood to imply a philosophical doctrine of skepticism. It does not mean that reasonable persons do not agree in political judgment because objective values do not exist, or are subjective; or that what we take as judgments about values are simple historically conditioned opinions giving voice to interests rooted in time and place. It refers instead to the many difficulties in reaching agreement arising with all kinds of judgment.” Id., 36.

<sup>24</sup> Id., p. 35.

below, I set out the five obstacles Rawls identifies.<sup>25</sup> While Rawls does not expressly discuss his burdens of judgment in terms of questions about how we know anything, i.e., as epistemological questions, his burdens of judgment do seem to raise such issues. For example, it is said that evidence is hard to assess, that our moral concepts are vague and indeterminate and that it is difficult to make an overall assessment of different kinds of normative considerations. Furthermore, if objective knowledge is footed on intersubjective agreement, disagreements about how to weigh evidence and the impact of our different experiences on how we weigh moral values would seem to point to epistemological matters.

While Rawls believes that it is unlikely that agreement will ever be reached among the various rival comprehensive doctrines, in his view it is possible that all would agree to one political conception of justice and this conception is what Rawls calls justice as fairness.<sup>26</sup> Rawls posits the idea of an overlapping consensus in which *all* the holders of the various opposing and yet reasonable comprehensive doctrines agree to the same conception of justice.<sup>27</sup> Thus, for Rawls there is no pluralism when it comes to his

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<sup>25</sup> Rawls specifies the five following obstacles (the burdens of judgment) to the correct exercise of our powers of reason when wrestling with moral questions in the ordinary course of political life: “(a) The evidence – empirical and scientific – bearing on a case may be conflicting and complex, and thus hard to assess and evaluate. (b) Even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments. (c) To some degree all our concepts, and not only our moral and political concepts, are vague and subject to hard cases. This indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretations) within some range (not sharply specifiable) where reasonable persons may differ. (d) The way we assess evidence and weigh moral and political values is shaped (how much we cannot tell) by our total experience, our whole course of life up to now; and our total experiences surely differ. So in a modern society with its numerous offices and positions, its many divisions of labor, its many social groups and often ethnic variety, citizens’ total experiences differ enough for their judgments to diverge to some degree on many if not most cases of significant complexity. (e) Often there are different normative considerations of different force on both sides of a question and it is difficult to make an overall assessment.” Justice 35-36.

<sup>26</sup> Briefly, a political conception of justice is one which answers questions about the basic structure of society, “the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time.” Justice, p. 10.

<sup>27</sup> “For those who hold well-articulated, highly systemic, comprehensive doctrines, it is from within such a doctrine (that is, starting from its basic assumption) that these citizens affirm the

political conception of justice. While I make no pretense to have mastered the details of Rawls' argument, I believe that some of the opposing policies that different charitable nonprofit groups take may reach up into his political conception of justice. For example, because of their views on distributive justice some charitable nonprofits may not accept Rawls' difference principle.<sup>28</sup> Thus, the pluralism of the charitable nonprofit sector harbors different views on distributive justice than those held by Rawls which he believes we should all agree about.<sup>29</sup> However, as will be brought out below, I do assume that the pluralism of America's charitable nonprofit sector operates within a representative democracy and that we have all agreed to a political conception of justice that accepts such a democratic system – about this there is no pluralism.<sup>30</sup>

## II

Before arguing that the pluralism facilitated by the charitable nonprofit sector is itself an important public good, it will be helpful to describe the sector in a way that suggests the wide plurality of views that are represented by the some 800,000<sup>31</sup> § 501(c)(3) nonprofits in America today and in addition to provide some idea of how these various groups interact.

My analysis of charitable nonprofit pluralism, in ways that will be shown below, understands nonprofits as one of the significant mediums through which we express our moral beliefs and conduct our moral practice. I divide the sector into three categories of

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political conception of justice. The fundamental concepts, principles and virtues of the political conception are theorems, as it were, of their comprehensive view.” Justice 33.

<sup>28</sup> The difference principle holds that social and economic inequalities must “be to the greatest benefit of the least-advantaged members of society.” Justice, pp. 42-43.

<sup>29</sup> To this extent the pluralism of the charitable nonprofit sector, as I conceive it, is broader than the pluralism of the comprehensive doctrines that underlie the fact of reasonable pluralism for Rawls.

<sup>30</sup> We may all also agree that certain individual rights impose limits on majority decision, that is, we might accept a bill of rights as being part of a political conception of justice we all agree about, although there may be a plurality of interpretations of the meanings of the various individual rights. There may also be other constitutional-type principles we all agree upon, but specifying them is not important to my argument.

<sup>31</sup> [This figure would be substantiated by a reference to Bowen's []]

charitable nonprofits that follow the three levels of morality discussed above in the introduction to Part I. Of course, there are hardly any examples of nonprofits that occupy only one category. Most occupy two and some all three.

We begin with the first level of morality, namely, the personal level. As suggested above, this level raises such questions as how should I live my life alone so-to-speak. Should I make efforts to learn to appreciate difficult music? How much should I exercise? How much attention should I give to spiritual matters? And related to this, what should I believe in? Many of the groups representing organized religion fall into this category to the extent that they are devoted to helping individuals find personal salvation and some sort of relationship with the transcendent. Also groups with what might be called perfectionist ends such as fostering the appreciation of high culture fall into this category as do many educational organizations to the extent that they promote the education of the mind and an attachment to the liberal arts for the sake of leading individuals to a richer life. In terms of numbers of separate entities, because religious groups make up such a large part of the charitable nonprofit sector, this category is quite large.<sup>32</sup>

Second, there is the interpersonal level which raises such questions as how should I treat my family, what should I do to be a good teacher as well as when is it justifiable to lie or break promises, when should I help my neighbor in distress, and when is it improper to be dismissive or rude to others? Plainly many of the religious groups that are part of the first category also fall into this category – the ethics of how we treat each other is central to much of their teachings. Charity groups whose purposes are to relieve the suffering of individuals (as distinguished from ameliorating the conditions in society that cause the suffering) would also fall into this category.

Finally, there is the social level which raises such questions as what kind of a society do we want? Here we confront questions of justice including questions about what Rawls

calls the political conception of justice (questions about the basic structure of society) as well as political questions that in some sense fall below questions of the basic structure. This third category raises social and political questions: what kind of a government do we want? What kind of a public school system do we want? How extensive a social safety net do we want? These questions ask how our society as a whole should be rather than how we should treat each other as individuals. Perhaps the biggest component of this third category is our social service subsector. But also included are the myriad of good government and rights groups and groups devoted to protecting the environment.

These three levels do not exist in tightly separated compartments but frequently influence and implicate each other. If I hold Christian beliefs, presumably a first-level matter, they will strongly influence my second and third level principles. As another example, it seems clear that how I react to the question of helping my neighbor in distress, a second-level matter, will almost certainly influence my third level principles. Furthermore, as already mentioned, charitable nonprofits operate at two or more levels. Religious groups help individuals find personal salvation, urge them to treat their neighbors in an ethical fashion, run soup kitchens and advocate for greater funding for social services.<sup>33</sup> Arts and cultural groups aim to help individuals develop an attachment for beauty and also work to change society in a way that will more fully recognize the importance of the arts as a social function.

There is a characteristic of a great many charitable nonprofits that is central to my thesis whatever the category or categories they might fall into. Many such groups have as a purpose to persuade others to the rightness of their view. They are missionaries for their goals; they proselytize and preach. Many are drawn to work in nonprofits because of

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<sup>32</sup> It may also be large in terms of the numbers of people involved with these organizations. On the other hand, in terms of number of paid employees or net worth it may not be that large a category.

<sup>33</sup> Frequently this advocacy work will be done through an affiliated organization to sidestep First Amendment problems. But there is one great church that has been known to advocate for progressive social justice from the pulpit. (Because this church is committed to what many regard as retrograde personal justice issues -- e.g., right to life policies, no women priests and punishing views on homosexuality -- the tremendous interest that important parts of this church has in social justice issues is frequently overlooked.)

their strong moral commitment to the underlying purposes that they espouse. Their goal is not to have a consumer purchase their product but to convert the benighted to their conception of the good. I have often thought that if greed and self-interest are among the unattractive features of the commercial and for-profit sector of our business life, moral self-righteousness and preachiness are among the unattractive features of our charitable nonprofit life. But, as we will see below, the energy and passion that is manifested because of the strong beliefs that people in our sector hold releases a force that allows an important virtue of nonprofit pluralism to come about.

Of course, and this merely repeats the fact upon which this paper is based, these groups differ and contest each other. At the first level, religious groups argue about salvation. At the second level, libertarians argue with those who espouse a more paternalistic morality about how individuals should treat one another. And great wars go on at the third level about what rights different classes of people should have and how much public funds should be devoted to knitting the safety net or to supporting the arts and on and on about the kind of a society we should have.

I believe that there is one general social/political issue that underlies many of these particular conflicts, which for me reflects a division that has been prominent in American society for a long time, is prominent today and will be prominent for a long time to come. I have in mind the question of distributive justice: arguments over principles of fair distribution of advantages. Are there principled reasons why assets that are held by one person, or one group of persons, should be transferred to another person, or group of persons? Are there principled reasons why one person, or one group of persons, should work on behalf of another person, or group of persons? Today at a concrete level this issue plays out mostly over questions of taxation. Should redistribution be a goal of taxation? Should earnings be taxed to provide for the relief of poverty and destitution and perhaps as well to provide support for the arts?<sup>34</sup> (There are, of course, other ways the issue arises.)

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<sup>34</sup> Some may question whether taxing to raise funds to support the arts is redistributive. As will be noted below, it may not be redistributive in the sense of transferring resources from the

I believe that distributive justice issues are as important as any for deciding what kind of society we want. I believe that one's position on this issue grows out of what Rawls calls a reasonable comprehensive doctrine and as well informs our views on what Rawls calls conceptions of political justice. At bottom the issue raises the age-old conflict between liberty and equality. If, like Nozick, one gives priority to the separateness of persons and believes that society will be advanced, perhaps through the workings of the invisible hand, by allowing individuals to freely pursue their private interest burdened by government only to a minimal degree, including the burden of taxation, one then might be said to be in the liberty camp. On the other hand, if one believes that society will be most worthwhile if we see ourselves as connected and as having responsibilities for each other that might entail our sacrificing ourselves for another or others, one might then be said to be in the camp of equality. At one level I am, of course, describing the difference between the Conservative Right and the Liberal Left. As will be noted below, charitable nonprofits fall into both camps, and thus they express plural values. My argument is that there is no ultimate resolution of this conflict. Both positions are reasonable,<sup>35</sup> and thus both kinds of nonprofits ought to be allowed to pursue their ends.

Issues of redistribution among charitable nonprofit groups come up in a variety of ways. For example, those who are socially progressive (i.e., on the left wing) may believe that so long as our society has a substantial amount of people living in poverty and abject conditions it is right that virtually all redistribution be directed towards eliminating these conditions and that resources that might be devoted to achieving these ends should not be diverted to support the arts and other cultural activities. This kind of redistribution is frequently favored by the left on the grounds of advancing equality and opposed by the

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wealthy to the non-wealthy (although perhaps a case could be made that it may be), but it is certainly redistributive in the sense of taking from those who may not believe that support of the arts is merited (and who probably do not derive much pleasure from some of the arts that might be supported) and giving what is taken to the support of the arts.

<sup>35</sup> Given over 300 years of scholarly and political debate on the subject, how could one say that both sides are not reasonable?



right on the grounds of preserving liberty.<sup>36</sup> Even within one subsector such as social services the issue rages. Many in this subsector believe that that society should allocate a significant amount of public funds to the creation and support of a fully adequate safety net. They will argue that everyone concerned about helping the needy should also advocate for more funding for social services. On the other hand, many of those who believe that alleviating the suffering of individuals living in abject conditions should be done as “charity” also believe that those who engage in these efforts should not concern themselves with social reform.<sup>37</sup>

Support for cultural groups and private education may also be redistributive; although it may be less clear that that the distribution runs from one class to another. Assuming, as seems to be the case empirically and almost must be the case logically, that the source of much government support, namely resources raised by taxation, comes from the better-off of society, then government grants to private educational institutions may also involve redistribution from the better-off to the less well-off. This no doubt is highly contestable. It may be that most students who attend private universities are from the middle to upper levels of society, and that if there is redistribution it is from the top levels to the middle

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<sup>36</sup> At the extreme, some on the right will regard taxation to support the poor as an invasion of liberty. Of course, other reasons are advanced in support of these two positions. Some, on both the right and the left, will argue that people who are destitute and suffering deserve to be helped simply as a matter of common humanity. Others will argue that much of the “social service industrial complex” promotes dependence and works to lock groups of people into dysfunctional and miserable circumstances.

<sup>37</sup>In early January the New York Times reported that Harvard University's new president, Lawrence H. Summers had been criticized for advising public service organizations on campus to stick to charitable work and not get involved in social or political advocacy. “Trevor Cox, president of Phillips Brooks House, Harvard's umbrella for community service groups, said that at the meeting with student leaders, Mr. Summers seemed to be saying that public service should focus more on charity work than on advocacy of a particular approach to solving social problems. Tutoring children might be appropriate, for example, while fighting vouchers might not, even if it was based in a belief that they make conditions for children in public schools worse. 'The general drift of it was that he didn't consider advocacy public service,' Mr. Cox said. 'His conception was more of charity. To have the president of the university define a narrow definition of public service was not well met.' " N.Y. Times January 6, 2002.

Note that many of those who believe that those who want to help the needy should stay out of politics and not try to shape the social structure toward collective (i.e., government) efforts to provide assistance and services to the needy, that is who see helping the needy solely as a second-level matter, are in effect making a third-level claim that society ought to be organized in such a way that private charity be limited to direct assistance and not concern itself with social reform.

levels.<sup>38</sup> A similar point would seem apposite for government grants to cultural organizations. Private giving, as distinguished from government support to private schools and cultural organizations, may very likely not be redistributive. More generally, those on the left will argue on egalitarian grounds that in view of the inequalities in society public support to “elitist” institutions cannot be justified. On the other hand, those who hold to what above have been referred to as perfectionist conceptions will approve of such support.

Finally, advocacy groups that advance redistributive policies are arrayed against advocacy groups who advocate against redistributive policies and the same can be said about support from philanthropies to left-leaning or right-leaning groups. The analysis could go on but enough has been said to support my point that arguments regarding principles of fair distribution roil through the sector. Note that answers to the issues raised above – e.g., is support for private universities redistributive or not – do not need to be reached to foot my argument. All that need be agreed to is that such arguments do exist and who could deny that?

There are of course charitable nonprofits that pursue opposing goals that do not raise significant distribution issues and which differ strongly. For example, groups supporting gay rights contest with groups who work to discourage homosexual life styles. These questions do not seem to raise important distribution issues. It would seem also that many religious groups that vigorously dispute one another on doctrinal and other grounds also involve distributive issues very little.<sup>39</sup>

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<sup>38</sup> This is no doubt a very hot button issue. I believe that when some of us older members of the Forum attended private universities there were a great many students from the upper levels – too many, perhaps. Today with the development of a huge scholarship program over the past fifty years or so many of our private universities seem to be true meritocracies where a student’s economic background is not determinative of her acceptance. I exclude private primary and secondary schools from the reach of this last observation (although even at these schools there may have been some broadening in the last fifty years).

<sup>39</sup> For completeness sake, perhaps a word about medical nonprofits should be said. These groups may or may not raise distribution questions, but, whatever the answer to this question may be, it seems clear that there is very little disagreement in America today about support for these groups and nothing need be said about whether those who support different and opposing views regarding support for nonprofit medical efforts should be allowed to flourish since the

### III

In this part I make the argument that the pluralism facilitated by the charitable nonprofit sector is itself an important public good. Before doing so I need make some assumptions and some background distinctions. First, I assume that nearly everyone believes that we are better off living together in a society than living alone although there will be many disagreements about the nature of such a society. Second, I assume we believe in a democratic system such as we have in America and that binding decisions about justice and social policy are arrived at through a legislative process that is grounded on the principles of a representative democracy.<sup>40</sup> While we (the majority) do impose our views on everyone, everyone has a right to participate in the process and to vote for or against proposed social policies.<sup>41</sup> As suggested above in Part I, I assume we have all accepted a representative democracy and about this there is no plurality of views.

I now offer two justifications for the proposition that the pluralism the charitable nonprofit sector contributes to the American polity is itself a substantial public good. First, I argue that the sector provides a wide range of organizations and institutions through which citizens can engage in the public sphere. Second, it is my contention that the sector presents to citizens a myriad of ways the public good might be fostered and in doing so informs such citizens of the many alternative conceptions of the public good and thus places them in an improved position to develop their own ideas about what is in the public good.

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disagreements are so small. There are no doubt disagreements about the level of support and whether one disease or another ought to be especially supported, but it seems everyone is in favor of improving everyone's health.

<sup>40</sup> I am not going to try to justify any of these assumptions, but rather make the further assumption that nearly everyone will agree with them so that no justification is needed. I recognize that the last assumption, viz., that it is a good thing that we have agreed to live in a democracy, is a major question for political philosophy, if political philosophy is broadly conceived. But I suppose that for my readers this question has been finally settled.

<sup>41</sup> In contrast to the political system and its imposition of binding rules (democratically arrived at), charitable nonprofits do not enforce their views on anyone. They conduct programs that have strong social policy implications and in doing so provide examples for others to consider. They may urge the adoption of social policies consistent with their programs and they may urge their adoption strenuously, but they do not impose such programs.

A.

Charitable nonprofits by definition are set up to accomplish public benefits and consequently those who participate in their activities engage themselves in the public sphere. I assume that most everyone would agree that it is a good thing for members of society to be involved in public matters. Doing so gives people a stake in society and may move them to think more about the kind of society they want and thus to become more fully engaged citizens. I believe it follows that the higher the number of members of society that are engaged in the public sphere, the better the society.

Charitable nonprofits just insofar as they involve members of society in the public sphere provide a public good whatever their underlying purpose might be. The higher the number of people that participate in the activities of charitable nonprofits, the more of the public good is produced. And here we come to the crux of the argument. The greater the variety of different kinds of charitable nonprofits, the greater will be the number of people who participate in the sector. Let me briefly amplify this point.

People are different. They have different aspirations, different talents and different abilities. For some the most suitable way to participate in the public sphere may be in the arts. Such people may not have the nature or inclination, for example, to pursue a career or avocation in the social services. And the converse is true. If the only charitable nonprofits that are available are social service groups, many who might otherwise participate in the charitable sector will not. And so we return to the crux of the argument. The broader the array of different nonprofits offering different opportunities, the greater will be the number of people who are able to participate in the public sphere by working with nonprofits. I conclude then that the pluralism of the nonprofit sector brings about a higher level of community involvement than would be the case if the sector was less diverse and this higher level of public participation by individuals is itself a public good.

To substantiate this first justification, more is needed. So far we have only considered the value of having nonprofits that pursue various and different activities insofar as they

provide ways of bringing large numbers of people into the public sphere. While we have assumed that these activities are different, we have not assumed that they are rival. But many nonprofits have among their goals the pursuit of an advocacy agenda for reforming society. And these agenda may differ so that the groups that advocate them in fact oppose one another. Many of these groups may be viewed by some as ideological or political. I shall refer to them in this section as social justice groups. Assume two charitable nonprofits with different views of how social services should be provided. The adherents of each believe that their conception should be accepted by society as the dominant, if not sovereign, conception. Why would either be in favor of letting the other pursue its goals? We first address this question from the viewpoint of Berlin's objective pluralism and then briefly from the viewpoint of epistemological pluralism.

Recall that Berlin's objective pluralism holds that there are many different conceptions of the public good that are equally genuine and equally objective even though they may be in conflict. Fundamental to his argument is his assertion that there is no absolute standard by which the different conceptions might be measured and ranked. We have assumed two charitable nonprofits pursuing rivalrous conceptions of the public good, as reflected in their beliefs on how social services should be provided. We further assume that the adherents of both of our contesting groups have wisely decided to follow Berlin and believe that the reasons that their rivals put forward to justify their purposes are real and objective. They are just not reasons that they find convincing. Indeed, each group believes that society would be best served if it accepted its particular conception of the public good.<sup>42</sup> To repeat the question posed above, why should either group be in favor

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<sup>42</sup> Bernard Williams, in a paper he gave in the fall of 1998 at a conference of the New York Institute for the Humanities convened to mark the first anniversary of Berlin's death, caught this idea wonderfully:

One way of interpreting the value of, say, freedom, makes sense to us, and a slightly different one makes sense to these other people. In addition, it makes sense to us that the other way of looking at freedom makes sense to them. This does not mean that we have nothing to say about this difference between ourselves and them. On the contrary, our understanding of our situation and their situation gives us things to say, things relevant to our explaining why we think our ideas fit the situation better than theirs -- a situation which, under some description or other, we indisputably both share. (Of course, just in virtue of understanding how they and we come to be where we respectively are, we might well be amazed if we could get them to agree with us. B.

of the other group pursuing its goals when it believes that the achievement of the rival group's goals would not be optimum for society?

To begin, similar to the point made above regarding a pluralism of possible activities, I believe that all would accept that it is a good for members of society to engage themselves with the question of what kind of a society we should have. Behind this view is the belief that humankind chooses to live in a society and that humankind has a moral obligation to struggle to fashion an optimum social world. Nonetheless, as Berlin suggests, there are many different conceptions of the public good and different people will be attracted to different conceptions. In terms of the point being developed here, different people will be attracted to join different social justice nonprofit groups advocating for different conceptions.<sup>43</sup> Thus, if only one or a very few conceptions were available to choose from, if only a few different kinds of social justice charitable nonprofit groups existed, for large numbers of people there would be no organizations to join and they would be hindered in their ability to engage with questions of social justice. So similar to my earlier argument, I assert again that the pluralism of social justice groups afforded by the charitable nonprofit sector engages a greater number of people with these questions, that this is a good thing, indeed, it is a public good and thus supports the proposition that the pluralism the charitable nonprofit sector contributes to the American polity is itself a substantial public good.

Furthermore, objective pluralism affirms that in most cases no particular conception is wrong and at least by implication suggests that no particular conception of the public good will ever be permanently dominant. Thus, while the adherents of one particular conception may believe that, under the particular circumstances that prevail at the time, their conception should be preferred, they will also realize that circumstances change and

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Williams, "Liberalism and Loss," eds. R. Dworkin, M. Lilla and R. Silvers, *The Legacy of Isaiah Berlin*, (New York 2001), p. 96.

<sup>43</sup> As suggested above in Part II there will be those who believe that charitable nonprofits should not advocate for social justice. In their view, society should be ordered in such a way that the charitable sector sticks to direct charitable work and does not get involved in social or political advocacy. (This may be the only position they urge on how society should be.) From the

new objective truths will be born.<sup>44</sup> There is no way of knowing when one conception will give way to another. Under such conditions it would seem preferable for opposing groups to adopt a tolerant posture and to treat each other with mutual respect. Perhaps under these conditions to be is not to confront<sup>45</sup> but rather to be is to tolerate.<sup>46</sup>

Of course the above argument only makes sense if the contest between opposing views of social justice takes place in a functioning democratic society where different programs and policies can be voted in and out.<sup>47</sup> This point assumes that most of the policies that are advocated for by social justice charitable nonprofits sooner or later end up as duly enacted government programs (e.g., more funding for the homeless, stricter environmental rules, etc.).<sup>48</sup> I believe that this is true in most cases.<sup>49</sup> Thus, if a policy advocated for by a particular social justice nonprofit has not been recognized by the government, there is always the possibility that the group's efforts will succeed and that their policy will eventually be adopted.

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standpoint of objective pluralism, this view is as objective as the contrary view that charitable nonprofits should advocate for their views of social justice.

<sup>44</sup> They will also realize that even if the circumstances do not change, people may have different views and that both are objective and true in some sense.

<sup>45</sup> This axiom ("to be is to confront") is taken from subsection 33.4 of Justice as Fairness. In an earlier subsection Rawls contends that one requirement for a stable constitutional regime is that its basic institutions should encourage the cooperative virtues of political life: the virtues of reasonableness and a sense of fairness, and a spirit of compromise and a readiness to meet others halfway." Justice, p. 116. Later he suggests that the axiom overlooks the great values achieved by a society that realizes the cooperative political virtues.

<sup>46</sup> Pluralism as I have been describing it, of course, shares many features of classical liberalism.

<sup>47</sup> A functioning democracy would possess all the basic political rights: the right to associate, freedom of speech, the right to vote, etc.

<sup>48</sup> In view of the restrictions on lobbying by charitable nonprofits, some may question whether charitable nonprofits can actively advocate for legislatively enacted programs. While there are such limits, they are far less restrictive than many are aware of, and there is a great deal that social justice advocacy nonprofits can do by way of education that does not constitute lobbying and can be very effective in bringing about social change. I return to the question of lobbying limits below in Part IV. See, [some Chisholm-type cite for information on lobbying restrictions].

<sup>49</sup> There are no doubt some charitable nonprofits that take positions on social justice -- if only that charitable nonprofits should not get involved in social and political issues -- that do not call for a government program of some sort or other. I believe that there are very few such groups and it does not seem to me that their presence affects my argument.

Finally, I believe that a diverse and energetic group of social justice charitable nonprofits helps keep open the question of what kind of a society we should have and helps avoid the rigidity that inevitably adheres to any monistic view of social justice. In this connection, it may be useful to recall that Rawls asserts "... that a continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power, with all its official crimes and the inevitable brutality and cruelties..."<sup>50</sup> I take it Rawls has in mind a more or less totalitarian society and not a democratic one. Berlin reminds us that the twentieth century has shown us the dangers of the total triumph of any one principle.<sup>51</sup> Berlin also reminds us that democracy itself can be oppressive<sup>52</sup> and "... may, in fact, deprive the individual citizen of a great many liberties ... ."<sup>53</sup> This suggests another virtue offered by the pluralism of our nonprofit sector and that is that, through its social justice charitable nonprofits, it promotes an open democracy that keeps alive to changing and different views of social justice.<sup>54</sup>

So far I have advanced my justification for the claim that the pluralism of the nonprofit sector is a public good itself on Berlin's account of objective pluralism. The argument changes hardly at all if we adopt what I have called the view of epistemological pluralism. Under either view, the diversity of activities argument remains the same. So far as the differences between two opposing social justice advocacy groups, instead of recognizing that both of their conceptions may be equally objective and true they

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<sup>50</sup> Justice, p. 34

<sup>51</sup> FEL, p. lviii

<sup>52</sup> "[A] man may leave a vigorously and genuinely 'participatory' democratic state in which the social or political pressures are too suffocating for him, for a climate where there may be less civic participation, but more privacy, a less dynamic and all-embracing communal life, less gregariousness but also less surveillance." FEL, p. lvii.

<sup>53</sup> FEL, p. 130.

<sup>54</sup> There is the continuing debate over whether multiple parties would hurt democracy and whether the two-party system is put in jeopardy by such things as blanket political primaries and fusion candidacies. Some worry that such procedures will destabilize our democratic process and that the weakening of the two-party system will lead to factionalism and finally to some sort of political paralysis. See Richard H. Pildes, "Democracy and Disorder" in Cass R. Sunstein and Richard A. Epstein, eds., *The Vote* 140 (Chicago 2001). Whatever one's views may be on this issue, I would suggest that a robust group of social justice charitable nonprofits may achieve some of the same ends as multiple parties (bringing new voices into the system, the expression of new ideas, etc.) without damaging the two-party system.



recognize that neither of their views may be true and thus that it would be unsuitable for either one to assert that everyone should adhere to their view for all time.

## B

We turn now to the second justification of why the pluralism of the charitable nonprofit sector is itself a public good and should be supported. In sum, I believe that the sector presents to citizens a myriad of ways of how the public good might be fostered and in doing so informs them of the many alternative conceptions of the public good and thus places them in an improved position to develop their own ideas about what is in the public good.

I begin with some suppositions. First, as suggested above, I believe that it is a deep part of human nature to be concerned with moral questions and that struggling with moral questions is a large part of everyone's life. Throughout our life we are faced with moral decisions and are continuously forming, assessing and revising our moral conceptions of what we ought to do as individuals, of what it is we owe each other and of what kind of society we should want and what we should do to help bring it about. Implicit in this belief is the presupposition that we are free to a great extent and that our decisions are not determined.<sup>55</sup> Indeed, part of what it means to be free is that our actions come about as a result of undetermined choices and that we are responsible for our actions which ensue from such choices. As a result of our moral freedom many of us change our views in the course of our life as we grow and change. Put somewhat dramatically, we are self-creating and self-transforming creatures. Indeed it is because of our distinctive capacity for moral decision-making that the fact of pluralism comes about.

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<sup>55</sup> Whether our will is free or not is, of course, a huge subject that philosophers have debated about since the beginning. I will not argue the proposition but rather take free will as a given. Berlin has shown how, whatever we might argue as philosophers, we experience ourselves as free and live our daily life on that assumption. [] As lawyers it would seem we are committed to this position since I cannot see how our criminal law and much else in the law that depends on intent and purpose could function except on the assumption that our will is free.

I see no need to argue whether the claim that we have a moral capacity can be substantiated as an empirical matter<sup>56</sup>, but I do suppose as a normative matter that we ought to exercise this capacity and that we ought to continue to struggle throughout our life with the significant moral questions that forever arise and confront us. As will be seen below, my argument is that charitable nonprofits produce conditions that facilitate the exercise of our moral capacity.

While the point may need no further discussion, it may be instructive to note that Rawls' theory of justice as fairness rests in large part on his idea of us as free and equal persons. He notes that free and equal persons have what he calls "the two moral powers."<sup>57</sup> These are powers to conceive of justice and conceptions of good. His emphasis is on what I have referred to as the third level of morality, that is, a focus on how society should be and values of political justice as embodied in political institutions and social policies. He does however, recognize that citizens have nonpolitical aims as well and their conceptions of good will give rise to such aims. He also notes that citizens conceive of each other as free and thus as having the moral power to have conceptions of good but they do not regard themselves "as inevitably tied to the pursuit of the particular conception of good which they affirm at any given time. Rather, as citizens, they are seen as capable of revising and changing this conception on reasonable and rational grounds, and they may do this if they so desire."<sup>58</sup>

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<sup>56</sup> It could be that organisms might exist which look very much as we do but have no sense of morality – a race of sociopaths, perhaps. It would not seem likely, however, that we would elect to call them human.

<sup>57</sup> He defines such powers as follows:

- (i) One such power is the capacity for a sense of justice: it is the capacity to understand, to apply and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.
- (ii) The other moral power is a capacity for a conception of the good: it is the capacity to have, revise, and rationally to pursue a conception of the good. Such a conception is an ordered family of final ends and aims which specifies a person's conception of what is of value in human life or. Alternatively, of what is regarded as a fully worthwhile life. The elements of such a conception are normally set within, and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in the light of which the various ends and aims are ordered and understood. Justice, pp .18-19

A further supposition I make is that in the process of developing our moral positions we are more affected by doing than by, for example, reading or listening to lectures or sermons or, perhaps, by simply thinking.<sup>59</sup> Connected to this point, I believe that the debate and discussion that takes place among those who are engaged in actual doing makes more of an impact on one's moral development than any amount of solitary cerebration. Somewhere J. S. Mill talks about "lived-experiments" as a way of reaching moral decisions. As will be elaborated upon below, I believe that those who work with charitable nonprofits are exposed to and moved by an experience in which the moral issues that the groups are addressing are lived and not just abstractly thought about. In sum, our nature as moral persons is most fully realized by engaging in the moral practice of a life that is lived, and, as just suggested and will be argued below, the American charitable sector with its many different and contending groups constitutes a first-rate milieu for this to happen.

The vastly different and contending charitable nonprofit groups that were described above in Part II provide us with a wide range of ways to go out-of-doors and to meet and work with other citizens in improving our communities and thus with a wide range of ways to exercise our moral capacities in real and lived experiences.<sup>60</sup> As suggested above, there are left-leaning nonprofits intent on social reform and right-leaning nonprofits intent on conserving social traditions. There are groups that eschew advocacy and are content to alleviate suffering. There are groups that work to preserve our environment through local efforts and at the most global level. There is the widest range of rights groups and a huge variety of cultural and arts groups and so, in terms of various substantive purposes that charitable nonprofits pursue, the list goes on and on. Most of

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<sup>58</sup> Justice, p. [].

<sup>59</sup> My own views on social justice were far more influenced by actually doing civil rights work in Mississippi in the late 1960s than by all the reading and thinking I had done on the subject.

<sup>60</sup> To repeat what has already been said, people are different, a fact that lies at the base of pluralism, and as suggested above are able in differing ways to participate in bettering their community. They have different aptitudes, different interests, and different characters. Some are aggressive and like to confront while others are more gentle and thoughtful. For some it is natural to argue and persuade, for some to heal and for some to teach. People are drawn in differing ways to helping better their community. Some may be fit for engaging in hands-on

these groups not only carry on activities aimed at achieving their goals but also believe that others should also be concerned about and support their goals. Thus, the charitable nonprofit sector affords the widest range of lived opportunities through which we can contribute to the community and develop our moral capacities.

So far I have emphasized the different kinds of charitable nonprofits. I want now to consider how they operate in order to elaborate my point that nonprofits afford an admirable milieu of lived-experience in which to develop morally. To begin with, nonprofits are social enterprises. People work for nonprofits; people volunteer for nonprofits and people serve on the board of nonprofits, and it appears that the number of Americans participating in nonprofits grows every year. They talk about what they are doing and why they are doing it. They provide examples to one another. They argue and deliberate together and reach collective decisions about how their groups should conduct themselves and what their purposes should be, and thus they argue and deliberate together and reach collective decisions about moral questions and public matters. These are real, lived and shared experiences. In addition to internal debates about means and ends, nonprofits contend with each other. Sometimes the contest is carried on at a very quiet level with people urging claims on one another in subtle, sometime almost imperceptible ways – as by setting an example, for instance, or by explaining their views in a gentle non-confrontational way. Sometimes the fight is loud and very confrontational. Whether the contest is internal or between nonprofits, subtle or brash, the result is moral tension and sometimes moral collision. We are compelled to decide and not just think.

Above I imagined two charitable nonprofits with different views of how social services should be provided. Perhaps one group believed that such help should be provided by direct “charity” and not by social services run and supported by the government. Adherents to such a group might stand firm in the liberty camp of the liberty/equality division. Let us imagine the other group believed in full government support for social services and that its adherents were very much members of the equality camp. They will

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services, others may be predisposed to be advocates for justice and change, others to be

contest. It may be imagined that most of those involved will understand and find attractive the reasons that support liberty and those that support equality. They will sense that there is no ultimate resolution of the issue and that the values underlying the two positions are incompatible and may be incommensurable. They will also understand that in the context they are concerned about, i.e., the provision of social services, they have to make a choice and in doing so they may realize that, while they believe their choice the right one, they are losing something.<sup>61</sup> And however painful may be the moral tension that arises from having to make a choice, is it not clear that the choice will be a better one for having been made in an agonistic system where the moral tension is real and lived?

Berlin in his essay on Mill reminds us that Mill

...believed that to hold an opinion deeply is to throw our feelings into it. [Mill] once declared that when we deeply care, we must dislike those who hold opposite views ... He asked us not necessarily to respect the views of others - very far from it - only to try to understand and tolerate them; only tolerate; disapprove, think ill of, if need be mock or despise, but tolerate; for without conviction, without some antipathetic feeling, there was, he thought, no deep conviction; and without deep conviction there were no ends of life ...<sup>62</sup>

A little later Berlin observes “opposition is needed to keep truth alive” and reminds us that Mill said “‘Both teachers and learners go to sleep at their post, as soon as there is no enemy in the field’, overcome as they are by ‘the deep slumber of a decided opinion.’”<sup>63</sup> Without plural and differing views, without contest, without the edge of moral disapproval and consequent stress we might sail on the windless and tideless sea of settled opinion and our moral growth become becalmed and stagnate. Largely because of its pluralism, the ocean of American charitable nonprofits enjoys strong winds and this, I believe, for the reasons suggested, is a very good thing.

Finally, because of the enormous growth of the American charitable nonprofit sector and the fact that it touches so many citizens in different ways, I believe that the sector works

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performing artists and on and on.

<sup>61</sup> They may also realize that in part because there is no final resolution of the issue, they may change their position as time goes on.

<sup>62</sup>FEL, p. 184.

<sup>63</sup>FEL, p. 189

also to advance the moral growth of those who are not participants.<sup>64</sup> As suggested earlier, nonprofits are run by people with deep convictions, many of whom are inclined to turn outward to the general public and in various ways make claims upon its members. This may be done by providing examples, through energetic educational campaigns or through advocacy. While the moral friction that exists within and between nonprofits may be stronger than that which exists between nonprofits and the public, I believe it is of the same character and that the sector helps make possible the moral development of those who are not part of it in ways that are similar to what it does for those who do participate in it.

My second justification for the claim that the pluralism of the nonprofit sector is a public good itself focuses on how charitable nonprofits help us come to decisions about important moral questions. For these purposes it would not seem to matter whether the questions involve decisions about values which are different but which are equally genuine and objective or about matters about which, because of our cognitive limitations, we are unable to reach a permanently fixed resolution. Thus, I believe that my argument holds whether one accepts objective or epistemological pluralism.

In sum, my second justification for the claim that the pluralism of the charitable nonprofit sector is a public good in itself argues that we should persistently confront moral questions, that this is best done in a lived social context that presents us with a wide range of options of how we might act morally and that the American nonprofit sector with the pluralism afforded by its differing and contesting groups provides this context in a splendid manner that should be supported as such.

#### IV

In this final part of the paper I will briefly suggest a few implications that seem to me to flow from my thesis.

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<sup>64</sup> Below in Part IV I will suggest that this an aspect of the charitable nonprofit sector that is not well understood.

One clear implication, and one I lived in my gut for 15 years, is that organizations like the Nonprofit Coordinating Committee of New York (NPCC) and the Independent Sector (IS) which are set up to advance and protect the whole § 501(c)(3) sector must protect and advance the *whole* sector, should promote and advocate for the pluralism of the whole sector and should resist any moves to narrow the scope of the sector. It follows from this position that groups like NPCC and IS should not advocate on behalf of any one part of the sector. For example, in the early days of the National Council of Nonprofit Associations, an umbrella group of some 30 statewide NPCC-like organizations, there was a strong tilt toward restricting its efforts to helping primarily social service groups and other progressive nonprofits. The debates were fierce and sometimes personal. Andy and Jon may remember that in the early days of NPCC proposals to take positions aimed primarily at helping the social service sector would come up from time to time. I am happy to say that both groups kept their focus on sector-wide, generic issues (the “qua” issues) but it was not without a struggle.<sup>65</sup>

Most of us who participate in the nonprofit sector live in two worlds: one in which we pursue and advocate for particular substantive policies and one in which we promote the idea of the nonprofit as such. Of course just because we are committed to conserving and advancing the pluralism of the sector, it does not mean we must abandon our substantive interest. When we work for our individual nonprofit organizations, we can and should pursue our particular interests with all the vigor we possess. And we can join wider coalitions of like-minded nonprofits to pursue a wider agenda of reform. But we should all the while remember that we are part of the whole nonprofit sector and that we should support that whole sector with all its differing and incommensurable values. We can and should live in both worlds.

Second, today it appears to be conventional wisdom that the charitable tax-exemption and the charitable contribution deduction should be viewed as tax expenditures, back-door

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<sup>65</sup> Harvey D. and John may confirm my memory that from time to time similar issues came up at IS.

government grants.<sup>66</sup> One danger with this view is that if the government decides that a particular activity that has heretofore been considered worthy of support no longer deserves support, it need only change the definition of what is an exempt purpose so as to exclude the no-longer favored activity.<sup>67</sup> One can imagine circumstances in which arts and cultural groups might be the target of such a change. However, if the pluralism of the charitable sector were itself thought of as a public good rather than (or in addition to) the particular public goods offered by the various charities, then for all the reasons advanced above there would be good grounds to oppose any limitation on the definition of what is an exempt purpose.

Finally, my justification for treating the pluralism of the nonprofit sector as a public good itself has emphasized the educational nature of charitable nonprofits who by presenting to citizens a myriad of ways of how the public good might be fostered and thus informing them of the many alternative conceptions of the public good, places them in an improved position to develop their own ideas about what is in the public good. This suggests that many charitable nonprofits ought to be more aggressive in their educational and advocacy work. Continuing efforts should be made to inform them that their fears about engaging in advocacy are unfounded and continuing attempts should be made to reduce the limitations on lobbying activity.<sup>68</sup> Connected to this, I believe that what I have described

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<sup>66</sup> Virtually all tax scholars today regard these exemptions as tax expenditures. Furthermore, the Supreme Court of the United States has also made clear that it conceives of charitable exemptions as tax expenditures. See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) and *Bob Jones University v. United States*, 461 U.S. 574 (1983). The tax expenditure concept was primarily developed by the late Stanley S. Surrey when he was Assistant Secretary of the Treasury for Tax Policy. Surrey meticulously searched the tax code to find tax expenditures, one of which in his view was the charitable exemption. In 1974 as a result of his efforts the Congress incorporated a “tax expenditure budget” into the annual budget process. See Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 Harv. L. Rev 491 at 493 (1985) (book review).

<sup>67</sup> In contrast to the tax-expenditure view of the charitable exemption there is the (better) tax base approach which argues that it is part of the normative idea of what we tax not to include in the tax base assets that individuals have turned over to the public for its exclusive use and will receive no individual benefits from. Under this view, I would argue, pace Harvey G., that a change in the definition of what is an exempt purpose would be more difficult to effect than if the exemption is viewed as a tax expenditure. But, alas, the exemption is almost universally viewed as tax expenditure.

<sup>68</sup> Bob Smucker’s group, Charitable Lobbying in the Public Interest, is engaged in just this work.



as the charitable nonprofit sector's educational function is not widely appreciated. Thus, I believe efforts should be made to better inform people of this aspect of charitable nonprofits.

Peter Swords  
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