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CHARITABLE FRAUD IN NEW YORK: THE ROLE OF THE PROFESSIONAL FUND RAISER

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NOTES

CHARITABLE FRAUD IN NEW YORK: THE ROLE OF THE PROFESSIONAL FUND RAISER

I. INTRODUCTION

Total contributions for charitable[1] causes have increased dramatically over the years,[2] with Americans contributing an annual record

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1. "Charitable," in a legal sense, is defined as "every gift for a general public use, to be applied consistent with existing laws, for benefit of an indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical, or social standpoint." BLACK'S LAW DICTIONARY 212 (5th ed. 1979).

2. *See* Note, *The Regulation of Charitable Fundraising and Spending Activities*, 1975 WIS. L. REV. 1158, 1158. The rise of the charity business since World War I is attributed to the use of the professional fund raiser, the expansion of federated Community Chest and United Fund campaigns, and the increased number of small donors. *Id; see also* S. CUTLIP, FUND RAISING IN THE UNITED STATES: ITS ROLE IN AMERICA'S PHILANTHROPY 3 (1965) [hereinafter CUTLIP] ("the public relations practitioner and the professional fund raiser have played vital roles" in rise of charity business).

In 1964, charity was referred to as the fourth largest industry in the country. Forer, *Relief of the Public Burden: The Function and Enforcement of Charities in Pennsylvania*, 27 U. PITT. L. REV. 751, 755 (1966). Today, the charity sector may be the largest industry in terms of employment. C. BAKAL, CHARITY U.S.A. 12 (1979) [hereinafter BAKAL]. According to one study, in 1974 the non-profit charitable sector employed 4.6 million persons, translating into 5.2% of the American workforce. *Id.* Another study estimated that the philanthropic labor force—philanthropic organizations were defined in the article as those private, tax-exempt non-profit groups which afford donors a tax deduction for their contributions—grew by 43% between 1972 and 1982, compared to a 35% increase in the for-profit service industries. Rudney & Weitzman, *Trends in Employment and Earnings in the Philanthropic Sector*, MONTHLY LABOR REVIEW 16 (Sept. 4, 1984). Also, in that same ten-year span, philanthropic employment grew at a 3.6% annual rate, compared to a two percent increase for all wage and salary workers. *Id.* at 18.

When one takes into account the amount of volunteer work being performed, the specter of the charity industry looms even larger. *See, e.g.*, R. LISTON, THE CHARITY RACKET 133 (1977) [hereinafter LISTON] (according to a 1973 Gallup poll, 38 million men and women had volunteered for charity at least two hours a week). It was estimated that in the early 1970s 45-55 million persons were volunteer workers for charitable causes, BAKAL, *supra*, at 13, and that six billion man-hours were contributed annually to philanthropy in the United States, at a value of $26 billion. COMMITTEE ON OFFICE OF ATT'Y GEN., NAT'L ASS'N OF ATT'YS GEN., STATE REGULATION OF CHARITABLE TRUSTS AND SOLICITATIONS 28 (1977) [hereinafter NAAG] (citing REPORT OF THE COMM'N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA: TOWARD A STRONGER VOLUNTARY SECTOR 55 (1975)).

$93.6 billion[3] in 1987[4]. Individual donors continue to be the largest contributors, accounting for approximately 82% of all charitable contributions in 1987.[5] Although estimates vary, it is acknowledged that each year charitable fraud[6] is a multi-million dollar business.[7] New

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3. *See* N.Y. Times, June 26, 1988, at A18, col. 1. According to the American Association of Fund-Raising Counsel (AAFRC), the rate of increase of charitable donations in 1987 was the lowest in 12 years. *Id.* The AAFRC estimates that contributing was up 6.5% in 1987, compared to an increase of 9.2% the previous year. *Id.*; *see also* AMERICAN ASSOCIATION OF FUND-RAISING COUNSEL, GIVING U.S.A. 13 (1987)[hereinafter GIVING U.S.A.]. In 1955, contributions were estimated at $7.7 billion, and ten years later that figure jumped to $14.75 billion. In 1975, contributions almost doubled again, reaching $28.61 billion, ballooning to $79.72 billion in 1985; the latest figures show total giving for 1987 at $93.6 billion. *Id.* Such large jumps were not anticipated, as evidenced by Note, *Charitable Solicitations Acts—An Attempt to Curb Charity Cheats*, 16 DE PAUL L. REV. 472 (1967) (citing CUTLIP, *supra* note 2), which had predicted that by 1970 Americans would contribute $15 billion annually, considerably short of the actual figure.

4. Religious organizations continue to be the largest recipients of Americans' contributions. They received $43.6 billion in 1987. Health care causes were next at $13.6 billion, followed by hospitals at $12.26 billion and human services at $10.8 billion. In addition, donations to arts and cultural causes totaled $6.4 billion, while human services brought in $9.8 billion. N.Y. Times, June 26, 1988, at A18, col. 5.

5. The year 1985 marked the first time in 16 years that individual Americans gave more than two percent of their personal income to philanthropy. N.Y. Times, May 7, 1986, at C13, col. 1 (citing *Giving U.S.A.*, *supra* note 3, the annual report by the AAFRC). The $66 billion donated by individuals in 1985—up from the previous year's $60.6 billion—has been attributed to the increased number of baby boomers. "The significant increase reflects the larger number of Americans now in the 35-to-65 age group, the prime years of giving," explained Dr. Ralph L. Nelson, the economist who devised the Association's methods of estimating individual donations. *Id.* Somewhat surprisingly, many of these individuals in the past were in middle-to-low income brackets. *See* Note, *supra*, note 2, at 1158-59 nn.4-5 (citing United States Treasury Department statistics). Because individuals and small donors account for the majority of donations and possess less influence than wealthy corporations, they are forced to rely on their states' regulatory protections. *Id.* at 1158-59.

6. In the context of this Note, "charitable fraud" will encompass the numerous ways in which donations fail to advance the charitable cause for which the funds were expressly or implicitly solicited. As Justice Rehnquist remarked in Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984), "There is an element of 'fraud' in soliciting money 'for' a charity when in reality that charity will see only a small fraction of the funds collected." *Id.* at 980 (Rehnquist, J., dissenting). In Rehnquist's view, the failure of a charity to disclose high fund raising costs amounts to fraud because "a high fund raising fee itself betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited." *Id.* at 980 n.2. For a discussion of *Munson*, see *infra* text accompanying notes 55-64.

A New York-created committee, in discussing charitable fraud, specified five areas where "there is a considerable breach of the public trust by the unscrupulous who operate in [the charity] field." *See* CUTLIP, *supra* note 2, at 444. Essentially, these five areas are:

1) Misrepresentation—this included groups that misrepresented their charitable programs, or held themselves out to do things which were beyond their certifi-

York State is faced with an especially difficult task since New Yorkers annually donate approximately $5 billion to more than 17,000 charitable organizations.[8]

Today many charities hire professional fund raisers[9] to solicit con-

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cate of incorporation powers;

2) Fraudulent Sponsorships—this included the unauthorized use of other's names when soliciting funds;

3) Inadequate Records—this led to the diversion of funds by fund raisers or administrators;

4) Fronts—this included charities which were in reality commercial enterprises, or in some instances, all out phonies;

5) High Costs—this included excess fundraising and administrative expenses.

Id.

For a detailed discussion of the committee's findings, see *infra* text accompanying notes 79-88.

One popular fraudulent scheme involves the sale of goods. The public is often promised that certain goods are produced by the group to whom the benefits will inure. The handicapped have often been exploited by fraudulent fund raisers. In reality, the number of handicapped persons producing the goods is negligible, the goods are grossly overpriced, and the benefits to the handicapped are minimal. *See generally* NAAG, *supra* note 2, at 40. Another common example of charitable fraud occurs during the solicitation of advertisements from the public. For example, in Hyland v. Congress of Racial Equality (CORE), No. C-5087-75 (N.J. Super. Ct., Essex County August 13, 1976), it was found that CORE was misrepresenting itself, and intimidating and harassing the public in its solicitation of advertisements for its publication. CORE allegedly sent fraudulent invoices to various businesses, demanded payment for unordered merchandise, and represented itself as a governmental agency. *Id.*

Direct mail, an increasingly popular method employed by charities to raise money, is "vulnerable to fraud and misrepresentation," according to Ed Edgerton, president of the National Association of State Charity Officials and the chief charity regulator in North Carolina. Washington Post, Jan. 18, 1986, at A13, col. 4. Most states do not require extensive auditing of charities; therefore, the integrity of direct mail fund raising depends primarily on a charity's internal controls. *Id.*

7. *See, e.g.*, NAAG, *supra* note 2, at 42; *see also* BAKAL, *supra* note 2, at 290 (noting that Council of Better Business Bureaus' survey ranked charity rackets among the top four of country's swindles). One attributed reason is that "[t]he generosity of Americans is equalled by their gullibility." *Id.* at 289.

8. NEW YORK STATE DEPARTMENT OF LAW, 1985 ANNUAL REPORT 44.

9. The N.Y. Executive Law defines a professional fund raiser as:

> [a]ny person who directly or indirectly: (a) for compensation or other consideration plans, manages, conducts, carries on, or assists in connection with a charitable solicitation or individually solicits or who employs or otherwise engages on any basis another person to solicit in this state for or on behalf of any charitable organization or any other person, or who engages in the business of, or holds himself out to persons in this state as independently engaged in the business of soliciting for such purpose; (b) solicits by telephone or door-to-door and advertises a sale, performance, or event will benefit a charitable organization; or (c) who advertises a sale, performance, or event will benefit a charitable organization but is not a commercial co-venturer. A bona fide officer, volunteer or employee of a charitable organization or fund raising counsel shall not be deemed a professional fund raiser.

tributions.[10] Accordingly many states are concerned that professional fund raisers retain a majority of the funds, while the charities receive only a small percentage of the collected donations.[11]

New York, a pioneer[12] in the field of regulating charitable organizations,[13] recognized the need for increased monitoring. At the request

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N.Y. EXEC. LAW § 171-a(4) (McKinney Supp. 1988). For the New York definition of a commercial co-venturer, see *infra* note 117.

10. In 1978, the AAFRC estimated that its 32 member firms were collectively involved in 90% of the nation's fund drives, helping their clients raise at least $2 billion annually. *See* BAKAL, *supra* note 2, at 389; *see also infra* text accompanying notes 40-41 for discussion of a case in which fund raisers retained excessive percentages of collected donations.

In 1983, New York Attorney General Robert Abrams issued an opinion recognizing the increased role of professional fund raisers. 83-F7 Op. Att'y Gen. N.Y. 24 (1983). The Attorney General was asked whether a business corporation jointly owned by two not-for-profit organizations, which conducted computerized fundraising drives, was a professional fund raiser under the New York statute. The Attorney General was forced to distinguish two earlier opinions in which he had stated that a public relations firm and an advertising agency were not professional fund raisers, although they had provided charitable organizations with their services. He stated, "It is clear that in these early opinions, we took the position that an entity providing a service to business generally did not become a professional fund raiser simply by providing that same service to a charitable organization that was doing its own fund raising." *Id.* at 24-25. Finding the business organization a professional fund raiser under the statute, the Attorney General compared past distributions of solicitations with the practices of the subject distributor, and stated that the latter's practices were:

> a far cry from the distributor of advertising of 30 years ago. In those days, the distributor simply delivered house to house or by mail to geographical areas. In today's computer world, solicitations are sophisticated. . . . An organization like [the subject distributor] provides a charity with the expertise necessary for efficient fund raising. In short, an entity that in effect says to a charity: Send us your solicitation and we'll do everything else necessary to raise funds for you—is a professional fund raiser.

Id. at 25.

The Attorney General then concluded that "an organization that provides all the services necessary to conduct a fund-raising drive is a professional fund raiser." *Id.*

11. Unfortunately, not all professional fund raisers are reputable . . . . A reputable fund raiser does not solicit funds on his own behalf . . . . A disreputable fund raiser siphons off funds in various ways. One . . . is to engage in *costly fund-raising methods* that divert 85 or 90 percent of the donations into the hands of the fund raiser. Another method is to take a moribund charity or nonprofit association that has *tax-exempt status* and to use it *as a front* for a phony charity created by the fund raiser. The phony charity launches a quick, blitz mail campaign. The money received is *consumed in expenses* . . . and paid to the fund raiser and his associates in *salaries and consulting fees.*

LISTON, *supra* note 2, at 61-62 (emphasis added).

12. New York's resulting legislation was considered the most comprehensive in the charity field at the time. *See* E. NEWMAN, LAW OF PHILANTHROPY, 41 (1955); *infra* text accompanying notes 79-85.

13. The New York statute defines a "charitable organization" as "[a]ny benevolent, philanthropic, patriotic, or eleemosynary person or one purporting to be such." N.Y.

of the Department of Law, a proposed amendment to Article 7-A of

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EXEC. LAW § 171-a(1) (McKinney Supp. 1988).

Most state registration statutes allow certain types of groups to be exempt from filing, most notably religious organizations. *See, e.g., Id.* § 172-a(1). New York exempts corporations organized under its religious corporations law and other organizations "operated, supervised, or controlled by or in connection with a religious organization." *Id.* In addition, New York exempts: (1) educational institutions; (2) fraternal, patriotic, social, alumni organizations, and New York State chartered historical societies, provided solicitation of contributions is confined to their own membership; and (3) persons requesting contributions for the aid of any individual, provided that the individual is specified by name at the time of solicitation and all contributions collected are presented to the named beneficiary. *Id.* at § 172-a(2)(a) to (c).

For a discussion of three considerations which led states to allow these types of exemptions, see Note *supra*, note 2, 1183 n.2 (discussing inability to regulate religious organizations based on establishment clause of first amendment, administrative convenience, and lobbying strength); *see also* Larson v. Valente, 456 U.S. 228 (1982) (court invalidated, on establishment clause grounds, Minnesota statute which imposed requirements only on religious organizations which solicited more than 50% of its funds from non-members); Attorney General v. International Marathons, Inc., 392 Mass. 370, 467 N.E.2d 51 (1984) (charitable solicitation statute held inapplicable to promoters who received funds from sponsors in return for commercial opportunity provided); Heritage Village Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980) (state solicitation act, which made religious groups soliciting contributions from non-members subject to its scope, struck down as an unconstitutional establishment of religion); Commonwealth v. Association of Community Orgs. for Reform Now, 502 Pa. 1, 463 A.2d 406 (1983) (adopting test that organization is not charitable where it exists solely for benefit of its membership, with any benefits that may attach to non-members being incidental).

Fund raisers sometimes argue that their activities fail to fall within the purview of a certain state regulatory scheme and therefore are not subject to its reporting and registration requirements. *See, e.g.,* Degnan v. Nordmark and Hood Presentations, Inc., 177 N.J. Super. 186, 425 A.2d 1091 (Super. Ct. App. Div.), *appeal dismissed*, 87 N.J. 427, 434 A.2d 1098 (1981), in which a fund raiser entered into a contract to solicit contributions on behalf of charities by conducting short-lived events such as circuses. The court, noting that the New Jersey statute must be "liberally construed," *id.* at 192, 425 A.2d at 1094, found that the fund raiser fell within the statutory proscription since it was unregistered and retained a fee higher than permitted. *Id.* The court quoted the legislature's intent:

> This legislation addresses itself particularly to abuses which have existed in the case of fund-raising campaigns of relatively short duration, such as an individual event, in which professional fund raisers are called in to sell tickets and, in the process, retain a substantial part of the proceeds as their fee. In such cases, little of the money raised eventually goes to the charity for which the event was held.

Id. (quoting statement of legislative purpose following N.J. STAT. ANN. § 45:17A-8 (West Supp. 1988); *see also* Jones, *Solicitations—Charitable and Religious*, 31 BAYLOR L. REV. 53, 62-63 (1979) "All types of solicitors cannot be dealt with the same way. Depending on whether the solicitation is of a commercial, charitable, religious, political, educational, or informational nature, different interests are involved and the degree of protection afforded the solicitor will vary accordingly." *Id.*

There has been a great deal of controversy concerning the states' refusal to legislate against the religious solicitation of funds, because religious organizations are the number

the Executive Law—which currently governs the regulation of charities in New York State—was enacted, effective July 1, 1987.[14] In general, the law requires greater disclosure of information by those who solicit charitable donations in New York, strengthens the enforcement options by the State Attorney General and Secretary of State, and modifies certain reporting and registration provisions required of charitable organizations.

Before examining the details and projected impact of the new law, this Note will first explore the historical development of regulating charities, including the constitutional limitations encountered. It will then examine the modern regulation of charities, focusing on New York, and also study the problems which prompted many states to enact stronger legislation in the field. Finally, this Note will propose a scheme which, in light of the United States Supreme Court's recent decisions in the area, will survive constitutional attack while at the same time protecting the public without unduly burdening charities.

II. The Historical Development of Regulating Charitable Solicitation

The earliest method of regulation, such as the legislation enacted by New York in 1954, required charities to acquire solicitation permits through registration.[15] The states' authority to require such reporting by charities prior to solicitations was established early,[16] and such stat-

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one recipient of contributions. *See, e.g.*, N.Y. Times, Jan. 20, 1985, at 48, col. 3 (private charity officials calling for stricter governmental regulation of religious groups soliciting funds from public).

14. N.Y. Exec. Law §§ 171-a to 177 (McKinney 1982 & Supp. 1988) (originally enacted as Act of Oct. 1, 1977, L. 1977, ch. 669, § 5, 29).

15. *See, e.g.*, N.Y. Soc. Welfare Law §§ 481-483(b)(McKinney 1976)(repealed 1977). The New York law was primarily a registration statute which deemed solicitation by unregistered organizations a fraud on New York citizens and authorized the Attorney General to enjoin such violations. *Id.* § 482(k)(4). For a detailed discussion of the 1954 New York legislation, see *infra* text accompanying notes 79-88. Before enactment of specific legislation to regulate charities, the state relied on less effective and comprehensive means such as penal prohibitions. *See, e.g.*, People v. Gellard, 296 N.Y. 516, 68 N.E.2d 600 (1946)(defendants, falsely representing that their enterprise was a charitable one, were convicted of conspiracy).

In general, "charitable solicitation acts have the dual purpose, on one hand of protecting donors and donees and, on the other, of promoting the public's perception of the integrity and efficiency with which charitable funds are raised." Brief for Amicus Curiae, Attorney General of the Commonwealth of Massachusetts at 23, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)(No. 82-766).

16. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). For a detailed discussion of *Cantwell*, see *infra* text accompanying notes 18-22; *see also* Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943); City of Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

utes were often upheld by courts as a legitimate exercise of police power.[17] The Supreme Court, however, has limited such regulation in certain circumstances. For example, in *Cantwell v. Connecticut*,[18] the Court struck down a state provision[19] which empowered a state official

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17. The Supreme Court has recognized that there is a legitimate state interest in "protecting its citizens from abusive practices in the solicitation of funds for charity . . . ." Larson v. Valente, 456 U.S. at 248. For earlier state court cases upholding a state's regulation of charitable solicitation as a legitimate exercise of a state's police power, see *Ex parte* Williams, 345 Mo. 1121, 139 S.W.2d 485 (1940) (upheld conviction of man who violated statute which regulated solicitation for charitable or other purposes), *cert. denied*, 311 U.S. 675 (1940); Freidman v. Framer, 208 Misc. 236, 139 N.Y.S.2d 331 (Magis. Ct. 1954)(affirming conviction for solicitation of contributions in public without license); Cincinnati v. Epley, 116 Ohio App. 245, 185 N.E.2d 483 (1962) (upheld conviction of defendant for violating ordinance requiring registration of persons soliciting charitable contributions); Commonwealth v. Creighton, 111 Pa. Super. 302, 170 A. 720 (1934) (convictions upheld for soliciting money for charitable purposes without license); Terrell v. State, 210 Tenn. 632, 361 S.W.2d 489 (1962) (statute prohibiting unauthorized solicitation of advertising and granting authority to commissioner of safety to approve groups for solicitation declared constitutional delegation of legislative power because commissioner's choice reviewable).

As the Supreme Court stated in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), "Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the first amendment." *Id.* at 632. For a detailed discussion of *Schaumburg*, see *infra* text accompanying notes 47-54.

In *Ex parte* Dart, 172 Cal. 47, 155 P. 63 (1916), Justice Shaw, in a concurring opinion, established the foundation to regulate charitable solicitations in California:

> The occupation of soliciting contributions to charitable purposes is clearly so far subject to the police power that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein and for the application and use of the contributions received to the purposes intended, in order to prevent unscrupulous persons from obtaining money . . . under the pretense that they were to applied to charity, and to prevent the wrongful diversion of such funds to other uses, or to secure them against waste. Measures reasonably tending to secure these ends are unquestionably valid.

Id. at 56, 155 P. at 66-67 (Shaw, J., concurring).

But cf. Hoyt Bros. Inc. v. City of Grand Rapids, 260 Mich. 447, 245 N.W. 509 (1932)(invalidating city ordinance which authorized city official to determine whether particular charity was "worthy" and whether applicants were "fit and responsible"). For a discussion of other instances in which courts invalidated solicitation statutes because of overbroad discretion vested in a state official, see *infra* text accompanying notes 19-25.

18. 310 U.S. 296 (1940).

19. The statute provided, in pertinent part:

> No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause . . . unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity . . . .

with discretionary authority to determine whether a particular cause[20] was worthy of a solicitation permit. The defendants in *Cantwell,* members of Jehovah's Witnesses, were charged with violating a Connecticut statute prohibiting solicitation unless such group received approval by the state.[21] The Court reasoned:

> Without doubt a State may protect its citizens from fraudulent solicitation by requiring [a solicitor] . . . to establish his identity and his authority to act for the cause which he purports to represent. . . . [B]ut to condition the solicitation of aid . . . upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[22]

Accordingly, cases following *Cantwell* held statutes constitutional only if an objective standard was employed in determining whether to license solicitations by a group. In *American Cancer Society v. City of Dayton,*[23] for example, a court affirmed that the solicitation of charitable funds is subject to a state's police power but nevertheless invalidated a regulation which restricted licensing to groups which, in the state's view, would benefit the community. The ordinance found unconstitutional in *American Cancer* granted city officials the discretion to determine whether the objective of a charitable organization was already adequately performed by other groups in the community.[24] The court stated: "We know of no law which authorizes reasonable regulation to include the power to determine which of two equally charitable organizations may be permitted to solicit in a particular field."[25]

Id. at 301-02 (quoting CONN. GEN. STAT. § 6294 (West Supp. 1937)).

20. Although a religious organization was involved, the Court implied that the same concerns are also true of charitable organizations. *See Cantwell,* 310 U.S. at 304-05.

21. *Id.* at 301-02.

22. *Id.* at 306-07 (footnote omitted); *cf. Ex parte* Williams, 345 Mo. 1121, 139 S.W.2d 485 (rejecting argument that ordinance vested issuing board with arbitrary, unreasonable, and oppressive authority), *cert. denied,* 311 U.S. 675 (1940); *Ex parte* White, 56 Okla. Crim. 418, 41 P.2d 488 (1935) (municipal ordinance prohibiting solicitation of funds for charity without permit from mayor-appointed committee appointed by mayor held constitutional). *But see* Commonwealth v. Creighton, 111 Pa. Super. 302, 170 A. 720 (1934)(holding that issuing board has power to determine within reasonable limits "the worthy from the unworthy").

23. 160 Ohio St. 114, 114 N.E.2d 219 (1953).

24. *Id.* at 121, 114 N.E.2d at 223.

25. *Id.* at 122, 114 N.E.2d at 225; *see also* Holy Spirit Ass'n for Unification of World Christianity v. Hodge, 582 F. Supp. 592 (N.D. Tex. 1984)(ordinance authorizing denial of charitable solicitations permit if "the project is worthy [but] does not present a reasonably urgent need at the particular time," held unconstitutional because of vagueness and because denial of permit on these grounds would constitute content-based regulation of free speech); Conlon v. City of North Kansas City, 530 F. Supp. 985 (W.D. Mo. 1981)(in-

In *Gospel Army v. Los Angeles*,[26] a city regulation was upheld on the ground that the official authorized to issue a solicitation permit had no authority to deny an organization the right to solicit if the required information was properly filed, regardless of whether the official disagreed with or objected to the group's cause.[27] The Los Angeles ordinance required that solicitors show prospective donors a printed card, which contained information deemed valuable to the prospective contributor.[28] This ordinance was one of the first that placed an affirmative duty on a charitable organization to present information to a donor *whether or not requested*.[29]

This type of regulation, known as point-of-solicitation disclosure, is premised on the belief that disclosure of the specific purpose for which donations will be applied, as well as disclosure of an organization's financial records, including its fundraising and other administrative costs, would protect the public by fostering more informed decision making before contributions are made.[30] Such laws, however, have drawn many opponents who contend that the requirement to provide

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validating city code provision which failed to provide narrow, definite, and objective standards in determining whether solicitation certificates should be granted and vested council with authority to determine which particular cause was in the public good); Swearson v. Meyers, 455 F. Supp. 88 (D. Kan. 1978) (charitable solicitation licensing ordinance empowering city officials to deny permit on various grounds, including expenditure of less than fixed percentage of total receipts on charitable purposes, held unconstitutionally vague); Hillman v. Britton, 111 Cal. App. 3d 810, 168 Cal. Rptr. 852 (1980) (charitable solicitation licensing ordinance held to violate procedural and substantive due process); People v. Knueppel, 117 Cal. App. 3d 958, 173 Cal. Rptr. 466 (1980) (California charitable solicitation statute invalidated because it vested state official with power to determine the worthiness of charitable cause, thus exercising prior restraint on solicitations); League of Mercy Ass'n v. Walt, 376 So. 2d 892 (Fla. Dist. Ct. App. 1979) (upholding Jacksonville ordinance which required charitable organizations intending to solicit contributions or sell goods to obtain permit on ground that it set forth sufficient guidelines to enable issuing city official to grant licenses and did not bestow upon him unbridled discretion to determine what constituted charitable endeavor).

26. 27 Cal. 2d 232, 163 P.2d 704 (1945), *appeal dismissed on jurisdictional grounds*, 331 U.S. 543 (1947).

27. The Supreme Court of California stated that, "The board has no discretion to withhold a license if the applicant's good character and reputation and his financial responsibility are established and the required bond is filed. The board is not free to deny licenses, but must act reasonably in light of the evidence presented." *Id.* at 249, 163 P.2d at 714.

Furthermore, the ordinance was constitutionally valid because "[t]he provision empowering the board to revoke a license in case of unfair . . . or fraudulent practices of solicitation is neither vague nor uncertain." *Id.*

28. *Id.* at 234, 163 P.2d at 706.

29. Most state regulations simply provide that the charitable organization must register and report to the state or sometimes that the charity inform the public where they can obtain additional information on the group. For a further discussion of the point-of-solicitation regulation, see *infra* text accompanying notes 30-31, 134-156.

30. *See, e.g.*, Note, *supra* note 2, at 1164.

information to every donor whether or not asked was costly, burdensome, misleading, and unnecessary.[31] Consequently, a compromise between point-of-solicitation disclosure and no disclosure at all was usually enacted by states in order to provide the public with some information about soliciting charitable organizations.[32] This middle-ground, sometimes referred to as "demand disclosure," requires charities to provide information only upon a donor's request. Demand disclosure, however, is often insufficient because most solicitations invite and often encourage an immediate contribution—for example, by mail—and any disclosure of information will probably occur after-the-fact.[33]

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31. *See* B. HOPKINS, CHARITIES UNDER SIEGE—GOVERNMENT REGULATION OF FUNDRAISING 96-109 (1980) (increased direct costs include printing and mailing costs of disclosure notices, increased amount of time used during solicitation, and increased media costs; indirect costs include reduced effectiveness of acquiring donations due to direct disclosure).

Normal fundraising costs are dependent upon six factors: (1) the age of agencies, (2) the campaign technique, (3) geographic and population make-up, (4) acts of God, (5) inflation, and (6) and bequest giving. Note, *supra* note 2, at 1178-79 (citing National Health Council).

Because of tax changes and the state of the economy, charities are employing alternate methods of fundraising. N.Y. Times, Nov. 29, 1987, at C17, col. 1. Such methods include cooperative ventures with businesses—for instance, solicitation for "affinity cards"—and the sending of videotapes to potential donors. *Id.*

32. *See generally* NAAG, *supra* note 2, at 28-35. Time, place, and manner regulations became prevalent. Massachusetts, in addition to limiting payment to professional fund raisers to 15% of the collected donations, prohibited the use by charities of paid telephone solicitors to raise funds; however, the Massachusetts Supreme Judicial Court ruled unconstitutional the prohibition against paid telephone solicitors. Planned Parenthood League of Mass., Inc. v. Attorney General, 391 Mass. 709, 464 N.E.2d 55, *cert. denied*, 469 U.S. 858 (1984). For support of the decision, see Note, *Constitutional Law—Free Speech—Limitation of Fundraising by Charities*, 69 MASS. L. REV. 139 (1984). "[C]harities are engaged in numerous educational, social, environmental and humane endeavors. Restricting free speech undermines their social utility." *Id.*; *see also* Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir. 1985)(anti-solicitation ordinance barring door-to-door canvassing for charitable and political causes in residential areas between hours of 8 p.m. and 9 a.m. held unconstitutional); Association of Community Orgs. for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983)(striking ordinance that prohibited charitable canvassing between 6 p.m. and 9 a.m.); Optimist Club of North Raleigh v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982)(North Carolina statute making it misdemeanor for professional solicitor to solicit charitable contributions by telephone declared unconstitutional because less restrictive means were available to prevent abuses, such as existing comprehensive state scheme requiring registration and disclosure); 79 N.Y. Ag. Op. Att'y Gen. 114 (1979)(municipality may not prohibit all door-to-door solicitations by not-for-profit charitable and religious corporations). *But cf.* Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984) (upholding four ordinances prohibiting door-to-door canvassing after 5 p.m.).

33. *See* Note, *Secretary of State v. Joseph H. Munson Co.: State Regulation of Charitable Fundraising Costs*, 5 PACE L. REV. 489, 523 (1985). For a further discussion of

III. Modern Regulation of Charitable Solicitation

The ineffectiveness of state registration and reporting requirements led many states to believe there was a need to directly regulate the solicitation and use of charitable funds.[34] The underlying goals of this method are to prevent fraud and to ensure that the collected funds are used for their purported purpose. Thus, in addition to reporting requirements,[35] states began imposing statutes which restricted the percentage of collected funds a charity may apply toward fundraising costs.[36] By 1984, the "simplicity and ease of administration"[37] of percentage limitation statutes led twenty-two states to enact them.[38]

New York's demand disclosure provisions, see *infra* text accompanying notes 132-33.

34. Direct regulation mandates that charities comply with regulations which restrict the amount they may spend on fundraising, rather than merely requiring them to register with the state.

Many people, however, remain skeptical regarding the effectiveness of even direct regulation, claiming a lack of enforcement because of understaffing. "[O]ne does not have much protection against unscrupulous or inefficient charities. . . . 'Most states are woefully understaffed for the purpose of regulating charitable solicitations.' " BAKAL; *supra* note 2, at 429 (quoting Report of the Commission on Private Philanthropy and Public Needs).

35. By 1974, 25 states had annual reporting requirements for charities which solicited funds, and by 1977, 30 states required that charities and their professional fund raisers register. For a discussion of these statutes, see NAAG, *supra* note 2, at 28.

36. *See* Note, *supra* note 33, at 496.

37. Brief of Petitioner at 26 n.18, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984) (No. 82-766).

38. *See* Note, *supra* note 33, at 496, which lists the following state statutes: ARK. STAT. ANN. § 64-1610 (1980) (25% to professional fund raiser); CONN. GEN. STAT. ANN. § 21a-179 (West 1985) (repealed 1986) (25% to 50% sliding scale); FLA. STAT. ANN. § 496.11(8) (West 1984) (amended 1984) (repealed 1987) (25% to professional fund raiser); GA. CODE ANN. § 43-17-7 (1984) (repealed 1987)(30% for fundraising and administrative costs); HAW. REV. STAT. § 467B-7 (1985) (repealed 1985) (20% to professional fund raiser); ILL. ANN. STAT. ch. 23, para. 5109(c) (Smith-Hurd 1988) (25% for fundraising and administrative costs); KAN. STAT. ANN. § 17-1747(c) (1981) (25% for fundraising and administrative costs); MD. ANN. CODE art. 41, § 3-207(O)(1) (1986) (30% for professional fund raiser); MASS. GEN. LAWS ANN. ch. 68, § 21 (West 1988) (25% to professional fund raiser); MINN. STAT. ANN. § 309.555 (West 1969) (repealed 1987) (30% to professional fund raiser); N.H. REV. STAT. ANN. § 320.20 (1984) (repealed 1987) (15% for fundraising and administrative costs); N.J. STAT. ANN. § 45.17A-10(a) (West 1978) (15% to professional fund raiser); N.D. CENT. CODE § 50-22-04.1 (1982) (repealed 1985) (35% total, 15% to professional fund raiser); OKLA. STAT. ANN. tit. 18, § 552.3(B) (West 1986) (10% to professional fund raiser); OR. REV. STAT. § 128.855 (1985) (repealed 1985) (25% for solicitation costs, 50% for solicitation and administrative costs); PA. STAT. ANN. tit. 10, § 160-6 (repealed 1986) (15% to professional fund raiser); R.I. GEN. LAWS § 5-53-4 (1987) (50% total, 25% to professional fund raiser); S.C. CODE ANN. § 33-55-80 (Law. Co-op. 1987) ("reasonable percent" to professional fund raiser); S.D. CODIFIED LAWS ANN. § 37-27-24 (1977) (repealed 1984) (30% to professional fund raiser creates rebuttable presumption of reasonableness); TENN. CODE ANN. § 48-3-513 (1988) (less than 25% to professional fund raiser creates rebuttable presumption of reasonableness); WASH. REV. CODE ANN. §

The primary reason states felt the need to impose percentage limitations paid to fund raisers was the emergence and frequent use of professional fund raisers and commercial co-ventures as a charity's primary means of acquiring donations.[39] In 1959, for example, a New York court recognized in *People v. Stone*[40] that it was a fraud on the public for a professional fund raiser to solicit contributions for a charitable organization and retain 45% of the proceeds collected without informing the public.[41] Indeed, there have been many reported instances which revealed that only a small percentage of contributions actually reached the purported charitable cause after the deduction of fundraising expenses.[42] Arrangements allowing fund raisers to retain a large commission are even more prevalent today.[43]

Justice Rehnquist described the benefits of a fixed percentage limitation scheme as follows:

> They insure that funds solicited from the public for a charitable purpose will not be excessively diverted to private pecuniary gain. In the process, they encourage the public to give by allowing the public to give with confidence that money designed for a charity will be spent on charitable purposes.[44]

19.09.100(1) (1978) (amended 1982) (20% for solicitation costs); W. VA. CODE § 29-19-7(a) (1977) (amended 1985) (15% to professional fund raiser).

39. *See supra* note 10 and accompanying text.

40. 24 Misc. 2d 884, 197 N.Y.S.2d 380 (Sup. Ct. 1959).

41. *Id.* at 887, 197 N.Y.S.2d at 383.

42. *See* NAAG, *supra* note 2. For a further discussion, see *Hearings on Children's Charities Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 602 (1974), in which it was found that the Epilepsy Foundation of America (EFA) in 1973 spent $1.4 million, or 42% of all contributions collected, on fundraising and administrative expenses. The hearing also pointed out that in 1973, a Chicago advertising firm received 71% of collected contributions for the Asthmatic Children's Foundation. *Id.* at 172; *see also* LISTON, *supra* note 2, at 41 (pointing out that the Asthmatic Children's Foundation collected nearly $10 million from 1963-1973 but only 14% was spent on the care of asthmatic children during that time span); CUTLIP, *supra* note 2, at 453. A 1958 House investigation found that the National Association of Veteran's Employment Councils, purportedly organized to aid handicapped veterans, collected $2,121,104 from September 1, 1955 to June 30, 1957 but applied only 9.6% of the collected proceeds toward the charitable purpose, after fundraising costs were deducted. The Committee on Veteran's Affairs of the House of Representatives in the 85th Congress reported that it found "plentiful examples of waste, abuses, and highly questionable practices in fund raising." *Id.*

43. *See, e.g., supra* text accompanying note 42.

44. Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 980 (1984)(Rehnquist, J., dissenting); *see also* Brief for Amicus Curiae, Attorney General of the Commonwealth of Massachusetts at 26 & n.12, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)(No. 82-766)("fundraising limits do more than shield charities from abuse by professional solicitors; they actually encourage the public to give by maintaining confidence in the integrity of the system," and percentage limitations are not primarily anti-fraud measures).

In addition, a fixed percentage limitation statute is "uniform, it gives fair notice of what is permissible and the public is assured that a certain amount of their donation will be utilized for charitable purposes."[45] Such a statute, however, is not without a major disadvantage—inflexibility.[46]

Regardless of the advantages and effectiveness of such percentage limitation statutes, the Supreme Court has declared three state versions unconstitutional. In 1980, in *Village of Schaumburg v. Citizens for a Better Environment*,[47] the Court held unconstitutional a village ordinance[48] which required that a charity use at least 75% of collected

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45. *See* NAAG, *supra* note 2, at 34 (citing Ohio Attorney General's Office).

46. There are many aspects to this inflexibility. Charities may be encouraged to spend up to the allowable amount even though such expenses would be unreasonable under the circumstances. *See* NAAG, *supra* note 2, at 34. Similarly, a professional fund raiser may be tempted to charge up to the allowable amount for all campaigns, regardless of the actual cost of raising the money, by, for examplew, inflating fundraising costs.

Furthermore, many charities may have justifiable reasons for exceeding the statutory limit. For example, new or controversial groups and ideas might have higher costs to persuade the public to contribute. *See* NAAG, *supra* note 2, at 34. Also, as the Court pointed out in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636-37 (1980), organizations engaged primarily in research, advocacy, or public education and which use their own paid staff to carry out these functions, would often encounter higher fundraising expenses than those organizations not engaged in those activities.

In National Foundation v. City of Fort Worth, 415 F.2d 41, 46 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), the court, in upholding a percentage limitation statute, recognized that different charities may very well encounter different fundraising expenses. The court asserted that "[a] fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to *all types* of charitable organizations." *Id.* (emphasis added).

For a further discussion, see BAKAL, *supra* note 2, at 456, rejecting a direct limitation of fundraising costs, supporting instead a full-disclosure approach: "I am not greatly concerned about the need for this, with the full disclosure and registration requirements suggested. If the costs seem too high, I leave it to the intelligence of the public to determine whether or not the special nature of the particular charity justifies them . . . ." *Id.* *But see infra* text accompanying notes 151-52 and 157 for a discussion of the ineffectiveness of disclosure statutes.

47. 444 U.S. 620 (1980).

48. *Id.* at 622.

The constitutional challenge attacked primarily section 22-20(g) of the ordinance, which required that the permit application to solicit funds contain, among other things: "[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." *Id.* at 624 (quoting Schaumburg Ill. Village Code ch. 22, art. III, § 22-20(g)). The statute stated that the following items were not considered "charitable purposes" of the organization:

> (1) Salaries or commissions paid to solicitors;
>
> (2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.

Id. (quoting Schaumburg Ill. Village Code ch. 22, art. III, § 22-20(g)).

proceeds directly for the organization's charitable purpose.[49] The issue before the Court was whether the state had exercised its police power to regulate solicitation in a manner which impermissibly intruded upon the rights of free speech.

In defense of its statute, the Village argued that a charity spending more than twenty-five percent of its receipts on salaries, fundraising, and administrative expenses is not actually a charity but a for-profit enterprise, and to permit it to represent itself as a charity is fraudulent.[50] The Court, however, agreed with the Court of Appeals for the Seventh Circuit that this assumption cannot be true of those organizations which are primarily engaged in research, advocacy, or public education and who use their own paid staff to effectuate these func-

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49. *Id.* at 636. The Court, however, did not expressly state that all percentage limitations statutes are unconstitutional in all circumstances and distinguished a Fifth Circuit case National Found. v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970), which upheld such a statute. *Schaumburg*, 444 U.S. at 635 n.9. In *Fort Worth*, a city ordinance limited fundraising costs to 20% of total collections, "unless special facts or circumstances are presented showing that a cost higher . . . is not unreasonable." 415 F.2d at 44 (quoting FORT WORTH TEXAS CITY CODE ch. 32, § 32.5(g) (1964)). The court implied that not all percentage limitation statutes like the one before it were necessarily constitutional. "A fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations. What may be proper in one situation may not be so in other situations." *Fort Worth*, 415 F.2d at 46.

Unlike the *Schaumburg* ordinance, the one in *Fort Worth* created a rebuttable presumption of unreasonableness for those costs exceeding 20%. "Unlike the ordinance upheld in *National Found. v. City of Fort Worth* . . . , the village ordinance has no provision permitting an organization unable to comply with the 75% requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable." *Schaumburg*, 444 U.S. at 635 n.9. However, the Court subsequently ruled that a similar provision allowing for a showing of reasonableness was insufficient to save a percentage limitation statute. *See* Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984). For a discussion of *Munson*, see *infra* text accompanying notes 55-64.

Two state courts considered the constitutionality of percentage limitations statutes after the *Fort Worth* decision, each ruling differently. *Compare* Holloway v. Brown, 62 Ohio St. 2d 65, 403 N.E.2d 191 (1980)(upholding statute which prohibited professional fund raisers from retaining more than 75% of collected donations, unless it was shown to be reasonable) *with* State *ex rel.* Olson v. W.R.G. Enters., 314 N.W.2d 842 (N.D. 1982)(striking down statute which limited professional fund raiser's commission to 15% of gross proceeds, with no allowance for showing of reasonableness). In Degan v. Nordmark & Hood Presentations, Inc., 177 N.J. Super. 186, 425 A.2d 1091 (Super. Ct. App. Div. 1981), *appeal dismissed*, 87 N.J. 427, 434 A.2d 1098 (1981) and Rehabilitation Center and Workshop, Inc. v. Commonwealth Comm'n on Charitable Orgs., 45 Pa. Commw. 295, 405 A.2d 980 (1979), the validity of the statutes regulating the amount or proportion of fundraising expenses was not challenged, although the respective courts held that the charities/fund raisers involved were subject to the statutes' registration and reporting requiremets.

50. *Schaumburg*, 444 U.S. at 636.

tions as well as to solicit support.[51] In holding the ordinance unconstitutionally overbroad in violation of the first and fourteenth amendments, the Court stated the "the Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation."[52] Furthermore, "[t]he 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech."[53]

The Court also noted that state-imposed reporting requirements should sufficiently promote informed giving. "Such [requirements] may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses."[54]

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51. *Id.* at 636-37; *see also* Dunn, *Making Sure Charities are on the Level*, BUS. WK. 131 (June 24, 1985)("[b]e ready to make allowances . . . for a younger organization that must spend more heavily on solicitation before its name and cause are well known"); Note, *Ordinance Restricting Solicitation of Funds by Charities Restricts Freedom of Speech—Village of Schaumburg v. Citizens for a Better Environment*, 9 FLA. ST. U.L. REV. 185, 191 (1981) ("[n]ewly formed organizations that support unpopular causes . . . are far more likely to employ paid solicitors and incur greater operating costs, as opposed to the more traditional charities that can more readily rely upon volunteers"); LISTON, *supra* note 2, at 34 ("a new, lesser-known charity on behalf of an unknown disease or an unpopular cause might have to spend substantially more on fundraising and still be thrifty").

52. *Schaumburg*, 444 U.S. at 637.

53. *Id.* at 639. An important consideration in the *Schaumburg* decision was that residents of the town had the right to be exposed to the concepts of various groups, including the Citizens of a Better Environment (CBE). By prohibiting CBE from soliciting, the ordinance denied the residents not only the right to hear their views but also the right to decide whether to contribute to such a cause. *See* Note, *supra* note 51, at 191.

54. *Schaumburg*, 444 U.S. at 638. However, under ILL. REV. STAT., ch. 23, para. 5102(a) (1977), which requires charitable organizations to report certain information regarding their fundraising activities, there is no explicit disclosure requirement of fund raiser percentages. For a discussion of the similar approach adopted in New York, see *infra* note 84 and accompanying text.

After the Court decided *Schaumburg*, a state statute which placed percentage limitations on administrative expenses and professional solicitor fees was surprisingly upheld. In Streich v. Pennsylvania Comm'n on Charitable Orgs., 579 F. Supp. 172 (M.D. Pa. 1984), several charitable organizations and their solicitors challenged the constitutionality of the Pennsylvania Solicitation of Charitable Funds Act which, among other things, (1) placed a 15% limitation on funds paid to professional solicitors, and (2) imposed a 35% limitation on administrative expenses, although allowing for a waiver upon a showing of special facts or circumstances.

In upholding the provisions, the court was forced to distinguish *Schaumburg*, in which the Supreme Court invalidated a statute which required that 75% of an organization's charitable solicitations be used directly for the charitable purpose of the group. First, in upholding the 15% limitation on fees paid to professional solicitors, the court stated:

> The statute in question here is similar yet distinctively different from the

Four years after deciding *Shaumburg* the Court, in *Secretary of State of Maryland v. Joseph H. Munson Co.*,[55] considered the question it had left unanswered—whether a percentage limitation statute could survive a constitutional challenge if it allowed a waiver in certain circumstances. The statute in *Munson* allowed such a waiver where the percentage limitation "would effectively prevent a charitable organization from raising contributions."[56]

Munson Co., a professional, for-profit fund raiser, brought suit after a client expressed reluctance to contract with it to raise funds because of the applicable statute.[57] Munson conceded in its complaint

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one in question in *Schaumburg*. Here, only payments to professional solicitors are regulated, not administrative expenses in general. . . . [T]his distinction is critical. The 85% of contributions which must go to the charitable purpose, under the statute, does not significantly affect the First Amendment rights of the charities since the 85% can be spent to further the charity regardless if it is a "traditional" one or one which emphasizes dissemination of ideas and positions. Only the use of funds for solicitation is regulated. We do not believe that a 15% limitation on funds paid solely to *professional solicitors* unconstitutionally restricts the First Amendment rights of Plaintiffs.

Id. at 177 (emphasis in original).

Second, the Court upheld the provision limiting a charity's administrative expenses to 35% of raised funds, with a waiver allowance if additional expenditures were deemed reasonable. It stated:

While [this statute] sets a limit considerably higher than the ordinance discussed in *Schaumburg*, and applies only to the narrower category of fundraising (as opposed to administrative) expenses, the statute also allows waiver if the additional expenditures were not unreasonable. We do not believe that the intrusion . . . into First Amendment rights is substantial or unwarranted. The state has employed an appropriate means of supervision which is not impermissible.

Id. at 179.

55. 467 U.S. 947 (1984).

56. *Id.* at 952.

57. *Id.* at 950 n.2. The statute provided in part:

"(a) A charitable organization . . . may not pay or agree to pay as expenses in connection with any fundraising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-rasing activity. The Secretary of State shall . . . provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation . . . shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity."

that it regularly charged its clients more then the twenty-five percent of gross proceeds that the state permitted but contended that, as in *Schaumburg*, the statute impinged upon its first amendment rights.[58] The Court agreed and invalidated the statute,[59] stating that, "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a *fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.*"[60] The majority, in refusing to accept the argument of dissenting Justice Rehnquist that percentage limitation statutes are effective measures to prevent fraud, called the relationship between low fundraising costs and a valid charitable endeavor "tenuous."[61] The Court stated:

> That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous. It is equally likely that the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular. . . . *In either event, the percentage limitation, though restricting solicitation costs, will have done nothing to prevent fraud.*[62]

The Court explained that the waiver provision could not save the statute because the statute was unable to distinguish between those organizations which had high fundraising costs not due to protected first amendment activity from those organizations that incurred high costs due to protected activity.[63] The statute's defect was that "the means chosen to accomplish the State's ob-jectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech . . . ."[64]

Munson was interpreted by lower courts as removing any hope of drafting a percentage limitation statute narrowly enough,[65] and the Su-

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Id. (quoting MD. ANN. CODE art. 41, § 103D (1982)).

58. *Id.* at 952.

59. *Id.* at 950.

60. *Id.* at 966 (footnote omitted)(emphasis added).

61. *Id.* at 967 n.15.

62. *Id.* at 966-67 (footnote omitted)(emphasis added).

63. *Id.* at 965-66.

64. *Id.* at 967-68.

65. Two district courts also considered the constitutionality of percentage limitation statutes after *Munson*, both invalidating such provisions. In Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489 (D. Minn. 1986), a Minnesota charitable solicitation statute which deemed fundraising costs in excess of 30% to be presumed unreasonable, and allowed for costs less than 30% to be challenged as unreasonable, was declared unconstitutional. A charity was, under the statute, able to assert as a defense that costs exceeding

preme Court finally put the issue to rest in *Riley v. National Federa-*

30% are reasonable due to extenuating or mitigating circumstances. *Id.* at 1494. In *Heritage*, a professional fund raiser filed suit challenging the statute after being ordered by the state attorney general to cease all activities as a professional fund raiser in Minnesota. *Id.* at 1492. Heritage had contracted with American Christian Voice Foundation (ACVF) to solicit money on its behalf, with 85% of the proceeds to be retained by Heritage, including 10% for costs of printing and distributing a booklet. *Id.*

The court concluded that there were "no meaningful distinctions between the Maryland and the Minnesota statutes," despite the fact that the Minnesota statute provided for a 30% limitation of reasonableness, five percent higher than the Maryland statute in *Munson*. *Id.* at 1504. The court stated that "the difference in the amount does not materially correct the underlying flaw in the statute." The court also refused to find that the waiver provision served to save the statute. "[T]he *Munson* [C]ourt found that such waiver was not sufficient to overcome the basic unconstitutionality of the limitation. The Minnesota statute is perhaps even broader than the Maryland statute in that it permits the Commissioner to also challenge expenditures under 30% as unreasonable." *Id.* Further, the First Circuit recently declared in Shannon v. Telco Communications, Inc., 824 F.2d 150 (1st Cir. 1987), that the Massachusetts Charitable Solicitation Act, which limited professional solicitors compensation to 25% of any money raised, was unconstitutional. *Id.* at 151. Telco, a private Rhode Island corporation that raises funds for charities, was sued in Massachusetts court by that state's Attorney General, who claimed Telco had violated the Solicitation Act by retaining more than 25% of raised funds. *Id.* Telco then sued in federal district court, seeking a declaratory judgment that the statutory provision violated its first amendment rights. *Id.* After removing the state action and consolidating it with the federal one, the District Court, ruling on cross-motions for summary judgment, held that the statute was invalid on its face because it was indistinguishable from the Maryland statute struck down by the Supreme Court in *Munson*. *Id.* Finding "no relevant distinction between the case before [us] and *Munson*," the court had little trouble disposing of the Commonwealth's three distinguishing arguments. *Id.* at 159. The Commonwealth first argued that the Massachusetts statute was distinguishable from the one found in *Munson* because Massachusetts imposed limits on what professional fund raisers could charge charities, in contrast to the Maryland statute in *Munson*, which imposed a limit on what the charity could spend on fundraising, including what it could pay a fund raiser. The court, however, called this "a distinction without a difference." *Id.* The court noted that the state's argument was, in effect, the same reasoning advanced by Rehnquist's dissent in *Munson* but rejected by the majority. Rehnquist argued that Maryland's statute sought primarily to control only the "external economic relations between charities and professional fundraisers," *id.* at 152, but the majority held that "the fact remains that the percentage limitation is a direct restriction on the amount of money a charity could spend on fundraising activity." *Id.* at 153. Moreover, the First Circuit noted that both National Fed'n of the Blind v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), *aff'd mem.*, 817 F.2d 102 (4th Cir. 1987), *aff'd*, 108 S. Ct. 2667 (1988), and *Heritage* concluded that "laws regulating the fees of professional charitable solicitors are not significantly different from laws regulating the expenditures of charities." *Shannon*, 824 F.2d at 153.

Massachusetts next argued that the statute was constitutional because it exempted from its 25%-compensation limit "the actual cost . . . of performance, events or goods sold to the public." *Id.* The court rejected this argument, however, stating that *Munson*'s statute "contained an even broader exemption." *Id.* Finally, Massachusetts contended that its statute was necessary to protect the public from fraudulent charities. *Id.* The court, however, pointed out that "this is the exact argument that the Supreme Court rejected in *Schaumburg* and *Munson*." *Id.*

tion of the Blind of North Carolina.[66] There, a North Carolina charitable solicitation act which prohibited professional solicitors from charging an "excessive or unreasonable fee" was held unconstitutional.[67] Specifically, the statute provided that: a) a fee of twenty percent or less of the gross receipts was deemed to be reasonable; b) a fee greater than twenty percent but less than thirty-five percent of gross receipts is excessive if the party challenging the fundraising fee shows that the solicitation does not involve the dissemination of information or advocacy of public issues; and c) a fee of thirty-five percent or more of the gross receipts is presumed to be excessive.[68]

The district court, acknowledging that the North Carolina statutes were more flexible than the one found in *Munson*, nevertheless found it unconstitutional, reasoning that "[t]he basic problem with this statute, as with the statute in *Munson*, is that solicitation costs are not an accurate measure of fraud."[69]

The Supreme Court rejected North Carolina's contentions that (1) its statute ensured that the maximum amount of funds ultimately reached the charity, and (2) the statute's three-tiered schedule allowed for more flexibility than did the statutes in *Schaumburg* and *Munson*.[70] Further, the Court once again rejected the argument that the fee provisions were merely economic regulation with no first amendment implications. It stated, "[T]his regulation burdens speech, and must be considered accordingly."[71] As for the State's argument that charities' speech must be regulated for their own benefit, the Court noted that the "First Amendment mandates that we presume that speakers, not the government, know best what to say and how to say it."[72]

In finding that the North Carolina statute did not remedy the underlying flaw of the *Munson* statute, the Court reasoned:

> [T]here are several legitimate reasons why a charity might reject the State's overarching measure of a fundraising drive's legitimacy—the percentage of gross receipts remitted to the charity. For example, a charity might choose a particular type of fundraising drive, or a particular solicitor, expecting to re-

66. 108 S. Ct. 2667 (1988). For a discussion of post-*Riley* decisions, see *infra* note 135.

67. *Id.* at 2671 n.2. The Supreme Court struck down two other challenged provisions of North Carolina's charitable fraud scheme. In addition to the "reasonable fee" provision—the percentage-limitation provision—the Court also found unconstitutional a compelled disclosure provision, and a licensing requirement.

68. *Id.*

69. *Riley*, 635 F. Supp. 256, 261 (E.D.N.C. 1986), *aff'd mem.*, 817 F.2d 102 (4th Cir. 1987), *aff'd*, 108 S. Ct. 2667 (1988).

70. 108 S. Ct. at 2675.

71. *Id.* at 2674.

72. *Id.*

> ceive a large sum as measured by total dollars rather than the percentage of dollars remitted. Or, a solicitation may be designed to sacrifice short-term gains in order to receive long-term, collateral, or non-cash benefits.[73]

The Court also found unconvincing the State's argument that its statute was flexible in that its three-tiered scheme permits a charity to rebut a presumption of unreasonableness.

> Permitting rebuttal cannot supply the missing nexus between the percentages and the State's interest.
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> . . . Even if we agreed that some form of percentage-based measure could be used, in part, to test for fraud, we could not agree to a measure that requires the speaker to prove "reasonableness" case by case based upon what is at best a loose inference that the fee might be too high.[74]

The Court noted that a fund raiser may rebut a prima facie case of unreasonableness but proof that the solicitation involved advocacy or dissemination of information is not dispositive but merely one factor to be considered. Additionally, the Court found the Act "impermissibly insensitive" to small or unpopular charities, which often pay higher fundraising fees because of their great difficulty of attracting donors.[75]

In striking down the fee provision of the Act, the Court noted that the State is free to continue to require fund raisers to disclose financial information to the State. "If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice free speech for efficiency."[76]

Chief Justice Rehnquist maintained, as he did in *Munson* and *Schaumburg*, that fee-limitation provisions were rationally related to the State's legitimate interest in regulating charitable fraud, even contending that the statute withstands heightened scrutiny.[77] Rehnquist also found the North Carolina statute distinguishable from the statute struck down in *Munson*. He noted that the fee provisions require the trier of fact to consider first amendment factors such as whether the solicitation involved the dissemination of information, discussion, or advocacy, and whether the ability of a charity to raise money and communicate would be significantly diminished by the charging of a lower fee. He contended that, "The inclusion of these factors in the 'reasonableness' determination of the factfinder protected against the vices of

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73. *Id.* at 2675.
74. *Id.* (footnote omitted).
75. *Id.* at 2676.
76. *Id.*
77. *Id.* at 2684 (Rehnquist, C.J., dissenting).

the fixed-percentage scheme struck down in *Munson*."[78]

IV. The New York Approach—Its Development

In 1954, following an investigation by a state-created committee, New York amended its Social Welfare Law[79] in order to regulate charities. The legislation—the Tompkins Act[80]—was designed to protect contributors by requiring charities to register with the State.[81] The Tompkins Committee hearings brought "expensive and questionable fundraising practices into the national spotlight, setting off public debate."[82]

Specifically, the law required that every charitable organization intending to solicit contributions from persons in New York by any means file with the Department of Social Welfare prior to soliciting.[83] Among the information required to be provided by the charity was: (1) the name under which the charity intends to solicit contributions, (2) the names and addresses of the charity's officers and directors, (3) the names and addresses of any fund raisers or professional solicitors who will act on behalf of the charity, (4) the charity's purpose, (5) the purposes for which the contributions will be used, and (6) any other information necessary for the protection of contributors.[84]

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78. *Id.*

79. N.Y. Soc. Serv. Law § 482-1 (McKinney 1954) (repealed 1977). The law became effective September 1, 1954.

80. Senator Bernard Tompkins headed the investigation and sponsored the resulting legislation.

One expert testifying before the Tompkins Committee estimated that "about 3% [of the millions collected] or between $20,000,000 and $25,000,000 goes into outright charity rackets." Cutlip; *supra* note 2, at 442. Other experts agreed with this figure, while still others place the figure at two percent. *Id.* The Tompkins Committee, created by the New York State Legislature on March 31, 1953, later concluded that "[t]he public is being mulcted of millions of dollars each year . . . . *The generosity of our citizens has been consistently and flagrantly abused by a small minority of frauds operating as 'charities' which have mulcted New Yorkers out of an annual amount probably in excess of $25,000,000.*" *Id.* at 443-44 (emphasis in original).

The Committee also recognized the abusive nature of professional fund raisers, noting in its final report that "an even vaster sum of dollars contributed by the public is cut down to pennies before reaching intended beneficiaries by excessive fund raising and administrative costs of inefficient charities." *Id.* at 444.

81. The purpose of the law was to " 'regulate . . . the operation of organizations which are now engaged, or purport to engage, in charitable activities and which violate the law by failing to register or by engaging in what is tantamount to fraudulent solicitation.' " 80 Op. Att'y Gen. N.Y. 74 (1980) (quoting Matter of Green v. Javits, 1 A.D.2d 342, 343, 149 N.Y.S.2d 854, 856 (App. Div. 1956)).

82. *See* Cutlip, *supra* note 2, at 451.

83. N.Y. Soc. Serv. Law § 482 (McKinney 1954) (repealed 1977).

84. *Id.* The statute, however, did not confer the Board with the authority to approve or disapprove a fundraising contract. It merely had the power to require the filing of

In addition to the above provisions, the law contained annual reporting requirements. Each charity was required to submit a financial statement to the Department of Social Welfare. Enforcement of this law was vested in the attorney general, who was empowered to bring an action in the Supreme Court of New York to enjoin solicitation, cancel the group's registration statement, or revoke the organization's charter.[85]

Although the Tompkins Act[86] provided some protection to the prospective contributor, many deficiencies became apparent. For example, the statute failed to address such questions as: (1) whether the sending of unordered merchandise through the mail could be regulated, and (2) whether the telephone solicitations by professional fund raisers could be regulated. "In general, the concept of Tompkins Act has been to create a framework for regulation within which the charitable organizations and the professional fundraisers and solicitors can work out their own codes of ethics and systems of self-discipline."[87] However, the same forward-looking commentator questioned: "[A]lthough an attorney general's list exists to inform the contributor about subversive organizations, should there be any legislative effort to restrict or control the fund-raising of such organizations?"[88]

In 1977, section 482 of the Social Service Law became Article 7-A of the Executive Law, the state's present regulatory scheme governing charities. The transfer of enforcement authority over the regulation of charitable organizations from the Department of Social Welfare to the Department of State was for administrative efficiency and did not affect the purposes of the original law.[89] Additionally, the growing number of complaints led the attorney general, in 1959, to establish a Division of Charitable Frauds and Compliance[90] to work in conjunction with the Department of State.

Early on, the New York courts[91] were inclined to declare the con-

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such contracts between fund raisers and charities. *See* Sport Celebrities, Inc. v. Maull, 56 A.D.2d 849, 392 N.Y.S.2d 315 (App. Div. 1977).

85. N.Y. Soc. Serv. Law §§ 482(c), 482(i) (McKinney 1954) (repealed 1977).

86. *Id.* § 482.

87. *See* E. Newman, Law of Philanthropy 41 (1955) (noting that at the time only Pennsylvania and Michigan had comparable charitable solicitation regulations).

88. *Id.*

89. 80 Op. Att'y Gen. N.Y. 74, 74 (1980).

90. *See* N.Y. Times, Feb. 1, 1959, at 55, col. 1. Former New York State Attorney General Louis J. Lefkowitz said that an average of 10-20 complaints had flowed into his office weekly, spawning to the establishment of the division. *Id.*

91. There are relatively few reported decisions involving charities because they are eager to settle, avoid publicity, and minimize litigation expenses. V.A. Voorhees, Remedies of the Attorney General in Protecting the Public Interest in Charitable Non-Profit Organizations—An Introductory Overview of Statutory Bases Commonly Relied Upon 10 (November 1985) (unpublished manuscript).

duct of an organization or its fund raiser a fraud on the public even though some charitable work was performed.[92] In *People v. Stone*,[93] an action was brought under the Social Welfare Law to enjoin the defendant, a professional fund raiser for the Police Benevolent Association, from soliciting donations. The attorney general charged that, when soliciting funds, the defendant was falsely identifying himself and members of his organization as police officers and that only a small percentage of the money donated by the public was available to further the charitable organization's cause. The defendant, while denying all other charges, admitted that the charity for whom it was soliciting was charged forty-five percent of collected donations and that it did not inform the contributor of this fact.[94]

Although the court denied the request for an injunction because the defendant ceased soliciting and did not seek a renewal of his license, it did find the solicitation campaign to be a fraud on the public. The court observed:

> [A]bsent special circumstances to justify it—the charge made by the defendant, of 45 cents for every dollar collected, is grossly excessive and that his failure to inform the contributing public of this percentage arrangement is a fraud upon that public which (were it likely to be continued) would warrant the injunctive relief asked for by the Attorney General.[95]

The court was not persuaded by the fact the charity voluntarily entered into the contract and agreed to accept only fifty-five percent of the proceeds,[96] noting that "the interests of the citizens who are asked

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92. However, the New York approach had been criticized because, absent specific fundraising limits and point-of-solicitation requirements, the legitimacy of a charity's conduct was subject to a case-by-case determination by the courts—although the New York courts were inclined to scrutinize professional fund raiser's conduct in protecting the public at large. *See* Note, *supra* note 2, at 1173.

93. 24 Misc. 2d 884, 197 N.Y.S.2d 380 (Sup. Ct. 1959).

94. *Id.* at 884-85, 197 N.Y.S.2d at 382.

95. *Id.* at 885-86, 197 N.Y.S.2d at 383 (footnote omitted) (emphasis added).

96. This argument had been rejected consistently by the New York courts. For example, although the arrangement between a professional fund raiser and a charitable organization may have been entered into voluntarily, the court in State v. Francis, 95 Misc. 2d 381, 407 N.Y.S.2d 611 (Sup. Ct.), *aff'd*, 67 A.D.2d 640, 412 N.Y.S.2d 340 (1978), stated that, "The contracts with the non-profit organizations are not merely bilateral, but rather establish a triangular relationship with the public as the third party whose interest should be protected." *Id.* at 386, 407 N.Y.S.2d at 614. Thus, the court concluded that the agreed upon contract does not preclude the attorney general from protecting the public's rights. *Id.*

A charity often agrees to allow a fund raiser to keep a majority of the proceeds simply because, from the charity's perspective, any raised money is "found" money that would not have otherwise been available to the charity. *See* Brief for Petitioner at 26 n.18, Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (No.

for and urged to make contributions to this organization are not to be ignored."[97]

New York courts continued to scrutinize professional fund raisers in *Lefkowitz v. Burden*,[98] where the defendant was a priest who solicited funds by mail and telephone. The court found that the defendant collected $34,651, of which only $1,485 had been used for charitable purposes. It then held that a fund raiser, deemed a "business" subject to the Executive Law, will have a prima facie case made against it to have fraudulently converted or diverted the funds upon showing that a small portion of funds solicited for charitable purposes were actually used for those purposes.[99]

As compared to *Stone*, in which the court found that the forty-five percent fundraising costs were clearly excessive, courts subsequently relaxed, to some degree, their treatment of professional fund raisers. In *State v. Francis*,[100] the attorney general requested an injunction *pendente lite* against a professional fund raiser that was retaining seventy-five percent of the proceeds collected on behalf of non-profit organizations. The court refused to find this arrangement fraudulent per se; instead, it examined whether there was any fraud, misrepresentation, or pressure tactics. Failing to find any of these elements, the court denied the attorney general's motion.[101]

The court in *Francis*, however, did concur with the *Stone* court in

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82-766). Also, "[i]t's less expensive to hire a fund-raising company than to increase your own staff." BAKAL, *supra* note 2, at 389. *See, e.g.*, Optimist Club v. Riley, 563 F. Supp. 847, 852 (E.D.N.C. 1982) (charitable organization granted injunctive relief because it had "neither the staff nor the expertise . . . to begin its telephone solicitation campaign.").

But see Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 980 (Rehnquist J., dissenting) (percentage-limitation statute protects charities themselves from being overcharged by unscrupulous fund raisers); Streich v. Pennsylvania Comm'n on Charitable Orgs., 579 F. Supp. 172, 179 (M.D. Pa. 1984) (noting that one state charitable solicitation scheme was partly designed to protect public from organizations hiring professional solicitors who may not be interested in or genuinely concerned about charity for whom they solicit); BAKAL, *supra* note 2, at 293 (" '[a] charity that employs an outside professional fundraising organization without checking on its background is a lamb waiting to be fleeced' ")(quoting Wallerstein, Assistant Attorney General, Charities Bureau of the New York State Department of Law); United Press International, June 10, 1985 (Connecticut Attorney General Joseph I. Liederman stating that after charity hires fund raiser, the former "just walks away. We want to make that link of responsibility closer than it is."). For a discussion of New York law's protection of charities from unscrupulous fund raisers, see *infra* note 122.

97. *Stone*, 24 Misc. 2d at 886, 197 N.Y.S.2d at 383.

98. 22 A.D.2d 881, 254 N.Y.S.2d 943 (App. Div. 1964).

99. *Id.* at 882, 254 N.Y.S.2d at 945; *see* People v. United Funding, 106 A.D.2d 846, 484 N.Y.S.2d 245 (App. Div. 1984); *see also* NEW YORK STATE DEPARTMENT OF LAW, ANNUAL REPORT 77-78 (1984).

100. 95 Misc. 2d 381, 407 N.Y.S.2d 611 (Sup. Ct. 1978), *aff'd*, 67 A.D.2d 640, 412 N.Y.S.2d 340 (App. Div. 1979).

101. *Id.* at 385-86, 407 N.Y.S.2d at 614.

dicta that the public has a right to know of an arrangement between a charity and a professional fund raiser.

> This Court agrees that where a charitable organization is to receive but a small share of the total funds solicited in the name of a charity or a non-profit organization, *the public solicited has a right to know* these facts so that people may knowingly decide on that basis whether or not they wish to make their donations.[102]

Calling it "not an unreasonable responsibility,"[103] the court demanded that the defendants divulge to the state the percentage of the total funds actually going to the organization--in this instance, twenty-three percent. The defendants also had to disclose that the remaining funds are used for fundraising expenses.[104]

The New York courts, in addition to requiring that the fund raisers reveal the percentage of the contribution that will further the charitable "cause," have made it clear that the fund raiser must not identify itself as the charity. For example, in *New York v. ZKG Associates, Inc.*,[105] the court ordered the defendant fund raisers to disclose to the solicited public that it retained eighty percent of the collected funds, finding that the defendants were engaging in "deceptive practices"[106] by misrepresenting themselves as members of the charity. The court noted:

> There also appears to be substantial evidence that solicitations were done in such a manner that the victimized contributor, a member of the public, believed that solicitations were done by members of the client organization itself, and indeed by various officers of the law . . . rather than by agents and representatives of the defendant.[107]

The problem of misrepresentation arose in *People v. New York State District Attorney Investigators Police Benevolent Association*

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102. *Id.* at 385, 407 N.Y.S.2d at 614 (emphasis added); *cf.* People *ex rel.* Scott v. Police Hall of Fame, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1978). In *Scott*, a professional fund raiser was held to be engaged in fraudulent conduct by not disclosing its operating costs to the public. The court stated, "Although the public might have been aware that the amount contributed to a charity cannot be used for charitable purposes *it is entitled to be apprised of promotions which entail high operation expenses.*" *Id.* at 342, 376 N.E.2d at 677 (emphasis added).

103. *Francis*, 95 Misc. 2d at 384, 407 N.Y.S.2d at 614.

104. *Id.*

105. N.Y.L.J., Oct. 29, 1974, at 1, col. 6 (Sup. Ct. Oct. 29, 1974).

106. *Id.*

107. *Id.*

(DAIPBA).[108] There, the DAIPBA entered into a contract with the defendant fund raiser to raise funds. The attorney general enjoined the fund raisers from soliciting after the court found that: (1) the defendants were wrongfully claiming that any donations would be tax deductible; (2) the defendant's callers were fraudulently identifying themselves as police officers; (3) the defendants promised contributors that they would receive preferential treatment from the police; (4) the defendants said that donations would help the policemen and policemen's widows and orphans in New York City; and (5) the defendants implied that the solicitation had the approval of the state Attorney General.[109]

The court, quoting from a factually similar case,[110] found that the fund raisers must disclose the fact that they retained a majority of the proceeds. The court then stressed that the fund raisers "have a duty to be aware of the public's perception of the New York Police Department and to not solicit funds by implying they . . . are the same PBA as represents the officers of the NYPD."[111]

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108. No. 41672/83 (N.Y.L.J., Aug. 30, 1983, at 1, col. 5) (Sup. Ct. Aug. 30, 1983).

109. *Id.* at 1, col. 5; *see* People v. Illinois State Trooper's Lodge No. 41, 7 Ill. App. 3d 98, 286 N.E.2d 524 (1972) (use of phrase "Illinois State Trooper" in solicitation campaign held to be in violation of solicitation statute by creating misleading impression that state agency was connected with campaign); Guatsche v. State, 67 A.D.2d 167, 415 N.Y.S.2d 280 (App. Div. 1979) (Assistant Attorney General who alleged that solicitors were fraudulently representing that contributions would be used to assist laid-off policemen and local police held not to have committed libel or slander); Terrell v. State, 210 Tenn. 632, 361 S.W.2d 489 (1962) (defendants convicted for soliciting advertisements without authorization for publication called *Tennessee Police News*).

110. State of New York v. Police Benevolent Ass'n for Dist. Attorney Investigators of New York, Inc., N.Y.L.J., Dec. 30, 1976, at 10, col. 2 (N.Y. Sup. Ct. Dec. 30, 1976).

> [T]he retention by the fund raisers of 75 percent of the funds collected, when this fact is not disclosed to persons who are solicited, constitutes a fraud upon the public which cannot be countenanced. Such fraud was further exaccerbated [sic] . . . by the impression conveyed by the solicitors that the caller was a member of the police department; that the money solicited would be used to help the local police; or that it would be used to assist laid-off policemen, all of which were grossly and patently false.

Id.

111. *New York State Dist. Attorney Investigators Police Benevolent Ass'n*, N.Y.L.J., Aug. 30, 1983, at 1, col. 5. Some states have enacted legislation specifically targeted at fund raisers soliciting funds on behalf of law enforcement associations. *See, e.g.*, Fraternal Order of Police v. State, 392 So. 2d 1296 (Fla. 1980) (law enforcement associations and professional fund raisers unsuccessfully challenged statute—Law Enforcement Funds Act, FLA. STAT. § 496 (1979)—which required persons soliciting on behalf of law enforcement organizations to register and post bond with state). Rejecting the argument that the statute violated equal protection, the court held that "the legislature could rationally conclude that the potential for abuses by solicitors collecting funds for law enforcement organizations are greater than for solicitors for other non-charitable organizations." *Fraternal Order*, 392 So. 2d at 1303. However, the court did find unconstitutional a section of the statute—FLA. STAT. § 496.31(8)-(9) (1979)—which limited a professional

Against this background, New York sought to amend its charity regulation law to more closely monitor charities and the conduct of its professional fund raisers.

V. AMENDMENT TO ARTICLE 7-A OF THE NEW YORK EXECUTIVE LAW

In general, the amendment to Article 7-A of the Executive Law imposes greater disclosure requirements on charities and their fund raisers,[112] strengthens the enforcement vehicles against its violation, and modifies some registration and reporting requirements.[113] The purpose of the bill was:

> [t]o improve the protection afforded the public by Executive Law, Article 7-A by enhancing the quality of information available for disclosure concerning charitable organizations, providing administrative remedies to the Secretary of State to insure compliance with the statute, and requiring a statement to potential contributors to charities of what proportion of contributions has been spent on charitable purposes.[114]

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solicitor's fee to 25% of gross contributions. The court agreed with the lower court that "[i]f the placement of limitations of fees and costs to be expended in soliciting funds is a proper legislative enactment there is nothing in the evidence presented that makes that need unique to the solicitation of contribution for law enforcement organizations as opposed to solicitors for other organizations." *Fraternal Order*, 392 So. 2d at 1301; *see also* Eye Dog Found. v. State Bd. of Guide Dogs for the Blind, 67 Cal. 2d 536, 432 P.2d 717, 63 Cal. Rptr. 21 (1967) (special problems of blind justified special legislation for their protection).

112. The Executive Law's requirement that professional fund raisers register with the state was upheld as a legitimate exercise of the secretary of state's authority in Viguerie Co. v. Paterson, 94 A.D.2d 672, 462 N.Y.S.2d 669 (App. Div. 1983), *aff'd*, 62 N.Y.2d 871, 467 N.E.2d 528, 478 N.Y.S.2d 864 (1984). The court held that the state's requirement that professional fund raisers complete registration statements disclosing the names of charitable, religious, and other non-profit organizations with which they are under contract to solicit funds "is neither unreasonable, arbitrary nor capricious, and is founded upon a rational basis." *Id.* at 673, 462 N.Y.S.2d at 670. For a discussion of New York's protection of charities against unscrupulous fund raisers, see *infra* note 122 and accompanying text.

113. N.Y. EXEC. LAW § 172 (McKinney Supp. 1988), requires that every charitable organization "which intends to solicit contributions from persons in this state" must register with the secretary of state prior to solicitation. Section 172-b provides that each registered organization must file an annual written report with the secretary. *Id.* § 172-b. Also, N.Y. EST. POWERS & TRUSTS LAW § 8-1.4 (McKinney Supp. 1988) and N.Y. COMP. CODES R. & REGS. tit. 13, § 100.2 (1986) require every charitable trust and non-profit corporation to register with the Charities Bureau of the New York State Department of Law and to file an annual financial report with that office.

114. Act approved July 21, 1986, ch. 440, 1986 N.Y. Laws A-818. In its statement in support of the bill, the Department of State said:

> Although the basic concepts underlying the 1954 law were sound, the law has proved to be largely ineffective because of the law's inflexibility and lack of

In order to allow the contributor to make a more informed decision, the law requires that all solicitations must include a statement informing the public that, upon request, a person may obtain from the organization or secretary of state a copy of the charity's latest annual financial statement.[115] In addition, the law now requires that the charity must provide a clear description of the programs for which the donation is requested or, in the alternative, state that such a description is available upon request.[116]

To increase the amount of valuable information available to donors, charities are now required to report to the secretary of state the percentage of funds generated by professional fund raisers or commercial co-ventures.[117] The purpose of imposing this requirement on the

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effective enforcement provisions. Article 7-A has not been significantly amended in 30 years, and, during that time, fundraising has become a billion dollar "business" in this State. The advent of computers has enabled many charities and fundraisers to maintain out-of-state offices while soliciting within the state, thereby making surveillance and enforcement much more difficult.

. . . Experience over the past 30 years has clearly shown that the present law is inadequate to present-day needs and that it does not deter those who would engage in fraud or misrepresentation to take advantage of the generosity of the people of this State.

Id. at A-820 to 21.

115. N.Y. EXEC. LAW § 174-b(1) (McKinney Supp. 1988) (statute formerly required that only *written* solicitations contain such notice provision). The notice statement must comply with certain typeface standards. Specifically, the statement "must be placed conspicuously in the material with print no smaller than ten point bold face type or, alternatively, no smaller than the size print used for the most number of words in the statements." *Id.* An exemption is provided, however, if the mass media has donated an advertisement and time and space restrictions prevent the statement's inclusion. *Id.*

The demand disclosure provision also requires that the charity comply with the information request within 15 days of receipt. *Id.* § 174-b(4). The law exempts from registration those organizations which do not receive contributions in excess of $25,000 in a fiscal year, provided none of its fundraising functions are conducted by professional fund raisers. *Id.* § 172-a(2)(d). The amendment increased from $10,000 to $25,000 the minimum amount a charity must raise in order to fall within the purview of the statute, presumably for administrative convenience. *Id.*

116. *Id.* § 174(b)(2). The amendment, however, has been criticized as ambiguous with respect to the specificity of the information required. *See* Bromberger, *Fundraising Dangers for Charities*, N.Y.L.J., Aug. 24, 1987, at 1, col. 1.

[I]t remains unclear as to how specifically a charitable organization's activities must be described. The new law contains little language which would establish the guidelines to be used. For example, if an organization is soliciting funds for cancer research, must the organization provide the donor with the specific project the money will be used for? Or does a description stating that donations will be used for cancer research satisfy the requirement? At present, such questions are left to the discretion of the Attorney General . . . .

Id. at 2, col.2.

117. N.Y. EXEC. LAW § 173-a(4) (McKinney Supp. 1988). *See supra* note 9 for the New York definition of a professional fund raiser. The statute defines a "commercial coventurer" as:

charities rather than on the fund raisers, as did the former law, is to provide more accessible information to the public. The statute for the most part, however, does not contain a "point-of-solicitation" disclosure provision, which would have required charities to disclose at the time of solicitation the percentage of revenue used for the charitable program.[118]

The legislation does require a charity to report at the time of solicitation the percentage of proceeds it will receive if (1) it retains a professional fund raiser, and (2) solicitation relates to a sale.[119] The amendment provides:

> All advertising, of every kind and nature, that a sale of goods, services, entertainment or any other thing of value will benefit a charitable organization shall set forth the anticipated portion of the sales price, anticipated percentage of the gross proceeds . . . or other consideration or benefit the charitable organization is to receive.[120]

Furthermore, to alleviate the difficulty in monitoring campaigns conducted by telephone and other means which do not convey messages by mail, oral presentation must now be reduced to writing and filed with the secretary of state.[121] Charities and fund raisers[122]

> Any person who for profit is regularly and primarily engaged in trade or commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment, or any other thing of value will benefit a charitable organization.

N.Y. EXEC. LAW § 171-a(6) (McKinney Supp. 1988). The distinction between a professional fund raiser and a commercial co-venturer is that commercial co-venturers are usually involved with the sale of goods, the receipts from which are utilized to pay for the cost of the project.

118. For a discussion of the point-of-solicitation requirement, see *supra* text accompanying notes 30-31 and *infra* text accompanying notes 134-56.

119. N.Y. EXEC. LAW § 174-c (McKinney Supp. 1988). This is because most of the receipts of the "sale" will be used to pay for the cost of the product or event.

120. *Id.* The charity is subject to this provision only if it retained the services of a professional fund raiser. *Id.* In addition, section 175(2)(e) was eliminated. It had required that at least 50% of the funds raised by the selling of goods be used for charitable purposes. Presumably, *Munson* caused this provision to be removed. For a discussion of the *Munson* case, see *supra* text accompanying notes 55-64.

121. N.Y. EXEC. LAW § 173-a(1) (McKinney Supp. 1988).

122. Professional fund raisers are now required to post a $10,000 bond before soliciting, an increase of $5000 from the old law. *Id.* § 173(1).

In addition, the law protects charities from unscrupulous fund raisers in the following ways:

(1) Professional fund raisers must maintain accurate and up-to-date records. *Id.* § 173-a(2).

(2) "Every contract between a professional fund-raiser and a charitable organization shall contain . . . a provision that within five days of receipt all funds received from

must also provide the State with any information involving prior unlawful conduct of a charity or its principals, and a clear description of current and planned programs.[123]

A bulk of the changes to the law included the expansion of several "prohibited activities."[124] These provisions are largely concerned with ensuring that funds are collected without deception and that the funds are used for the purposes for which the contributor was promised. For example, subsection 4 provides that a charity or solicitor must "apply contributions in a manner *substantially consistent* with the solicitation for charitable purposes."[125] Subsection 17 prohibits the solicitation of contributions in a manner, or with words, which are "coercive."[126]

Thus, by increasing the number of prohibited activities under the statute, the enforcement power of the attorney general and secretary of state is enhanced.[127] The law now prohibits a charity from: (1) failing to apply contributions in a manner substantially consistent with its solicitation; (2) using coercive tactics; (3) using a symbol which may be confused with that of another organization; (4) misrepresenting that registration with the State constitutes endorsement by the State; (5) entering into a contract with a professional fund raiser which is not registered with the State; and (6) using personal influence as an officer or member of the board of directors of a charitable organization, where such an officer has a conflict of interest.[128]

In addition, the state attorney general may now seek court orders for restitution, damages, costs, removal of directors or other persons, and corporate dissolution.[129] The secretary of state may now enforce this statute through administrative hearings and, in the course of such hearings, deny, suspend or revoke the registration of a charity, issue

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solicitation shall be deposited in a bank account *under the exclusive control of the charity.*" *Id.* § 173-a(2) (emphasis added).

(3) When a charity enters into a contract with a professional fund raiser, the charity has the right to cancel it "without cost, penalty, or liability" for 15 days following the signing of the contract. A charity may not waive this right of revocability. *Id.* § 174-a(1).

(4) The contract must also contain a "clear statement of the financial agreement" entered into by the charity and fund raiser. *Id.* § 174-a(4)(e).

123. *See generally id.* § 172.

124. *Id.* § 172-d(1) to (19).

125. *Id.* § 172-d(4) (emphasis added).

126. *Id.* § 172-d(17). It is also illegal to use false or materially misleading advertising or promotional material, *id.* § 172-d(3), to engage in any "fraudulent scheme," *id.* § 172-d(2), or to use contributions for an undisclosed purpose, *id.* § 172-d(4). To establish fraud for this purpose, neither intent to defraud nor a resulting injury need be shown. *Id.* § 172-d(2).

127. Under the new law, the secretary of state and attorney general will jointly develop a single registration system and a uniform set of reporting forms. *Id.* § 172.

128. *See generally id.* § 172-d.

129. *See generally id.* § 175 (attorney general enforcement powers).

cease and desist orders, and assess civil penalties.[130]

VI. Demand Disclosure: The Only Remaining Alternative

Before the United States Supreme Court expressly prohibited states from imposing percentage-limitation requirements on a charity's professional fund raiser, which restricts the amount the fund raiser could retain as its commission, states were left with two options.[131] One was demand disclosure—which is essentially the New York approach—and the other was a point-of-solicitation requirement. Demand disclosure requires that charities provide information to donors only upon request. For example, the New York law provides that all solicitation by a charity must include its latest financial statement and a clear description of the programs for which the donation is being sought, or inform the public where it may obtain that information. While demand disclosure certainly is preferable to providing no access to information at all, it has been criticized as providing only after-the-fact disclosure of information, thus failing to promote the informed giving at the time of contribution.[132] In addition, a dissatisfied donor is forced to seek a refund, which can often be timely and burdensome, if the after-the-fact disclosure prompts him to take such action.[133]

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130. *See generally id.* § 177 (secretary of state powers).

131. In addition to these two options, several alternatives are under review. For example, a model solicitation act is currently being studied in hope of enacting a uniform system of regulation. In 1976, a committee published the framework for a model solicitation act. *See* National Health Council, Viewpoints: State Legislation Regulating Solicitation of Funds from the Public 8-18 (rev. ed. 1976) [hereinafter National Health Council]. Such a law would, among other things, create a national commission of charitable organizations and require that all information between charities and professional fund raisers be public records. NAAG, *supra* note 2, at 36; National Health Council, *supra*, at 9, 15. Similarly, one commentator suggests creating an independent agency like the Securities and Exchange Commission to regulate charities. Bakal, *supra* note 2, at 455. As further means of protecting contributors from misrepresentation and fraud, the same commentator suggests that the Federal Trade Commission apply "truth in advertising" guidelines to charities, comparable to those used for consumer goods. *Id.* at 456.

132. However, Litigation Section Chief of the New York State Charities Bureau, Valerie A. Voorhees, does not necessarily agree that demand disclosure results in after-the-fact information to the public. Telephone Interview with Valerie A. Voorhees, Litigation Section Chief, Charities Bureau, New York State Attorney General (Oct. 14, 1987). Voorhees noted that under the New York statute, charities are required to furnish information within 15 days of a request, which she characterized as not an unreasonably long time to wait before donating. *Id.*

133. *See* Note, *supra* note 33, at 523 n.219 (citing Kurtz, Concepts for NAAG Charitable Solicitation Law Project 9 (1984)). In the year ending March 31, 1984, the New York Secretary of State received only 13,000 requests for financial reports of charities, which works out to an average of 1.4 requests per charity. *Id.* Even though such information is requested, there is little guarantee a charity will respond by providing it.

On the other hand, point-of-solicitation, or compelled, disclosure would force a charity to disclose at the time of solicitation important information including program information, the portion of collected funds used for fundraising expenses, and the portion that actually reaches the charitable cause.[134] The Supreme Court until *Riley v. Na-*

See LISTON, *supra* note 2, at 143. Evidence demonstrates "if a citizen writes to ask for an annual report and financial statement, many charities will not reply at all and many others will send only fundraising and promotional brochures. When the required data are submitted, much of them are unaudited and subject to several interpretations." *Id.* Further, "even when the actual figures are available, the average citizen finds it difficult to determine whether a charity is reporting accurately and fairly and spending its money wisely." *Id.* at 49. In fact, only relatively few of the best-known charities provide understandable audited financial reports. *Id.* at 143. "The simple fact [is] that the American people have to accept charities on faith . . . [since] meaningful information is next to impossible to obtain." *Id.* at 49. This led the same commentator to conclude that "the charity should be compelled to provide accurate information, audited, if necessary, *that is understandable* to the average citizen and uniform for similar types of organizations. . . . [This] would impose little hardship on anyone except fraudulent or inefficient [charities.]" *Id.* at 145 (emphasis added).

Obtaining information from charities themselves can prove to be difficult. *See* BAKAL, *supra* note 2, at 430 (author described writing to 100 "leading" charities requesting information; 33 failed to respond). Fortunately, other sources do provide the public with information on charities. The New York State Attorney General encourages the public to write to the various watchdog agencies to obtain information on national charities.

For a discussion of other agencies which provide information to the public on charities, see BAKAL, *supra* note 2, at 432-33.

134. Point-of-solicitation opponents argue that such a requirement impinges on a charity's first amendment rights and is also misleading, burdensome, and expensive. Charities argue that a balanced amount of information cannot be provided at the time of solicitation, and since the reasonableness of fundraising costs is based on numerous factors not taken into account by the public, contributions will simply be made to those charities with the lowest fundraising costs. Charities also contend that a point-of-solicitation requirement is counter-productive because it increases a charity's relative costs. Further, some states have even suggested that a point-of-solicitation provision may discourage the public's willingness to contribute. "[A] state may . . . conclude that *requiring solicitors to disclose* that they themselves will keep 75% to 85% of any donation *will not promote the public's willingness* to involve themselves in charitable endeavors." Brief for Amicus Curiae, Attorney General of Commonwealth of Massachusetts at 50, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)(No. 82-766)(emphasis added). *But see* Steele, *Regulation of Charitable Solicitation: A Review and Proposal*, 13 J. Legis. 149, 188 (1986) (proposing mandatory disclosure of certain information in "standardized form . . . coupled with a statement that more detailed information will be furnished upon request"; this structure will help reconcile the differing views of "point-of-solicitation" and "demand" disclosure proponents). In addition, the public may be compelled to contribute to those organizations with the lowest fundraising costs, unaware that they have ineffective programs. *See* BAKAL, *supra* note 2, at 431. Moreover, many times the reported fundraising costs are inaccurate. "Certainly the percentages of fundraising and management costs reported by even the best-run charities are something less than thoroughly reliable and comprehensive. [Thus,] [j]udging a charity by its fundraising costs may not be a wholly reliable way to determine its effectiveness as a char-

tional Federation of the Blind of North Carolina,[135] had been largely ambiguous in discussing the constitutionality of a point-of-solicitation requirement. In *Riley*, a challenged section of a North Carolina solicitation law required "professional solicitors to disclose certain information prior to requesting, either directly or indirectly, a charitable contribution."[136] Among the information required to be disclosed was the average percentage of gross receipts actually paid to the charity in fundraising campaigns over the preceding twelve months or, if the professional solicitors had been soliciting funds for less than twelve months, for all completed solicitation campaigns.[137]

The district court held that mandatory disclosure of the professional solicitor's name and the name of the charity for whom it is soliciting is not burdensome; however, it held that the "gross receipts" disclosure was "an undue burden on protected speech in the context of a telephone solicitation campaigns which involved the sale of a good or a

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ity." LISTON, *supra* note 2, at 36. Many annual reports often mask fundraising costs under such euphemisms as education, public information, administration, and public services. *Id*; *see also* Brief for Amicus Curiae on behalf of Independent Sector in support of Respondent at 5, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984) (No. 82-766) (fundraising costs may exceed prescribed 25% limit as imposed by Maryland statute in *Munson* in following ways: (1) fraud or self dealing, (2) inefficiency, (3) unexpected external events beyond charity's control, and (4) pursuit of unpopular or unattractive objectives).

135. 108 S. Ct. 2667 (1988).

Several decisions have come down since the Supreme Court's *Riley* decision and most, not surprisingly, have declared unconstitutional various state statutory provisions which compelled disclosure of financial information or which imposed percentage limitations on fundraising fees. *See, e.g.*, People v. French, 762 P.2d 1369 (Colo. 1988) (finding unconstitutionally overbroad a statutory provision which required fund raisers to disclose to donors amount of adjusted gross proceeds to charity if charity contracted to pay 50% or more of adjusted gross proceeds to fund raiser); WRG Enters. Inc. v. Crowell, 758 S.W.2d 214 (Tenn. 1988) (declaring overbroad statutory provision which limited professional solicitor's fee to 15% of gross contributions received and striking prohibition against telephone solicitation); Telco Communications Inc. v. Carbraugh, 700 F. Supp. 294 (E.D. Va. 1988) (striking provision which required solicitors to disclose minimum percentage of collected funds which would reach charity and which required charities before solicitation to submit campaign literature and oral solicitation scripts to commissioner); Indiana Voluntary Firemen's Assoc., Inc. v. Pearson, 700 F. Supp. 421 (S.D. Ind. 1988) (finding unconstitutional section of statute which required solicitor to disclose at time of solicitation, as well as after solicitation, fee arrangement with charity, although upholding requirement that solicitor disclose its professional status). *But see* City of El Paso v. El Paso Jaycees, 758 S.W.2d 789 (Tex. Ct. App.) (curiously upholding constitutionality of ordinance which required solicitors to disclose percentage of funds received by charity—a holding that which flies in the face of *Riley*), *reh'g denied*, 758 S.W.2d 792 (Tex. Ct. App. 1988).

136. 635 F. Supp. 256, 261 (E.D.N.C. 1986), *aff'd mem.*, 817 F.2d 102 (4th Cir. 1987), *aff'd*, 108 S. Ct. 2667 (1988). For a further discussion of *Riley*, see *supra* text accompanying notes 66-76.

137. *Id.*

ticket to an event."[138] The district court reasoned:

> First, the professional solicitor's "track record" over a twelve-month period is not relevant to the particular solicitation campaign he is involved with at the time . . . . Second, . . . those charitable organizations which rely on professional solicitors [are] at a tremendous disadvantage in raising funds compared to those charitable organizations which do not have to use professional solicitors. . . . Finally, if the state's interest is to inform the public about how much of their money will reach the designated charity, there is no valid reason to require a mandatory disclosure from professional solicitors but not from volunteer fundraisers.[139]

The Supreme Court agreed with the district court that it is unconstitutional to require professional fund raisers to disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous twelve months that were turned over to the charity.[140] Initially, the Court had to decide which level of judicial scrutiny to apply to this provision; the state argued this portion of the act regulated commercial speech, since it related only to the professional fund raiser's profit from the solicited contribution. Thus, the state contended that the Court should apply its more deferential commercial speech principals.[141] That argument was rejected, however, with the Court noting that even assuming such speech was commercial, it lost its commercial value when it was "inextricably intertwined with otherwise fully protected speech."[142] The Court noted that in *Munson* and *Schaumburg* it refused to separate the component parts of charita-

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138. *Id.*

139. *Id.* at 261. The court may be incorrect in asserting its third reason, since disinterested professional fund raisers have been shown to be more susceptible to fraud than volunteers who are not receiving a fee for their work. *See* Streich v. Pennsylvania Comm'n on Charitable Orgs., 579 F. Supp. 172, 179 (M.D. Pa. 1984) (professional solicitors may not be interested in or overly concerned about charity for whom they solicit).

But see Heritage Publishing Co. v. Fishman, 634 F. Supp. 1489, 1494 (D. Minn. 1986). The district court found Minnesota's point-of-solicitation disclosure requirement to be permissible. The statute required that in all charitable solicitations, the following must be disclosed: (1) the charity's identity, (2) the percentage of the contribution that is tax deductible, and (3) the percentage of the contribution that is actually received by the charity if a professional fund raiser is employed. The court, in a rather brief analysis, concluded that these requirements are less restrictive means than statutes which limit the amount a fund raiser may retain. It said, "This section appears to be constitutional. This type of public disclosure was suggested by the Supreme Court in *Munson* and *Schaumburg* as an appropriate way for a state to prevent fraud in charitable solicitation." *Id.* at 1504.

140. *Riley*, 108 S. Ct. at 2676.

141. *Id.* at 2677.

142. *Id.*

ble solicitation from the fully protected whole because in reality that solicitation was characteristically intertwined with informative and persuasive speech. Therefore, North Carolina's content-based regulation was subject to first amendment scrutiny.[143]

The state contended, in defense of the provision, that it had great interest in informing donors how the money they contribute is spent in order to warn the public that a greater than expected portion of its donation may never reach the charity. The Court found several flaws with this compelled disclosure and declared that the means chosen to accomplish this end were unduly burdensome and not narrowly tailored to prevent fraud.[144]

First, the Court pointed out that it is not necessarily true that a charity derives no benefit from funds collected but not forwarded to it. For example, where solicitation is combined with advocacy and dissemination of information, the charity enjoys a benefit from the act of solicitation itself.[145] Second, the Court noted that an unchallenged portion of the disclosure law requires professional fund raisers to disclose their professional status to potential donors, "thereby giving notice that at least a portion of the money contributed will be retained."[146] It added that, "Donors are also undoubtedly aware that solicitations incur costs, to which a part of their donation might apply. And, of course, a donor is free to inquire how much of the contribution will be turned over to the charity."[147] The Court also noted that another North Carolina statute requires that fund raisers disclose this information upon request.[148]

Significantly, the Court held in dictum that a state may compel a fund raiser to disclose its professional status. "Nothing in this opinion should be taken to suggest that the State may not require a fund raiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny."[149] In a separate opinion, Justice Scalia disagreed with this statement, arguing that to require a professional fund raiser to disclose its professional status is not narrowly tailored to prevent fraud. Scalia stated that:

> [s]ince donors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses—whether the solicitor is a professional, an in-house em-

143. *Id.*
144. *Id.* at 2678.
145. *Id.*
146. *Id.* at 2679.
147. *Id.*
148. *Id.*
149. *Id.* at n.11.

> ployee, or even a volunteer—it is not misleading in the great mass of cases for a professional solicitor to request donations "for" a specific charity without announcing his professional status.[150]

The majority next reasoned that the compelled disclosure would hamper the efforts of professional fund raisers from raising money because the provision discriminates against small or unpopular charities—which must often rely on professional fund raisers.[151] The Court also pointed out that the provision will harm those groups with high costs and expenses because donors will often be discouraged from donating. The Court further noted that verbal solicitation will likely result in a donor being dissatisfied with the disclosed percentage and the fund raiser will often not be afforded the opportunity to explain the figure.[152] In short, the Court held that more "benign and narrowly tailored" options were available. For example,

> [T]he State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.[153]

Chief Justice Rehnquist, joined by Justice O'Connor, dissented, contending that the disclosure provision was constitutional.[154] First, Rehnquist disagreed that the Court should apply a strict scrutiny standard. "The required disclosure of true facts in the course of what is at least in part a 'commercial' transaction—the solicitation of money by a professional fundraiser—does not necessarily create such a burden on core protected speech as to require that strict scrutiny be applied."[155] He also pointed out that, because of the record's lack of evidence, the provision should be upheld absent a showing that the effect of the disclosure was to dramatically limit contributions or to impede a charity's ability to disseminate ideas.[156]

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150. *Id.* at 2681 (Scalia, J., concurring).
151. *Id.* at 2679.
152. *Id.*
153. *Id.*
154. *Id.* at 2685 (Rehnquist, C.J., dissenting).
155. *Id.*
156. *Id.*

VII. CONCLUSION

In the interim, New York's amendment represents a considerable improvement over its predecessor, by empowering the secretary of state and attorney general to monitor more closely the conduct of a charity and professional fund raiser. In addition, by expanding the types of behavior that are prohibited, the State is dissuading charities and their fund raisers from deceptively soliciting contributions, while allowing the public to inspect the group's financial and program information if it so desires.

The primary flaw of a demand disclosure type of regulation is that often the public will not request any information and, even if it is obtained, it is frequently incomprehensible. However, access to the information is nevertheless essential before making a donation. The Supreme Court majority may be accurate when it claims that "donors are also undoubtedly aware that solicitations incur costs, to which part of their donation may apply."[157] However, while many donors realize that *some* percentage of their donations are applied towards administrative and fundraising costs, many of them are not aware that the percentage is often as high as eighty-five percent.

The Court implied in *Riley* that demand disclosure is an entirely appropriate means to regulate charitable fraud as opposed to compelled disclosure. The Court noted that under an unchallenged North Carolina statute, fund raisers must disclose certain information *upon request*, including the percentage of funds to be retained by the fund raiser. A state's demand disclosure statute should require fund raisers to disclose the very same information a point-of-solicitation statute would have required. At a minimum, the following should be disclosed:

—Clear identification of the professional fund raiser and a clear explanation that it is soliciting on behalf of the named charity (the Court in *Riley* stated that a state may compel a fund raiser to disclose this information even *before* a demand, and states should so require);

—The details of the financial arrangement between the fund raiser and the charity, including disclosure of the percentage of funds that the fund raiser will retain, or, if unavailable, a good faith estimate based on similar past campaigns;

—An elaborate description of the charitable programs for which

157. *Id.* at 2679. The Philanthropic Advisory Service of the Council of Better Business Bureaus endorses only those organizations that spend no more than 35% of contributions of fundraising and at least 50% of income on charitable programs. N.Y. Times, Sept. 22, 1985, § 23, at 4, col. 4. Furthermore, "[t]he National Information Bureau suggests that at least 70% of all available contributed funds should be spent for *program activities*, that is, only 30% may be spent for fundraising." Brief of Petitioner at 35 n.23, Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984) (No. 82-766) (emphasis in original).

the funds are being collected, including an explanation of whether the funds will be used for research, program awareness, administration, or other particular areas; and

—The name and phone number of a charity representative whom the donor can call in the event a fund raiser solicits deceptively or coercively, or if the donor doubts the fund raiser's word.

In short, although a state may monitor and attempt to eliminate charitable fraud by enacting strict reporting and registration legislation, the most powerful deterrent to charitable fraud would be the education of the public. Demand disclosure is the only remaining alternative with which to regulate charitable fraud constitutionally and effectively; therefore, it is imperative that states mandate that fund raisers disclose information upon request and that the public is quick to seek such information. Once the public is made aware that a great portion of its donation may never reach the charity and, even if it does, that it may not reach the specific program the donor intended, it will demand more plentiful disclosure at the time of solicitation. The public's inquiry will be further triggered when told of the fund raiser's professional status, which the Supreme Court has declared that states may compel a fund raiser to disclose even before soliciting. The availability of pertinent and generous information at the time of solicitation is necessary to ensure an informed contributing public.

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