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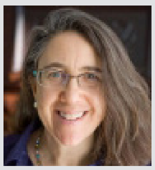

RAY MADOFF is a professor at Boston College Law School. She is the co-founder and director of the Boston College Law School Forum on Philanthrophy and the Public Good, a non-partisan think tank. She spoke with Boisi Center program coordinator **Suzanne Hevelone** after her presentation on philanthropy and the public good at the Boisi Center.

HEVELONE: How did you become interested in philanthropy and its effectiveness in terms of the public-private partnership?

MADOFF: I did a book about the law of the dead. How does the law treat interests of the dead? Private charitable foundations are one of the big ways that people are allowed to live on after death. The legal treatment of private charitable trusts has changed enormously over our country's history. They went from being literally not allowed, to becoming allowed, and even heavily subsidized by our tax system. That brought me to the question of "What are we getting for this subsidy?" I was surprised to see how little we ask of our private charitable foundations in terms of payout.

HEVELONE: Should we be worried about how we define the public good in terms of payout? Is it okay to let people define the public good for themselves? How do we go about measuring the public good?

MADOFF: It's a little bit like what people say about democracy – it's the worst system other than every other system.

Our current system lets everyone decide for themselves what the public good is, which obviously has its problems, but it also

avoids other problems. When we want to be having a robust civil society, we don't necessarily want the government defining it too narrowly. I'm not sure we've drawn the line perfectly. There are some lines that should be examined. For example, we have charitable hospitals that operate identically to for-profit hospitals. Maybe we should be rethinking some of these things along the margins, but the line-drawing is hard to do.

HEVELONE: The title of your talk, "Promoting a Closer Alignment Between Philanthropy and the Public Good," suggests that there is some disconnect, or at least an inefficiency, between charitable giving and the actual net increase in the public good. Does this occur in the distribution of funds or do you see it elsewhere as well?

MADOFF: The area that I'm particularly interested in is the trend for charities to be involved in the accumulation of capital, rather than spending wealth for the public good. It is not the same thing for money to be spent currently toward feeding hungry people or building housing or studying to create a vaccine, as when you set it aside and it's subject to no payout requirement. For people who feel that those are the same things, then that's where the disagreement will be. I think that spending matters.

HEVELONE: What do you view as the largest obstacles between donors making donations and the charities actually receiving those donations? Is this due to the government structure of our tax law?

MADOFF: One problem is that our law does nothing to encourage it. It fails to draw distinctions between setting money aside for future charitable spending and money being spent today. That's one impediment. Then once the law doesn't draw that distinction, I think another impediment is that people are afraid of misspending their charitable dollars. People are busy in their lives. They are not experts in the charitable world. They read stories about charities that are wasting money. They don't know how to make good decisions and so they make no decisions at all.

HEVELONE: Especially in situations where you have a really significant amount of money to give, it's a weighty responsibility.

MADOFF: Right. The Mark Zuckerberg story about the $100 million wasted in Newark. That's an example where people can see how good intentions can come to nothing when it's not thoughtfully spent.

HEVELONE: For those people that weren't able to attend your talk or are not familiar with the subject, can you talk about what the donor-advised funds [DAFs] are, and how that differs from private trusts?

MADOFF: Basically a private foundation is an entity that is set up by an individual or a small number of individuals. The tax law makes it subject to greater reporting requirements and oversight requirements. So a private foundation must spend 5% of their assets each year. They're prohibited from doing different things, they're subject to greater oversight, and they provide fewer tax benefits for the donors. Donor-advised funds are basically an account that is maintained by a public charity, like a community foundation or like a commerical sponsoring organization. The public charity agrees to hold the person's contribution in a separate account and to await advice from that person about how the money should be spent. Legally it's treated the exact same as an outright contribution to that public charity. It's treated the same as if you gave money to the American Red Cross for it to currently spend, but, instead, the sponsoring organization holds the funds awaiting instructions from the donor about spending.

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Donor-advised funds have grown tremendously in recent years. They've gone from being virtually unheard of to being the fastest growing form of charitable giving. This year, of the ten largest charities, in terms of receiving most donations in the year, five of them were sponsoring organizations of donor-advised funds. They are really growing tremendously, and they're taking a lot of charitable dollars. One of the reasons is that they provide better tax advantages than contributions to private foundations. Also, they're not subject to any payout requirement. So they provide lots of benefits to donors. However, they are not subject to any rules about the timing of when the money has to come out.

HEVELONE: That goes right into my next question. In an op-ed you wrote back in 2011, you said that Congress should require DAFs to contribute their assets to charitable work within seven years. Do you still think that's a worthwhile legislative initiative?

MADOFF: Yes, I still think Congress should impose a payout requirement, although seeing what's happened with the growth of donor-advised funds in recent years, I think the payout requirement should be longer, maybe even 15 or 20 years. The reason is that I would prefer people to create a donor-advised fund with a more reasonable payout period than a private foundation. In a private foundation, money can be lost to things like salaries and administrative expenses. There are greater efficiencies if you just have essentially a charitable checking account. However, I think we should have some time period imposed on the distribution of the funds. Now that people are using donor-advised-funds for larger and larger gifts—you see gifts even as much as $1 billion going into donor-advised funds—it's important that you make the time period one that is reasonable for people to spend large amounts of money. Maybe a billion might be too hard to spend in 20 years, but why give all the tax benefits then in year one if you're not going to spend it?

HEVELONE: Could private foundations also have some sort of timeframe in which their incoming contributions have to be spent? Would that be beneficial as well?

MADOFF: There have been, in the past, questions about whether private foundations should be allowed to exist in perpetuity. In 1969, the year that Congress imposed all of these payout requirements on private foundations, they also considered limiting private foundations to 25 years because of this concern that we give lots of benefits for money that gets set aside, and you just are growing an organization and you're not committing the money to the public good.

HEVELONE: You've also mentioned in some of your editorials that DAFs are growing in size, but overall charitable output has remained relatively flat.

MADOFF: This is a separate point about the growth of donor-advised funds. Supporters of donor-advised funds say, "Look at how much more money this has brought into charity." In fact, giving to charity has remained remarkably consistent in the history of taking in these numbers, which has been 50 years now. It has remained pretty consistent at 2% of disposable net income. What's happened is that more money has gone to DAFs, but more money has not been going to charity. It's still staying at 2% of disposable net income.

HEVELONE: Do you have any tax advice to American taxpayers who want to give charitably?

MADOFF: The tax advice, from a practitioner point of view, is that people should give appreciated property because you get double the tax benefits. Somebody who gives cash only gets the benefit of the income tax deduction. Someone who gives appreciated property gets to save both capital gains and income taxes. We give a double benefit to contributions of appreciated capital, and this is just another of the many ways that our tax system provides extra tax benefits for the wealthy.

HEVELONE: It would be nice to see that reformed legislatively!

MADOFF: The reason that we don't see that reform is because it's part of a larger giveaway of capital gains taxes, which is that everybody can avoid capital gains taxes by dying and holding onto their capital assets. Then they never pay capital gains taxes. Their heirs get a step-up in basis, so no capital gains taxes are ever paid.

All of that is to say that we have a system that already disproportionately benefits capital assets in a way that is not ideal for society.

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