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ARISTOTLE AND LYNDON BAINES JOHNSON: THIRTEEN WAYS OF LOOKING AT BLACKBIRDS AND NONPROFIT CORPORATIONS — THE AMERICAN BAR ASSOCIATION'S REVISED MODEL NONPROFIT CORPORATION ACT

*Michael C. Hone**

I. ESSENCES AND POLITICAL REALITY

OVER TWO THOUSAND years ago Aristotle searched for the essence of truth. He believed that the essence of truth was the convergence of mind and reality.¹ He believed in the existence of objective truths which could be realized and appreciated. Since that time, man has searched for the nature and essence of many things. He has tried to determine the nature of justice,² beauty,³ war,⁴ desire,⁵ mind,⁶ and a myriad of other concepts.

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1. ARISTOTLE, *Categories*, in BASIC WORKS OF ARISTOTLE 35 (R. McKeon trans. 1941).

2. *O'Rorke v. Bolingbroke*, 2 App. Cas. 814, 834 (1877). Lord Blackburn stated that "it is of the essence of justice not to decide against any one on grounds which are not charged against him, and as to which he has not had an opportunity of offering explanations or calling evidence." *Id.* at 834.

3. PLATO, *Symposium*, in THE DIALOGUES OF PLATO 301, 334-35 (B. Jowett trans. 1937). "And the true order of going, or being lead by another, to the things of love, is to begin from the beauties of earth and mount upwards for the sake of that other beauty, using these as steps only, and from one going on to two, and from two to all fair forms, from fair forms to fair practices, and from fair practices to fair notions, until from fair notions he arrives at the notion of absolute beauty, and at last knows what the essence of beauty is." *Id.* at 335.

4. LORD NUGENT, MEMORIALS OF JOHN HAMPDEN (4th ed. 1860).

5. ARISTOTLE, *Politics*, in BASIC WORKS OF ARISTOTLE, *supra* note 1, at 1127, 1158-61. "But want is not the sole incentive to crime; men also wish to enjoy themselves and not

In the modern era, academics and jurists have sought a general theory explaining the existence of nonprofit corporations.⁷ They are following the path first trod by Aristotle. They are searching for the universal essence of nonprofit corporations. Once satisfied that they have discovered this elusive quality, they have derived a system of legal categories and legal conclusions reflecting the proper treatment of nonprofit corporations.⁸ In this manner, the law of nonprofit corporations has been explained in terms of legal,⁹ economic,¹⁰ tax,¹¹ and political¹² theories.

As a legislator, Lyndon Baines Johnson was also interested in the laws governing nonprofit corporations. However, Johnson was

to be in a state of desire — they wish to cure some desire, going beyond the necessities of life, which preys upon them; nay, this is not the only reason — they may desire superfluities in order to enjoy pleasures unaccompanied with pain, and thereafter they commit crimes." *Id.* at 1159.

6. LUCRETIUS, ON THE NATURE OF THINGS 133 (C. Bailey trans. 1910). "Death, then, is but naught to us, nor does it concern us a whit, inasmuch as the nature of the mind is but a mortal possession." *Id.*

7. See, e.g., Ben-Ner, *Nonprofit Organizations: Why Do They Exist in Market Economies?*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS 94, 94-95 (S. Rose-Ackerman ed. 1986); Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416, 1418 (1980); Ellman, *Another Theory of Nonprofit Corporations*, 80 MICH. L. REV. 999, 999 (1982); Hansmann, *The Role of the Nonprofit Enterprise*, 89 YALE L.J. 835, 837-43 (1980); James, *The Nonprofit Sector in Comparative Perspective*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 397, 397 (W. Powell ed. 1987); Krashinsky, *Transaction Costs and a Theory of the Nonprofit Organization*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS, *supra*, at 114, 114-15; Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three Sector Economy*, in THE VOLUNTARY NONPROFIT SECTOR 51, 51-52 (B. Weisbrod ed. 1977).

8. For example, in the late 1970s Henry Hansmann, now a professor at Yale, proposed an economic analysis of nonprofit corporations. He described nonprofit corporations as resulting in large part from market failure and emphasized their role in providing "public goods." He proceeded to divide nonprofit corporations into four categories: mutual donative, mutual commercial, entrepreneurial donative, and entrepreneurial commercial. He then reached various conclusions as to how nonprofit corporations should be treated based upon these categories. See Hansmann, *supra* note 7, at 837-43.

9. See, e.g., Clark, *supra* note 7, at 1418; Ellman, *supra* note 7, at 99; Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 504-08 (1981).

10. See, e.g., Ben-Ner, *supra* note 7, at 94-95; Hansmann, *Economic Theories of Nonprofit Organization*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 7, at 27, 29-33; James, *supra* note 7, at 397; Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 7, at 99, 99-100; Weisbrod, *supra* note 7, at 94.

11. See, e.g., Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 357-58 (1976); Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 55 (1981).

12. See, e.g., Douglas, *Political Theories of Nonprofit Organization*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, *supra* note 7, at 43.

not as interested in discovering the essence of nonprofits as Aristotle was in discovering the essence of truth. As a politician, Johnson's primary goal in life was being elected to office. In one sense, it was the essence of his life.¹³ When the concerns of Johnson the legislator clashed with those of Johnson the politician, it was the latter that prevailed.

Johnson believed that a private Texas foundation had financially supported his opponent in a tough election.¹⁴ After he was elected, Johnson proposed an amendment to the bill which eventually became the Internal Revenue Code of 1954.¹⁵ That amendment provided that 501(c)(3) organizations may "not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office."¹⁶

There is no record of the debate, if any, surrounding the passage of that amendment. The logical argument favoring such an amendment is that those corporations qualifying for the section 501(c)(3) tax subsidy should not be permitted to directly or indirectly use that subsidy to support candidates for office.¹⁷ However, it is unlikely that Johnson was motivated to propose the amendment because of logic or his understanding of the nature of 501(c)(3) organizations. It is much more likely that Johnson was motivated by a desire to exact revenge on the foundation he believed supported his opponent and to prevent it and other nonprofit corporations from acting similarly in the future. This political decision has significantly affected a large number of nonprofit corporations.¹⁸

II. BLACKBIRDS, PLURALISM, AND MODEL LAWS

Which approach is more helpful, insightful, and useful — that of Aristotle or that of Lyndon Baines Johnson? The answer is

13. See generally R. CARO, *THE YEARS OF LYNDON JOHNSON* (1982)(arguing that Johnson was driven by his ambition to run for political office).

14. B. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 281 (5th ed. 1987).

15. *Id.*

16. I.R.C. § 501(c)(3) (1986).

17. See, e.g., *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

18. In 1985 there were 366,071 section 501(c)(3) organizations according to Internal Revenue Service records. B. HOPKINS, *supra* note 14, at 22.

found in the poem "Thirteen Ways of Looking At A Blackbird."¹⁹

19. THIRTEEN WAYS OF LOOKING AT A BLACKBIRD

I

Among twenty snowy mountains,
The only moving thing
Was the eye of the blackbird.

II

I was of three minds,
Like a tree
In which there are three blackbirds.

III

The blackbird whirled in the autumn winds.
It was a small part of the pantomime.

IV

A man and a woman
Are one.
A man and a woman and a blackbird
Are one.

V

I do not know which to prefer,
The beauty of inflections
Or the beauty of innuendoes,
The blackbird whistling
Or just after.

VI

Icicles filled the long window
With barbaric glass.
The shadow of the blackbird
Crossed it, to and fro.
The mood
Traced in the shadow
An indecipherable cause.

VII

O thin men of Haddam,
Why do you imagine golden birds?
Do you not see how the blackbird
Walks around the feet
Of the women about you?

VIII

I know noble accents
And lucid, inescapable rhythms;
But I know, too,
That the blackbird is involved
In what I know.

IX

When the blackbird flew out of sight,
It marked the edge
Of one of many circles.

The poem was written by Wallace Stevens,²⁰ and it suggests that there is not one way, but numerous ways of looking at a blackbird. A multiplicity of factors affect one's perception of the blackbird. They include the changing colors, time of day, weather, the observer's background, values, and emotional state.

Neither blackbirds nor nonprofit corporations have one objective essence. Some nonprofit corporations aid the needy,²¹ others act as educational institutions²² or museums.²³ More recently, nonprofit organizations have championed environmental causes²⁴ and brought public interest lawsuits.²⁵ Some nonprofit organizations operate as membership department stores,²⁶ do research for the United States Air Force,²⁷ or provide social²⁸ or athletic facili-

X

At the sight of blackbirds
Flying in a green light,
Even the bawds of euphony
Would call out sharply.

XI

He rode over Connecticut
In a glass coach.
One, a fear pierced him,
In that he mistook
The shadow of his equipage
For blackbirds.

XII

The river is moving.
The blackbird must be flying.

XIII

It was evening all afternoon.
It was snowing
And it was going to snow.
The blackbird sat
In the cedar-limbs.

Wallace Stevens

THE COLLECTED POEMS OF WALLACE STEVENS 92 (A. Knopf ed. 1961).

20. Mr. Stevens was a graduate of New York Law School, a member of the Bar, an insurance executive, and a distinguished poet. More interestingly, he turned down the position of Lecturer at Harvard College to continue his career as a poet and insurance executive, stating that "such a move would precipitate the retirement that I want so much to put off." 54 *DICTIONARY OF LITERARY BIOGRAPHY* 500 (Gale Research Co. 1987).

21. *E.g.*, The American Red Cross.

22. *E.g.*, Leland Stanford Junior University.

23. *E.g.*, The Metropolitan Museum of Art.

24. *E.g.*, The Sierra Club.

25. *E.g.*, Public Advocates.

26. *E.g.*, Fedco; this California nonprofit has over \$200,000,000 in sales.

27. *E.g.*, The Aerospace Corporation; this California nonprofit has over \$50,000,000

ties²⁹ for members. Others minister to their members' spiritual needs.³⁰

Nonprofit organizations are as diverse as people's perceptions of them. Lawyers, economists, sociologists, foundation executives, grant recipients, the tax authorities, directors, members, state attorney generals, and others all may have different ways of viewing and categorizing nonprofit organizations. The perception of each may be different and contradictory in one sense, yet useful and subjectively accurate in providing new and different insights into nonprofit corporations. Their perceptions are useful as long as they are recognized for what they are: value-laden observations built upon any number of explicit and implicit assumptions.

How can a model law of nonprofit corporations be written in a manner consistent with the Wallace Stevens poem? The answer is that a model law must draw upon as many perspectives of nonprofit organizations as possible. A model law must recognize that there exist innumerable ways of perceiving nonprofit corporations. As a law represents a series of policy decisions, it is particularly important to consider the various conflicting values which underlie the law. As Stevens' poem indicates, there is more than one essence to a person, organization, or concept. This is particularly true for nonprofit organizations in the United States. A law should not subjectively define the essence of an object or idea and then base all of its conclusions on that essence. Rather, it must accommodate a series of practical and conceptual concerns.

The United States has numerous and diverse voluntary nonprofit organizations. They appeal to, are based upon, and promote different perceptions and values. Similarly, a law should recognize and promote this diversity. In a pluralistic society it is dangerous to use a single economic or philosophical theory to explain, validate, or exclude organizations from a role in the nonprofit sector. Academics, politicians, and writers of model laws should be particularly careful in this regard. When given a choice between validation or exclusion, they should choose exclusion only if there is a compelling reason to do so.

in contracts with the United States Air Force.

28. *E.g.*, The Bohemian Club.

29. *E.g.*, The New York Athletic Club.

30. *E.g.*, The First Church of Christ Scientist.

III. DRAFTING PROCESS: THE AMERICAN BAR ASSOCIATION'S REVISED MODEL NONPROFIT CORPORATION ACT

A. Role of Model Law

A model nonprofit law has limited functions: it does not deal with taxation,³¹ antitrust,³² or labor³³ laws; nor does it deal with numerous constitutional³⁴ and other issues. Its role is circumscribed by history and tradition.

A model nonprofit law does, however, play an important role in facilitating nonprofit activities. A nonprofit law must provide: 1) an easy and inexpensive method of organizing nonprofit corporations,³⁵ 2) flexibility in corporate operation consistent with societal norms,³⁶ 3) easily understood and fair methods of effecting structural changes in³⁷ and dissolving³⁸ nonprofit corporations, and 4) protection for the public³⁹ and those participating⁴⁰ in the non-

31. See I.R.C. § 170 (tax deductions for charitable contributions); § 274 (disallowance of certain entertainment expenses including charitable sporting events); § 403(b) (treatment of annuity contracts for charitable organizations); § 501 (general requirements for income tax exemption); § 502 (feeder organizations); § 503 (transactions resulting in denial of tax exemption); § 508 (special rules for 501(c)(3) organizations); § 509 (definition of private foundations); § 511 (tax on unrelated business income); § 512 (definition of unrelated business income); § 513 (definition of unrelated trade or business); and §§ 4941-4947 (certain rules for private foundations).

32. See *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (NCAA's plan to broadcast certain collegiate football games violates § 1 of the Sherman Anti-Trust Act).

33. See 12 U.S.C. § 1715(c) (1986); 29 U.S.C. § 213 (1986); see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (schools operated by religious organization not subject to National Labor Relations Act); *NLRB v. Salvation Army*, 763 F.2d 1 (1st Cir. 1985) (day care center operated by religious organization subject to National Labor Relations Act).

34. See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (definition of "educational" contained in treasury regulation granting tax-exempt status to educational and charitable organizations unconstitutionally vague).

35. See REVISED MODEL NONPROFIT CORP. ACT §§ 2-4 (1987) (sections dealing with organization, purposes and powers, and names).

36. See *id.* § 1.60 (judicial relief); § 6.40 (delegates); § 7.05 (notice of meetings); § 7.06 (waiver of notice); § 7.07 (record date for determining members entitled to notice and vote); § 7.08 (action by written ballot); and § 8.01 (requirement for and duties of board).

37. *Id.* §§ 10-12 (sections dealing with amendment of articles, mergers, and sale of assets).

38. *Id.* § 14 (dissolution).

39. *Id.* § 1.70 (Attorney General); § 3.04 (*ultra vires*); § 2.02(a)(3) (requiring an initial registered agent for service of process to be named in the original articles of incorporation); § 2.04 (liability for preincorporation transactions); § 6.14 (creditor's action against member); § 16.22 (annual report for Secretary of State). See also *id.* § 5 (office and agent) and § 6 (foreign corporations).

40. *Id.* § 2.04 (liability for pre-incorporation transactions); § 6.12 (member's liability to third parties); § 6.3 (member's liability for dues, assessments, and fees); § 6.20 (resigna-

profit corporation consistent with the scope of model laws.

B. Nonprofit Laws — A Legal Hodgepodge

In 1977, I was asked to draft an entirely new nonprofit corporation law for the state of California.⁴¹ That law became effective on January 1, 1980,⁴² and has since served as a beta site for the American Bar Association's Revised Model Nonprofit Act. This task gave me the opportunity to review the existing nonprofit corporation laws in the various states. They were and still are an inconsistent hodgepodge. Some states have a general nonprofit law applicable to all nonprofit corporations;⁴³ others, most notably Delaware, do not.⁴⁴ Many states have statutes applicable to religious corporations⁴⁵ or to particular religions.⁴⁶ Some nonprofit

tion); § 6.21 (termination, expulsion, and suspension); § 6.30 (derivative suits); § 8.30 (general standards for directors); § 8.31 (director conflict of interest); and §§ 8.50-.58 (dealing with indemnification).

41. For a more detailed account of the drafting of the California Nonprofit Corporation Law, see Hone, *California's New Nonprofit Corporation Law — An Introduction and Conceptual Background*, 13 U.S.F. L. REV. 733, 734-36 (1979).

42. CAL. CORP. CODE §§ 5000-5913 (West Supp. 1988).

43. COLO. REV. STAT. §§ 7-20 to -29 (1986); CONN. GEN. STAT. ANN. §§ 33-416 to -526 (West 1987); MISS. CODE ANN. §§ 79-11-1 to -33 (1973), *repealed by* 1987 Miss. LAWS 485; TEX. REV. CIV. STAT. ANN. art. 1396-1.01 to -11.01 (Vernon 1980); WASH. REV. CODE ANN. §§ 24.03.005-.935 (1969).

44. Delaware's General Corporation Law is applicable to business corporations and nonprofit corporations. DEL. CODE ANN. tit. 8, §§ 201-398 (1983). A few of its provisions make particular reference to nonstock corporations or corporations with members. *Id.* §§ 141(j) & 228(b).

45. See CONN. GEN. STAT. ANN. §§ 33-264a to -264i (West 1987); DEL. CODE ANN. tit. 27, §§ 101-113 (1975); D.C. CODE ANN. §§ 901-916 (1981); ILL. ANN. STAT. ch. 32, para. 154-188.3 (Smith-Hurd 1970); MASS. GEN. LAWS ANN. chs. 67-68A (West 1988); VT. STAT. ANN. tit. 11, §§ 1471-1571 (1984).

46. See, e.g., CONN. GEN. STAT. ANN. §§ 33-268 to -282a (West 1987)(sections dealing with nonprofit corporations made applicable to the Protestant Episcopal Church, Methodist Church, Augustana Evangelical Lutheran Church, Lutheran Church in America, Roman Catholic Church, and The United Methodist Church); DEL. CODE ANN. tit. 27, §§ 114-118 (1975)(sections dealing with nonprofit corporations made applicable to the Protestant Episcopal Church and the Roman Catholic Church); MASS. GEN. LAWS ANN. ch. 67, §§ 39-46 & 55 (West 1988)(sections dealing with nonprofit corporations made applicable to the Protestant Episcopal Church, Reformed Episcopal Church, United Methodist Church, African Methodist Episcopal Church, Roman Catholic Church, and various Orthodox Churches); MICH. COMP. LAWS ANN. §§ 458.1-.408 (West 1988)(statutes dealing with nonprofit corporation law made applicable to the Roman Catholic Church, Methodist Episcopal Church, Wesleyan Methodist Church, Methodist Protestant Church, Free Methodist Church, Baptist Church, Baptist Convention, United Presbyterian Church, Protestant Episcopal Church, Congregational Church, Reformed Protestant Dutch Church, Christian Reformed Church, Evangelical Church, and the United Missionary Church); MINN. STAT. ANN. §§ 315.17-.20 (West 1988)(sections dealing with the Protes-

statutes prohibit indirect economic benefits from flowing to members and controlling persons.⁴⁷ Other laws allow indirect benefit, but prohibit direct benefit.⁴⁸ Some states follow the ABA's Model Nonprofit Corporation Act,⁴⁹ but others do not.⁵⁰ New York has categories of nonprofit organizations;⁵¹ most states do not.⁵² The old California law contained twelve pages of provisions specifically applicable to nonprofit corporations, but otherwise incorporated the business law except "as to matters otherwise specifically provided for" in the skeletal nonprofit law.⁵³

These nonprofit laws are the poor stepchild of the state business statutes. Legislators have paid little attention to the structure, activities, needs, and role of nonprofit corporations. Scholars, too, have devoted relatively little time and effort to the study and analysis of nonprofit statutes. The body of statutory and case law applicable to nonprofit corporations remains sparse and undeveloped.

C. Input from the Field — Providing Practical Solutions

Empirical analysis, not simply deductive reasoning, is essential in drafting an effective law. Concurrent with my review of nonprofit laws, but before I began to draft, I spent several months contacting nonprofit organizations and associations to ask a simple

tant Episcopal Church).

Some states have separate provisions for corporations sole. *See, e.g.*, CAL. CORP. CODE §§ 10000-10015 (West Supp. 1988); WASH. REV. CODE ANN. §§ 24.12.01- .40 (West 1969).

In the nineteenth century some state constitutions prohibited the incorporation of churches. Article 13, § 5 of the Missouri Constitution of 1820 provided that "no religious corporation can ever be established in this state." MO. CONST. of 1820 art. 13, § 5. Article 6, § 47 of the West Virginia Constitution provides: "No charter of incorporation shall be granted to any church or religious denomination . . ." W. VA. CONST. art. 6, § 47.

47. Note, *Nonprofit Corporations — Definition*, 17 VAND. L. REV. 336, 337-40 (1963)(discussion of the economic relationship between a nonprofit and its membership).

48. *Id.*

49. ALA. CODE §§ 10-3A-1 to -225 (1987); D.C. CODE ANN. §§ 29-501 to -599.13 (1981); HAW. REV. STAT. §§ 415B-1 to -159 (1985); KY. REV. STAT. ANN. §§ 273.161-390 (Baldwin 1988); VA. CODE ANN. §§ 13.1-801 to -940 (1985).

50. MASS. GEN. LAWS ANN. ch. 180, §§ 1-29 (West 1987); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 101-1411 (McKinney 1970); TEX. REV. CIV. STAT. ANN. art. 1396-1.10 to -11.01 (Vernon 1980).

51. N.Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney 1970).

52. ILL. ANN. STAT. ch. 32, para. 163A-188.3 (Smith-Hurd 1970); MISS. CODE ANN. §§ 79-11-1 to -33 (1973), *repealed by* 1987 MISS. LAWS 485; TEX. REV. CIV. STAT. ANN. art. 1396-1.01 to -11.01 (Vernon 1980).

53. CAL. CORP. CODE § 9002 (West 1977).

question: What problems are you having and what can be done to help solve these problems? This process continued throughout the drafting process of the California law and the Revised Act. More than one thousand copies of an Exposure Draft of the Revised Act were sent to nonprofit organizations, the Internal Revenue Service, academics, accountants, and others for their comments.⁵⁴ The input received from nonprofit organizations was crucial in shaping the law.

Drafts of the Revised Act were evaluated over an eight year period by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association.⁵⁵ Early in the process, the Subcommittee decided that the Revised Act should address the everyday problems facing nonprofit organizations. The object was to provide practical answers to these problems that were consistent with generally perceived concepts of fairness. Each problem and proposed solution was considered in light of its effect on nonprofit organizations, their members, and the public.

D. Holding Nonprofit Corporations' Feet to the Fire

There was a general consensus among members of the Subcommittee that nonprofit corporations should be required to act in a manner consistent with their representations to the general public. A large number of nonprofit organizations hold themselves out as operating for a public or charitable purpose. These groups came to be known as public benefit corporations.⁵⁶ The American Red Cross, the Museum of Modern Art, and Case Western Reserve University are examples of public benefit corporations.

Other nonprofit corporations hold themselves out as operating for the mutual benefit of their members. These organizations came to be known as mutual benefit corporations.⁵⁷ Trade associations, such as the California Wine Institute, and clubs, such as the Harvard Club in New York, are examples of mutual benefit corporations.

There was a long battle over the question of how churches and other religious organizations should be treated. Some thought they were public benefit organizations. The Subcommittee initially

54. See REVISED MODEL NONPROFIT CORP. ACT xix (1987).

55. *Id.*

56. *Id.* at xxiv-xxviii.

57. *Id.* at xxviii-xxix.

could not agree on whether they should be treated as public benefit corporations, mutual benefit corporations, or as a separate category of religious corporations. After considerable public input, a majority of the Subcommittee decided that corporations purporting to operate for religious purposes should be treated as "religious corporations."⁵⁸ The Revised Act provides for differential treatment of these organizations based on societal consensus and constitutional requirements.⁵⁹

These three categories are not intended to represent the essence of nonprofit corporations. They represent only one way, although an important way, of looking at nonprofit corporations. The categorizations are not based on the essence of the organizations, but on representations they make to the public, their members, and others. If an organization purports to benefit the public, or to provide services or facilities for the private enjoyment of its members, or to engage in religious activities, then it is reasonable to provide rules which are consistent with these representations.

E. Simplicity as a Precondition of Utility

Simplicity is a precondition of utility. For this reason, over ninety percent of the provisions of the Revised Act treat all nonprofit corporations the same way. This uniform approach is possible because the formation, operation, restructuring, and dissolution of nonprofit corporations follow the same general provisions. For example, nonprofit corporations file articles,⁶⁰ give notices,⁶¹ and qualify to transact business⁶² in similar ways, regardless of the nature of their activities. The special provisions that apply to only a public benefit,⁶³ a mutual benefit,⁶⁴ or a religious corpora-

58. *Id.* at xxix-xxx. The Attorney General may bring an action to enjoin illegal activity or to dissolve a corporation violating the public policies or a state or which has obtained its articles through fraud. *See* REVISED MODEL NONPROFIT CORP. ACT §§ 1.30 and 14.30.

59. *See, e.g., id.* § 1.80 (religious corporations' constitutional rights); § 6.21 (termination, expulsion, or suspension); § 7.03 (court ordered meetings); § 8.30 (ability of directors to rely on religious authorities); § 14.30 (grounds for judicial dissolution); and § 14.32 (receivership or custodianship).

60. *See id.* §§ 1.20-.28 (filing documents); § 2.01 (incorporators); § 2.02 (articles of incorporation); and § 2.03 (incorporation).

61. *See id.* § 1.41 (notice); § 5.03 (resignation of registered agent); § 5.04 (service on corporation); § 7.05 (notice of meeting); and § 7.06 (waiver of notice).

62. *See id.* ch. 15 (foreign corporations).

63. *See id.* § 6.11(b) (transfers); § 6.30(c) (notice to attorney general in derivative actions); § 8.31(b) (director conflict of interest); § 8.55(d) (notice to attorney general of

tion⁶⁵ comprise less than ten percent of the Revised Act.

As a model act grows in complexity it is less likely to be adopted, followed, or understood. The California law, unlike the Revised Act, treats public benefit,⁶⁶ mutual benefit,⁶⁷ and religious organizations separately.⁶⁸ This tripartite treatment adds complexity to and needlessly stresses the differences between nonprofit corporations. The Revised Act treats the three categories together, thereby highlighting their similarities.

Skillful but limited application of the "what if" game is crucial in developing a useful model law. Lawyers and particularly law professors often ask: "What if this? What if that?" They then provide legal solutions to the possible scenarios developed by these questions. Unfortunately, this is often done without regard to the likelihood and consequences of an event occurring.

The overuse of the "what if" game results in a complex law answering too many questions, so that only a few experts can understand it. Such laws are not only counterproductive, but, in the nonprofit area, catastrophic. Generally, the retention of specialized legal expertise is an expensive undertaking. Nonprofit corporations would be forced to divert funds from their substantive activities in order to comply with a complex law's provisions. Many organizations simply would not comply with an overly complex model nonprofit law, and those that did would do so only at great economic and organizational expense.⁶⁹

A model law should provide general rules and safe harbors, and answer some common questions in detail. Implementation should be left to the nonprofit corporations themselves. In most instances the organizations will find workable and fair solutions. When all else fails, the courts may intervene.

proposed indemnification); § 11.02 (limitations on mergers of public benefit or religious corporations); § 12.02 (notice to attorney general on sale of assets); and § 13.01 (prohibited distributions).

64. See *id.* at § 6.11(a) (transfers); § 8.31(c) (director conflict of interest); and § 13.02 (authorized distributions).

65. See *supra* note 57.

66. CALIF. CORP. CODE §§ 5110-6910 (West Supp. 1988).

67. *Id.* §§ 7110-8910.

68. *Id.* §§ 9110-9690.

69. These comments are applicable to the vast majority of nonprofit organizations. There are a few prosperous nonprofit hospitals, educational institutions, churches, charities, trade associations, and clubs, but even they would be better off spending their funds on substantive activities.

“The best is the enemy of the good.”⁷⁰ This is particularly true when attempting to draft a model law. The law should recognize and facilitate societal consensus, incorporate existing legal standards, and not attempt to solve every possible problem. It should apply new concepts only if those concepts are useful and desirable. On the other hand, incorporating too many new concepts on which there is no general consensus, and on which reasonable people can differ, will preclude the adoption of any model law. If a model law deviates too far from political and societal norms, it will become an academic curiosity.⁷¹

CONCLUSIONS

The Revised Act:

1) Is based on an empirical analysis of the problems faced by nonprofit corporations and attempts to provide practical solutions to those problems;

2) Is relatively simple in structure. This allows for its use by nonexperts and lay people and makes its universal adoption more likely;⁷²

3) Recognizes the unique and diverse nature of nonprofit corporations and allows them to use appropriate structures, procedures, and control mechanisms;

4) Promotes ease of formation and operation while providing fundamental protection to members and directors;

5) Recognizes that nonprofit corporations hold themselves out as benefiting the public, benefiting their members, or engaging in religious activities. Value judgments are applied consistently with these representations. Individuals may quarrel with these value judgments, but the structure of the Revised Act allows an ongoing dialogue that focuses on the proper issues.

70. “Le mieux est l’ennemi du bien.” (Il meglio e l’inimico del bene). VOLTAIRE, 2 *DICTIONNAIRE PHILOSOPHIQUE* 49 (Lebigre Freres ed. 1834).

71. This approach must not be overdone. Taken to its extreme it would result in a mediocre law providing no novel solutions but simply incorporating pedestrian ideas on which there was complete consensus.

72. The Revised Act is structurally similar to the Model Business Corporation Act. It emulates the law’s provisions in regard to administrative filings with state authorities. This makes it easier for state legislatures to evaluate the nonprofit law, provides less incentive for state bureaucracies to oppose the law, and allows lawyers and others to work with a familiar set of rules.

