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BRINGING CANDOR TO CHARITABLE SOLICITATIONS

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The American public donates a staggering amount of money to nonprofit charities. These charities routinely solicit and receive money from donors for specific, earmarked purposes. Often, however, charities ignore their obligations to use money for these designated uses. In many circumstances, even a seemingly benign redirection of earmarked gifts for other charitable purposes could constitute fraud and misrepresentation.

Breaking the implicit or explicit promise to use money in a designated manner harms donors, charities, and the public. Prospective donors assess the value of charitable donations in a manner similar to the way they value consumer goods and services and can be swayed by false claims. Accordingly, allowing distortions of perceived value misleads donors when they are directing their charity.

In light of detailed examinations of charitable-organization spending practices, this Article will propose that charities should adhere to a new, higher level of candor in their public communications. Maintaining a renewed, scrupulous approach to disclosure would, in Chief Justice John Marshall's parlance in Trustees of Dartmouth College v. Woodward*, ensure "that the charity will flow . . . in the channel" that the donors expressly choose.*

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INTRODUCTION

In *Trustees of Dartmouth College v. Woodward*,[1] Chief Justice John Marshall observed that donors are motivated to give because of the "pleasing hope" that the charity will use the gift for the donors' intended purpose:

> It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these [charitable] gifts is the conviction felt by the giver, that the disposition he makes of them is immutable . . . . All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it.[2]

Today, as then, charities routinely solicit and receive money from donors for specific, earmarked uses. Often, however, charities do not technically fulfill their obligations to use money for those designated uses. Dishonoring these claims harms donors, charities, and the public. This Article will argue that requiring a new, higher level of candor from charities in their

1. 17 U.S. (4 Wheat.) 518 (1819).
2. *Id.* at 647 (emphasis added); *see* Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663, 1716 (2015) (noting the durability of these words).

fundraising communications will ensure, in Chief Justice Marshall's parlance, "that the charity will flow . . . in the channel" that the donors select.[3]

The American public donated a staggering $410 billion to charities in 2017, representing over two percent of gross domestic product.[4] Individual donors accounted for nearly eighty percent of that giving,[5] with education and human service[6] charities receiving the largest aggregate amount, a combined twenty-six percent.[7] Put starkly, in 2017, individual donors collectively gave nearly six times more money than all foundations combined.[8] The sheer magnitude of the economic role of individual philanthropy invites an examination into the routine practices for raising that money.[9]

Charities persuade donors through "the provision of information . . . and promotion."[10] Though donation solicitations differ from consumer advertising pitches that aim to induce traditional market exchanges, they seek to yield similar transactional decisions.[11] Price points, combined with other claims, influence where funds go. Charities confront this dynamic just like sellers of

3. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 647.

4. *Giving Statistics*, CHARITY NAVIGATOR, https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=42 (last visited Apr. 15, 2019) (citing GIVING USA, THE ANNUAL REPORT ON PHILANTHROPY (2018)).

5. *Id.* (including bequests in this number).

6. Human service charities, as defined by Charity Navigator, include children's and family services, youth development, shelter, and crisis services, food banks and pantries, human service organizations (for example, YMCA, YWCA and the Red Cross), homeless services, and social services. *Human Services*, CHARITY NAVIGATOR, https://www.charitynavigator.org/index.cfm?bay=search.categories&categoryid=6 (last visited Apr. 15, 2019).

7. *Giving Statistics*, *supra* note 4.

8. *See Charitable Giving Statistics*, NAT'L PHILANTHROPIC TRUST, https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics/ (last visited Apr. 15, 2019).

9. The demographics of giving, with lower-income and older households donating more as a percentage of income than others, also warrant concern. *See* John A. List, *The Market for Charitable Giving*, 25 J. ECON. PERSPECTIVES 157, 166 (2011) (decomposing giving by demographics). List's decomposition includes giving to religious organizations, but this Article focuses on the solicitation practices of providers of non-religious charitable goods and services, which also includes religiously-affiliated providers of charity, such as Catholic Charities.

10. Marco A. Castaneda et al., *Competition, Contractibility, and the Market for Donors to Nonprofits*, 24 J. L. ECON. & ORG. 215, 216 (2008). The United States Supreme Court recognized that charitable solicitation and communication of information about causes are intertwined, stating:

> [C]haritable appeals for funds . . . involve . . . communication of information, the dissemination and propagation of views and ideas . . . . Soliciting financial support is undoubtedly subject to reasonable regulation but . . . must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

11. "[W]hen there are strings attached to donations, those revenues are essentially akin to sales." Burton A. Weisbrod, *The Nonprofit Mission and its Financing*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 15 (Burton A. Weisbrod ed., 1998).

soap and electronics. As the proverb goes, "If charity cost nothing, the world would be full of philanthropists."[12]

Individual donors[13] have a vast choice of charities for their philanthropy.[14] Therefore, charities must compete to raise money.[15] According to one model, charities compete by manipulating the "implicit price" of donations,[16] reflected in the amount of the gift that the donor believes will directly support the expected charitable goods and services, as opposed to other programmatic expenses and other uses.[17] One issue with implicit pricing, however, is the amount of money leaked to overhead functions and fundraising.[18]

The implicit pricing of individual donations affects their ultimate amount and distribution.[19] Solicitations persuade individuals to give (versus not give) or to choose one recipient over another.[20] Charitable claims inform choices and substitution decisions, just like other consumer claims,[21] driving the ultimate allocation of charitable funding. Therefore, the candor of these representations becomes critical to donors, recipients, and the larger public interest because they shape the output of the entire nonprofit sector. Charitable candor ensures that the donor's implicit price reflects the true destination of funding and inspires confidence in charities.

The fungible nature of money creates an opportunity for mischief—for charities to dishonor the letter and spirit of a promised earmarked use. Fun-

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12. PAUL G. BLACKETOR, EVERYDAY USEFUL QUOTES 310 (2009). This saying has been attributed to Yiddish humorist Leo Rosten, although it also appears without attribution as a Jewish proverb. John Peloza & Piers Steel, *The Price Elasticities of Charitable Contributions: A Meta-Analysis*, 24 J. PUB. POL'Y & MARKETING 260, 260 (2005); BLACKETOR, *supra*, at 310.

13. I use the term "donors" to refer to the "individual donors" who contribute the vast bulk of dollars, even though corporations, foundations, and other entities also donate to charities. *See Giving Statistics*, *supra* note 4.

14. In 2015, over one million public charities claimed tax-exempt status. Brice McKeever, *The Nonprofit Sector in Brief*, NAT'L CTR. FOR CHARITABLE STAT. (Jan. 3, 2019), https://nccs.urban.org/project/nonprofit-sector-brief.

15. *See generally* Castaneda et al., *supra* note 10, at 215–18 (discussing models of competition for donations in the nonprofit sector).

16. For the purposes of this Article, I will use "implicit price" to describe the donor's overall perceived value of donations, including expectations that charities will honor specifically-promised, earmarked uses of the money made in solicitations.

17. Castaneda et al., *supra* note 10, at 216.

18. *See* Cagla Okten & Burton A. Weisbrod, *Determinants of Donations in Private Nonprofit Markets*, 75 J. PUB. ECON. 255, 255–57 (2000). Additionally, some literature assesses the effect of income tax policy on the implicit pricing of donations. *See, e.g.*, Gerald E. Auten, et al., *The Effects of Tax Reform on Charitable Contributions*, 45 NAT'L TAX J. 267 (1992); William S. Reece, *Charitable Contributions: New Evidence on Household Behavior*, 69 AM. ECON. REV. 142 (1979).

19. *See* Letter from BBB Wise Giving All., GuideStar, and Charity Navigator to Donors of America (2013), http://s5770.pcdn.co/wp-content/uploads/2013/06/GS_OverheadMyth_Ltr_ONLINE.pdf.

20. Susan Rose-Ackerman, *Charitable Giving and "Excessive Fundraising,"* 97 Q. J. ECON. 193, 194 (1982).

21. *Id.*

gible funding enables charities to spend incremental money on entirely different uses from those designated by the donor.[22] New donations enable charities to shift funding from specific, solicited purposes to other discretionary uses, or simply toward activities less attractive for soliciting donations.[23] This ability to put solicited money into one earmarked pocket in public, and subsequently, when the public looks the other way, take money out of that very pocket for other uses, disregards donor intent.

Solicitation claims that create an implicit price gap are not easily self-correcting. For markets to correct false claims, donors need the capability to assess the truthfulness of the claim after the gift transaction.[24] Donors would, as a general matter, find it difficult to see precisely how organizations use their gifts because the details of charitable operations are not publicly visible. An individual donor to a complex university or medical charity might need a forensic accountant with full access to financial and operational information of the organization to determine whether their funds had the expected incremental impact on the recipient organization. In order for markets to reflect and incorporate the charity's actual behavior, the donor would need to ascertain whether the represented implicit price reflected the true expected value of the donation. Opacity makes that scenario unlikely.

Donor ignorance of this dynamic offers no comfort. As Judge Frank Easterbrook noted in a case where a manufacturer made fraudulent advertising claims to consumers about the pain-relieving effects of its product, "One important reason for requiring truth is so that competition in the market will lead to appropriate prices. Selling brass as gold harms consumers independent of any effect on pain."[25] Requiring truth is equally important for compe-

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22. The charitable sector maintains no monopoly on the fungibility phenomenon. The ability to flexibly deploy fungible resources contrary to promised use presents challenges well beyond the charitable sector, including in public fiscal budgeting and foreign-aid spending. *See, e.g.*, Tarhan Feyzioglu et al., *A Panel Data Analysis of the Fungibility of Foreign Aid*, 12 WORLD BANK ECON. REV. 29 (1998) (explaining how fungibility of foreign aid makes it difficult to discern impacts on projects); Howard Pack & Janet Rothenberg Pack, *Foreign Aid and the Question of Fungibility*, 75 REV. ECON. & STAT. 258, 258 (1993) (discussing how fungibility of aid "thwart[s]" donor intent). Fungibility concerns have been much more voluble when federal budget spending over controversial causes have been at issue. *See* Mary Katherine Ham, *NYT Very Concerned About Fungibility of Money in Charity; Not So Much in Federal Gov't*, WKLY. STANDARD (Nov. 13, 2009), http://www.weeklystandard.com/nyt-very-concerned-about-fungibility-of-money-in-charity-not-so-much-in-federal-govt/article/271545 (analogizing concerns about transparency and accountability with respect to fungibility and use of charitable donations to concerns about the fungibility of health care funding and abortion); David Saperstein, *Appropriate and Inappropriate Use of Religion*, *in* SACRED PLACES, CIVIC PURPOSES: SHOULD GOVERNMENT HELP FAITH-BASED CHARITY? 303 (E.J. Dionne Jr. & Ming Hsu Chen eds., 2001) ("[E]very dollar in the church budget freed up by government funding is going to be used for religious activities.").

23. *See infra* Part II.

24. *See* David Adam Friedman, *Refining Advertising Regulation*, 49 CONN. L. REV. 837, 843–53 (2017).

25. FTC v. QT, Inc., 512 F.3d 858, 863 (7th Cir. 2008).

tition in markets for donations, if solicitations are to generate accurate implicit pricing calculations. Donors are harmed by misdirection of their funds to non-earmarked uses. Truth-telling charities also suffer. The charities that create an implicit pricing gap through dishonest means draw resources away from those that use full candor in their earmarked solicitations, thus harming charities that honor these commitments.

In this Article, I will urge the charitable sector to close the implicit price gap by self-policing a higher standard for solicitation claims. Charities should adopt a revised "Donor Bill of Rights"[26] that commits them to use full candor in donor communications, especially with respect to earmarked uses of money. If successful, the sector could elevate fundraising practices without incurring high compliance costs. If self-policing fails, enforcement agencies could prosecute nonprofits that employ deception to generate implicit price gaps. Though serious and egregious instances of charitable misrepresentations warrant and already receive enforcement attention,[27] these more routine solicitation practices should not remain ignored. Some of these practices may even meet the common law elements of fraud and misrepresentation, and the public should no longer tolerate them.

This Article will proceed in four major parts. In Part I, I will discuss the motivations for charitable donations. I will further explain the concept of implicit pricing and how charities use solicitation to manipulate implicit pricing to induce donations. With that underpinning, in Part II, I will describe and illustrate the specific problem of honoring earmarked donor intent where donations are fungible. I will show that raising money for particular purposes, and then directing that money elsewhere, constitutes misrepresentation and fraud. I will also explore the problems created by fungibility in a variety of contexts and the associated deficiencies in the current Donor Bill of Rights, the voluntary code established by philanthropy watchdogs. Part III will propose revising the Donor Bill of Rights to require participants to use full candor—to be "scrupulously ethical" in public communications.[28] Failing that, public enforcement agencies can focus resources on these marketing tactics. Part IV will conclude that increased candor will lead to improved allocations of charitable funding and higher public confidence in the charitable sector.

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26. ASS'N OF FUNDRAISING PROFESSIONALS ET AL., A DONOR BILL OF RIGHTS (1993), https://afpglobal.org/sites/default/files/attachments/2018-10/DonorBillofRights.pdf (last visited Mar. 3, 2018) [hereinafter DONOR BILL OF RIGHTS].

27. *See, e.g.*, Press Release, FTC, FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits (Mar. 30, 2016), https://www.ftc.gov/news-events/press-releases/2016/03/ftc-states-settle-claims-against-two-entities-claiming-be-cancer. The FTC put a sizable sham cancer operation out of business, one that "allegedly bilked more than $187 million from donors." *Id.* In this instance, the FTC alleged that the charities' operators directed a miniscule fraction of donor money toward cancer charities, redirecting the operations to their self-benefit. *Id.*

28. OR. ADMIN. R. 583-030-0035(12) (2015); *see infra* note 305 and accompanying text.

I. CLASSIC PROBLEMS WITH FUNDRAISING CLAIMS

When does a false fundraising claim rise to the level of common law misrepresentation or fraud? When charities outright lie and steal, they provide easy cases.[29] When fundraising involves other, less-obviously misleading behavior, however, the common law offers guidance to resolving such cases. The law of misrepresentation and fraud squarely addresses commercial pecuniary transactions, but the principles also hold for fundraising transactions. Essentially, the fundraising charity makes representations that the donor should be able to rely upon when deciding whether to donate, to what cause, and for which purpose.[30] In other words, resources should flow toward where donors intend them to flow. The social importance of the sector warrants requiring more candor in fundraising disclosures.

To contextualize this problem, Section I.A reviews the established consensus around the varied motivations for individuals to make charitable donations. Section I.B observes that charities convey a price for their charitable goods and services to donors through their representations. If solicitations mislead donors about the implicit price of donation, such solicitations will misdirect charitable giving. Section I.C dissects a recent example of intentional solicitation misrepresentation and fraud—a flagrant example involving cancer research fundraising, settled by the Federal Trade Commission ("FTC") and the states. Classic fraud proves obviously damaging to donors and the public. Though less blatant, the damage from misdirecting earmarked funds bears a conceptual resemblance. Donors expect value from the implicit price of their donation, and here, their donation yields almost no value. Finally, in Section I.D, in order to further flesh out the challenges presented by funding fungibility, I offer a high-profile scenario where, due to impossibility, a well-intended charity simply could not use solicited earmarked money as directed. Unlike routine fungibility problems, this tangle received high scrutiny because the intended beneficiaries were the victims of the September 11, 2001, terrorist attacks. This much rarer scenario shows that even with the *drag* of candor, candid charities will have an easier time exercising discretion for fund use, and charities need to balance those considerations when soliciting donors.

A. Why Do People Donate to Charities?

As Professor Anna Tait observes, "gift-giving . . . is not solely a bilateral exchange with easily-definable, material benefits accruing to each party. Rather, gift-giving is a complicated form of exchange that provides a donor with numerous intangible benefits and operates within an intricate system of

29. *See infra* Section I.C.
30. *See infra* Section II.A.

social networks and cultural norms."[31] Economists and sociologists have dissected these underlying components to understand the motivations for charitable donations.[32] A review of these motivations situates the importance of charities honoring promises to use funds for earmarked purposes.

Individuals make charitable donations for a host of reasons, in addition to the ability to focus their money on creating specific forms of charitable production. An exhaustive meta-analysis of the charitable-giving literature concluded, "[T]he most important forces that drive charitable giving [are] [1] awareness of need; [2] solicitation; [3] costs and benefits; [4] altruism; [5] reputation;[33] [6] psychological benefits; [7] values; [and] [8] efficacy."[34]

When charities make specific representations in solicitations about how funds will be used, but the charity operators use the fungible nature of the gift to direct those funds elsewhere, they make use of several of these forces. "Solicitation" proves of paramount importance because approximately eighty-five percent of all giving follows an affirmative solicitation, such as a fundraising letter or a personal request.[35] When donors know who will specifically benefit, this enhanced "awareness of need" drives likeliness to give.[36] The power of solicitation combined with creation of the awareness of need can serve as a proxy for the power of the charity's representation that a donation will be used for a specific, earmarked purpose.[37]

As for "cost and benefits," they hinge in some part on the "psychological benefits of donations."[38] Professor Christine Exley catalogs some of these "potential motives" in more detail,[39] citing studies that show "people feel

31. Tait, *supra* note 2, at 1702.

32. Tait offers a comprehensive, but concise, overview of "charitable giving as [squarely] situated in a complex gift economy." *Id.* at 1702.

33. "Reputation" folds into other motivations driven by "signaling status" and prestige of donation. For an overview of the power of "signaling status," see Tait, *supra* note 2, at 1704–07.

34. René Bekkers & Pamala Wiepking, *A Literature Review of Empirical Studies of Philanthropy: Eight Mechanisms that Drive Charitable Giving*, 40 NONPROFIT & VOLUNTARY SECTOR Q. 924, 924 (2011). "An overwhelming body of knowledge is available on philanthropy in the social sciences . . . from very different disciplines, including marketing, economics, social psychology, biological psychology, neurology and brain sciences, sociology, political science, anthropology, biology, and evolutionary psychology." *Id.* To focus on the narrower legal questions at hand, a general sweep of the literature offers context, but a summary must suffice.

35. *Id.* at 931 (citing Bryant et al., *Participating in Philanthropic Activities: Donating Money and Time*, 26 J. CONSUMER POL'Y 43 (2003)).

36. *Id.* at 930.

37. Reputation might not matter in the earmark context if this variable purely concerns appearances of generosity, virtue, and financial strength, rather than expected substantive charitable production.

38. *Id.* at 948–49. The meta-analysis treated psychological benefits as a supporting magnification of the other forces and did not separately explore the "feel-good" benefit of donations. *Id.*

39. Christine L. Exley, *Excusing Selfishness in Charitable Giving*: *The Role of Risk*, 83 REV. ECON. STUD. 587, 587 (2015).

good about themselves when they help others,"[40] wish to "appear[] nice to others,"[41] and comport with "social norms."[42] She notes that "these motives, as well as standard economic models, may easily explain a common finding in charitable giving: individuals *give less* when there is a greater risk that their donation will have less impact."[43] Exley made a significant contribution by determining through experimentation that given these desires, potential donors may use "charity risk" as an excuse for *not giving*.[44]

If donations diminish due to informational uncertainty about impact, total welfare diminishes.[45] Of course, individuals enjoy utility from gift giving, even if some of the value may be lost in the gift transfer. The literature about person-to-person gift-giving offers some context for understanding what distinguishes gifts from other transactions. Professor Joel Waldfogel revealed that "between a tenth and a third of the value of holiday gifts is destroyed by gift-giving."[46] In the Waldfogel study, gift recipients quantified the gap between the estimated price paid for received gifts and their own personal valuation of the gifts.[47]

If person-to-person gift-giving destroys value, why is gift-giving ubiquitous? One explanation for this behavior is that gift-giving carries unique social importance, and many scholars have emphasized that point.[48] Profes-

40. *Id.* (first citing James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J., 464 (1990); then citing James Andreoni, *Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence*, 97 J. POL. ECON. 1447 (1989)).

41. *Id.* (citing, for example, Daniel Ariely et al., *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially*, 99 AM. ECON. REV. 544 (2009)).

42. *Id.* (citing James Andreoni & B. Douglas Bernheim, *Social Image and the 50–50 Norm: A Theoretical and Experimental Analysis of Audience Effects*, 77 ECONOMETRICA 1607 (2009)).

43. *Id.* (emphasis added) (first citing J. Michelle Brock et al., *Dictating the Risk: Experimental Evidence on Giving in Risky Environments*, 103 AM. ECON. REV. 415 (2013); then citing Michal Krawczyk & Fabrice Le Lec, *"Give Me a Chance!" An Experiment in Social Decision Under Risk*, 13 EXPERIMENTAL ECON. 500 (2010)).

44. *See id.* at 589–90. Through experiments, she finds that study participants will weigh heavily the riskiness of a charitable lottery payout against a charitable payout for themselves. *Id.*

45. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). When information asymmetry about non-commodity goods (like used cars) pervades a market, buyers may value the goods at a price lower than that of the seller. *Id.* at 489–90. The transactions that might result with more trustworthy information about the goods might not happen, leading to a suboptimal welfare outcome. *Id.* A risk of fraud drives the buyers' valuation lower, making transactions less likely to occur. *Id.* The ultimate use of charitable donations may prove even more opaque than the prospective performance of used cars. *Id.* The riskier charitable donations appear, the less likely they will occur or occur at the quantity they might with more informational certainty. *Id.* at 488.

46. Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1336 (1993). *See generally* JOEL WALDFOGEL, SCROOGENOMICS: WHY YOU SHOULDN'T BUY PRESENTS FOR THE HOLIDAYS (2009).

47. Waldfogel, *supra* note 46, at 1330–33.

48. In his original study, Waldfogel did not address the social benefits of giving squarely. *See generally* Waldfogel, *supra* note 46.

sor Eric Posner observes that person-to-person giving creates value by communicating "gratitude" and hope for reciprocity.[49] Twenty years after Waldfogel's study, a survey of economists revealed a strong reluctance to downplay the social value of gift-giving.[50] For example, Professor Alan Auerbach replied that Waldfogel's conclusion that cash transfers were superior to gifts was "[c]learly true if one ignores the pleasure one may get in choosing or receiving specific gifts."[51] Professor Barry Eichengreen observed that "[i]mplications of a specific gift (signal it sends, behavioral impact) may give additional utility to either the giver or receiver."[52]

Ideally, social value would be maximized after resources are transferred through gifting, but "social value" proves complex to define in this context. People feel good about making gifts, among the other identified motives, but gifts given inefficiently, or based on misinformation, come at some social cost. With person-to-person gift giving, the risks of giving are different from that of the charitable donation. The person-to-person giver has different motivations and may wish to convey sentiment as much as transfer wealth.[53] The doting relative likely knows that the cash price they paid for their gift might not match the non-sentimental value attached to the gift by the recipient. After all, doting relatives receive gifts, too. The person-to-person giver knows full well who the recipient is and can speculate about what the recipient might do with the gift.

A charitable donor may, like the person-to-person giver, also be motivated by sentiment. Charities, however, can exploit the so-called "warm glow" element of giving.[54] By framing donations as directed for one specific purpose, the donor can feel good about the impact of a gift. Does the donor have the same giving-impact awareness of the aforementioned doting relative? Does the donor merely want to feel good about purpose-based giving, but with a wink that it might not incrementally support that particular purpose? These questions prove difficult to answer satisfactorily, but more high-quality information would certainly help the donor. Just as an Amazon Wish List or wedding registry can aid a person-to-person gift-giver, full-candor

49. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WISC. L. REV. 567, 569 (1997).

50. *See Bah Humbug*, IGM FORUM, (Dec. 17, 2013, 1:03 PM), http://www.igmchicago.org/surveys/bah-humbug.

51. *Id.*

52. *Id.*

53. According to economist Professor David Autor, "Presents serve multiple interpersonal purposes. Revealed preference indicates that income transfer is not the primary one." *Id.*

54. For a discussion of the "warm glow" factor, see Tait, *supra* note 2, at 1711–12. *See also* Heidi Crumpler & Philip J. Grossman, *An Experimental Test of Warm Glow Giving*, 92 J. PUB. ECON. 1011, 1011–12 (2008) (donors are motivated by both pure altruism, conferring a pure benefit to the recipient, and separately, "warm glow"—the personal joy of giving); Susan Rose-Ackerman, *Altruism, Nonprofits and Economic Theory*, 34 J. ECON. LIT. 701, 712–13 (1996). *See generally* Andreoni, *supra* note 40.

disclosures about specified use might help the charitable donor, without significantly cooling down the warm glow. The giver-donor is free to ignore or discount the candid disclosures and give accordingly.

The "wide range of possible objects of charity" naturally can overwhelm donors[55] who ultimately must select some forms of charitable production over others.[56] Donors attempt to make choices among causes to satisfy personal preferences,[57] thus "it comes as no surprise that '[t]he choice of what to support lies at the heart of defining a strategy for giving.'"[58] As Professor Usha Rodrigues observes, charities sell "identity" through their solicitation.[59] Taking that observation one step further, donors choose the charitable production with which they want to identify. If the substance of the choice lies at the heart of the strategy for giving, the candor of the presentation of that substance, as offered through solicitation, becomes critical.

Charities and regulators have incentives and duties to ensure that charitable donations reach an optimal level and appropriate use. Mitigating some of the risk of the potential misuse or misallocation of donations could lead to more donations. One way to reduce risk is to address the implicit price gap that results from misuse of fungible donations. The implicit price of a donation incorporates the risk that the funds will be used in their intended way. If charities committed to more candor in their solicitations, this risk would diminish.

B. The Implicit Price of Donation and the Implicit Price Gap

The market for donations shares various attributes with traditional consumer markets, and conceptualizing donations through the lens of a price for an expected value proves helpful for analyzing the impact of distorted claims.[60] The decision to donate resembles any decision to transact. The donor must decide whether to give at all or save resources for personal consumption. If the donor chooses to give, the donor must decide to which recipient, and if possible, for what specific purpose. The donor also has the option to create charitable goods and services personally, by donating volunteer hours, for example. The lower the price for the charitable goods and services, all things being equal, the more likely the donation, and the greater the magnitude of donation.

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55. Tait, *supra* note 2, at 1708 (exploring this concept and the supporting literature).

56. *See generally* FRANCIE OSTROWER, WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY 32–33 (1995).

57. *See* PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY 147 (2006).

58. Tait, *supra* note 2, at 1708 (citing FRUMKIN, *supra* note 57, at 147).

59. Usha Rodrigues, *Entity and Identity*, 60 EMORY L. J. 1257, 1283 (2011). *See generally* Tait, *supra* note 2, at 1707–10.

60. *See generally* Castaneda et al., *supra* note 10, at 215–18.

In a competitive environment for fundraising, solicitations will make claims about degree and concentration of impact.[61] The donor will assess whether the charity will provide the best opportunity for making the desired impact for their dollar. Solicitation claims drive the perception of the price—the implicit price of the donation.[62] Fraudulent or misleading claims attempt to lower the *apparent* implicit price in order to induce a donation, a larger donation, or cause the donor to choose their charity over a rival. These troublesome claims might be made for the purpose of personal self-enrichment of the charity operators, as in the case of the cancer scam described below,[63] or they may merely be made as a more benign, yet still troublesome, puffed attempt to induce a donation to one "legitimate" charity over another.

Merely puffed-up representations may not appear as damaging to donation markets. Competition based on false claims, however, leads donors to make choices not in accord with their wishes, causing them injury.[64] Also, honest charities, presenting lower, but truthful, apparent implicit prices, lose out to the less honest charities.[65]

Put differently, where donors have the "ability to contract"[66] with charities for the production of specific charitable goods and services, the implicit price of the donation lowers, making giving more attractive.[67] That is, when donors have contractual-like confidence that a donation will support a specific purpose rather than a broader purpose, the resulting lower implicit price should induce more donations for that purpose.[68] Like other goods and services, the demand for charitable goods and services exhibits price elasticity.[69]

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61. *See, e.g.*, ROBIN HOOD, ANNUAL REPORT 9 (2016), http://2016.robinhood.org/assets/pdfs/Robin-Hood-Annual-Report-2016.pdf ("At the heart of Robin Hood's grant making process is our rigorous metrics, a disciplined system to carefully analyze each grant to determine its benefit-cost ratio.").

62. *See supra* note 16 and accompanying text.

63. *See infra* Section I.C.

64. The California Supreme Court recognizes this premise in markets for goods:

> For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm—the loss of real dollars from a consumer's pocket—is the same whether or not a court might objectively view the products as functionally equivalent.

Kwikset Corp. v. Superior Court, 246 P.3d 877, 890 (Cal. 2011). I extend this to the market for charitable goods and services.

65. As one Nobel Laureate famously observed, dishonest practices tend to prevail over honest practices, if left unchecked. *See* Akerlof, *supra* note 45, at 488, 495.

66. *See generally* Castaneda et al., *supra* note 10 (using the term "ability to contract").

67. *Id.* at 216.

68. *Id.*

69. *See generally* Peloza & Steel, *supra* note 12 (discussing a meta-analysis of studies of the impact of tax-deductibility on giving).

Donors are willing to give more to charity at a lower price.[70] When the implicit price appears higher or lower for any reason, the price elasticity should determine amount and incidence of donations.

To attract more donations, charities can manipulate the apparent implicit price, while not altering any previously-committed spending targets on contracted charitable production. A charity can compete for dollars by contracting with donors to use money for specific purposes, even if additional money ultimately does not incrementally increase the charity's planned budget line for that specific purpose.[71] The charities can use attractive donation targets as a low implicit price to lure fungible contributions or declare that they will not put the funds to less attractive-appearing use, like overhead spending.[72] Organizations can still redirect incrementally-raised money to support other, less market-attractive, activities.[73] The fungible nature of money enables charities to deviate from assurances made in solicitation claims to reflect the charity's preferential uses.[74]

If the implicit price reflects an accurate donor understanding of the impact of a donation in creating charitable goods and services, the donation transaction will clear. A donor interested in supporting the local hospital may be content giving a gift for general use, even knowing that some of the money might be spent on widening parking spaces for surgeons, rather than on extra staffing for the burn unit. The implicit price might be right, if all is known and disclosed. Another donor might have different preferences. For this donor, a general gift to one hospital would lose out to a gift dedicated to a burn unit at a different hospital, again, because the donor is seeking out the lowest implicit price for creating the charitable goods and services they seek.

An implicit price gap emerges when a charity makes a false claim or obscures a claim that artificially makes the implicit price appear lower. When the apparent price deviates downward from what the price would be without the false or obscured claim, a gap appears that, if left uncorrected, will lead to market distortions.[75] In the case of a complete fraud, discussed in the next

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70. For a broader discussion of the centrality of tax incentives to the "modern charitable bargain," see Tait, *supra* note 2, at 1700–02.

71. *See, e.g.*, *infra* Section II.B.1 (discussing GiveWell's analysis of Aravind Eye Care System and Smile Train).

72. The overhead spending issue sparked a debate due to its centrality to certain fundraising efforts and effectiveness measurement. *See infra* Section II.B.2.

73. *See infra* Section II.B.

74. "[M]oney is in fact different from other social goods: more fungible, remarkably mobile, and highly transferable . . . ." VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 214 (1994). The concept of fungibility of money applies across many dimensions and social constructs, including welfare relief and personal budgeting. *See generally id.* at 170–98 (discussing budgeting and "earmarking").

75. Market failures emerge when "consumers lack information about the quality or nature of a product, and therefore cannot make utility-maximizing purchasing decisions." ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 290 (3d ed. 1995). *See generally* Akerlof, *supra* note

Section, the implicit price gap would be infinite because no charitable production happens at any price.[76]

In contrast, in the case of overshooting a fundraising target *without* ill intent, as in the disaster relief example in Section I.D.,[77] the challenge for the charity rests in honoring the represented implicit price given changed circumstances.[78] The charity can aim to create an equivalent or close substitute for the promised charitable production via cy pres[79] or offer to return the donation. The better the charity's efforts, and the more transparent, the stronger the donors' confidence should be. Charities can close the implicit price gap with an open and demonstrated commitment to candor. Closing the implicit price gap leads to an environment where donor wishes match more closely with charitable production, and honest charities prevail.

C. Problems with "Ill-intended" Fundraising Claims

An outrageous case of charitable fraud provides a clear starting point for examining the basic principles behind implicit price and the need to close the implicit price gap. The pursuit of troublesome fundraising claims involves making tradeoffs about directing energies at singular, obvious, prolific cases, while also ensuring that routine fundraising efforts maintain integrity. Though I focus more on the trouble invoked by the more routine cases involving earmarks and fungibility, the spectacular fraud of Cancer Fund of America starkly illustrates the harm that results from false fundraising claims.

When the charitable offering has zero value, enforcement agencies can act with easy justification. If the implicit price exceeds zero, donors suffer injury from having their money misdirected to scammers, rather than directed towards generating the charitable output that they expected. Dissection of a large-scale charitable fraud also can reveal a clear picture of the social costs of any lesser lapse of solicitation integrity, including misdirected earmarked funds.

When a charity functions like a racket, all solicitations constitute fraud and misrepresentation, and *FTC v. Cancer Fund of America*[80] provides an extreme baseline for illustrating the concept of the implicit price gap. This scam resulted in "the largest joint enforcement action ever undertaken by the

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45, at 488. For a specific illustration, *see* Dhruv Grewal & Larry D. Compeau, *Comparative Price Advertising: Informative or Deceptive?*, 11 J. PUB. POL'Y & MARKETING 52, 54–56 (1992) (documenting a meta-analysis of welfare losses resulting from bad-faith manipulation of discount pricing).

76. *See infra* Section I.C.

77. *See infra* notes 102–115 and accompanying text.

78. *See infra* Section I.D.

79. *See infra* Section I.D (discussing the cy pres doctrine).

80. No. 2:15-cv-00884-NVW (D. Ariz. filed May 18, 2015).

FTC and state charity regulators."[81] The enforcement agencies alleged that four nonprofits conned $187 million from donors who expected to support cancer sufferers.[82]

Fungibility abuse does not leap out as the primary way to characterize this scam. All of this donated money, however, was fungible enough to line the pockets of the operators and for years evade detection, even at the high volume of activity and visibility required to raise such funds.[83] According to the complaint, the defendant "sham charities" and associated individual defendants "engaged in a massive, nationwide fraud."[84] They told potential donors "that their contributions [would] help people suffering from cancer, but instead, [spent] the overwhelming majority of donated funds supporting the Individual Defendants, their families and friends, and their fundraisers."[85] The defendants used a well-developed accounting scheme to "appear to be larger [in size] and more efficient with donors' dollars than they actually were, deceiving the donating public."[86]

The expressed fundraising purposes were broadly focused around supporting cancer patients, including children, and specifically, patients with breast cancer.[87] The operators effectively recognized that by making specific representations about where solicited funds would go, they could lower the apparent implicit price of donations, thus attracting more money. The cancer charities described "specific programs that donors' contributions supposedly would support" such as pain medication for children, patient transportation to chemotherapy, and hospice care.[88] As the FTC and state plaintiffs put it in the Complaint, "These were lies."[89] None of these specific programs existed, the promoters used them to draw funding, or more bluntly, scam funding.[90]

Unlike the more benign-appearing, fungibility-focused instances explored below—where donations effectively support the charitable institution, but just not in the manner advertised—the donations in this case did not assist

81. Press Release, FTC, *supra* note 27. The action involved all fifty states and the District of Columbia. *Id.*

82. *Id.*

83. *Id.*

84. Complaint at 15, FTC v. Cancer Fund of Am., No. 2:15-cv-00884-NVW (D. Ariz. May 18, 2015).

85. *Id.* Even with legitimate charities, fundraising expenses raise controversy, but this example reaches beyond the pale. *See Overhead Ratios Are Essential for Informed Giving*, CHARITYWATCH, https://www.charitywatch.org/charitywatch-articles/overhead-ratios-are-essential-for-informed-giving/133 (last visited Apr. 18, 2019) (discussing fundraising and overhead expenditures).

86. Complaint, *supra* note 84, at 16.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

cancer patients or serve any other means of charity.[91] Instead, the donations flowed to the pockets of private individuals for their own ill-gotten gain. As the complaint put it, the "diversion of charitable funds . . . deceived donors and wasted millions of dollars that could have been spent as donors intended, to help Americans suffering from cancer."[92]

The *Cancer Fund of America* matter starkly presents two dynamics that coincide with false solicitation claims, both evident in other fungible money scenarios.[93] First, the scammers here expertly marketed their charity to appeal to people who wanted to have an incremental impact on cancer patients in concrete ways. Second, money donated at a falsely-low implicit price diverted money away from where donors thought it would go, defeating the honest players in the market who could also deliver like charitable goods and services.[94]

An opportunity to help alleviate pain for suffering children, for example, presents a low implicit price for creating more of that charitable good than a broader, unrestricted donation to a charity like the American Cancer Society. It appears that the true budget for child pain relief in *Cancer Fund of America* was fixed, but fixed near zero. Although magnitude of the implicit price gap is nearly infinite due to the fraud, the *concept* of the implicit price gap is the same as if the charity truly fixed the budget for children's medication at $10,000,000 and stole the rest.[95] If a charity solicited incremental money for child pain relief, and the incremental money was spent elsewhere, like on large grants to establish research centers, this practice would dishonor the promoted implicit price.

Cancer Fund of America presents a pure form of fraud and misrepresentation in solicitation, as the charity absolutely intended to make false promises about use of funds. However, as discussed in the next Section, some charities intend to keep promises about spending, but due to unanticipated circumstances, cannot keep them. These charities do, however, attempt to close the unanticipated implicit price gap, and their efforts tell us about the importance of matching donor intent to use. Although fungible money could be put to other charitable uses, when a solicited cause becomes overfunded in a sudden manner, some charities seek to find the best, if still imperfect, way to honor intent.

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91. In this case, less than three percent of the raised money reached cancer patients. *See "Sham" Cancer Charities Settle Massive Fraud Case*, CBS NEWS (Mar. 30, 2016), https://www.cbsnews.com/news/sham-cancer-charities-settle-massive-fraud-case/.

92. *Id.*

93. For detailed illustrations of these scenarios, *see infra* Section II.B.

94. *See* Akerlof, *supra* note 45, at 488.

95. Assume that even a legitimate cancer fund would cap the budget *somewhere* because a certain amount would more than cover any need. Only so many children need medication funding during any given period.

D. Problems with "Well-Intended" Fundraising Claims

Sometimes, charities can actually use the fungibility of donated money *to help* donors realize their implicit price, rather than use fungibility as a device to enable the charity to break a promise quietly. After the honoring of a well-intended charitable promise becomes impracticable or impossible, principles of cy pres[96] can support putting that money to use in a similar fashion.[97]

In the immediate aftermath of unprecedented tragic events, like extreme natural disasters or terrorist attacks, carefully-crafted fundraising appeals and targeted fundraising goals may appear less important in light of the immediacy and uncertain dimensions of need. These circumstances can lead to the application of cy pres, which "contemplates an application [of the gift] 'as near as possible' to that specified by the donor."[98] Here, unlike the challenges presented in some instances of cy pres, significant time has not lapsed to render the original gift too outdated to implement.[99]

As has been long observed, "[t]he ideal charitable gift clearly expresses the donor's intention, yet is flexible enough to be accommodated to later radical changes in the circumstances surrounding the gift. But all too often these gifts are impulsively conceived, indefinitely expressed and planned with lamentable shortsightedness."[100] In a time-pressured, high-stakes situation, however, occasionally charities can hastily solicit more funds than can actually be used for the intended donor purposes. That scenario describes the circumstances of the immediate aftermath of the terrorist attacks of September 11, 2001 ("9/11").[101] No discussion about fungibility of charitable donations would be complete without visiting this extraordinary circumstance involving fungibility.

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96. The American cy pres doctrine mostly focuses on disposition of gifts from charitable trusts and testaments that lose their ability for fulfillment over time. *See generally*, RONALD CHESTER ET AL., THE LAW OF TRUSTS AND TRUSTEES § 433 (3d ed. 2005).

97. This Article does not delve into the thicket of cy pres but discusses its function as a post-hoc correction to changed circumstances that play out over a lengthy period of time. For a deeper exploration, see John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 FORDHAM L. REV. 693, 729 (2007) ("Cy pres [is one of] the primary 'orthodox' routes to dealing with problematic donor restrictions.").

98. Comment, *A Revaluation of Cy Pres*, 49 YALE L.J. 303, 303 n.4 (1939) (first citing GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431 (1935); then citing AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 399 (1939)).

99. *See* Tait, *supra* note 2, at 1682–84 (stating the passage of time can outmode gift purposes, like relief help to early settlers of the West and regressive gift restrictions based on race).

100. Comment, *supra* note 98, at 303.

101. *See generally* Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 252–53 (2003) (providing, in the wake of 9/11, a thorough analysis of the legal options and restrictions for charities facing an overfunded scenario).

In the hours and days after 9/11, uncertainty abounded about the magnitude of loss of life.[102] Though the immediate financial needs for affected families of victims and first responders were not yet clear, individual and corporate donors generously opened their checkbooks to help with assistance through charitable organizations skilled at distributing disaster aid and relief.[103]

9/11 provides the ultimate example of how disaster-relief charities have had to contend with spending excess money earmarked for a uniquely specific purpose.[104] Disaster-relief organizations like the American Red Cross realized extraordinary fundraising success in the wake of 9/11, raising so much money in such a short period of time[105] that they had difficulty dispensing it on the narrow terms that many donors intended.[106]

In the aftermath of the attacks, some recognized that charities took in "too much money . . . for too few survivors for typical guidelines to apply."[107] Some charities that specifically solicited money to support families of first responders raised money at unexpectedly-high per-family amounts.[108] The charities were caught between honoring the intent of the donors and colliding into tax-exempt-status compliance problems for conferring a "private

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102. In the hours after the attacks, New York City Mayor Rudolph Giuliani expressed the overwhelming scale of the tragedy to a global audience. "The number of casualties . . . will be more than any of us can bear ultimately." Michael Powell, *In 9/11 Chaos, Giuliani Forged a Lasting Image*, N.Y. TIMES (Sept. 21, 2007), http://www.nytimes.com/2007/09/21/us/politics/21giuliani.html. A few days later, Mayor Giuliani relayed that nearly 4,000 people in the World Trade Center complex remained unaccounted for since the collapse, including firefighters. Terence Neilan, *Hopes are Raised and Dashed About Rescue of Firefighters*, N.Y. TIMES (Sept. 13, 2001), http://www.nytimes.com/2001/09/13/nyregion/hopes-are-raised-and-dashed-about-rescue-of-firefighters.html. According to the 9/11 Commission Report, 2,600 people perished at the site. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1–2 (2004).

103. *See generally* THE FOUND. CNT., GIVING IN THE AFTERMATH OF 9/11: 2003 UPDATE ON THE FOUNDATION AND CORPORATE RESPONSE (2003). Individual donors gave over sixty percent of the estimated $2.8 billion in donated 9/11 relief. *Id.* at 3.

104. *See* Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHICAGO-KENT L. REV. 977, 988–92 (2010) (discussing the problems created by the overwhelming donor response to the American Red Cross and other organizations for victim-support funds after 9/11).

105. A 2002 study prepared for the Ford Foundation revealed that "[fifty-eight] percent of Americans had given money to a 9/11-related cause . . . . Two months after 9/11, the largest relief funds had raised over $1.1 billion . . . the American Red Cross stopped soliciting for its 9/11 Liberty Fund on October 31, having raised $543 million, by far the largest amount ever contributed in the aftermath of one disaster." TOM SEESSEL, THE PHILANTHROPIC RESPONSE TO 9/11, at 1 (2002), https://www.fordfoundation.org/media/1721/2002-philanthropic_response.pdf. Even after active fundraising stopped, $424 million rolled in over the next several months. *Id.*

106. Gary, *supra* note 104, at 990–92. Given the array of donation channels even to a single charity, and the range of intent, donor preferences became quite difficult to discern. *Id.* at 991–92.

107. Victoria B. Bjorklund, *Reflections on September 11 Legal Developments*, *in* THE FOUND. CTR., SEPTEMBER 11: PERSPECTIVES FROM THE FIELD OF PHILANTHROPY 18 (2002), http://foundationcenter.org/gainknowledge/research/pdf/911book1.pdf.

108. Katz, *supra* note 101, at 288–89.

benefit" on the families.[109] "Given the other sources of aid available to such families, these charities were indeed challenged to find many intended beneficiaries in long-term financial distress."[110]

Professor Robert Katz extensively examined the 9/11 surplus-donations problem.[111] He identified three primary possible options that charities have when confronted with the benefit and logistical curse of a surplus.[112] They can use the extra resources "for a related charitable purpose,"[113] through the doctrine of cy pres, they can "retain the surplus for another corporate purpose,"[114] or they can "use [the] surplus to enrich the same beneficiaries."[115]

All of these options present means of finding the best match for original donor intent—intent that donors factored into the implicit price when making the gift. Of course, returning the donated money would present a perfect match with implicit price. Effectively, a refund could restore the donor back to her original position. Such a return may prove impractical to execute, however.[116] The cy pres related options, including organizational retention of funds, if implemented with integrity, would use the fungible nature of donor money to honor intent.

When a charity makes a sincere promise, but extraordinary circumstances make that promise difficult to keep, mitigation through a well-matched substitute use offers a reasonable manner of honoring implicit price.

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109. *Id.* The Internal Revenue Code prohibits nonprofits with tax-exempt status from conferring private benefits on individuals. I.R.C. § 501(c)(3) (2012).

110. Katz, *supra* note 101, at 289.

111. *See id.* at 284–333.

112. *Id.* at 272–74. Though the focus here is on the perception in the near-term aftermath of the attacks that the monies raised exceeded need, ironically, the other interesting consideration about 9/11 was the underestimation of long-term effects and trailing needs of certain victim populations. *See generally* Kevin McCoy, *9/11 Death and Injury Total Still Rising*, USA TODAY (Sept. 9, 2015), https://www.usatoday.com/story/news/2015/09/09/911-death-and-injury-total-still-rising/71943340/; Linda Reinstein, *15 Years After 9/11, The Death Toll Continues To Rise*, HUFFINGTON POST (Sept. 9, 2016), https://www.huffingtonpost.com/entry/fifteen-years-after-911-the-death-toll-continues_us_57d2fb21e4b0273330ac3e3f (discussing the trailing epidemic of 9/11 asbestos-exposure related disease, in light of immediate assurances from the Environment Protection Agency that "the people in lower Manhattan that air monitoring showed 'the public in these areas are not being exposed to excessive levels of asbestos or other harmful substances'"). If relief organizations retained money, the funds possibly could have been used for unanticipated needs that emerged later.

113. Katz, *supra* note 101, at 273.

114. *Id.* at 274.

115. *Id.*

116. Ironically, also, for reasons of fungibility, it might be difficult to determine which donors should receive refunds and for which amounts, and challenging to administer repayment to vast numbers of donors. Accordingly, in the aftermath of their 9/1l controversy, the American Red Cross recommitted to meet funding commitments and offered refunds only as part of a last resort. *See* Diana B. Henriques & David Barstow, *A Nation Challenged: The Red Cross; Red Cross Pledges Entire Terror Fund to Sept. 11 Victims*, N.Y. TIMES (Nov. 15, 2001), https://www.nytimes.com/2001/11/15/nyregion/nation-challenged-red-cross-red-cross-pledges-entire-terror-fund-sept-11-victims.html.

The unanticipated implicit price gap that subsequently emerged can be partially closed. Candor in communications about use of surplus funding *after the fact* can also ensure that donors are able to have input and give feedback that might close the gap even further.

These disaster scenarios provide an important insight into the benefits of fungible use, and the associated flexibility, if permitted. Though such scenarios should not be conflated with the *before-the-fact* earmarked charitable solicitations that I focus on here, they show that charities might still be wise to leave room to use gifts in a fungible manner. Candor may diminish donor excitement about being able to contract for specific goods with certainty, lowering implicit price, but the benefits of flexibility to the charity may be worthwhile anyway. The 9/11 experience may be exceptional, but it illustrates that point.

Next, in Part II, I discuss some of those deliberate schemes to raise money through exploitation of fungibility. Even when the charity is legitimate, misdirected earmarked donations deliberately dishonor promises that factor into the donors' implicit price.

II. FUNDRAISING CLAIMS AND FUNGIBLE DONATIONS

The fungible nature of donated money becomes a pernicious problem when charities make representations to use money in a certain way, they actually *do* use money in that certain way, but money given for that *certain* way is used in *any* way.

Cancer Fund of America demonstrates plain fraud. Donors paid an implicit price for charitable goods and services, but the donations effectively generated almost no such production.[117] Fungibility-based fraud, where a charity conceals where gift money really lands, differs in degree of impact but harms donors and honestly-soliciting charities in a substantially similar manner.

In the routine fungibility circumstance, the promise made to the donor appears to have a low implicit price. The actual impact of the gift, however, is different from the promised impact and may not reflect that low price, as the charitable institution uses the gift differently. When a charity redirects money toward another charitable purpose, the level of perceived *evil* may be lower, if the money supports some social good rather than illicitly lining the pockets of the operators. Nonetheless, the charity deprives the donor of the information necessary to make choices and of the opportunity to act on the true implicit price. In some quite common cases, the charity's behavior and representations rise to the spirit, if not the common-law criteria, of fraud, misrepresentation, and the like.

117. *See supra* Section I.B.

In Section II.A, I review the private law that would address claims that mislead donors about the ultimate use of fungible donations. From a pragmatic standpoint, donors and regulators would require a high degree of visibility into charitable operations to detect whether a fundraising claim might rise to the level of a common-law remedy. However, an application of private law focuses on the wrongs at issue. False earmarking promises, though routine in philanthropic culture, can be construed as paramount to misrepresentation and fraud. Section II.B offers extensive, real examples of problem scenarios involving fungible spending of earmarked money, including promises to spend money on activities that cannot absorb more funding and diversion of earmarked money to overhead. In Section II.C., I analyze general examples of public and legal controversy about fungibility of funding, involving charitable or similar purposes. I use these controversies to provide more glimpses into these opaque funding practices. Finally, in Section II.D, I show that the current Donor Bill of Rights still leaves room for spending mischief in the presented examples, driving my proposal in Part III to revise and strengthen this voluntary commitment.

A. Misrepresentation and Fraud in Charitable Fundraising

These common solicitation practices at issue can meet the elements of common law fraud and misrepresentation, or come close, under the right set of conditions.[118] This analysis raises the ethical question about whether charities should behave in this manner, and from a policy perspective, whether regulators should maintain current levels of apathy toward this fundraising approach.

For the purposes of understanding how misrepresentation and fraud apply, both technically and in spirit, to this primary context of concern, consider a basic hypothetical. Acme University, a small, non-profit higher-education institution, sends a mailer to alumni containing a picture of a student, smiling, and holding a book. The mailer reads, “Students like Sammy benefit from scholarships alumni like you have provided. Please fill out the enclosed form and send a gift to support student scholarships today.” Before the institution sends the mailer, the University trustees have already met, budgeted, and approved a maximum spending of $500,000 toward student scholarship awards for the next year.

David, an alumnus who feels grateful for the scholarship he received as a student at Acme, donates $5,000 toward student scholarships. David does so in lieu of his regular donation to a local animal shelter. David also donates twice more than he normally would to Acme because the promised use of the money especially appeals to him. David would have made a general purposes

118. These practices need not reach the level of common law fraud to inform an understanding of how they degrade donor decision making.

gift to Acme, but the concentration of the gift's promised purpose has lowered the implicit price of the donation, and the increased quantity reflects that dynamic.

After receiving David's gift, Acme University's scholarship spending remains unchanged from the budget, in part because the planned student needs have been met. Also, perhaps, Acme determined that the institution would benefit more from investment in other line items less attractive for gift solicitation—for example, information-technology upgrades—and decides to shift the incremental impact of David's gift there. Acme University *could* claim that David's gift supported or subsidized the $500,000 budget line, but in reality, David's gift made no marginal difference to scholarship spending. The gift supplied $5,000 of fungible resources that could be spent ultimately on any University need, while not increasing spending on the charitable good that Acme promised David.

When a charity solicits money by making promises to use the money in a certain way, without any intent to have that money make the marginal impact promised, donor resources are misallocated, which in a marketplace, yields inefficient allocations of resources. Acme University, through provision of incomplete information (or misinformation), draws money away from other charities—and more money than it would with wholly-truthful representations. Further, such practices harm individual donors who seek to realize personal charitable preferences with their personal resources and beyond that, of course, to maximize personal utility—with charity among many items of potential consumption. The hypothetical charity, Acme University, lowered the apparent implicit price, presenting donor David with information that caused him to give money to them, and to give them more of it. David's actual charitable consumption now deviates from his preferred levels and avenues of consumption, charitable and otherwise.

A broad review of the elements and doctrine of misrepresentation and fraud, provided next, contextualizes these fundraising practices. Regulators can prosecute fraudulent representations under federal and state consumer protection laws,[119] but individuals also have private remedies associated with misrepresentation and fraud.

Misrepresentation and fraud have a close relationship, sharing overlapping elements.[120] Misrepresentation, according to the *Restatement (Second)*

119. For an example of the resolution of a prosecution involving federal and state statutes, see Stipulation re Order for Permanent Injunction and Monetary Judgment at 2, FTC v. Cancer Fund of America, No. 2:15-cv-00884-NVW (D. Ariz. Mar. 29, 2016) (settling the complaint alleging defendants "engaged in deceptive acts or practices by making false and misleading claims in charitable solicitations in violation of Section 5 of the FTC Act . . . and . . . [in all fifty states and the District of Columbia], statutes regulating charitable solicitations and prohibiting deceptive and/or unfair trade practices").

120. This Article follows the guidance of the *Restatement*, recognizing that many states have their own formulations of misrepresentation, fraud, and related causes of action.

of Contracts, is "an assertion that is not in accord with the facts."[121] A non-disclosure of a known fact "is equivalent to an assertion that the fact does not exist . . . where [the speaker] knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract."[122] In the case of Acme University, disclosing the budgetary limitations on scholarships would correct David's mistaken assumptions. Misrepresentation claims, however, only avail if the misrepresentations are *fraudulent* or *material*.[123]

An assertion "is *fraudulent* if the maker intends [it] to induce a party to manifest his assent and the maker . . . knows or believes that the assertion is not in accord with the facts."[124] The strictest form of intent is not required, however. If the maker merely "does not have the confidence . . . in the truth of the assertion, or . . . knows that he does not have the basis . . . for the assertion," the assertion can be fraudulent.[125] A misrepresentation is "*material* if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[126] If a donor like David gave money with the expectations of a specific use, based on representations or the absence of a required correction, the donor appears able, at the very least, to void the gift on this basis.[127]

Turning to fraud, the characterization of injury to the individual donor becomes at issue. Doubtless, there are distinctions between charitable donations and consumer transactions for goods and services, but the defrauded charitable donor can experience injury just like the defrauded buyer. Professors, and noted torts scholars, John C.P. Goldberg, Anthony J. Sebok, and Benjamin C. Zipursky reject the notion that fraud *requires* "financial loss to the victim, as well as gain to the defrauder."[128] They frame fraud more broadly than as an "'economic' tort,"—as "the wrong of interfering with a particular interest of the victim, namely her interest in making certain kinds of choices in certain settings free from certain forms of misinformation."[129]

Goldberg and others further suggest that fraud can be better understood as "[w]hen one person, through a knowing misrepresentation of material fact, induces another to make a decision in a transactional setting that she would not have otherwise made, and the decision is to her detriment, whether that

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121. RESTATEMENT (SECOND) OF CONTRACTS § 159 (AM. LAW INST. 1981).

122. *Id.* § 161(b).

123. *See id.* §§ 159, 162.

124. *Id.* § 162(1)(a) (emphasis added).

125. *Id.* § 162(1) (b)–(c) (emphasis added).

126. *Id.* § 162(2) (emphasis added).

127. *See id.* § 164 (noting a contract is voidable where one party justifiably relies on the fraudulent or material misrepresentation of another party).

128. John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1011 (2006).

129. *Id.*

detriment is primarily loss of wealth, *or some other loss*."[130] Confronting Acme University's presentation of fundraising information, David made a decision he would not otherwise have made. He donated more money than he otherwise would have, money he would have otherwise donated elsewhere. Certainly, this would constitute "a loss of wealth" emerging from paying a higher implicit price than calculated, or perhaps "some other loss" rooted in the failure to have his preferences honored.[131]

Though a fraudulent *or* material misrepresentation can render a contract voidable,[132] a fraudulent *and* material representation opens the door to tort liability.[133] "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act . . . in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."[134] If the speaker merely knows that the representation could be interpreted two different ways, fraud liability could attach.[135] Here, if a charity knows a solicitation creates *ambiguity* concerning the funding's use, the charity could conceivably confront fraud liability. The *Restatement of Tort*s warns that Acme University could not reliably hide behind the ambiguity of the scholarship fundraising message.

Charities walk the line of fraudulent behavior when they use these deliberately misleading fundraising tactics, but pure fraud is not the sole measure of private law for characterizing this activity. Also relevant here are the torts of negligent misrepresentation and promissory fraud. Negligent misrepresentation appropriates the standard of the "exercise of reasonable care or competence" in communication of information in the course of business transactions.[136] Perhaps reasonable care would require Acme University to communicate with more candor or to represent that the University has broader discretion to use funds. Of course, such candor would raise the implicit price to donors, just as certain disclosures about consumer goods and services could cause buyers to recalculate value.

130. *Id.* at 1011–12 (emphasis added).

131. *Id.*

132. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981).

133. *See* RESTATEMENT (SECOND) OF TORTS § 537–538 (AM. LAW INST. 1977); *see also* RESTATEMENT (SECOND) OF CONTRACTS ch. 7, intro. note (AM. LAW INST. 1981). Punitive damages may avail in circumstances involving particularly egregious behavior. For a discussion of New York law of misrepresentation, see generally Edward J. Normand, *Damages for Deceit: A Case Study in the Making of American Common Law*, 71 N.Y.U. ANN. SURV. AM. L. 333, 361–62 (2016) ("Although [punitive damages] have been refused in . . . 'ordinary' fraud . . . case[s], . . . there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involved high moral culpability." (quoting Walker v. Sheldon, 179 N.E.2d 497, 498–99 (N.Y. 1961))).

134. RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

135. *See id.* § 527.

136. *Id.* § 552.

The Acme University hypothetical circumstances may also satisfy the elements of the tort of "promissory fraud."[137] The *Restatement (Third) of Torts* deems a statement as a fraudulent misrepresentation "if the . . . intention to perform a promise . . . does not exist at the time the statement is made."[138] As distinguished from contractual breach of performance, "promissory fraud is typically concerned with lying promises, where a party promises to do something but actually has no intention even at the time of making the promise to do the thing promised."[139]

If Acme promises David that the University will use incremental donations for scholarships with no intent to do so when the promise was made, Acme may have promissory fraud exposure. Acme could try to cast the solicitation as conveying a promise that the donated money will fund the line item labeled "scholarships," but the concept of fungibility renders that notion a fiction. This, again, assumes that Acme University knows that David's donated money is fungible at the time of solicitation. Acme could respond by claiming that David implicitly understood this concept when he donated the money and, therefore, there was no intent to breach any promise to David. In the end, however, David still can contend that Acme had the opportunity to disclose the complete nature of the intended promise and chose not to do so. Even if a charity like Acme merely lacks the confidence that money will be used in the manner represented, and knowingly makes an appropriately ambiguous representation, donors could pursue voiding the donation or claim fraud and seek appropriate remedies.

In sum, misrepresentation, fraud, and related common law provide an avenue for regulators and potential plaintiffs to hold charitable organizations

137. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 15 (AM. LAW INST., Tentative Draft No. 2, 2014). Promissory fraud has been recognized as a cause of action in nearly every jurisdiction. Karen Sandrik, Comment, *Overlooked Tool: Promissory Fraud in the Class Action Context*, 35 FLA. ST. U. L. REV. 193, 221 (2007).

138. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 15 (AM. LAW INST., Tentative Draft No. 2, 2014). The *Third Restatement of Torts* generally addresses matters discussed in Section 530(1) of the *Second Restatement of Torts*. *See* RESTATEMENT (SECOND) OF TORTS § 530(1) (AM. LAW INST. 1977) ("Misrepresentation of intention . . . a representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 15 rep. note a (AM. LAW INST., Tentative Draft No. 2, 2014). For a nuanced analysis of concepts invoked by promissory fraud, see generally IAN AYRES & GREGORY KLASS, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT (2005).

139. Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379, 387–88 (2009). Elsewhere, Professor Curtis Bridgeman makes the case that courts should encourage parties with "a huge advantage in bargaining power" to disclose the likelihood of exercising their options to perform or not to perform. Curtis Bridgeman, *Misrepresented Intent in the Context of Unequal Bargaining Power*, 2006 MICH. ST. L. REV. 993, 1010 (2006). In the context of charitable donations, the bargaining power of parties proves challenging to dissect contextually. For example, there is only one Harvard University competing among other prestigious charities, but there is also only one Bill Gates competing among prestigious donors. Generally, this Article concerns smaller donors and opaque fundraisers.

accountable more tightly for promising to put donations to the specific use promised. Given that charitable organizations have incentives as strong as their commercial counterparts to induce a donation or transaction, charities will have similar incentives to make insincere promises to do so effectively and in volume, assuming that their operators are so motivated.

The most egregious fraud claims become evident from the most blatant abuses. With *Cancer Fund of America*, the implicit price of the charitable donation reflected the donor contracting for specific charitable production.[140] If all was known to the donor, the implicit price might have been infinite, compared with the low implicit price associated with solicitations producing legitimate charitable goods and services. The next category of cases presents a twist of the solicitation representation that proves misleading and fraudulent, even though less seemingly egregious—the case where the charity knowingly or negligently makes a false promise to the donor about the incremental impact of the donation.

Nonetheless, other considerations avail about whether these practices truly amount to these common law wrongs, at least in spirit. Perhaps donors wink at such behavior, knowing that they contribute to a certain cause, properly pricing in the risk that the resulting incremental charitable production will not precisely match the solicitation. That is, maybe these specific-use solicitations, on the whole, do not withhold material information, they merely puff out about specific use.

Another consideration would be that donors, per the arguments raised about motivation of donation, may wish to reap the psychological benefits from charity, and these imperfect methods of solicitation may maximize those benefits.[141] Interference with this process might reduce incidence and quantity of donations, and donors' utility or enjoyment of gifts. Sometimes, people do not want to see how the sausage maker makes the sausage or how the magician performs a trick. They know the knowledge will burden them and diminish their enjoyment.[142]

Nonetheless, Joel Waldfogel's adjacent work informs that gift-giving can destroy economic value when information about the recipient's uses and needs mismatch the giver's perception.[143] Courts have frowned upon the false marketing of placebos, like seller claims that a metal bracelet emits

140. *See supra* Section I.B.

141. *See supra* Section I.A.

142. *See* Christian Turner, *The Burden of Knowledge*, 43 GA. L. REV. 297, 299 (2009) ("Sometimes we are better off not knowing things . . . . We are happier, indeed better off by many measures, if ignorant . . . . Despite the advantages knowledge often confers, ignorance is sometimes preferable because it shields us from unpleasant realities, keeps us from facing difficult choices, or immunizes us against attack by others.").

143. *See* Waldfogel, *supra* note 46, at 1330.

pain-relieving rays, even when consumers seem to enjoy the placebo effect.[144] With truthful information, consumer resources might be redirected toward real solutions or other consumption. Donations that a charity directs to the *wrong place* should be treated similarly because better information gets funds to the *right place* at the *right* implicit price.

What is the social cost of requiring truthfulness and more disclosure with respect to earmarked charitable donations? A fib that directs more money to the charitable sector, absent the type of misuse in *Cancer Fund of America*, may not be the worst kind of fib imaginable. A legitimate charity's misdirection of the promised incremental impact of a fungible gift likely does not equate to a seller's lie about the medical benefits of a consumer product. Nonetheless, the fib has an impact worth consideration and assessment. The social benefits from honest use of incremental money or disclosure appear to arm donors with more confidence, less perceived risk, and, in theory, overall lower implicit prices.

B. Earmarked Donations and Fungible Money

In most circumstances, a donor would find it difficult, from a forensic standpoint, to confirm that a charity used their money to increase incrementally the charitable production solicited.[145] Acme University could report scholarship spending in a self-produced or other regulatory disclosure and claim that David's gift supported the sum that was listed in that segregated budget account. Acme could claim, somewhat disingenuously, that in the event of a drastic shortfall, David's money would commit the University to spend the minimum level that he had donated.

Perhaps Acme University could try to contend that the budgeted amount for scholarships does not constitute a solid institutional commitment to spend the literal, budgeted amount. David's gift toward scholarships merely helped to enable the pre-budgeted amount to be met, Acme could claim, or supported

144. *See* FTC v. QT, Inc., 512 F.3d 858, 860–62 (7th Cir. 2008) (describing seller claims that their metal bracelet emits magic "Q-Rays" with pain-relieving power).

145. The publicly-available Internal Revenue Service Form 990 filing provides uniform financial data but with limited utility to the consumer seeking to understand or track donation impact. "Not only won't [the Form 990] tell you what a charity does, it won't tell you where it does it." Holden Karnovsky, *Don't Talk to Me About the Form 990*, GIVEWELL: THE GIVEWELL BLOG (May 23, 2007), https://blog.givewell.org/2007/05/23/dont-talk-to-me-about-the-form-990/. "The form was not designed primarily for the use of the general public, but rather as a document to help the IRS and state charity regulators to ensure that organizations remain true to their charitable purposes, and that private individuals do not enrich themselves at the expense of those purposes." Chuck McLean, *Understanding the IRS Form 990*, GUIDESTAR: GUIDESTAR BLOG (Oct. 18, 1999, 9:00 AM), https://trust.guidestar.org/understanding-the-irs-form-990. *See generally* Rosabeth Moss Kanter & David V. Summers, *Doing Well While Doing Good: Dilemmas of Performance Measurement in Nonprofit Organizations and the Need for a Multiple-constituency Approach*, *in* PUBLIC SECTOR MANAGEMENT: THEORY, CRITIQUE AND PRACTICE 220–33 (David McKevitt & Alan Lawton eds., 1994) (describing the challenge of measuring and assessing nonprofit performance generally, even with internally available organizational information).

scholarships in a symbolic fashion, signaling to the University with a financial vote what the donor community deems important.

The probability of controversies surfacing is lower than one might expect, however, due to the unlikelihood that the donor would detect any dishonoring of intent with the initial solicitation claim. Due to the difficulty of obtaining and analyzing information, a charity can make claims of this sort without much worry of discovery, which is why such claims could be made freely.[146] Some promises about use, however, cannot be fulfilled. With access to the right data and analytical effort, such promises reveal themselves.

1. Solicitation and "Room for More Funding"

Money cannot accomplish everything—that concept has inspired art. In the words of the Beatles, "Money can't buy [us] love."[147] Putting it more prosaically, not every charity can create additional charitable goods and services with additional donated money. Sometimes, non-financial factors limit additional charitable production, such as actual need or use for the money. Earmarked donations might overfund a need.

The charity evaluator, GiveWell,[148] restates the core problem with charitable donations and fungibility of funding:

> [J]ust because a donation is formally allocated to a given [specified] program doesn't mean that the charity is executing more of that program than it would without the donation. Most charities have unrestricted funds that they use to supplement restricted funds; if a charity can't, or doesn't wish to, expand a given program, it can often offset your restricted donation with a reallocation

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146. Locating examples of undiscovered dishonored solicitation claims or difficult-to-verify credence claims proves impossible. However, evidence exists in the consumer arena supporting that bold, difficult-to-verify false advertising claims are made, and occasionally caught. For some examples of spectacular chutzpah, see FTC v. QT, Inc., 512 F.3d 858 (7th Cir. 2008) (describing seller claims that their metal bracelet emits magic rays with healing power); Jack Ewing, *10 Monkeys and a Beetle: Inside VW's Campaign for "Clean Diesel,"* N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/world/europe/volkswagen-diesel-emissions-monkeys.html (describing the full scope of Volkswagen's false clean diesel claims and associated machinations of concealment).

147. THE BEATLES, MONEY CAN'T BUY ME LOVE (Capitol Records 1964).

148. GiveWell is described as,

> a nonprofit dedicated to finding outstanding giving opportunities and publishing the full details of . . . analysis to help donors decide where to give. Unlike charity evaluators that focus solely on financials, assessing administrative or fundraising costs, [it] conduct[s] in-depth research aiming to determine how much good a given program accomplishes (in terms of lives saved, lives improved, etc.) per dollar spent.

About GiveWell, GIVEWELL, https://www.givewell.org/about (last visited Apr. 23, 2019).

> of unrestricted funds. That is, restricted funds may be fungible with unrestricted funds.[149]

"[H]ow will the charity's activities be influenced by additional donations?"[150] This question must be answered to ensure that implicit price for an earmarked, specified donation is realized. Incremental money cannot always buy specifically-promised incremental charitable production.

With close analysis, fungibility problems can be identified under certain, specific circumstances. A decade ago, GiveWell developed a methodology for measuring whether earmarked donations indeed met their mark, creating the solicited incremental impact. The methodology asks whether a charity or a charitable activity has "room for more funding."[151] The first-order question appears simple enough: In an environment where a charity supports multiple programs or carries overhead, "[w]ill more funding lead to more of the good program(s)?"[152] GiveWell noted in 2011 that it has "seen next to no helpful discussion of the issue within academia, within the non-profit sector, or anywhere else."[153] Perhaps this Article presents a modest starting point for such a discussion.

GiveWell, as a charity evaluator, does not make any legal conclusions about the practice of knowingly raising money when there is no room for more funding.[154] This is unsurprising because *nobody* has apparently made any legal objection about this solicitation activity. Arguably, however, if a charity solicits and accepts the gift knowingly lacking that additional room, that solicitation could constitute fraud, misrepresentation, and promissory fraud for reasons described above.[155] Charities might not use a donation in the directed way for a number of reasons. Producing the designated activity may be limited by "many factors besides money, such as skilled labor, political support, and appropriate target populations. Thus, more money can't necessarily be used to do more of it."[156]

GiveWell offered several real illustrations of charities that solicit earmarked money for causes that are overfunded. For example, GiveWell evaluated the Aravind Eye Care System with high overall praise, as "one of the

149. *Room for More Funding*, GIVEWELL, https://www.givewell.org/how-we-work/criteria/room-for-more-funding (last visited Apr. 23, 2019) (emphasis omitted).

150. *Id.* (emphasis omitted).

151. *Id.*

152. Holden Karnovsky, *An Essential Question that No One is Asking Charities*, GIVEWELL: THE GIVEWELL BLOG, https://blog.givewell.org/2009/12/15/an-essential-question-that-no-one-is-asking-charities/ (last updated Aug. 17, 2011).

153. *Id.*

154. *Id.*

155. *See supra* Section II.A.

156. *Room for More Funding*, *supra* note 149.

more impressive humanitarian organizations [they] have seen, performing vision-restoring surgery extremely cost-effectively."[157] However, Aravind's core surgical program, as evaluated in 2012, did not require additional donation funding to support surgeries, as fees already cross-subsidized surgical expenses for in-need patients.[158] The impact of additional donations proved unclear to GiveWell, given the success of the surgical program. GiveWell explained, "Revenue from for-pay surgeries subsidizes free surgeries, and donations are used on entirely and substantially different programs such as distribution of spectacles and free food."[159]

GiveWell also offered the similar example of the fundraising tactics of the Smile Chain charity. Today, Smile Train laudably aims to "change the world one smile at a time."[160] This international children's charity aspires to "provide[] training, funding, and resources to empower local doctors in 85+ developing countries to provide 100%-free cleft repair surgery and comprehensive cleft care in their own communities."[161]

A decade ago, Smile Train solicited donations with the representation that a $250 donation could yield one incremental surgery, thus changing a life.[162] Apparently, this solicitation communicated to Professor Steven Levitt, author and blogger of *Freakonomics*, the idea that this promise of incremental impact could be taken literally.[163] Levitt praised Smile Train's solicitation strategy accordingly:

> Smile Train isn't just smart about how it delivers the surgeries, it is smart about how it attracts donors. It covers all of its non-surgery costs through contributions of its board members. So every dollar that a donor provides goes directly to surgeries. As a donor, this feels really good. I like to think about my money going for surgeries, not office parties. Being able to link a $1,000 donation to four lives changed is a powerful motivator.[164]

GiveWell, however, contemporaneous with these solicitations, uncovered that a "shortage of skilled surgeons" prevented Smile Train from putting all of its earmarked financial resources toward these $250 surgeries.[165] The organization funded as many operations as possible but still maintained a surplus of funding. Smile Train used this extra money to "engage[] in other

157. Karnovsky, *supra* note 152.
158. *Id.*
159. *Id.*
160. *Our Cause*, SMILETRAIN, https://www.smiletrain.org/our-cause (last visited Apr. 23, 2019).
161. *Id.*
162. Steven D. Levitt, *Smile Train*, FREAKONOMICS: BLOG (Nov. 8, 2006, 3:38 PM), http://freakonomics.com/2006/11/08/smile-train/.
163. *Id.*
164. *Id.*
165. *Room for More Funding*, *supra* note 149 (emphasis omitted).

activities" and make grants to seemingly worthy organizations aligned with the cause.[166] These granted activities, according to GiveWell's examination of Smile Train's Form 990 filings, included travel missions and research. Though all presumably worthwhile and related to the mission, these activities were inconsistent with the specific promise of use, certainly as interpreted by Levitt.[167] The claim that $250 donations created an incremental surgery appeared not to match with the reality, given that the procedures funding had a surplus.

With a more candid solicitation, Steven Levitt may have attached a higher implicit price to his donation. If the ability of the charity to produce the service was limited, any earmarked donation effectively supported a different bundle of services, which included external grants. The implicit price solicited from donors like Levitt did not factor in the solicitation representation. Though donors may still find satisfaction with the implicit value of their donation, if all charitable communications carried candor, the donation might have gone elsewhere. Their donor dollar may have been drawn instead to a charity that the donors would have valued more.

The "room-for-more-funding" problem evokes common, visible solicitation claims in our culture, like the assessment of claims that you can "save a child for only fifty cents per day."[168] Express solicitation representations that commit to spend money on programmatic uses, as opposed to overhead uses, also prove powerful to donors, and present their own set of similar fungibility problems.

2. Solicitation and Overhead Spending

In their assessment of implicit price, compelling evidence surfaces that potential donors value knowing to what degree their funding will cover overhead or operating expenses.[169] One extensive laboratory study "confirm[ed] that donations decrease when overhead increases, but only when donors pay for overhead themselves."[170] Solicitations involving the destination of spe-

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166. Holden Karnovsky, *Smile Train*, GIVEWELL: THE GIVEWELL BLOG, https://blog.givewell.org/2009/11/30/smile-train/ (last updated Dec. 8, 2011).

167. *Id.*

168. *See, e.g.*, UNICEF USA, *UNICEF USA: Save a Child for Only 50 Cents a Day*, YOUTUBE (Sept. 4, 2013), https://www.youtube.com/watch?v=XozrqJHA-yI (presenting this type of claim dramatically).

169. *See* Letter from BBB Wise Giving All. et al. to Donors of America, *supra* note 19 (revealing that donors "ranked overhead ratio and financial transparency to be more important attributes in determining their willingness to give to an organization than the demonstrated success of the organization's programs"). *See generally* MARK A. HAGER ET AL., NONPROFIT OVERHEAD COST PROJECT, IND. UNIV., GETTING WHAT WE PAY FOR: LOW OVERHEAD LIMITS NONPROFIT EFFECTIVENESS (2004) (the study referenced by the BBB).

170. Uri Gneezy et al., *Avoiding Overhead Aversion in Charity*, 346 SCI. 632, 632 (2014).

cific-use giving heightens the importance of representations about segregating those donations from overhead spending, and the importance of understanding how to categorize and conceptualize overhead spending.

As discussed below, other donor surveys circumstantially reveal that the destination of funding for overhead plays a sizable role in donors' implicit pricing. Though overhead spending proves difficult to conceptualize and may not bear on charitable productivity or impact, donors have come to view the measure as important information, and some cases, *the most important* consideration in their donor decision making.[171] Donors do have some sense of the fungibility potential of their donation, have sensitivity to such claims, and appear to take them at face value.

From a review of the debate, nothing seems simple about defining and measuring charitable overhead spending, let alone linking it to charitable effectiveness. One revealing debate emerged concerning the practice of using overhead-spending financial ratios as a tool for assessing charitable performance. Charity watchdog groups Guidestar, BBB Wise Giving Alliance, and Charity Navigator united to debunk what they called the "Overhead Myth."[172] The Overhead Myth group conceded that monitoring overhead can play a part in "ensuring charity accountability . . . [a]t the extremes" because properly interpreted, such excessive overhead spending ratios can expose fraudulent activities and poor management.[173] However, the Overhead Mythers warn that "[i]n most cases . . . focusing on overhead without considering other critical dimensions of a charity's financial and organizational performance does more damage than good."[174]

The Overhead Mythers support their concerns about the misuse and misunderstanding of overhead information with data showing the imprecision and inaccuracy of overhead ratio measurement.[175] Such imprecision and inaccuracy would make it difficult for donors to use such metrics as reliable standalone evaluation tools for assessing implicit price. They also cite evidence that overhead spending can enhance organizational performance and impact and, conversely, that "underinvestment" in overhead can lead to "a range of negative outcomes which undermine quality [of outcomes] and sustainability."[176]

Despite these problems with the metric, donor interest in overhead spending remains high. Significant numbers of donors tend to maintain a belief that charities spend too much on activities in this category. One survey

171. *See* Letter from BBB Wise Giving All. et al. to Donors of America, supra note 19.
172. *See id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*

revealed that sixty-two percent of "all Americans believe the typical charity spends more than it should on overhead."[177]

Yet another watchdog group, CharityWatch,[178] sharply criticized the Overhead Mythers's analysis and recommendations.[179] While conceding that "overly-simplistic overhead ratios or computer-automated ratings" have "limited value" when not placed in proper context, CharityWatch countered that "carefully considered" ratios can provide valuable information to donors.[180] However, CharityWatch noted that the overall lack of transparency into calculation and categorization of overhead activities diminishes the usefulness of overhead analysis.[181]

CharityWatch further noted the obvious difficulties in meaningfully measuring impact against overhead spending.[182] For example, the organization pointed out that the Overhead Myth group defended overhead numbers because they included mission-critical items like "training, planning and evaluations."[183] CharityWatch contended that these numbers do not belong in the overhead category but rather in the programmatic category that generates and, thus, should not stand as a basis for defending higher overhead ratios.[184] CharityWatch points out that the extreme example can be revelatory. A donor wishing "to support a charity that makes grants to fund medical research . . . would prefer to donate to a charity that spends 70% of its budget on research grants and 30% on overhead costs, rather than donate to a charity that only spends 20% on research grants and 80% on overhead costs."[185]

The Overhead Myth group's recommendation to charities, expressed in an open letter, do not necessarily contradict CharityWatch's general point. The Overhead Myth group emphasized the importance of assembling meaningful data, improving management systems, and offering transparency.[186] The Overhead Myth group offered three paths to move toward an "[o]verhead [s]olution."[187] First, charities should "demonstrate ethical practice and share [performance] data . . . information about . . . goals, strategies, management

177. *Id*. (citing *Good Charities Spend More on Administration than Less Good Charities Spend*, GIVING EVIDENCE (May 2, 2013), https://giving-evidence.com/2013/05/02/admin-data/.

178. Formerly known as the American Institute for Philanthropy. *Give Thoughtfully*, CHARITYWATCH, https://www.charitywatch.org/about-charitywatch (last visited Nov. 26, 2018).

179. *Overhead Ratios are Essential for Informed Giving*, CHARITYWATCH, https://www.charitywatch.org/charitywatch-articles/overhead-ratios-are-essential-for-informed-giving/133 (last visited Apr. 23, 2019).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Letter from BBB Wise Giving All. et al. to Donors of America, *supra* note 19.

187. *Id.*

systems, and governance processes."[188] Second, organizations should develop a more rigorous understanding of their true costs and results to "understand[] the cost of achieving their missions," and do so by "employ[ing] effective performance management systems."[189] And third, charities should "educate funders . . . on the real cost of results."[190] The Overhead Myth group warns that "highlighting financial ratios as [a] core accomplishment—especially in . . . fundraising materials . . . can be at the expense of meaningful performance metrics and reinforces [donor] confusion. Funders need to understand the truth."[191] In other words, the Overhead Myth group supports additional candor—a scrupulously ethical approach toward disclosure.

Of course, a charitable organization of any size and scale will need some degree of infrastructure to support and enable charitable production. The question is how donors should assess the value of the infrastructure when they consider implicit price, especially when solicitations leave room for manipulation of spending of earmarked gifts. Given the importance that donors place on overhead activities, unsurprisingly, charities have responded by competing for donations on that basis. Just as price point and value prove to be the top consideration for consumers seeking information when shopping for cars,[192] donors attach the same levels of importance.

In light of the power of overhead-based solicitations, it is not surprising to find a few prominent and successful charities making promises not to spend money on overhead. Given the problems mentioned above, these commitments have raised questions, and received some scrutiny. The aforementioned Smile Train promised donors that solicited donations paid for the delivery of programming, while separate funds paid for overhead expenses.[193] The *accuracy* of Smile Train's representation about the way it accounts for spending stands apart from the general question of whether Smile Train spends excessively on overhead.[194] The first question to address is whether *any* definitive statement can truthfully be made about overhead spending, given fungibility.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. DELOITTE, DRIVING THROUGH THE CONSUMER'S MIND: STEPS IN THE BUYING PROCESS 10 (2014), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/manufacturing/in-mfg-dtcm-steps-in-the-buying-process-noexp.pdf.

193. *Solicitation Train*, CHARITYWATCH (Aug. 1, 2010), https://www.charitywatch.org/charitywatch-articles/solicitation-train/40.

194. Assessing the appropriate level of overhead spending proves complex, as discussed *infra*. *See generally* Letter from BBB Wise Giving All. et al. to Donors of America, *supra* note 19.

On that basis, the American Institute of Philanthropy ("AIP")[195] challenged the strength of Smile Train's representation "that '100% of [their] donation goes to program [and] 0% goes to overhead . . . [and] '[a]ll non-program expenses, such as overhead and fundraising, are paid for with start-up grants from [their] Founding Supporters.'"[196] Claiming that a solicitation will be dedicated 100% to programs and not to overhead cannot "mean that there are no operating costs affecting the total costs of the program."[197] In other words, the sum total of resources could potentially still be spent more effectively, including earmarked donations, in some circumstances. GiveWell describes this fundraising tactic as a "feel-good gimmick" aimed at "zooming in on 'your' money."[198] Or, it could be described as an accounting trick designed to lower the implicit price of the donation by representing a higher impact of the donation on charitable production.[199]

Indeed, corralling a core of loyal supporters to cover overhead enables charities like Smile Train to claim that incremental money supports only incremental charitable production.[200] However, AIP clarifies that this leaves out a critical point.[201] The overhead expenses may be "covered," but "overhead expenses will not disappear . . . . [W]hat is spent on one function is not available for another function."[202] That is, the overhead money and the incremental solicitations remain fungible, regardless of their label.[203] In the case of Smile Train, "more donations could go toward treating children with cleft palates if the charity were operating more efficiently, regardless of whether or not some donors earmarked their donations for overhead."[204]

Robin Hood, New York City's "largest poverty-fighting organization,"[205] makes similar claims about segregating overhead funds. This organization represents that "Robin Hood's Board of Directors underwrites all operating costs, so 100[%] of [individual and other] donation[s] go[] directly

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195. AIP changed its name to the more descriptive "CharityWatch," presumably to lower its own implicit price for its supporters. *See CharityWatch FAQs*, CHARITYWATCH, https://www.charitywatch.org/about-charitywatch/faq/3113/3115 (last visited May 8, 2019).

196. *Solicitation Train*, *supra* note 193.

197. Holden Karnovsky, *Robin Hood, Smile Train and the "0% Overhead" Donor Illusion*, GIVEWELL: THE GIVEWELL BLOG (Dec. 7, 2009), https://blog.givewell.org/2009/12/07/robin-hood-smile-train-and-the-0-overhead-donor-illusion/.

198. *Id.*

199. *See id.*

200. *Solicitation Train*, *supra* note 193.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. ROBIN HOOD, *supra* note 61, at 2.

to fighting poverty."[206] Robin Hood, a high-profile, sophisticated, well-regarded, and well-established organization,[207] leads boldly in marketing efforts with this overhead-related claim, even highlighting it in the very front of annual reports.[208] The prominence of such a solicitation representation signals the potential importance of the overhead factor in the implicit price of donation. Robin Hood wants donors to assign a low implicit price, based on the notion that donations will not go toward executive salaries, photocopying, or plant-care service at the headquarters, but will go right toward solving the root causes of poverty.

Perhaps unsurprisingly, Professor Uri Gneezy and his coauthors conclude from their study of how donors react to overhead that the type of approach used by Robin Hood would help organizations raise money.[209] Though the study does not mention Robin Hood specifically, the authors recommend using "donations from major philanthropists to cover overhead expenses" so that charities can "offer potential donors an overhead-free donation opportunity."[210]

Bold claims about overhead and donations, exemplified by Smile Train and Robin Hood, evidence the recognized importance to donors of stretching their finite charitable dollar. For sophisticated and reputable charities to make such a claim, the inference naturally follows that overhead-usage claims have a significant impact on implicit price. Organizations believe that overhead claims will lower implicit price and increase the quantity of donations. Whether these types of promises are kept may prove difficult to track. Generally, the overhead problem in the charitable solicitation marketplace could be resolved if charities took it upon themselves to compete more transparently and openly, as the Overhead Myth group recommends. Disclosures about overhead fungibility might help donors set their implicit prices more accurately. If truly adhered, such claims, in theory, would help donors sort out the market, but the potential for manipulation may outweigh any such benefit.

Alternatively, regulators, recognizing the importance and power of an overhead-centered solicitation claim, could perhaps establish some baseline disclosure standardizations. Or, perhaps a group like the Overhead Myth could repurpose itself to set new best practices rather than serve mostly as a

206. *Id.*

207. For a colorful depiction of Robin Hood's image, see Jeryl Brunner, *Why Is the Robin Hood Foundation So Cool?*, HUFFPOST (May 18, 2018), https://www.huffingtonpost.com/jeryl-brunner/why-is-the-robin-hood-fou_b_863438.html.

208. *See, e.g.*, ROBIN HOOD, *supra* note 61, at 2; ROBIN HOOD, ANNUAL REPORT 3 (2017) https://robinhoodorg-production.s3.amazonaws.com/uploads/2018/06/Robin-Hood-Annual-Report-2017.pdf; ROBIN HOOD, ANNUAL REPORT 2 (2015), http://2015.robinhood.org/assets/pdf/RH_AR15.pdf.

209. *See* Gneezy, *supra* note 170, at 632.

210. *See id.*

warning siren. As I later discuss, if the Donor Bill of Rights worked effectively, representations about fund use, including room-for-more-funding and overhead issues, among others, could be clarified more consistently.

C. Fungible Donation Controversies

Earmarked solicitations and overhead claims present a complex tangle, but that complexity compounds when a charitable organization fundraises for multiple purposes and causes. Fungibility problems surface in many different forms. When controversies involving spending emerge, they offer an opportunity for a more detailed and illuminated examination of such dynamics. They may not prove completely representative of the vast run of problems, but open disputes and debates provide a useful view.

Analyses of room-for-more-funding and misspending of funding into legitimate charitable activities prove difficult to find.[211] Some solicitation approaches deftly find a way around the problem. They market earmarked uses, but then, like Oxfam, expressly, but not prominently, leave open the possibility of shifting fund use.[212]

Large operating institutions like the American Red Cross, Harvard University, and Memorial Sloan Kettering Cancer Center solicit for specific needs, while also soliciting donations for general needs.[213] Soliciting for general needs *among other needs* could create the impression that if a donor selects a specific need, the funding would create an incremental impact in that specific area. These larger charitable organizations may indeed have room for more funding and engage in budgeting processes that honor earmarked solicitation through incremental production of charitable goods and services. However, individual donors may have difficulty verifying incremental production and whether spending budgets for those specific categories had already been preset. Therefore, problems that may lie within their spending practices would not readily or easily surface; so to understand these issues practically, controversial instances provide the best view.

As shown below, controversies are worth exploring because they often lay bare more facts to illuminate the conceptual problems at issue. A few controversies have emerged from organizations that expressly serve as vehicles for donors or like supporters to choose among beneficiaries. These organizations can confront problems in fulfilling their literal promises, but at the same time, the extra level of specificity of the earmarked promise raises donor scrutiny, as these cases reveal.

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211. GiveWell appears to provide the only publicly available analyses.

212. *See infra* Section II.D.

213. *Donate Now*, AM. RED CROSS, https://www.redcross.org/donate/0218c (last visited Apr. 23, 2019); *Giving*, MEM'L SLOAN KETTERING CANCER CTR., https://giving.mskcc.org/donate-now (last visited Apr. 23, 2019); *Harvard Online Giving Form*, HARV. UNIV., https://community.alumni.harvard.edu/give/16040850 (last visited Apr. 23, 2019).

1. *Solicitation for a Choice of Causes*

Recent litigation involving PayPal and the PayPal Charitable Giving Fund offers a simple, but large-scale, controversy involving alleged misdirection of earmarked charitable funds.[214] The complaint explains why donors care about the ultimate destination of their earmarked use, and why intended charities depend on the integrity of those entrusted with ensuring the ultimate destination.[215] Similarly, the nonprofit organization, Kiva, an entity that enables individuals to help entrepreneurs through global microfinance, was embroiled in an open controversy that illuminated the fundamental challenges of promoting and then honoring implicit price.[216] In both cases, the allegations suggested that the organizations could have been more candid.

a. *PayPal Giving Fund*

According to the complaint in a recent class action lawsuit, in 2013, PayPal, the "open digital payments platform,"[217] established the PayPal Giving Fund, a nonprofit with the mission "to raise funds for charitable purposes online, primarily in the eBay Inc. and PayPal marketplaces."[218] PayPal then partnered with the Giving Fund "to process and disburse donations made through its giving platform to certain charities."[219]

The PayPal Giving Fund enables donors to match up with charitable recipients, and then transmit payments to those charities. The PayPal Giving Fund website told users, "[d]onate to a cause you care about with PayPal. Choose from over a million charities now."[220] In essence, PayPal offered to serve as a clearinghouse between donors and charities, and this service proved successful, reportedly processing over seven billion dollars in contributions within three years of inception.[221] If this service functioned as advertised, PayPal Giving Fund would enhance the ability of a donor to shop by implicit price. The allegations here, however, claim that PayPal failed to fulfill the promise of directing the money to the right place.[222]

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214. Complaint, Friends for Health v. PayPal, Inc., No. 17-cv-1542 (N.D. Ill. Feb. 28, 2017).

215. *Id.* 14–15.

216. For a contemporaneous account of the Kiva controversy, see Stephanie Strom, *Confusion Over Where the Money Lent via Kiva Goes*, N.Y. TIMES (Nov. 8, 2009), https://www.nytimes.com/2009/11/09/business/global/09kiva.html.

217. *Who We Are*, PAYPAL, https://www.paypal.com/us/webapps/mpp/about (last visited Apr. 23, 2019).

218. Complaint, *supra* note 214, at 6–7. For the purposes of this Article, I analyze the allegations in the complaint, recognizing that they have not yet been litigated.

219. *Id.*

220. *Id.* at 7.

221. Matthew Haag, *PayPal Redirects Charitable Contributions Without Consent, Lawsuit Says*, N.Y. TIMES (Mar. 1, 2017), https://www.nytimes.com/2017/03/01/technology/paypal-giving-fund-lawsuit.html.

222. *See generally* Complaint, *supra* note 214.

The class action lawsuit against PayPal contends that the PayPal Giving Fund simply did not channel the money to the designated recipients. The named plaintiffs are one donor who gave through the platform and one charitable recipient who did not receive designated donations.[223] PayPal promised that 100% of donations would go to the charity that the donors selected through their platform.[224] In some instances, according to the complaint, PayPal promised to add one percent to each donation made to charities through the Giving Fund platform.[225]

The Giving Fund platform enabled donors to search an extensive database of the charities.[226] If the "charity of choice" did not appear in the database, the donor could invite the charity to join the platform per PayPal's instruction.[227] When a donor completed a transaction, PayPal Giving Fund would email an acknowledgement and tax receipts to the donor confirming the donation to that chosen charity.[228]

The plaintiffs alleged, however, that "[w]hile this charitable vehicle seems straightforward, there [was] a catch."[229] Donor money will only be transmitted to chosen charities "if, and only if, those charities have already set up a business account with PayPal and a separate account with PayPal Giving Fund."[230] If the charities did not maintain such accounts, according to the plaintiffs, "they . . . never receive[d] the donation, despite being listed on the PayPal Giving website."[231] Indeed, the lawsuit claims that "*hundreds of thousands*" of recipients have not set up the necessary accounts, but PayPal Giving fund "nonetheless list[ed] those same charities as potential donation recipients without their knowledge or consent."[232]

Further, the class action complaint alleged that upon receiving a donation, as a general practice, PayPal and the Giving Fund did not notify the intended recipient about the donation, let alone what they needed to do to receive it.[233] Despite sending receipts, donors did not receive any notice from PayPal that a charity could not "receive the funds" and that PayPal Giving Fund would not give them the donation.[234] If the chosen charitable recipient did not make arrangements to set up the accounts and then claim the donated money, after six months, the money would be given "to an organization of

223. *Id.* at 5.
224. *Id.* at 8.
225. *Id.* at 2.
226. *Id.* at 2–3.
227. *Id.*
228. *Id.* at 3.
229. *Id.*
230. *Id.* (emphasis omitted).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*

[PayPal or the Giving Fund's] choosing without regard to the intention, beliefs, or desires of the donor."[235]

As the plaintiffs summarized, "[D]onors put their trust in [PayPal and the PayPal Giving Fund] to deliver their donations, only to have their donations surreptitiously redirected to unknown entities, including those that serve different causes and different communities than the intended recipient."[236]

b. Kiva

Kiva, a nonprofit organization, seeks out to realize "a world where all people hold the power to improve their lives" by "creat[ing] connection and relationships."[237] Kiva takes pains to distinguish that participants are lenders, not donors, as this "creates a partnership of mutual dignity."[238] Through the Kiva organization, individuals can "lend[] as little as $25 . . . [to] be part of the solution and make a real difference in someone's life."[239]

A decade ago, Kiva encountered a public controversy about the mechanics of lending solicitation and whether the earmarked loans flowed directly into the pockets of the specific borrowers.[240] Despite implications that they were, many of the posted lending opportunities had already been funded. As an influential observer explained at the time:

> Less than 5% of Kiva loans are disbursed *after* they are listed and funded on Kiva's site. Just today, for example, Kiva listed a loan [for] Phong Mut in Cambodia and at this writing only $25 of the needed $800 has been raised. But you needn't worry about whether Phong Mut will get the loan because it was disbursed last month. And if she defaults, you might not hear about it: the intermediating microlender MAXIMA might cover for her in order to keep its Kiva-listed repayment rate high.
>
> In short, the person-to-person donor-to-borrower connections created by Kiva are partly fictional. I suspect that most Kiva users do not realize this. Yet Kiva prides itself on transparency.[241]

In sum, Kiva essentially funneled individual lender money to larger "microfinance institutions," which supported the ultimate recipients.[242] After this controversy emerged in the philanthropy community, Kiva responded by

235. *Id.* at 4.
236. *Id.*
237. *About Us*, KIVA, https://www.kiva.org/about (last visited Apr. 23, 2019).
238. *Id.*
239. *Id.*
240. *See generally* Strom, *supra* note 216; David Roodman, *Kiva Is Not Quite What It Seems*, CTR. FOR GLOB. DEV., (Oct. 2, 2009), https://www.cgdev.org/blog/kiva-not-quite-what-it-seems.
241. Roodman, *supra* note 240.
242. Strom, *supra* note 216.

bringing more clarity and candor to explaining how the nonprofit functioned.[243]

Before, the organization promised that "Kiva lets [people] lend to a specific entrepreneur, empowering them to lift themselves out of poverty."[244] The representation that people could lend small amounts to specific entrepreneurs, encouraging these lenders to envision that their personal capital would help a real individual with a specific ambition in a specific place, creates a low implicit price. A higher implicit price likely results if the lenders envisioned their money pooling with other donations to backstop larger lending intermediaries.[245] After this public exposure of their model, Kiva's expressed promise was watered down to reflect the true implicit price: "Kiva connects people through lending to alleviate poverty."[246]

These past concerns about Kiva provide a classic example of the fungibility problem. Though not nominally involving directing use of charitable funds, the spirit of the Kiva model comes close. The narrow representation of funding use created an artificially low implicit price. Exposure of the mechanisms behind the operational curtain revealed that lender money served broader pre-set purposes, thus not technically having the desired incremental impact, illuminating a higher implicit price.

Note that Kiva did not divert money to line the pockets of operators or other third parties. Kiva used the lower implicit price associated with putting a face on a donation to raise funding for a larger operation that would ultimately support that face, just not directly. Kiva's model creates transactions that lead to social good, if they provide access to capital, good feelings for lenders, and general awareness about the impact of microfinance. Nonetheless, potential participants have a choice in this market of how to use their capital for social and other purposes—or even support microfinance.[247] The more the representations made by the opportunities reflect the true implicit price, the more likely the funding use meets the desires of the donors and perhaps finds the most effective place.

2. *Freeing up Money for Competing Purposes or Causes*

Controversies about fungibility, generally considered, also hide well because those who benefit from the flexibility of fungible use often have a disincentive to disclose their actual use. The next two examples do not focus as squarely on donor-to-charity charitable donations. They instead show the

243. *Id.*
244. *Id.*
245. *See id.*
246. *Id.* A search reveals that Kiva's website no longer includes this language.
247. Contemporaneous players in this space included Microplace, the Grameen Foundation, and Acción. *See* Deanna Chea, *Microlending: State Regulatory Reforms to Promote Economic and Employment Growth in California*, 10 HASTINGS BUS. L.J. 451, 452–53, 457 (2014).

nature of conflict that emerges when a specific use is named, but fungibility enables competing uses.

Fungibility enables money (or action) solicited in the name of one cause to generate unexpected—and perhaps, undesired—incremental activities. The clash between a retailer, Meijer, the U.S. Sportsmen's Alliance activist group, and the Humane Society over the "Foreclosure Pets Fund" crisply illuminated such tensions.[248] Also providing illumination on the concept of specific-use money enabling the freeing up of funding for other purposes are state lotteries. Some state lotteries, like North Carolina's, market ticket sales as a boost for education funding, when in reality, the ticket revenue boosts all general-purpose state funding.[249]

These two different examples share a common problem. Money attracted for one cause can attract a low, but misleading implicit price, especially when the money goes to competing causes or into completely different pockets. Again, these controversies may not expose classic donor-to-charity issues, but they provide a rare glimpse into the dynamics of fund use that inform the donor-to-charity, implicit price concern.

a. Foreclosure Pets Fund

A conflict between the Michigan-based retailer Meijer and the pro-hunting U.S. Sportsmen Alliance presents a crisp example of the problems associated with charitable donations and fungible use.[250] The Sportsmen Alliance successfully exposed that Meijer's promotional support of the Foreclosure Pets Fund of the Humane Society of the United States indirectly served to finance the Humane Society's pursuit of anti-hunting causes.[251] Meijer's subsequent discontinuation of the program under pressure from the Alliance, though disappointing to Humane Society fundraisers, ultimately provided more visibility to the public into the true impact of a donation to the fund.

During the homeowner foreclosure crisis in 2008, the Humane Society observed that with foreclosure-driven home evictions and other financial pressures, "pets . . . turn[] out to be the unexpected victims."[252] When in dire

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248. *See generally Meijer Ends Humane Society Contest After Sportsmen Complain*, GRAND RAPIDS PRESS (Apr. 28, 2008), http://blog.mlive.com/grpress/2008/04/meijer_ends_contest_after_spor.html.

249. *See infra* notes 262–263 and accompanying text.

250. *See generally* Jordan J. Ballor, *Fundraising and the Fungibility Phenomenon*, ACTON INST. (Apr. 29, 2008), http://blog.acton.org/archives/2315-fundraising-and-the-fungibility-phenomenon.html.

251. *See Meijer Ends Humane Society Contest After Sportsmen Complain*, *supra* note 248.

252. Wayne Pacelle, *Money Crunch Claims Pets*, HUMANE SOC'Y OF THE U.S, A HUMANE NATION: KITTY BLOCK'S BLOG (Mar. 26, 2008), https://blog.humanesociety.org/2008/03/foreclosure-pet.html (last visited Nov. 26, 2018).

financial straits, people may save money by "sacrificing pet care or by relinquishing or even abandoning their pets."[253] In response, the Humane Society set up the Foreclosure Pets Fund as a fundraising vehicle "to provide grants to shelters, rescue/adoption groups, and animal care and control agencies to assist families in caring for their pets."[254] Retailer Meijer took the opportunity to support the Foreclosure Pets Fund with a modest promotion involving donations of "$1, up to $5,000, for every entry in an online pet photo contest."[255]

Though a $5,000 donation to an organization receiving over $112 million in grants seems insignificant,[256] the fact that this donation could spill over into supporting causes that the Sportsmen Alliance sharply opposed proved symbolically important enough to raise the organization's ire. Put differently, the Alliance pointed out to the public that Meijer's support of the Foreclosure Pets Fund would not reflect the implicit price, as each incremental dollar given by a donor could generate a dollar's worth of charitable activities the donor ideologically opposes, not the cause they thought they were supporting.

The Alliance's scrutiny exposed a dynamic that may have misled Meijer shoppers on a small scale, many of whom purchased hunting equipment and licenses there.[257] Up front, when establishing the Foreclosure Pets Fund, the Humane Society expressly linked the foreclosure crisis to the broader fate of animals and humankind, an idea that might have raised suspicion about the ultimate impact of supporting the fund. As the Humane Society explained:

> We at The [Humane Society of the United States] have long argued that there's a link between the fortunes of animals and other pressing social issues. When someone abuses an animal, for instance, it is often a precursor to other forms of violence to come. Or if a downer cow is abused and funneled into the food supply, there is a greater threat to public health.
>
> Well, the issue cuts in many ways. When people are in economic distress, or facing a financial loss, that often has repercussions for animals. Human and animal lives are entangled in our culture, and when there is crisis that affects one or the other, there's usually an impact to be felt elsewhere.[258]

253. *Id.*
254. *Id.*
255. *Meijer Ends Humane Society Contest After Sportsmen Complain*, *supra* note 248.
256. *See* Humane Soc'y of the U.S., IRS Form 990, Return of the Organization Exempt from Income Tax (OMB No. 1545-0047) (2016).
257. *See Meijer Ends Humane Society Contest After Sportsmen Complain*, *supra* note 248.
258. Pacelle, *supra* note 252.

In introducing the context for the program, the Humane Society hinted at the systemic impact of the foreclosure program on the broader organizational mission. Certainly, the specified use for the raised money proved attractive to certain types of donors, but the implicit price, if one takes the donation at face value, like a Meijer customer might, would reflect the narrower promoted cause.

In the end, the Humane Society effectively validated the Sportsmen Alliance fungibility concerns in their sharp response to Meijer's pressured abandonment of the foreclosure fund. In the wake of Meijer's withdrawal, the Humane Society did not deny fungibility. To the contrary, the organization embraced fungibility and the systemic impact of an earmarked donation:

> Yesterday, I issued a call to raise $10,000 after the radical U.S. Sportsmen's Alliance (USSA), in a despicable move, intimidated Meijer department stores into dropping its support of a fund we created to help keep pets with their families during home foreclosures. Already, supporters have donated more than $25,000—and counting—to help the pet victims of the foreclosure crisis *and to save wildlife from horrible abuses such as captive shoots and polar bear trophy hunting* . . . . I will soon send a letter to the Sportsmen's Alliance and let them know that they've helped us raise money for pets and for fighting canned hunts and the other inhumane and unsporting practices that are the group's favored activities.[259]

Though the Meijer case study involved a charitable promotion, and not a straight individual charitable donation, it presents a live example about solicitation representations that imply earmarking of funds that in the end, the charity admits are for fungible use. In this instance, the organization is not shifting the funding to overhead or closely-related causes, but to causes laden with entirely different values—for the constituents of the Sportsmen's Alliance, at least.

The Meijer customer may go to the effort of participating in the promotion with an implicit price set around the concept of helping families and pets stay together. If the Meijer customer knew that participation in the promotion also supported other Humane Society causes, the implicit price would differ. For the Meijer customer, the realization of the true implicit price for assisting families and pets might require different efforts, like direct donation of dog food to shelters. Though the political motivations magnified perhaps a broader conflict between two competing organizations, fungible use for causes other than the one earmarked sparked the conflagration, despite the almost negligible amount of funding at issue.

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259. Wayne Pacelle, *We Did It*, HUMANE SOC'Y OF THE U.S, A HUMANE NATION: KITTY BLOCK'S BLOG (May 7, 2008), https://blog.humanesociety.org/2008/05/meijer-ussa2.html (emphasis added).

b. State Lotteries and Funding of Specific Public Services

State lotteries, though clearly distinct from charities, market a public do-good element as part of their appeal to lawmakers and ticket buyers, in addition to selling the opportunity to achieve instant fortune. Like many charitable solicitations, this form of marketing raises questionable specific-use claims about their actual impact on state budgets. Lotteries make public marketing claims that revenue surpluses from their operations "fund state-run programs such as education, parks, emergency responders, veterans' health and other services."[260] In effect, these claims lower the implicit price of this form of gambling by assuring that losses will be allocated to a good cause. Public uses of this money that deviate from such causes create an implicit price gap. As discussed, the political justification for, but also the marketing of lotteries promotes such uses, so the power of the advertising representation about fund use must be weighed.

In part, the fungibility of funding enables public lottery operators and state legislatures to undermine the specific-use representations made to lottery customers and sponsors. The fungibility question here has achieved a higher public profile as public spending data proves more accessible than private charitable spending.[261]

One example helps illustrate the fungibility problem with respect to surplus money. North Carolina calls its state lottery the "North Carolina Education Lottery."[262] The North Carolina Education Lottery makes quite specific representations to ticket purchasers and the general public about the

260. David Goldman, *Does Powerball Really Fund Education?*, CNN MONEY (Jan. 4, 2016), http://money.cnn.com/2016/01/13/news/powerball-education/index.html.

261. *See, e.g.*, Sonali Kohli & Joy Resmovits, *The Problem with Your Lottery Tickets and School Funding*, L.A. TIMES (Jan. 26, 2016), https://www.latimes.com/local/education/la-me-lottery-schools-20160126-story.html (questioning the equity of lottery fund educational redistribution and quoting a lottery official: "[I]f people are motivated to support their schools they'll just support their schools directly."); Valerie Strauss, *Mega Millions: Do Lotteries Really Benefit Public Schools?*, WASH. POST (Mar. 30, 2012) ("State lotteries . . . were sold to the public as enterprises that would benefit schools with millions of dollars . . . . [H]as public education really received a windfall? . . . [A] lot of money goes to public schools from the lotteries. But . . . the money doesn't do what it was promised it would by any means."); Elizabeth Chuck, *Powerball Windfall? Schools Don't Always Benefit From Lottery Sales*, NBC NEWS (Jan. 13, 2016), https://www.nbcnews.com/news/us-news/powerball-windfall-schools-don-t-always-benefit-lottery-sales-n494746 ("State legislatures often use the millions of dollars that come in from the lottery as an opportunity to reallocate other funds intended for schools from the state's general revenue, making the overall education budget barely higher than it was before lottery money was added.").

262. *See* N.C. EDUC. LOTTERY, https://www.nclottery.com/ (last visited Apr. 23, 2019); *see also* Goldman, *supra* note 260.

impact of lottery surplus money on state education services and infrastructure,[263] embedded in the claim that all surplus proceeds go to the state education budget.[264] The incremental impact of the lottery on education, however, remains in question.

When the North Carolina General Assembly established the state lottery, the initial bill from the North Carolina House of Representatives addressed concerns about fungibility head on. The bill first maintained that "net revenues generated by the lottery shall not supplant revenues already expended or projected to be expended for those public purposes, and lottery net revenues shall supplement rather than be used as substitute funds for the total amount of money allocated for those public purposes."[265] This language intended to set a budgeting rule that lottery revenue would be added to the established education budget. However, the North Carolina State Senate struck that language from the bill.[266]

Presumably, this change enabled North Carolina to have a freer hand in the budgeting process, but even if the Senate kept the House language, assessment of the incremental impact of lottery revenue on education spending would prove difficult to discern in the long run. If a lottery windfall financed the construction of new schools, certainly, the legislature would factor the existence of those schools into their total appropriations for school construction from general funds. The North Carolina Education Lottery can make claims to ticket buyers and the public that the money goes toward education, but factoring in whether the revenue causes incremental spending proves more difficult.

The above illustrations show how fungibility can enable solicited money to be used for radically different purposes. Ultimately, fungibility leaves room for sophisticated charitable marketers to attract donors through the lure of a low implicit price, followed by language presented elsewhere that enables them to disclose the true use. Or, the opacity and complexity of the larger organization simply provides more of a shield. Such dynamics lead donors to misprice their charity, as noted, donating it to the lower-priced charity at the expense of other more candid charitable causes and uses. A solution to this problem can come from within, through stricter self-regulation of candor in charitable representations. Failing a private solution, it can come from regulators. Self-regulation, through a governing mechanism like

263. This lottery claims to fund free pre-kindergarten to a specific number of children, support school construction, and provide higher-education scholarships, among other public education needs. *See Winning for Education*, N.C. EDUC. LOTTERY, https://www.nclottery.com/Education (last visited Apr. 23, 2019).

264. *See* Goldman, *supra* note 260.

265. H.R. 1023, 2005 Gen Assemb., 2005 Sess. § 18C-102 (N.C. 2005); *see* Goldman, *supra* note 260.

266. S. 622, 2005 Gen. Assemb., 2005 Sess. § 31.1(b) (N.C. 2005) (codified at N.C. GEN. STAT. § 18 C-102 (2015))*; see* Goldman, *supra* note 260.

a revised Donor Bill of Rights might prove more appealing because formal compliance and enforcement will put an expensive, larger burden on charitable production.

D. *"A Donor Bill of Rights"*

Some charitable organizations have recognized that *confidence* in donation use effectively lowers the implicit price of donation. As such, several organizations agreed to pledge their compliance with "A Donor Bill of Rights," created by several fundraising and philanthropy associations.[267] Among other commitments, those who pledge to honor the Donor Bill of Rights, agree "to . . . inform[] [donors] of the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes . . . [and] [t]o . . . assure[] their gifts will be used for the purposes for which they were given."[268]

A charitable organization can still *promote* a specific use of funding without *formally* committing to such use, yet still able to comply with a commitment to honor the Donor Bill of Rights. For example, Oxfam self-describes as "a global organization working to end the injustice of poverty[,] . . . help[ing] people build better futures for themselves, hold[ing] the powerful accountable, and sav[ing] lives in disasters."[269] Oxfam's donation page presents rotating examples of specific uses for gift money, much like the way Smile Train presented impact for a price.[270] Oxfam presents these specific uses prominently, but uses careful language in so doing. For example, the organization claims that a specific donation of X dollars "*can* provide," "educate," or "help" address the identified problems, which leaves Oxfam more flexibility for ultimate use than the language of "*will* provide" or "*shall* provide."[271] A click on *any* of Oxfam's specific uses leads to the *same* donation-capture page, briefly presenting an image of a man, presumably a potential beneficiary, with the general message:

267. *See* DONOR BILL OF RIGHTS, *supra* note 26. The organizations who created this code were "the Association of Fundraising Professionals (AFP), the Association for Healthcare Philanthropy (AHP), the Council for Advancement and Support of Education (CASE), and the Giving Institute: Leading Consultants to Non-Profits." *The Donor Bill of Rights*, AFP, https://afpglobal.org/donor-bill-rights (last visited Apr. 29, 2019) (emphasis omitted). Among others, prominent charity Oxfam claims endorsement of the Bill, along with "the Independent Sector, the National Catholic Development Conference, the National Committee on Planned Giving, the National Council for Resource Development, and the United Way of America." *See Donor Bill of Rights*, OXFAM AM., https://www.oxfamamerica.org/donate/help/donor-bill-of-rights/ (last visited Apr. 29, 2019).

268. DONOR BILL OF RIGHTS, *supra* note 26.

269. *See About Oxfam*, OXFAM AM., https://www.oxfamamerica.org/explore/about-oxfam/ (last visited Apr. 29, 2019).

270. *See Donate*, OXFAM AM., https://www.oxfamamerica.org/donate/ (last visited Apr. 23, 2019).

271. *See id.* (emphasis added).

> Now, more than ever, your support matters. Millions of families are struggling to overcome hunger, poverty, and injustice. You can support survivors of the devastating disasters in Indonesia, aid Rohingya families and others displaced by violence, assist families on the brink of famine in Yemen, and help people work their way out of poverty.[272]

Oxfam also promotes its subscription to the Donor Bill of Rights, which "assure[s] [that] gifts will be used for the purposes for which they were given,"[273] and the mechanisms and language certainly leave room for use for the *general* purposes listed on the donation capture page. This general language stands apart from specific uses that the user clicked upon to reach the capture page. Oxfam appears to comply with the letter of the Donor Bill of Rights while retaining discretion about funding allocation. Oxfam's web donation process invokes and leverages the appeal of specific uses but leaves the ultimate funding use to the discretion of the organization. In other words, Oxfam deploys specific-use-like tactics to lure in funds but makes no firm commitments. A standard of full candor might require Oxfam to be more up front about trying to raise a general pool of money for distribution at their expert discretion.

The World Wildlife Fund ("WWF")[274] uses solicitation tactics similar to that of Oxfam, but the representations about incremental impact are somewhat softer and less specific (that is, no dollar donation amounts linked to specific impact) and disclosure about fungible ultimate use emerges more clearly on their website.[275] The WWF centers web solicitations on donor "[a]doptions" of animals, for which they offer a vivid array of available exotic species.[276] This tactic makes the donation impact a bit more tangible, as the donor can click on one of dozens of attractive pictures of specific animals for adoption. However, the WWF, in contrast to Oxfam, conspicuously represents that the adoptions are "symbolic" only. They are indeed called "*Symbolic* Species Adoptions,"[277] and the adoptions are without specific impact on any animal, or even any particular species. WWF discloses, albeit less vividly and conspicuously than the heartrending pictures of the creatures up

272. *See Donate Now, Save a Life*, OXFAM AM., https://secure2.oxfamamerica.org/page/contribute/main_donate_new?donation_level=100&s_src=onetime (last visited Apr. 29, 2019).

273. *See Donor Bill of Rights*, OXFAM AM., https://www.oxfamamerica.org/donate/help/donor-bill-of-rights/ (last visited Apr. 23, 2019).

274. WWF's "mission is to conserve nature and reduce the most pressing threats to the diversity of life on Earth." They focus their work on food, climate, fresh water, wildlife, forests, and oceans. WORLD WILDLIFE FUND, https://www.worldwildlife.org (last visited Apr. 29, 2019).

275. *See generally WWF Gifts*, WORLD WILDLIFE FUND, https://gifts.worldwildlife.org/gift-center/ (last visited Apr. 29, 2019).

276. *Symbolic Species Adoptions*, WORLD WILDLIFE FUND, https://gifts.worldwildlife.org/gift-center/gifts/Species-Adoptions.aspx (last visited Apr. 29, 2019).

277. *Id.* (emphasis added).

for adoption, that "[y]our donation provides general support to World Wildlife Fund, a 501(c)(3) charitable organization. [Eighty-four] percent of WWF's spending is directed to worldwide conservation activities."[278]

Charitable appeals, expressly promoting earmarked use, while also expressly disclaiming the earmark restriction, echo other areas of consumer marketing practices. Regulation of consumer claims presented alongside simultaneous disclaimers varies by context. For example, under FTC guidelines, a seller can lawfully declare an item "free," as long as the terms, conditions, and obligations required for the consumer to realize the "free" price are disclosed.[279] Such a rule provides permission for a seller to make a contradictory claim, perhaps a claim more contradictory than the charitable representations. On the other hand, the drafters of the Magnuson-Moss Warranty Act[280] set out to attack contradictory language about simultaneous seller warranty claims and disclaimers.[281] In drafting Magnuson-Moss, the House Committee reported concern that "in many cases where a warranty or guarantee was ostensibly given the old saying applied 'The bold print giveth and the fine print taketh away.'"[282] As noted above in the description of the Oxfam website, the Oxfam lead-in induces the donor with a narrow solicitation claim, but the subsequent disclosure upon click-through "taketh away" the implied spending restrictions.[283]

FTC guidance on the use of the word "free" permits a degree of express seller contradiction, and if the charitable solicitation norms leaned that way, both the Oxfam and the WWF representations would pass the test. Magnuson-Moss, however, attacks and rejects such contradiction with warranties

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278. *Id.* The charity Save the Children employs the adoption mechanism in a similar fashion to WWF, using children instead. Up front, Save the Children promotes sponsorship of individual, named children in need of support for nutrition, health, development, and education, but discloses elsewhere that the money will not go directly to that particular, named child. *See Frequently Asked Questions About Child Sponsorship*, SAVE THE CHILDREN, https://www.savethechildren.org/us/sponsor-a-child/sponsorship-faqs (last visited Apr. 29, 2019). Save the Children states:

> When you become a sponsor, Save the Children does not give your donation directly to your sponsored child, rather we combine your monthly support with the support of other sponsors to help support projects in your sponsored child's community—creating a "ripple effect" of positive change throughout the entire sponsorship community.

Id.

279. Commission Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. § 251.1(c) (2018); David Adam Friedman, *Free Offers: A New Look*, 38 N.M. L. REV. 49, 53–56 (2008).

280. Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 2301–2312 (2012)).

281. *See generally* H.R. REP. NO. 93-1107 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7702, 7706.

282. *See id.* at 24.

283. *See supra* notes 271–273 and accompanying text.

for consumer goods. Claims of earmarked use, when coupled with a disclaimer, would likely find disfavor under the spirit of the Magnuson-Moss approach.

The Magnuson-Moss approach appears to fit the charitable-solicitation problem better than the *free* approach. With the free pricing regime, the consumer, though put at some risk of confusion, has an opportunity to tally and verify the total price before completing the transaction. Warranties, in comparison, in practice, reveal more of their content in the future and unlike price, the consumer may not confront the warranty's meaning at the point of transaction. Therefore, the opacity associated with the use of earmarked funds may closely resemble warranties for consumer goods, thus the standard for charitable solicitations should lean more toward the spirit of the concerns that led to the enactment of Magnuson-Moss. Deception should be construed more broadly for difficult-to-verify claims about specific use.

In sum, WWF exemplifies an attempt to lower implicit price by making potential uses more vivid—evoking notions of specific use but simultaneously clarifying that donations can be used for "general support" of the organization.[284] Oxfam apparently attempts to lower implicit price by presenting specific uses and showing the incremental impacts of dollar amounts to specific uses, in the manner of Smile Train.[285] Ultimately, an accurate implicit price should reflect the broad discretion that Oxfam retains to spend donations on the worthy specific causes promoted by the charity. In both cases, enhanced candor in charitable communications would help donors make informed assessments of impact.

Though deficient, the current approach toward self-regulation of charitable-solicitation representations contains the seeds of realistic proposals for reform of these practices. Next, I discuss how a revised Donor Bill of Rights could be the centerpiece of an initial effort to bring candor to charitable communications.

III. PROPOSALS FOR CHARITABLE SOLICITATION REFORM

Bringing candor to the solicitation process when funding is fungible can help all honest charitable causes, while enhancing donor confidence in charities. Requirements of more disclosure would change the way organizations solicit money and might shape how organizations use money. However those changes pan out, the incremental impact of a donor's gift will more closely reflect the donor's intentions.

The need for extra candor in charitable solicitation representations, particularly where fungibility surfaces as an issue, results from the difficulty of market correction of the claim, which I explain in Section III.A. In Section

284. *WWF Gifts, supra* note 275.
285. *See supra* Section II.B.1.

III.B, I suggest an addition to the Donor Bill of Rights: a more robust commitment of candor in solicitations and communications, to ensure that specific-cause solicitations meet or exceed donor expectations for use. Self-policing of communications, with the assistance of philanthropy watchdog groups, will ensure that money finds the channel that donors expect. Finally, Section III.C prescribes a last resort path for regulatory intervention. The costs of regulatory compliance alone make this option less attractive, but the prospect, along with risks of civil liability and public-relations exposure, should incentivize the sector to embrace the "candor commitment."

A. Enhancing the Integrity of Fungible Solicitation Claims

Though the approach taken here focuses on the concept of implicit pricing, charitable solicitation claims usually frame a promised impact. That promised impact can be general, like a no-strings-attached donation to a university. That promised impact can be specific, as in "twenty dollars can feed this particular child in a particular remote village for one week." Consumers have difficulty sorting out these claims in the same way they have trouble sorting out claims about the need for auto repairs, claims about a product's environmental impact, or pain relief from wearing a bracelet.[286] All of these claims prove expensive to verify relative to the price of the purchase.

These types of advertising claims exemplify "credence claims," often the types of claims that concern regulators the most.[287] Advertising claims can be characterized as falling into three categories—search, experience, and credence—with each raising different levels of concern about whether consumer markets can correct them without intervention.[288]

Search claims involve seller claims about price, category of item, and availability.[289] In the charitable context, a search claim might be, "We are a nonprofit higher-education charity." These claims prove comparatively inexpensive for a donor to verify in advance of a gift, should the donor so choose.[290] Experience claims involve claims about quality that can be verified after a transaction.[291] In the charitable context, an experience claim might be, "Your donation will pay for a late-applying child named Taylor to attend a private academy for free, even though the academy has never seated more than twenty students." The donor can verify after the gift whether that student named Taylor enrolled for free as the twenty-first student.[292]

286. *See* Friedman, *supra* note 24, at 847–51.
287. *Id.* at 859.
288. *See id.* at 853–58.
289. *Id.* at 843.
290. *See id.*
291. *See generally id.* at 844–47.
292. *See generally id.* at 862–63 (discussing consumer verification of experience claims).

Credence claims, however, encompass most of the potential claims that charities make where resources are fungible and verification proves expensive. In the world of consumer protection enforcement, credence claims often take enforcement priority.[293] Consumers find credence claims challenging to test, as they never openly indicate that they were unfulfilled.[294] Therefore, consumers will not adjust behavior based on false credence claims, meaning that markets alone are not well-situated to punish those sorts of claims as swiftly. False credence claims can prevail over more honest claims.[295] The same applies for charitable markets, where the element of trust in charities and the faith in their regulatory oversight may be higher. Though an argument has been made that rational advertisers would never invest in credence claims because consumers would not attach value to unverifiable information, empirical evidence indicates that they proliferate.[296]

Smaller individual donations, in particular, are of concern in this dynamic because the cost of investigation rapidly exceeds the potential value of the gift. Larger solicited donations might instigate the donor to investigate or at least indicate that the donor has resources and ability to inspect. A university donor endowing a five-million-dollar chaired professorship in computer science may have the resources to investigate and extract necessary guarantees about incremental impact. A twenty-five-dollar donor to a university for scholarship funding, on the other hand, must take it on faith that the donation will have an incremental effect, or simply discount the representation.

Charities that solicit honestly and with full candor may carry a higher implicit price than those credibly generating the same charitable production with less candor and more persuasive tricks in their solicitation. The nature of credence claims indicates that nobody will check them, and they will not self-correct. In order for a charity to compete for the donation dollar, a charity will have to cut corners in their solicitations the same way that their competitors might. If leading charities cut corners, less sophisticated charities will have fewer choices.

Therefore, the first step that leading charities can make, along with guidance, credentialing, and monitoring from leading philanthropy watchdogs, would be to strengthen their obligations of candor. The current Donor Bill of Rights offers a framework that can support a renewed commitment by charities to either honor their representations about incremental impact or to represent how they handle their money with full candor.

293. A content analysis revealed that the FTC focuses enforcement on credence claims and hybrid experience-credence claims. *Id.* at 859.

294. *See id.* at 847–48 (using the example of the claim that an automobile owner needs a coolant flush—how does the lay consumer verify such a claim?).

295. *See id.* at 847–49.

296. *See id.* at 864 (recapping the debate between Professors Lillian BeVier and Roger Schechter).

B. *Adding Candor Commitments to the Donor Bill of Rights*

The Donor Bill of Rights, written by fundraising-professional organizations in 1993[297] and adopted by a range of prominent nonprofits,[298] provides a ready framework for clarifying the rules and establishing new norms about fundraising practices. Although the Association of Fundraising Professionals incorporated electronic-focused additions in an "e-donor Bill of Rights,"[299] some nonprofit sector leaders have observed that after twenty-five years, the Donor Bill of Rights may be ripe again for revision and amendment.[300]

The preamble of the Donor Bill of Rights enables charities to adopt a view of philanthropy that honors donor intent and recognizes the important of donor "confidence":

> Philanthropy is based on voluntary action for the common good. It is a tradition of giving and sharing that is primary to the quality of life. To assure that philanthropy merits the respect and trust of the general public, and that donors and prospective donors can have full confidence in the not-for-profit organizations and causes they are asked to support, we declare that all donors have these rights . . . .[301]

The ten articles of the Donor Bill of Rights generally focus on donor ability to "[t]o be informed" about and "[t]o have access" to the charity.[302] Articles I and IV, particularly, offer general, broad commitments about the information rights related to the use of donations. Through adoption, signatories agree that donors have the right "[t]o be informed of . . . the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes."[303] Note that room-for-more-

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297. *See* DONOR BILL OF RIGHTS, *supra* note 26.

298. In the absence of an available census, a Google search shows that a prolific variety of nonprofit organizations claim to have signed on to the document, ranging from educational and health care institutions to advocacy groups. *See, e.g.*, *Donor Bill of Rights*, CARNEGIE MELLON UNIV., https://www.cmu.edu/engage/about-us/donor-bor.html (last visited Apr. 29, 2019); *Donor Bill of Rights*, CHILDREN'S ORGAN TRANSPLANT ASS'N, http://cota.org/give/donor-bill-of-rights/ (last visited Apr. 29, 2019); *The NRA Foundation, Inc. Resolution Adopting a Donor Bill of Rights*, NRA FOUND., https://www.nrafoundation.org/a-donor-bill-of-rights/ (last visited Apr. 29, 2019).

299. *See Principles of the Donor Bill of Rights*, ASS'N OF FUNDRAISING PROF'L, https://afpglobal.org/principles-edonor-bill-rights (last visited Apr. 23, 2019) (addressing the issues regarding electronic solicitation and communication that emerged since 1993).

300. *See, e.g.*, Pamela Barden, *Is It Time to Reassess Donor's Rights?*, NONPROFITPRO (Mar. 9. 2017), http://www.nonprofitpro.com/post/time-reassess-donors-rights/; Bruce Deboskey, *On Philanthropy: Rethinking and Revising the "Donor Bill of Rights,"* DENVER POST (Jan. 16, 2017), https://www.denverpost.com/2016/09/11/on-philanthropy-donor-bill-of-rights-bruce-deboskey/ (observing both sectors offer proposals for updating and reforming the statement).

301. DONOR BILL OF RIGHTS, *supra* note 26.

302. *Id.*

303. *Id.*

funding issues have already been acknowledged by the prominent fundraising groups.

Further, the Donor Bill of Rights maintains that donors are "[t]o be assured their gifts will be used for the purposes for which they were given."[304] This latter question raises, albeit obliquely, the question of disclosures about fungible use of money and whether the charity will use a donation to truly produce the expected incremental production reflected in the implicit price.

If philanthropy watchdogs reopen the Donor Bill of Rights, they should first consider whether certain solicitation practices with respect to fungibility remain consistent with the spirit of the Donor Bill of Rights as written. The Donor Bill of Rights leaves open wiggle room for charities to define what "capacity" means, for example. Did Smile Train properly represent "capacity to use donations effectively"? Smile Train could respond that spending on like causes other than surgery would be an effective use.

Also, the word "purposes" could be construed broadly. As noted in detail throughout this Article, an organization can use fungibility as a means for claiming that donated money flowed to its purposes, if the organization eschews incremental impact as the measurement. Of course, vagueness, combined with voluntary compliance, weak self-enforcement, and little monitoring enables organizations to take liberties where they might want to do so. After all, the benefits of seeking to present a lower implicit price prove powerful, and the pledge offers loopholes.

The vague pledges to inform, provide access to, and reassure donors about fund use would bare more teeth if associated with an independent, stronger, affirmative commitment to full candor by recipients. Charities could pledge to achieve a new level of honesty. Such an example exists in the obligations that some states have put onto higher education institutions in their communications with students and the public.

These standards from higher-education regulation could inform reformation of charitable solicitation. Buying into an expensive education program that promotes effectiveness in achieving student goals requires that institutions use the utmost care in providing information to prospective students. One state offers language that could prove useful for incorporation in an additional article to the Donor Bill of Rights. In Oregon, in order to obtain authorization to grant educational degrees, "[a] school shall be scrupulously ethical in all communication with the public and with prospective students. School publications, advertisements, and statements shall be wholly accurate and in no way misleading."[305]

304. *Id.*

305. OR. ADMIN. R. 583-030-0035(12) (2015). Oregon appears to stand out as fairly demanding with educational institutions with this requirement, but, nonetheless, this language is offered only as inspiration for part of a voluntary pledge, not as a formal law reform proposal.

Philanthropy groups should add something similar to the Donor Bill of Rights to reinforce the existing articles, which have already been long accepted, in principle: "A *not-for profit organization* shall be scrupulously ethical in all communication with the public and with prospective *donors*. *Organization* publications, advertisements, and statements shall be wholly accurate and in no way misleading."

This additional clause would require complete candor from charities about their use of funding—the truth, the whole truth, and nothing but the truth. "Scrupulously ethical" behavior is warranted from entities that receive preferential status in the tax code, and from those who solicit money to serve a public interest. Ethical behavior alone might imply that a charity could be passive about eradicating any confusion. Scrupulously ethical behavior, as this one Oregon rule requires, calls for more affirmative efforts to ensure that donors are completely informed.

Organizations adopting and complying with a revised Donor Bill of Rights would have to communicate fungible use discretion, the true incremental impact of a gift, and whether the represented activities have room for more funding. Essentially, a charity would have an affirmative obligation to disclose with clarity how donations would be used. One would expect that this might change the nature of solicitation, or it might change the nature of use. The lead-ins with specific promises about use, followed by subsequent language that qualifies the promise as not carrying any commitment, would prove more difficult to make under this guideline. Perhaps the most inexpensive way to comply with a candor clause would be to declare conspicuously that the organization will put the money to best determined charitable use, consistent with the mission—without any confusing additional noise.

Openness should not impose significantly higher compliance costs, but it might make lowering the implicit price of donations more challenging. Generally, some empirical studies show that restricting advertising information raises consumer prices,[306] but this proposal aims to *increase* information, so the net impact on implicit pricing for charities may not be as clear. The perceived risks of charities misspending donated money should drop, however, and that dynamic could increase net donations. Whatever the result, donors would be making decisions based on a set of information with more integrity behind it.

306. For some illustrations of this phenomenon, see, for example, Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L & ECON. 337, 337 (1972); C. Robert Clark, *Advertising Restrictions and Competition in the Children's Breakfast Cereal Industry*, 50 J.L. & ECON. 757, 759–60 (2007); Jeffrey Milyo & Joel Waldfogel, *The Effect of Price Advertising on Prices: Evidence in the Wake of* 44 Liquormart, 89 AM. ECON. REV. 1081, 1081 (1999); *see also* J. Howard Beales, III et al., *In Defense of the* Pfizer *Factors*, *in* THE REGULATORY REVOLUTION AT THE FTC 86–87 (James Campbell Cooper ed., 2013) (discussing how advertising reduces prices).

Further, if more charities play by these rules, and if donors know to look for charities that play by these rules, honest charities should benefit over charities that decline to make the candor commitment. In essence, a successful implementation of these reforms would enhance "the respect and trust" for philanthropy that the original Donor Bill of Rights drafters sought to promote in their preamble.

Self-regulation and policing should serve charitable organizations well, avoiding compliance costs. Watchdog groups could use an updated Donor Bill of Rights as a new measuring stick for rating charities and for general public education. However, if still needed, adoption and proliferation of the Donor Bill of Rights could enhance opportunities for public enforcement.

C. The Last Resort: Additional Enforcement

Regulation of charitable speech through formal rulemaking and enforcement would prove expensive for the charitable institutions that the public wishes to support.[307] However, the FTC and the states need not promulgate a candor rule for charitable solicitations and communications in order to enjoy the desired effect. The FTC and state attorneys general could, of course, put their moral weight behind this effort with some support and endorsement.

Furthermore, if charities expressly adopt a revised Donor Bill of Rights, it could become a material claim. Such a claim would require the charitable entity to incorporate its commitment to candor and scrupulously ethical communications as a material, independent representation, the force of private and public law could follow. Donors, the FTC, and attorneys general would have that extra hook of "failure to meet the candor representation," if pursuing enforcement.[308] If policymakers firmly wished to push a candor commitment, the Internal Revenue Service ("IRS") could require organizations to make and disclose their candor commitment in order to receive tax-exempt status—just as the IRS requires of tax-exempt organizations in other areas.[309]

Of course, a heavy regulatory hand should not be used until private approaches have been exhausted, and even then, not without firm evidence of

307. Additionally, First Amendment concerns surface. Some courts have construed *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 618 (1980), as establishing a "strict scrutiny" standard for regulation of content of charitable speech. *Id.* at 636; *see, e.g.*, Recycle for Change v. City of Oakland, 856 F.3d 666, 673 (9th Cir. 2017); Planet Aid v. City of St. Johns, 782 F.3d 318, 330 (6th Cir. 2015). In *Recycle for Change*, the court found the ordinance at issue was content neutral, and thus applied intermediate scrutiny. 856 F.3d at 674.

308. *See supra* Section II.A. (discussing of application of misrepresentation, fraud, and promissory fraud.)

309. *See generally* IRS Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (OMB No. 1545-0056) (2017) (requiring provision of information in organizing documents, narrative descriptions of activities, and disclosure of conflicts of interest policies, among other items).

the costs and benefits of regulation.[310] More broadly, private philanthropy groups should draft and urge adoption of a revised Donor Bill of Rights that incorporates this proposed candor change. Some entities will prove reluctant to restrain their normal fundraising practices, let alone increase their civil exposure through a candor rule. So, the sector, in considering this proposal, would have a great deal to weigh.

IV. CONCLUSION

The American charitable sector is a marvel, in size, impact, and social innovation. Funding, particularly from individuals, provides lifeblood to the sector. Also, charitable donations comprise a significant consumer transfer of wealth. Given these factors, enhancing the integrity of charitable solicitations, which drive a substantial amount of giving,[311] should become a renewed priority for leaders in the charitable sector, and if necessary, for regulators.

When solicitations lower the implicit price of goods by obfuscating the true incremental impact of a donation, signals are distorted. Donors purchase incremental charitable goods and services that they did not wish to purchase. Charities that do not obfuscate the use of donations lose out because their implicit price for the same charitable production would be higher. In some instances, these problems are serious enough to warrant an analogy to common law fraud and misrepresentation.

The information flow in charitable solicitation, and thus the impact of donation, can be improved along several key dimensions by a renewed commitment to candor. The charitable sector can lead the way by adopting and self-enforcing new practices, but government enforcement looms as a potential alternative. Whichever path, the special position that charities hold should mean that they afford donors integrity that matches public trust.

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310. *See* Friedman, *supra* note 24, at 879–88 (describing the evolution of FTC's cost-benefit analysis).

311. *See* Bekkers & Wiepking, *supra* note 34, at 924.