

2004

## The Donation Registry

Robert D. Cooter

---

### Recommended Citation

Robert D. Cooter, *The Donation Registry*, 72 Fordham L. Rev. 1981 (2004).  
Available at: <http://ir.lawnet.fordham.edu/flr/vol72/iss5/26>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# THE DONATION REGISTRY

*Robert D. Cooter\**

When Al Gore disclosed his 1997 tax return, he revealed that his cash contributions to charity were \$353 and his income was \$197,000.<sup>1</sup> Charitable organizations were distressed by the example he set. The typical person in his tax bracket was giving ten times as much.<sup>2</sup> There was much discussion about the appropriateness of his behavior and he defended himself in various ways. I drew two conclusions from this case. First, the social norm with respect to charitable giving is relatively inchoate, by which I mean nobody really knows how much you are supposed to give. Second, except for a few famous politicians like Al Gore, people who fail to meet their charitable obligations do not suffer criticism or social sanctions. We don't know exactly how much we ought to give to charity, and we don't have effective institutions to enforce the obligation. Consequently, we don't give very much to charity.

To document the problem, consider the data on charitable giving provided by the Internal Revenue Service ("IRS").<sup>3</sup> Each year the IRS publishes a table showing charitable contributions by people who itemize their deductions when filing their income tax returns. According to this data, most people in the middle classes (say, \$50,000 in income per year or more) donate between two and three percent of their income to charity.<sup>4</sup> People in the highest bracket, which is over ten million dollars in income per year, jump to donating more than four percent of their income to charity.<sup>5</sup> People in the low income brackets who itemize their deductions give a much larger percentage of their income to charity than wealthier people, but this fact is

---

\* Herman Selvin Professor of Law, University of California at Berkeley. I would like to thank Blair Dean, Aaron Edlin, Jennifer Ulveling, and Paul Edwards. This lecture was first delivered at Fordham University Law School's conference entitled "Rawls and the Law" on November 8, 2003, whose participants provided useful comments.

1. *Gores' Charitable Giving Raises Some Eyebrows*, Apr. 15, 1998, at <http://www.cnn.com/ALLPOLITICS/1998/04/15/gore.taxes/>.

2. *Id.*

3. See David Campbell & Michael Parisi, *Individual Income Tax Returns, 2000, Returns with Itemized Deductions, by Size of Adjusted Gross Income tbl.3* (all numbers are estimated based on samples), at <http://www.irs.gov/pub/irs-soi/00indtr.pdf>.

4. *Id.*

5. *Id.*

misleading.<sup>6</sup> In reality we do not have accurate information on donations by people in the lower income brackets.

The low rate of giving, I believe, is caused by an information problem with so-called “disjunctive obligations.” A disjunctive obligation is something that you ought to do, but not at every opportunity. For example, you have an obligation to give to the needy, but you don’t have an obligation to give to every needy person whom you encounter. In this respect, disjunctive obligations are different than, say, universal obligations. To illustrate, subject to various exceptions, the obligation to tell the truth applies whenever you speak.

Like universal and statistical laws in science, universal and disjunctive obligations in ethics differ dramatically with respect to the information required to detect a violation. With universal obligations, observing a single act is sufficient to detect a violation. In contrast, with disjunctive obligations, detecting a violation requires observing many acts. Indeed, detecting a violation of the obligation to be charitable usually requires summing all of a person’s donations and comparing it to a person’s income. We almost never know the proportion of income that another person donates to charity. Lacking information, we cannot discuss concrete cases as required in morality and law to make an obligation precise. So it is no surprise that our charitable obligations remain vague and we are unsure about how much we ought to give to charity. And it’s no surprise that we cannot bring effective social pressure to bear to enforce this obligation.

The problem can be restated in the language of economics. Decentralized information collection cannot support the evolutionary development of disjunctive obligations like charity. There is an inherent failure in the “market for norms.” Overcoming this problem requires a mechanism to centralize information. As I will explain, private parties can overcome the information problem with help from the state.

Experimental evidence is relevant to understanding this problem.<sup>7</sup> Behavioral economists and social psychologists have done a lot of

---

6. In the lower income brackets, most people take the standard deduction instead of itemizing their deductions. So those who do itemize are unusual people, specifically the small percentage of poor people who donate a large percentage of their income to charity.

7. Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in *Barriers to Conflict Resolution* 87 (Kenneth J. Arrow et al. eds., 1995); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 *Nature* 137 (2002); Elizabeth Hoffman et al., *Behavioral Foundations of Reciprocity: Experimental Economics and Evolutionary Psychology*, 36 *Econ. Inquiry* 335 (1998); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 *Am. Econ. Rev.* 1281 (1993); Ernst Fehr et al., *Contracts, Fairness, and Incentives*, Sept. 5, 2003, at <http://www.uni-koeln.de/wiso-fak/feld/Schmidt.pdf>.

experiments in so-called “trust games.” The characteristic of a trust game is that a player who trusts others takes a risk. By trusting, the player wins if the other person is altruistic, and loses if the other person is selfish. To illustrate a typical trust game, the experimenter gives me a dollar and then says, “You can either keep the dollar or you can give it to this other person. If you give it to this other person, I am going to give the other person two more dollars and then the other person is going to decide how much to give back to you.” If the other person is altruistic, he returns the original dollar and more besides, whereas a selfish person keeps everything.

One of the characteristic results of trust games is that people are much more altruistic than the standard economic model of rational self-interest would predict.<sup>8</sup> Indeed, those people who play the game based on the assumption that everyone else is strictly self-interested, as economists are inclined to do, get lower payoffs than those who place some trust in others. This is because people are in fact more altruistic than the classical economic model assumes, so the classical economists bring factually incorrect beliefs to the game.

Another conclusion of these experiments is that information makes an enormous difference as to what people do. If the games are played under conditions of perfect anonymity, where it is impossible to know anything about the identity of another player, a much smaller proportion of players are altruistic than when they have some information about the identity of the other players. Charities act as if they understand this fact when they publish long lists of donors distinguished by the amount of their gift. For example, the back of the program at the Metropolitan Opera tells exactly how much the richest New Yorkers donated. However, no one has a way to find out the sum of their donations across all charities, or the percentage of their income that they donated. No one publishes the ratio of cash contributions to adjusted gross income for New York’s wealthiest taxpayers, or for anyone else.

Another kind of evidence about charity comes from religious groups. The Judeo-Christian tradition recognizes the obligation to “tithe.”<sup>9</sup> Some religious organizations have ways to solve the information problem with respect to this obligation. For example,

---

8. For a cross-cultural survey confirming this proposition, see Jean Ensminger, *The Co-Evolution of Social Norms and the Market: Evidence from Economic Experiments and Social Network Analysis in Africa*, Jan. 15, 2004 (manuscript cited with permission from author), at <http://www2.jura.uni-hamburg.de/le/Ensminger%20Paper.pdf>.

9. Examples of tithing are prominent in the Bible. For example, Abraham apparently gave ten percent of his wealth to the high priest, *Genesis* 14:19-20, and Jacob promised to give ten percent of his earnings to God, *Genesis* 28:20-22. Aside from examples, there is no explicit commandment to tithe. Christians, Jews, and Muslims recognize the obligation to tithe, but the interpretation of tithing varies across different groups and sects.

Mormons who want to participate in the special ceremonies of the church have to receive annual certification from their Bishop, which requires an interview. One of the questions in the interview is, "Have you paid your full tithe?" Mormons are also required to make the "fast offering," which consists of the money that they save from not eating two meals per month. The tithe provides Mormons with a definite standard of each person's fair share of charitable donations and the institutionalized church provides a mechanism of social enforcement.<sup>10</sup>

Although few religious groups are as successful as Mormons in this respect, religion still tends to exert a positive influence. Social surveys using interviews indicate that religious people are far more likely to donate than secular people. According to a probit regression Arthur C. Brooks did on a large data set, a person who identifies himself as secular rather than religious is twenty-three percent less likely to have made a donation in the last year and twenty-six percent less likely to have "volunteered."<sup>11</sup>

Apparently the tithe and its enforcement by religious institutions exert continuing influence on charity by the religious population. I would ideally replicate this success at the civic level. An overlapping consensus among religious doctrines and ethical philosophies recognize charity as an obligation. We should generalize the obligation of charity to citizens. Every citizen who enjoys wealth ought to do his or her share to help less fortunate people. The problem is to make the civic duty of charity precise and enforce it with social pressure.

I propose proceeding in three steps. First, the organized charities of the United States should create a donation registry on the Internet with open access to the information that it contains.<sup>12</sup> At the same time, the organized charities should insist that politicians disclose their income and charitable contributions by disclosing their tax returns. Second, after the registry becomes accepted among politicians, the organized charities should pressure all public figures to disclose the ratio of charitable contributions to adjusted gross income on the donation registry. They would not be expected to reveal their level of income or their tax returns. By "public figures," I mean people who are examples for the rest of us, including politicians, administrators,

---

10. I am grateful to Paul Edwards for this information. For a statement on tithing among Mormons, see Elder Jeffery R. Holland, *Like a Watered Garden* (2001), at <http://www.lds.org/conference/talk/display/0,5232,23-1-225-13,00.html>. Basic Mormon teaching on tithing can be found in *Gospel Principles* 207-10 (1997), at [http://www.lds.org/gospellibrary/materials/gospel/GospelPrin\\_Chapters/GospelPrin31110\\_37.pdf](http://www.lds.org/gospellibrary/materials/gospel/GospelPrin_Chapters/GospelPrin31110_37.pdf).

11. Arthur C. Brooks, *Religious Faith and Charitable Giving*, 121 *Pol'y Rev.* Online (Oct. 2003), available at <http://www.policyreview.org/oct03/brooks.html>.

12. For two possible hosts of the donation registry, see <http://www.guidestar.org/> and <http://www.independentsector.org/>.

business leaders, entertainers, and sports heroes. At this stage, society should have a discussion about what a fair share is and who is doing it.

In the long run, however, the big money for charity is in the middle class, which is numerous. To solve this problem, my third step is for the Internal Revenue Service to place an optional box on the tax form. If the box is checked, the IRS automatically transmits to the donation registry the taxpayer's name and percentage donation (the ratio of deductible cash contributions to adjusted gross income). Once the information is in the donation registry, anyone could look at it. In this way we could start a discussion that would encompass all of us and bring social pressure on us to be more generous. Note that such a check box would solve the problem of verifying that public figures disclose accurate information.

I will enumerate several of the donation registry's advantages without discussing them. First, it will result in substantially more contributions to charity. Second, it will accomplish more redistribution by less coercive means than taxation. With less coercion, the donation registry will avoid worsening the effects of high marginal tax rates on economic growth and employment. Third, charitable redistribution is almost certainly more efficient than state redistribution. Greater efficiency comes especially from the watchful scrutiny of donors, who withhold donations from inefficient charities.<sup>13</sup> (This fact suggests another attractive proposal: shifting redistributive efforts from the state to non-governmental organizations by partially replacing the charitable deduction with a charitable tax credit.)

Besides these advantages, the donation registry has some disadvantages that I will mention without discussing. First, the welfare state makes poor people feel they have a right to redistributive benefits. Replacing state aid with charity might undermine the beneficiary's sense of having a right to receive benefits. For reasons I can't explain here, I find this argument unpersuasive. Second, anonymous charity, which cannot produce any advantage for the donor, is the purest benevolence, so publicizing charity undermines its purity. I dismiss this objection because, compared to anonymous donors, public donors benefit society twice—directly through the use of the money and indirectly by showing that they did their fair share.

---

13. A related but difficult question is whether a greater percentage of expenditures by charities go to redistribution, or whether a greater percentage of government expenditures go to redistribution. The government and charitable sectors both undertake many forms of expenditure that are not redistributive, or at least not redistributive to the poor. Much of the federal government's expenditures are on the military; its direct purpose has to do with the protection of the state and not redistribution. In addition many of the regulatory activities in the state benefit the rich and other undeserving groups. In this respect, private charities have a great advantage. The advantage arises from the fact that people have to pay their taxes, even when the taxes are redistributed to the rich, but no one donates to charities that take from the poor and give to the rich.

The demonstration that they did their fair share challenges the rest of us to do our share. Third, the donation registry publicizes facts that many people would prefer to keep private and stimulates social sanctions such as gossip. In my view, disclosure of violations is essential to the effectiveness of any social norm, so this objection to the donation registry applies equally to any state action that triggers social sanctions. For example, the defendant who loses at trial would often prefer to keep the outcome quiet in order to avoid gossip and social sanctions. Judges, however, do not hesitate to publicize the outcome of trials, and judges often provoke social sanctions by castigating the wrongdoer at the trial's end.

My proposal for a donation registry suffers from the usual weaknesses of proposals for innovative social change. In order to arrive at the best form, such proposals must be tried by degree and adjusted by experience. In this spirit, variations on the donation registry should be articulated and considered. While I believe that charity is a civic duty, and publicizing the level of individual compliance is appropriate, many people will find my approach too aggressive and intrusive. For example, Europeans are much less aggressive than Americans about soliciting or publicizing charitable giving.<sup>14</sup> In general, charitable giving has a much larger role in the United States than in other countries.

An alternative mechanism, which I call the "challenge letter," might achieve similar results without publicity. The Internal Revenue Service could automatically send a private letter to each taxpayer comparing his donation to the donations of others.<sup>15</sup> The letter might challenge the taxpayer to commit to meeting the prevailing social norm.<sup>16</sup> The IRS would not disclose the content of the challenge letters to the public. The challenge letter might be adopted instead of the donation registry, or the challenge letter might supplement the donation registry. If used as a supplement, the challenge letter might be sent to everyone who did *not* check the box on his or her tax form and thus did *not* disclose his or her donation to the registry.

Another variation on the donation registry could be applied to lawyers. The obligation of law firms and individual lawyers to provide pro bono services is widely recognized and enforced in the United States through social pressure, whereas such services are largely unknown in other parts of the world. Pro bono services by lawyers in

---

14. My conversations with European legal scholars suggest this.

15. I want to thank Seana Shiffrin for suggesting that the IRS might send a private letter to each taxpayer to encourage charitable donations.

16. Jerry M. Burger, *The Foot-in-the-Door Compliance Procedure: A Multiple-Process Analysis and Review*, 3 *Personality & Soc. Psychol. Rev.* 303-25 (1999); Robert B. Cialdini et al., *Preference for Consistency: The Development of a Valid Measure and the Discovery of Surprising Behavioral Implications*, 69 *J. of Personality & Soc. Psychol.* 318-28 (1995).

the United States effectively substitute for legal aid provided by the state in other countries. Pro bono services have advantages and disadvantages relative to state legal aid programs that I will not discuss here. My point, however, is that a centralized donation registry could be established for pro bono legal services. The registry would list the level of pro bono services provided by law firms and individual lawyers. Public access to the registry would stimulate discussions to define more clearly the charitable obligations of lawyers and enforce them.

Pro bono legal work is an example of a non-cash donation often referred to as "volunteering." Beside cash contributions, the Internal Revenue Service allows the deduction of some non-cash donations to charities. The pro-bono registry is thus a non-cash donation registry, with values recorded in hours donated rather than dollars. We might call this variant the "volunteer registry." Presumably there are many other possibilities for volunteer registries. For example, a volunteer registry might be created for doctors, teachers, therapists, etc.

Another potential problem with my proposals concerns the definition of "charity." In the United States, a non-profit organization can satisfy some easily met conditions<sup>17</sup> and register as a charity for tax purposes. Registration as a charity permits contributors to deduct their donations from their taxable income. Consequently, the term "charity" in the United States tends to cover a heterogeneous class of organizations that satisfy the IRS criteria. Some people, however, will regard some charities as more relevant than others for social support. People who feel this way might want to make some adjustments in what counts as a donation for the donation registry. Indeed, people who disagree about this matter might want to establish separate registries with somewhat different criteria for what qualifies as a donation.

A useful distinction in non-profit organizations is between those that serve cultural or religious purposes, and those that are primarily concerned with redistributing income and helping the poor. Economists sometimes use the term "merit goods" to describe goods like opera, liberal education, basic scientific research, and various forms of artistic expression.<sup>18</sup> Merit goods have in common the fact that many people regard them as undersupplied by the market and worthy of a subsidy by the state or private donations. Merit goods, however, are different from income redistribution. The usual purpose of income redistribution is to increase equality and relieve poverty. Donations to increase equality and relieve poverty are what moralists usually mean by "charity."

---

17. For a list of the conditions, see 26 U.S.C. § 501(c)(3) (2002).

18. Richard A. Musgrave, *The Theory of Public Finance: A Study, in Public Economy* 13-15 (1959) (referring to "merit wants"). See generally John G. Head, *On Merit Goods*, 1 *Finanzarchiv* N.F. 25 (1966).



Some people will favor distinguishing donations for religion, merit goods, and redistribution in the donation registration. They will want the IRS to distinguish between non-profit organizations according to which of these general purposes the organization serves. My hope is that the donation registry will first be implemented in its simple form and later people can debate about refinements.

In his magisterial book *A Theory of Justice*, Rawls advocated the difference principle, according to which the basic institutions in a just society maximize the material well-being of its worst-off members.<sup>19</sup> Our society, like every society, is unjust by this standard. Constructing a just political order does not simply involve calls for more and higher progressive taxation. Other mechanisms are required to circumvent the resistance of voters to high tax rates. I have discussed some possibilities—the donation registry, the challenge letter, and the volunteer registry.

A lot more intellectual work needs to be done on implementing redistributive measures. The general aim is to find mechanisms that increase the extent and efficiency of redistribution. The idea of efficient redistribution is usually measured by the ratio of the amount paid to recipients divided by the amount collected from contributors. Thus a charity that distributes ninety cents of every dollar contributed is more efficient than a charity that distributes eighty cents of every dollar contributed. Economists are experts of two policy values: efficiency and distribution. Consequently, economists are centrally placed to develop mechanisms of efficient redistribution.

Charities are probably more efficient redistributors than the state because donors monitor them. The fact that donors take an interest in how their money is spent causes charities to be careful about spending money. For this reason, the state is much more likely to waste money and effort. Against this advantage of charity stands an advantage of the state. Since charities collect donations, they have to spend a lot of time and effort soliciting them. Since government agencies receive taxes that are compulsory, they do not have to invest as much effort in obtaining funds. Monitoring favors the relative efficiency of charities and collection costs favor the relative efficiency of the state. When balancing these considerations, my experience suggests that private charities will be more efficient than state agencies, but I do not have hard evidence to prove this assertion.

I have advocated creating a donation registry in order to reduce inequality and poverty. Philosophers may wonder whether such a mechanism pertains to political justice. The donation registry could be regarded as a requirement of justice or as unconcerned with justice. For example, justice presumably requires giving each person his due,

---

19. John Rawls, *A Theory of Justice* § 26, at 130-39 (rev. ed. 1999).

whereas generosity concerns giving people more than their due. Although generosity is admirable, justice does not require it.

In my opinion, the donation registry should be regarded as implementing justice while providing scope for generosity. In Rawls's view, political justice is a requirement of fairness. The purpose of the donation registry is to ensure that people know what is fair with respect to their redistributive effort, and social pressures are brought to bear so people do their fair share. Doing your fair share is a requirement of justice. Having done your fair share, you may wish to be generous and still do more. So the donation registry implements justice while providing scope for generosity.

An important fact to note about the donation registry is that it does not rely on the state's coercive power to achieve fairness. Fairness may justify the use of the state's coercive powers—as in a civil trial—but fairness does not necessarily require the use of state power. When a superior means to coercion is available to achieve the ends of justice, only a dogmatist would insist that coercion should be used. In my opinion, the invention and development of less coercive means of redistribution are essential to solving problems of distributive justice in a modern economy.

If the donation registry is necessary to implement an ideal of political justice such as the maximin or difference principle, then failure to implement it is an injustice. The potential beneficiaries of such a system could rightly complain about such an injustice. Once a donation registry is implemented, everyone can complain about those who do not do their fair share. However, these facts do not imply that the beneficiaries of charitable redistribution have a right to what they receive. Rather than having a right to what they receive, they have a right to live in a just society.

By the cash register in Moe's Bookstore in Berkeley there is a pile of books called *Rules of Thumb*. One of these rules of thumb is, "Up to 20 percent of your dinner guests can be economists without ruining the conversation." Most of the speakers at this conference are distinguished by their accomplishments, but I am distinguished by being the only economist. When philosophers in the tradition of Rawls choose a partner for a real conversation or hypothetical debate in writing, they often select a utilitarian. I wish that philosophers in law schools would notice that many of their colleagues are economists and few identify themselves as utilitarians. If philosophers would choose an economist instead of a utilitarian for dialogue, the conversation would be equally unpleasant and more productive.

*Notes & Observations*