1995

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INTRODUCTION

The American Red Cross, the United Way, and the Salvation Army are all images that come to mind when one thinks of charities. Yet, under the laws of most states, for the purposes of qualifying for real estate tax exemption, most colleges, universities and other institutions of learning are also treated as public charities.\(^1\) In addition, colleges and universities are exempt from federal income tax under the Internal Revenue Code.\(^2\)

However, the nature of the American education system, including colleges and universities, has changed since these laws were enacted. As a result, the courts are now confronted with the issue of whether colleges and universities continue to fit the definition of a “public charity,” as provided by the statutes and constitutions of various states, including Pennsylvania.

This comment addresses the issue of whether these institutions, some of which have multi-billion dollar endowment funds

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1. In Pennsylvania, the state constitution gives authority to the General Assembly to enact laws exempting “purely public” charities from taxation. See PA. CONST., art. VIII, § 2(a)(v). The legislature exercised this authority with the enactment of the General County Assessment Law in 1933. See PA. STAT. ANN. tit. 72, §§ 5020-1 to 5020-602 (1968 & Supp. 1994). Specifically, section 5020-204(a)(3) exempts from “all county, city, borough, township, road, poor and school tax . . . all . . . universities, colleges, seminaries, academies, associations and institutions of learning, benevolence, or charity.” Id. § 5020-204(a)(3).

   For a complete list of states that exempt educational institutions, schools, colleges and universities from taxation, see Byron C. Keeling, Property Taxation of Colleges and Universities: The Dilemma Posed by the Use of Facilities for Purposes Unrelated to Education, 16 J.C. & U.L. 623, 624-26 & n.16 (1990).

2. I.R.C. § 501(c)(3) (1988). Section 501(c)(3) of the Internal Revenue Code provides a list of tax exempt organizations, including “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” I.R.C. § 501(c)(3).
and capital campaigns\(^3\) and which charge thousands of dollars for their services,\(^4\) should be entitled to the tax exemption of a "purely public charity," as defined by Pennsylvania law. Recent decisions that have addressed this issue indicate that the tax exempt status of private schools in Pennsylvania is in jeopardy.\(^5\) This comment explores whether such a result is warranted in light of the traditional definition of "purely public charity" and the changing face of American higher education.

**THE INFLUENCE OF ENGLISH COMMON LAW ON EARLY DEFINITIONS OF "PURELY PUBLIC CHARITY"**

The concept of a purely public charity in Pennsylvania dates back to the adoption of the Pennsylvania Constitution in 1784, which gave the legislature the authority to pass laws exempting "institutions of purely public charity" from taxation.\(^6\) Pursuant to that constitutional provision, the Pennsylvania General Assembly enacted the Act of May 14, 1874 (the "Act of 1874"), which exempted, among other organizations, all hospitals, universities and institutions of learning from taxation.\(^7\) In applying the provisions of the Act of 1874 to various organizations, the Pennsylvania courts began to formulate a definition of purely public charity.

In formulating the definition of purely public charity, the early decisions were guided by a seventeenth century English

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3. In 1988, Harvard University had an endowment fund valued at 4.2 billion dollars. Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3 (1990). Yale University's endowment fund was valued at 2.1 billion dollars. Id.

4. Six percent of college students attend institutions where the tuition is $10,000 or more. Derek Bok, *What's Wrong With Our Universities?*, 14 HARV. J.L. & PUB. POL'Y 305, 322 (1991). Fourteen percent attend private schools where the tuition is less than $10,000, and 80 percent of the country's college students attend public universities where tuition averages less than $2,000 per year. Id.


6. PA. CONST. of 1874, art. IX, § 1. The 1874 Constitution provided that "[a]ll taxes shall be uniform, upon the same class of subjects, . . . but the General Assembly may, by general laws, exempt from taxation . . . institutions of purely public charity." Id.

7. Act of May 14, 1874, No. 94, 1874 Pa. Laws 158. Specifically, the act exempted from taxation, "all hospitals, universities . . . and institutions of learning, benevolence or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed, or maintained by public or private charity." Id. The Act of 1874 was one of the predecessors to the current General County Assessment Law. See PA. STAT. ANN. tit. 72, § 5020-1 to 5020-602. See note 1 for the relevant provision of the General County Assessment Law.
statute called the Statute of Charitable Uses. Entitled "[a]n Act to redress the misemployment of lands, goods and flocks of money heretofore given to certain charitable uses," the statute listed in its preamble certain activities which were deemed to be for charitable purposes. Among the purposes listed by the statute were "the relief of aged, impotent and poor people" and the "maintenance of . . . schools of learning, free schools, and scholars in universities."

In 1878, the Pennsylvania Supreme Court was confronted in Donohugh's Appeal with the issue of whether a library was a purely public charity under the Act of 1874. In Donohugh's Appeal, the Library Company of Philadelphia (the "Company") brought an action in equity against the tax collector of Philadelphia. The Company had been founded in 1731 by, among others, Benjamin Franklin as "an institution for the advancement of learning and the more useful dissemination of knowledge." It brought a declaratory judgment action seeking classification as a purely public charity and as an institution for learning, benevolence or charity. The lower court awarded the declaratory judgment, holding that the company was not only an institution of learning, but also a charity "within the long-settled and clearly-defined legal meaning of that term." The Company was therefore entitled to a tax exemption under the Act of 1874. In affirming the trial court's decision, the Supreme Court adopted the lower court's opinion.

The trial court in Donohugh's Appeal also addressed the issue of whether the legislature had gone beyond its constitutional

8. 43 Eliz., ch.4 (1601).
9. Id.
10. Id.
11. 86 Pa. 306 (1878).
13. Id.
14. Id. The Company was the trustee for the Logarian Library, a collection of books exceeding 100,000 volumes. Id. The library was maintained by the contributions of members, income derived by donated property and fees from non-members. Id. All the profits earned by the company were used to purchase more books. Id.
15. Id. at 308.
16. Id. at 309. The court did not expound, however, on this long settled and clearly defined legal meaning.
17. Donohugh's Appeal, 86 Pa. at 309. The court noted that the legislation had been passed to carry into effect the constitutional provision, as the constitution itself did not exempt specific property from taxation, but only enabled the legislature to do so. Id. at 309-10.
18. Id. at 317-18. The supreme court's opinion was per curiam. Id. at 317. The court noted that the lower court's opinion was so well written, nothing needed to be added to it. Id. at 318.
authority in enacting the Act of 1874 by extending the words "institutions of purely public charity" to include "institutions of learning." Concluding that the Act was constitutional, the court defined each element of a purely public charity. According to the court, a "charity," when used in relation to charitable gifts or institutions, meant "good-will, benevolence [and a] desire to add to the happiness or improvement of our fellow-beings." In addition, it defined a "public" charity as a charity not for the benefit of certain individuals, but for the benefit of the indefinite public. Finally, the court stated that "purely" meant "completely, entirely, and unqualifiedly." A purely public charity was therefore an institution formed for the accomplishment of a public purpose and not for private or individual gain. Thus, motive was an essential part of one of the earliest definitions of purely public charity.

In *Fire Insurance Patrol v. Boyd,* the Supreme Court of Pennsylvania once again attempted to define purely public charity. In *Fire Insurance Patrol,* the plaintiff filed suit against the Fire Insurance Patrol Board (the "Board"), alleging that the Board was vicariously liable for the negligence of its employees. The Board defended on the grounds that it was a charitable institution and, therefore, not liable for the acts of its employees. The trial court held that the Board was not a charitable institution, because the Board had an economic motive to benefit insurance companies by reducing the losses caused by fire.

On appeal, the supreme court reversed the trial court and stated that the true test of whether an institution was a purely public charity was the object sought to be attained and the purpose to which the money was to be applied, not the motive of the donor. The court, therefore, concluded that because the Board served a public purpose in protecting the public from fires, it was a charitable institution, notwithstanding the motives of its

19. Id. at 312.
20. Id.
21. Id. at 313.
23. Id.
24. 15 A. 553 (Pa. 1888).
26. Id.
27. Id. at 556.
28. Id. at 554.
29. Id. at 556. The objective of the Board, as provided by its charter, was "to protect and save life and property in or contiguous to burning buildings." Id. at 554.
contributors to help insurance companies.\textsuperscript{31} \textit{Fire Insurance Patrol} broadened the definition of public charity to exclude any consideration of motive and thereby increased the number of organizations which could qualify as "purely public charities."

The next significant development in the definition of a purely public charity came in 1892 in \textit{Trustees of Academy of Protestant Episcopal Church v. Taylor}.\textsuperscript{32} In deciding whether the academy was entitled to a tax exemption, the Pennsylvania Supreme Court followed the law of \textit{Fire Insurance Patrol} by focusing on the purpose of the institution, which was to educate children.\textsuperscript{33} The court noted that Pennsylvania courts had traditionally relied on the Statute of Charitable Uses in recognizing the education of youth and support of schools as a charitable purpose.\textsuperscript{34}

The court further stated that "[w]hatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a public charity."\textsuperscript{35} Finding that the school fit this definition and that it had complied with the other requirements of the Act of 1874, the court held that it was entitled to exemption from taxation.\textsuperscript{36}

Guided by the list of charitable purposes in the Statute of Charitable Uses, the definition of purely public charity in Pennsylvania had evolved to focus on the purpose or object sought to be achieved by the institution claiming to fit the definition. Thus, in 1894, in \textit{City of Philadelphia v. Masonic Home of Pennsylvania},\textsuperscript{37} the Supreme Court of Pennsylvania denied tax exempt status to a home for indigent, afflicted and aged persons.\textsuperscript{38} The residents of the home were incapable of supporting themselves, and the court reasoned that the home benefitted only a small number of people belonging to a voluntary association, not the public at large.\textsuperscript{39} Although it recognized the home

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  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} 25 A. 55 (Pa. 1892) [hereinafter \textit{Episcopal Academy}]. Trustees of the academy had brought suit to enjoin the collection of taxes assessed against its property. \textit{Episcopal Academy}, 25 A. at 55.
  \item \textsuperscript{33} \textit{Episcopal Academy}, 25 A. at 56.
  \item \textsuperscript{34} Id. The court also noted that the education of youth and support of schools advanced the public good, and that money given for such purposes was recognized as a charitable use before the enactment of the Statute of Charitable Uses. Id.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Id. at 57. The court also determined that the school was founded, endowed and maintained by public or private charity. Id. This was necessary to qualify for a tax exemption under the Act of 1874. See Act of May 14, 1874, No. 94, 1874 Pa. Laws 158.
  \item \textsuperscript{37} 28 A. 954 (Pa. 1894).
  \item \textsuperscript{38} \textit{Masonic Home}, 28 A. at 955-56.
  \item \textsuperscript{39} Id. at 955. The right to admission in the home was dependent on a
as a charity, the court concluded that it was not a purely public charity.\textsuperscript{40} The court stated that in order for a charity to be a purely public charity, "there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public."\textsuperscript{41}

The list of activities deemed to be for a charitable purpose, however, was not short. In \textit{In re Kimberly's Estate},\textsuperscript{42} the Pennsylvania Supreme Court acknowledged that the list offered by the Statute of Charitable Uses was not conclusive.\textsuperscript{43} \textit{Kimberly's Estate} dealt with the construction of a testamentary trust, which directed trustees to use and apply certain monies for "charitable uses, objects and purposes."\textsuperscript{44} At issue was whether some of the beneficiaries of these monies were charities and whether the gifts which had been given to them were consistent with the provisions of the will.\textsuperscript{45} The Attorney General claimed that certain donations made by the trustees of the estate, were not made to charitable organizations for charitable purposes.\textsuperscript{46} The court asserted that the guiding rule in determining what constituted a charitable purpose was not to circumscribe the operation of the statute.\textsuperscript{47}

\section*{Development of the HUP Test — Elements of a Purely Public Charity}

The next important development in the law of "purely public charities" was the enactment of the General County Assessment Law (the "Assessment Law") in 1933.\textsuperscript{48} The Assessment Law
exempted certain real property from taxation, including real property owned by institutions of purely public charity.\footnote{50}

In 1936, the Supreme Court of Pennsylvania interpreted the Assessment law in \textit{YMCA of Germantown v. City of Philadelphia}.\footnote{51} In \textit{YMCA of Germantown}, the appellant sought to have its property wholly exempted from taxation.\footnote{52} The Board of Revision of Taxes of the County of Philadelphia (the "Board of Revisions") exempted a portion of the YMCA property but taxed the remainder.\footnote{53} The YMCA appealed the board's decision to the court of common pleas, claiming that it was a purely public charity and as such, was entitled to a tax exemption for all the assessed property.\footnote{54} After the court of common pleas had upheld the Board of Revision's assessment, the YMCA appealed to the Supreme Court of Pennsylvania.\footnote{55}

In keeping with precedent, the court first addressed the YMCA's purpose, which was stated in its charter as the "moral and intellectual improvement of young men."\footnote{56} It then turned to the construction of the Assessment Law. Relying on its decisions interpreting the Act of 1874, the court asserted that an organization seeking an exemption from taxation had the burden of showing affirmative legislation supporting its claim and also had to show that it was part of the class intended to benefit from the legislation.\footnote{57} In determining that the YMCA had not

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\item \footnote{50} PA. STAT. ANN. tit. 72, § 5020-204(a)(9). In addition to exempting the property of hospitals and institutions of learning, the statute exempted from "all county, city, borough, town, road, township, poor, and school tax . . . all real property owned by one or more institutions of purely public charity . . . and necessary for the occupancy and enjoyment of such institutions using it." \textit{Id.}
\item \footnote{51} 187 A. 204 (Pa. 1936), overruled in part by West Allegheny Hospital v. Board of Property Assessment, Appeals & Review, 455 A.2d 1170, 1173 (Pa. 1982).
\item \footnote{52} \textit{YMCA of Germantown}, 187 A. at 205.
\item \footnote{53} \textit{Id.} Three-fifths of the assessed valuation was exempted; two-fifths was taxed. \textit{Id.} The board argued that although it agreed the YMCA was a purely charitable institution, it also operated a rooming house from which it derived revenue. \textit{Id.} Thus, the portion of the property used for the operation of the rooming house was not entitled to the tax exemption. \textit{Id.}
\item \footnote{54} \textit{Id.}
\item \footnote{55} \textit{Id.} The Chancellor who heard the case at the common pleas level entered a decree of total exemption for the YMCA. \textit{Id.} The common pleas court sitting en banc, however, did not agree and reinstated the Board's ruling. \textit{Id.} at 206.
\item \footnote{56} \textit{Id.} The YMCA constitution also stated that the organization's purpose in forming was to promote the "spiritual, mental, social and physical improvement of young men." \textit{Id.}
\item \footnote{57} \textit{YMCA of Germantown}, 187 A. at 208 (quoting Philadelphia v. Barber, 28 A. 644 (Pa. 1894)). The court also noted that the language of the Assessment Law was the same as that of the Act of 1874, with the exception of the words "[p]rovided, that the entire revenue derived by the same be applied to the support and to increase the efficiency and facilities thereof, the repair and the necessary increase of grounds and buildings thereof, and for no other purpose." \textit{YMCA of Ger-
sustained its burden, the court held that an institution claiming to be benevolent or charitable for the purposes of obtaining an exemption from taxation must "possess an eleemosynary characteristic not possessed by institutions or property devoted to private gain or profit."58

In addition, the Pennsylvania Supreme Court in YMCA of Germantown for the first time developed a specific test to determine when an institution was a purely public charity. Noting that earlier courts had tended to create a liberal construction of the term in order to favor and reward institutions for doing noble work, the court stated that in order to be a public charity, an organization must meet the following criteria: 1) "whatever it does for others is done free of charge or . . . nearly free of charge",59 and 2) those to whom the institution gave assistance had to be "legitimate subjects of charity."60 The court's decision in YMCA of Germantown also diminished the importance of having a charitable purpose, stating that the use of all its proceeds for charitable purposes did not in and of itself make an institution a purely public charity.61

Returning to broad definitions, the Pennsylvania Supreme Court in 1946 attempted to define charitable purpose. In Funk Estate,62 the court, in interpreting a will, asserted that there was no limitation on the number of charitable uses.63 The court decided that whether a use was charitable should be determined from all the surrounding circumstances,64 and that in its most general sense, a charitable use was something done for the benefit of the fellow man or the public.65

58. YMCA of Germantown, 187 A. at 208.
59. Id. at 209. This requirement was overruled by the Supreme Court in West Allegheny Hospital where the court stated that, "[s]uch a requirement clearly conflicts with the evident intent . . . to accommodate evolving institutional needs." West Allegheny Hospital, 455 A.2d at 1173.
60. YMCA of Germantown, 187 A. at 209.
61. Id. at 209. The court also hinted that another criteria for being a public charity was relieving the government of a burden, although it did not specifically include it as a requirement. Id. at 210. In explaining the policy behind exempting public charities from taxation, the court said that public charities relieve the government of a burden, and that relieving charities of the burden of taxation was therefore a quid pro quo. Id.
63. Funk Estate, 45 A.2d at 69 (quoting In re Tollinger's Estate, 37 A.2d 500, 502 (Pa. 1944)). At issue in the case was whether a residual gift in the will was too vague. Funk Estate, 45 A.2d at 69.
64. Funk Estate, 45 A.2d at 69 (quoting Tollinger, 37 A.2d at 502).
65. Funk Estate, 45 A.2d at 69 (quoting Taylor v. Hoag, 116 A. 826 (Pa. 1922)).
The Supreme Court of Pennsylvania once again assessed the applicability of the Assessment Law in *In re Ogontz School*. In deciding the case, the court effectively added another element to the definition of public charity which it had developed in *YMCA of Germantown*. Although it considered the school's educational purpose, as stated in its charter, the court held the school not to be a purely public charity because it did not relieve the government of any of its burdens. As to whether the school provided free services, the court pointed to the fact that scholarships amounted to only ten percent of the total fees paid by students. In addition, the court found that the school's purpose was not charitable, but that it was engaged in a commercial enterprise.

Subsequently, in *In re Hill School*, the Pennsylvania Supreme Court added yet another element to the equation of what constitutes a purely public charity. Addressing the issue of what effect the word “purely” has on the term purely public charity, the court asserted that a purely public charity had to be entirely free from a profit motive. Realizing that the mere receipt of payment for services did not preclude an institution from being a purely public charity, the court concluded that an organization crossed the boundary into the realm of taxation when it entered the commercial field and engaged in business. Adopting the findings of the lower court judge, the court held that the school was entitled to a tax exemption.

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66. 65 A.2d 150 (Pa. 1949). The appellant in *Ogontz School* was the Abington Township School District, which had appealed the decision of the Montgomery County Board of Assessment and Revision of Taxes to exempt from taxation property owned by the Ogontz School. *Ogontz School*, 65 A.2d at 150. After the Montgomery County Court of Common Pleas had dismissed the appeal, the township and school district appealed to the supreme court. *Id.*

67. *Ogontz School*, 65 A.2d at 153. The stated purpose of the school was to maintain, support and operate a school for the education of young men and women without profit. *Id.* at 151. In emphasizing the question of whether the school relieved the government of burdens, the court relied on the language of *YMCA of Germantown*. *Id.* at 154.

68. *Id.* at 153.

69. *Id.* at 154-55.

70. 87 A.2d 259 (Pa. 1952).

71. *Hill School*, 87 A.2d at 263.

72. *Id.* at 262-63. The court recognized, however, that the charging of tuition by a school or university did not alone remove it from the umbrella of tax exemption. *Id.* at 263.

73. *Id.*

74. *Id.* at 264. The court relied on the following factors: 1) the cost of education provided by the school was more than the amount of tuition charged; 2) no one received any profit or gain from the school’s operations; and 3) the school was the recipient of donations. *Id.*
As the foregoing cases indicate, the definition of purely public charity had evolved, by the middle of the twentieth century, to include specific criteria that institutions were required to meet in order to receive tax exempt status. However, the courts were not consistent in determining which criteria were determinative of the issue. In addition, the courts placed less emphasis on the fact that an organization's purpose was to benefit the community in determining whether it was a purely public charity.

In the 1985 seminal decision of Hospital Utilization Project ("HUP") v. Commonwealth, the Pennsylvania Supreme Court established a five part test for determining when an institution was a purely public charity and therefore entitled to tax exemption under the Pennsylvania Constitution. The court held that an institution would qualify for tax exempt status as a purely public charity if it:

(a) Advances a charitable purpose;
(b) Donates or renders gratuitously a substantial portion of its services;
(c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
(d) Relieves the government of some of its burden; and
(e) Operates entirely free from private profit motive.

The institution in HUP had requested a refund of sales and use taxes from the Commonwealth's Department of Revenue Board of Appeals, claiming that it was entitled to the refund because it was a charitable organization. The Board of Appeals

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75. 487 A.2d 1306 (Pa. 1985).
76. HUP, 487 A.2d at 1317.
77. Id. In developing the test, the court reviewed the various definitions it had assigned to purely public charity in the past and consolidated those different meanings into one test with several elements. Id. Specifically, the court stated that "[a]lthough the term 'purely public charity' has not been defined with exactness under Pennsylvania law, case law has provided criteria by which we can set forth the parameters of a 'purely public charity.' " Id. at 1312.
78. Id. at 1309. See Pa. STAT. ANN. tit. 72, § 7204 (1990). A charitable organization is defined as follows:
[A] group or body of persons which is created and which exists for the purpose of performing a humane service; promoting the good and welfare of the aged, poor, infirm, or distressed; combating juvenile delinquency or advancing the spiritual, mental, social, and physical improvement of young men and women. A foundation or fund organized to provide for the advancement of education or science is also included in the term charitable organization. The persons entitled to benefit from services performed by such an organization shall be chosen from a class of persons substantial and not predetermined in number. The funds of such an organization shall be primarily derived from public or private contributions, and the organization shall be operated without pecuniary benefit to any officer, member, or shareholder, except as reasonable compensation for actual services rendered to the organization.
denied the petition on the basis that HUP was not a “charitable organization.” Both the Board of Finance and Revenue and the commonwealth court subsequently affirmed the denial of the petition for refund, and HUP timely appealed to the Supreme Court of Pennsylvania. The supreme court recognized the definition of a “charitable organization” in determining whether HUP was entitled to a refund of its sales and use taxes. It concluded, however, that the origin of the exemption was the constitutional provision which authorized laws exempting purely public charities from taxation. Thus, the Tax Reform Code, which exempted charitable organizations from sales and use taxes, could only apply to entities that also met the definition of a purely public charity, as that term was used in the Pennsylvania Constitution.

The court ultimately held that HUP did not satisfy the five-part test used to determine whether an organization was a purely public charity. First, the court stated that HUP’s purpose in promoting quality health care and the effective use of health care services, though commendable, was not charitable. Next, it concluded that the organization did not render its services gratuitously because all of its clients were required to pay fees approximating actual cost. In addition, HUP’s beneficiaries — hospitals and health care providers — were not legitimate subjects of charity. Applying the last two parts of the test, the court found that HUP’s activities did not relieve the government of any burden, and because it could not be distinguished from any other commercial enterprise, HUP had not proven that it was free from profit motive.

The court’s decision in HUP signalled a significant change in

79. HUP, 487 A.2d at 1309.
80. Id.
81. Id. at 1311.
82. Id.
83. Id. at 1312.
84. HUP, 487 A.2d at 1312. The court did not reach the question of whether HUP was a charitable organization. Id. at 1312.
85. Id. at 1317.
86. Id.
87. Id. The court stated that the beneficiaries of HUP were its clients, not the general public. Id. at 1314.
88. Id. at 1317. HUP had argued that if it did not provide the research, as it had been doing, the government would have to do it. Id. However, the court found that the type of research done by HUP was not the type traditionally done by the government. Id.
89. HUP, 487 A.2d at 1318. The court pointed to the fact that the directors were well paid and that HUP accumulated profit, which was used to upgrade computer equipment. Id.
determining whether an institution was a purely public charity for purposes of qualifying for a real estate tax exemption in Pennsylvania. For the first time, a concrete and complete definition of purely public charity was established. Yet, this five-tiered definition was purportedly merely a compilation of various factors that had already been well established by precedent and often used to determine if an entity was a purely public charity. Why, then, did the HUP decision have such an impact? The answer is simple. Instead of considering one or two factors in deciding the issue, as a result of the HUP decision, courts were now required to consider all factors previously recognized by precedent in determining whether an entity was a purely public charity.

APPLICATION OF PURELY PUBLIC CHARITY TO INSTITUTIONS OF LEARNING

Having established how the definition of “purely private charity” evolved, this comment now turns to how the HUP definition applies to private colleges and universities. It should first be noted that although providing education to students has been recognized as a charitable purpose since the Statute of Charitable Uses, the Pennsylvania courts have never taken the position that a school, college or university, because it was educating people, was a purely public charity per se. This was evident as early as the supreme court’s decision in Donohugh’s Appeal. The court held in Donohugh’s Appeal that a library was both an institution of learning and a public charity, thereby recognizing the distinction between the two.

As jurisprudence developed, most courts recognized, however, that schools usually met the required tests for determining what is a purely public charity. As schools began to change, the courts also took note of the changes and in some cases, denied them tax exempt status. The courts took the following factors into consideration in deciding whether to deny tax exempt status to schools: 1) the amount of tuition in relation to costs; 2) the

90. The court, however, downplayed the significance of the case, stating that it had simply adhered to a long line of case law. Id.
91. Id. at 1317.
92. 43 Eliz., ch.4 (1601). See notes 8-10 for a discussion of the Statute of Charitable Uses.
94. Donohugh’s Appeal, 86 Pa. at 309.
95. See, e.g., In re Hill School, 87 A.2d 259, 264 (Pa. 1952).
percentage of students attending on scholarship; and 3) the presence of a commercial enterprise.  

In 1972, in Robert Morris College v. Board of Property Assessment, Appeals & Review, the Commonwealth Court of Pennsylvania addressed the issue of whether Robert Morris College was a purely public charity and thus entitled to tax exempt status. The court asserted that prior law required that, in order to qualify for tax exempt status, an institution must meet the following criteria: "(1) [the institution] is one of 'purely public charity'; (2) [it] was founded by public or private charity; (3) [it] is maintained by public or private charity." The court qualified these requirements somewhat, concluding that the school was not required to have been a purely public charity at its inception, as long as it was transformed into one at some later date. However, the court ultimately denied the tax exempt status to the college because it held that the school was not maintained by public or private charity, due to the small amount of money expended for scholarships.

Four years later, the supreme court expounded on the commonwealth court's holding in Robert Morris in Point Park Junior College v. Board of Assessment & Appeals. In Point Park, the court noted that in order to receive tax exempt status, the school requesting the exemption had to prove the following: "(1) that there is some significant charitable support for the school; (2) that the school has rendered significant charitable services to the public by way of scholarship aid to students; and (3) that the school's income was expended for its educational purpose without the accumulation of unappropriated surpluses."

Thus, even before HUP was decided, courts were closely scrutinizing institutions of learning that were requesting tax exempt status. As the decision in Hill School indicated, however, most schools were not in danger of losing their tax exempt status. Tuition prices were still low in relation to cost, and higher education had not achieved the "Big Business" quality that is so

97. See notes 65-74 and accompanying text for a discussion of earlier cases involving tax exemptions for schools.
100. Id. at 572 (quoting In re Woods Schools, 178 A.2d 600, 602 (Pa. 1962)).
101. Robert Morris, 291 A.2d at 574.
102. Id. at 575.
104. Point Park, 351 A.2d at 710.
prevalent today. That situation would soon drastically change.

In 1994, the Washington County Court of Common Pleas held in Washington & Jefferson,106 that Washington and Jefferson College was not entitled to tax exempt status.107 Applying the HUP test, the court determined that the college only met one of the five prongs — that it was operating without a profit motive.108

As to the other prongs of the test, the court first found that the school did not advance a charitable purpose because students unable to pay for their education were not permitted to remain enrolled.109 In reaching its decision, the court discussed the college’s reliance on the Pennsylvania Supreme Court’s recent decision in In re St. Margaret Seneca Place v. Board of Property Assessment, Appeals & Review.110 In Seneca Place, the supreme court held that a nursing home was entitled to tax exempt status.111 The Washington & Jefferson court distinguished Seneca Place, however, on the basis that unlike the nursing home, which was “committed to serv[ing] all applicants regardless of their financial means or availability of insurance,” Washington and Jefferson College had refused to allow students to attend classes due to their inability to pay.112

The court also concluded that Washington and Jefferson College did not donate a substantial portion of its services because only a small portion of financial aid given by the school was merit based.113 Additionally, the school did not benefit a class of persons who were a legitimate subject of charity.114 The court explained that although eighty percent of the students who at-

108. Id. at 125. The court noted that payment of salaries and other benefits to college officials did not establish a profit motive. Id. Furthermore, the college did not distribute dividends or profits. Id.
109. Id. at 121.
110. Id. (citing St. Margaret Seneca Place v. Board of Property Assessment, Appeals & Review, 640 A.2d 380 (Pa. 1994)).
111. Seneca Place, 640 A.2d at 385-86.
112. Washington & Jefferson, 74 Wash. Cty. Rep. at 121-22. In distinguishing the two cases, the court stated specifically that the nursing home in Seneca Place, had paid out of its own pocket one-third the cost of care for those patients who were unable to pay. Id. at 121. Washington and Jefferson College, however, received 76 percent of its educational and general expenditures from tuition and fees and offered only five full scholarships annually. Id.
113. Id. at 122. The school argued that it did donate a substantial portion of its services because it had paid out 3.9 and 5.4 million dollars in scholarships and other financial aid in 1992 and 1993, respectively. Id. However, only $797,215 in 1992 and $902,310 in 1993 was awarded without regard to financial need. Id.
114. Id. at 124.
tended Washington and Jefferson College received financial aid, this did not make these students "legitimate subjects of charity." The court stated that the students were not "needy" and were unlike the patients of the nursing home in Seneca Place, who were in need of institutional care. Finally, the court ruled that because local and state governments were not required to provide post-secondary education to their citizens, the college had failed to meet the fourth prong of the test of relieving the government of a burden.

In Washington & Jefferson, the court hinted that there were policy reasons for such a strict application of HUP to colleges and universities. According to the court, the increased number of properties that have received tax-exempt status was one reason why many cities face financial difficulties and were unable to provide adequate police and fire protection to their citizens. The court noted that the municipal loss could be great when schools, churches and hospitals claim exemptions. The rationale for denying such exemptions makes even more sense when the institution seeking the exemption epitomizes the big business attitude and environment that American higher education has adopted and become.

AMERICAN HIGHER EDUCATION IN THE 1990S — ITS CHARACTER AND CRITICS

Today, American higher education is a 100 billion dollar industry. This is not only the result of rising costs and tuition, but is also the result of the increasing number of people attending school beyond the high school level. Along with the growth of

115. Id.
116. Id.
118. Id. at 127.
119. Id.
120. Id. In Washington, Pennsylvania, where Washington and Jefferson College is located, 27 percent of the city's real estate is tax exempt. Bill Hetzel, Washington and Jefferson Loses its Exemption from State Taxes, PITTSBURGH POST GAZETTE, Aug. 7, 1994, at E1, E2. Consequently, if the court decision in Washington & Jefferson stands, the city of Washington could realize $74,000 to $115,000 in new tax revenue. Id.
122. The United States has a higher percentage of young people attending college than any other nation in the world. Pye, cited at note 121, at 337. Sixty percent of high school graduates will enroll at some time in a post secondary institution. Id. In addition, the number of persons 25 years and older completing college has risen from 11 percent in 1970 to 21 percent in 1992. STATISTICAL ABSTRACT OF
higher education has also come criticism by many who argue that America's institutions of higher learning no longer aspire to cultivate and educate young minds in the quest for knowledge and understanding, but rather have sold their souls in the quest for the almighty dollar.\footnote{123}

A look at the figures makes it easy to see the basis for this criticism. The cost of an education has risen in recent years at a rate much higher than the rate of inflation. In 1975, the average cost of tuition and fees at a four-year college was $599 per academic year.\footnote{124} By 1991, that figure had risen to $11,379.\footnote{125} Due to the increase in costs, many students are financing their college educations. Consequently, the number of student loans has drastically increased. For example, an estimated 5,551 Stafford loans were made to students in 1993, compared to just 1,017 in 1970.\footnote{126} The amount of funds utilized by these loans rose from just over one million dollars in 1970 to an estimated 16.5 million dollars in 1993.\footnote{127} Yet, some argue these figures are justified due to advancements in technology and increased competitiveness between institutions of higher education.\footnote{128}

According to Derek Bok, former President of Harvard University, the increase in the cost of a college education has been caused by advancements in technology and improved equipment.\footnote{129} Although the public may see red when it sees the multi-billion dollar figures, Bok argues that America's higher education system cannot achieve excellence without the correlating funds.\footnote{130} With an advance in technology comes an increase in cost. The very best equipment is needed to turn out the very best students.

In addition to advancements in technology, the increased competitiveness of colleges and universities has also added to the increased cost of higher education.\footnote{131} As Bok explains, to retain the competitive edge over other institutions, colleges and universities need to attract quality students and faculty, which requires more modern facilities such as state-of-the-art laboratories and libraries.\footnote{132} Yet he notes that the money colleges spend to at-
tract quality students cannot be justified by the need to inform prospective students about the opportunities available and the facilities at their school. But even if these costs can be justified, why do people see a problem with higher education’s emphasis on revenue and economic results?

Bok believes the problem arises from public expectations about what colleges and universities should be doing. Americans want their system of higher education to be the best in the world, as it is now widely regarded. As Bok states, “[w]e want our universities to produce research of a quality second to none so that we can enlarge our knowledge, renew our culture, and produce new insights to help us conquer disease, promote technological progress, and overcome our social problems.”

Yet, to meet these needs, schools must often turn to methods, such as aggressive capital campaigns and high priced fundraisers, that do not conform to traditional notions of academia. The combination of pressure from the public and the need for resources to meet those expectations creates a dilemma for colleges and universities. Resolving this dilemma may require institutions to take courses of action, such as massive fundraising campaigns, that are often inconsistent with the perceived more esoteric functions of institutions of higher learning. The key, according to Bok, is to strike a balance. Schools should obtain the funds and resources that are necessary, but in doing so, they should not ignore the higher purpose of education, which is to “prepare [students] to live productive lives; to be knowledgeable, critical members of our democratic society; and to appreciate, as fully as possible, the human experience and the world around them.”

133. Bok, cited at note 4, at 311.
134. Id. at 327-28.
135. Derek Bok, The Future of Higher Education in America, N.Y. ST. B. J., April 1987, at 36. Bok states that American higher education consists of a network of universities “widely recognized as the finest in the world in the fruits of their research, the quality of their professional training, their accessibility to a wide spectrum of the population, and the variety of programs they offer to meet the needs of a huge and diverse student population.” Id. at 37.
136. Bok, cited at note 4, at 309.
137. Id. at 327-28.
138. Id.
139. Id.
140. Id.
141. Bok, cited at note 4, at 309.
CONCLUSION

The drift away from academic excellence toward an emphasis on monetary value is what has stirred critics of higher education to voice their complaints. This trend is not only detrimental to the people who are served by higher education, but it is also detrimental to the institutions themselves. As Bok states, "when universities act in ways inconsistent with the pursuit of education, they do not merely compromise their mission; they threaten reservoirs of confidence and trust on which their welfare ultimately depends." In addition, the lack of focus on education affects the public by depriving it of the benefit that the education of its youth should bring.

When schools start to ignore that they are primarily educational institutions and thus, stop providing a benefit to the public, the consequences should realistically include loss of tax exempt status. Notwithstanding HUP, an institution of learning that fails to educate or at the minimum, relegates education to a secondary status, would not have even met the early common law definition of a purely public charity, as set forth by Donohugh's Appeal. In that sense, an application of HUP to deny tax exempt status would not be historically inappropriate.

The effects of such an application of HUP on American higher education, however, would be drastic. If the costs seem high now, imagine what the imposition of multi-million dollar tax liabilities will do to the price of tuition. Some schools will probably be unable to pay the taxes and will be forced to close. There will be fewer schools for the growing student population. Subsequently, the demand for a quality education will increase and this too will cause costs to rise. So, what are the alternatives?

When the controversy over Washington and Jefferson College's tax exempt status began three years ago, the college was not the only institution whose tax-exempt status was challenged. The city of Washington, Pennsylvania also challenged Washington Hospital's tax exempt status. Unlike Washington and Jefferson College, however, the hospital settled. In settling, the hospital agreed to pay the city $40,000 per year for the next eight years.

143. Bok, cited at note 142, at 3.
144. 86 Pa. 306 (1878). See notes 12-23 and accompanying text for a discussion of Donohugh's Appeal.
145. Hetzel, cited at note 120, at E2.
146. Id.
years. Not only did the hospital avoid a much larger tax liability by settling, it also avoided the cost of a long expensive legal battle. The option of settling is probably one that schools should consider to reduce the financial effects of large tax liabilities they will incur if they lose their tax exempt status.

As to redefining purely public charity, the schools can always wait and see if the supreme court is going to alter its course. But this appears unlikely. As the Pennsylvania Supreme Court's decision in Seneca Place indicated, the HUP test is embedded in Pennsylvania jurisprudence. In Seneca Place, although the court reversed a commonwealth court decision which had denied the nursing home a tax exemption, it applied the HUP test and held that the home's acceptance of medicare payments to help defray costs did not prevent it from meeting the criteria of a purely public charity.

Regardless of whether it secures their entitlement to real estate tax exemptions, institutions of higher learning in Pennsylvania should also reassess and reevaluate themselves. Perhaps if the courts saw less dollar signs and more working minds, they would be less inclined to exclude schools from the definition of a purely public charity.

As the court in Washington & Jefferson explained, however, applying the definition of a purely public charity to colleges and universities is a complex problem:

Just as very few, if any, institutions of learning do not fit neatly into neat categories entitling them to exemption, so Washington and Jefferson has attributes which in some instances seem to call for exemption and other attributes which do not. Even though the college with its historic beginning was founded by public charity, it has grown into an enterprise of big business. Of itself, this factor does not take away an exemption status; nevertheless the changes are dramatic and point up the complexity of the problem.

It is clear, however, that change is needed in American higher education, but more funds and better equipment are not going to cause the change. If American education is going to change, the people running it must change. They must stop looking at students as statistics and stop measuring them by the revenue they

147. Id.
149. Seneca Place, 640 A.2d at 382.
150. Id. at 382-85. The trial court had found that the nursing home was committed to serving all applicants without regard for their financial means. Id.
generate. They must look at students, first and foremost, as individuals who have something to give, to both the school and the community. Only then will colleges and universities be "purely public charities" and thus entitled to tax exempt status.

The following passage explains the potential of higher education:

[O]nly universities, or institutions like them, can discover the knowledge on which creative solutions rest and only they can educate the men and women who will eventually make the critical decisions . . . . Only education can work simultaneously to develop intellectual capacities, awaken new interests, life aspirations, provoke important questions, deepen understanding — and these, not the reflected lustre of the institution or the influence of its alumni, must be the university's true contribution to its students.152

This potential should not be wasted. Those institutions that choose to ignore it are of benefit to no one but themselves. An institution that pursues and accomplishes a mission such as that described above, however, should be treated as a purely public charity and should be entitled to tax-exempt status. Because, in striving to achieve academic excellence and fostering knowledge and understanding in its students, institutions of higher learning are serving a function that only they can serve and are providing to the public a benefit that only they can provide.

Alison T. Fenton

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152. Bok, cited at note 135, at 40-41.