

NONPROFIT ORGANIZATIONS: LAW, GOVERNANCE, AND ETHICS
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
JOHN M. BRADLEY
LAW -----

Course Description

This course examines the rationales, structures, and controversies related to nonprofit organizations and philanthropy in the United States. We will examine:

- The roles of nonprofit organizations as posited by economic, political, and historical vantage points;
- The legal purposes and framework of these organizations—including the advantages of the nonprofit form (e.g. whether tax-exemption is justified) and the restrictions on the type of commercial and political activity in which they can engage; and
- The controversies surrounding the nonprofit sector, with particular emphasis on the ethics of giving, the oversight roles played by boards of directors, state authorities, and federal regulators, and questions of accountability and performance.

Learning Outcomes

- Demonstrate an understanding of the legal structure of charitable organizations in the United States along with an appreciation of how theory and historical development have impacted these structures.
- Demonstrate an understanding of major ethical issues related to the nonprofit sector and be positioned to engage in current debates.
- Contribute a rigorous analysis of a particular legal, ethical, and/or governance issue impacting nonprofits.

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Grading

The course grade will be based on an End of Course Paper (50%) + In-class Article Submissions (30%) + Class Participation (20%).

Paper: Write a 20 page research paper on an issue of your choice (subject to my approval). I am always happy to discuss possible topics. Due Monday, April ____.

In-class Article Submissions: Discuss two articles during selected classes over the course of the semester.

- One article must be from an academic source: a journal/law review article or book chapter. One article must be from a popular source, such as a news report.

- This is not a formal presentation; rather, you should identify an article that would enhance the discussion during two classes and lead a discussion. You should summarize salient points in the articles and pose relevant points and/or questions for the class to consider.
- The article should be emailed to me before or within a day after class; no submission written by the student is expected.

Class Participation: Class participation is a vital aspect of the course. To receive the maximum number of available points, you must meaningfully contribute to each class discussion.

Required Texts

The following texts should be purchased:

- JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* (5th ed. 2015).¹
- OLIVIER ZUNZ, *PHILANTHROPY IN AMERICA: A HISTORY* (2012).

The following required texts are available free of charge online through Penn Libraries or directly posted on the Course Canvas. In choosing reading materials, I have sought to identify and use resources that are available free of charge to Penn students.

- JAMES J. FISHMAN, STEPHEN SCHWARZ, LLOYD HITOSHI MAYER, *STUDENT SUPPLEMENTAL UPDATE MEMORANDUM* (Jan. 2018) [hereinafter *STUDENT SUPPLEMENT 2018*]. (Posted on Canvas.)
- *GIVING WELL: THE ETHICS OF PHILANTHROPY* (Patricia Illingworth, et al. eds. 2011), <http://proxy.library.upenn.edu:3049/view/10.1093/acprof:oso/9780199739073.001.0001/acprof-9780199739073>.
- Additional articles as indicated within syllabus.

¹ Please note that these authors have written another textbook. Don't be confused and purchase the wrong one.

NONPROFIT ORGANIZATIONS LAW, GOVERNANCE, AND ETHICS
LAW ----
SYLLABUS
(Subject to adjustment)

PART I: LEGAL FRAMEWORK, HISTORY, AND CONTEXT

Week 1: The Purposes of Nonprofit Organizations: Historical and Legal Roots

- FISHMAN ET AL., Chapter 1, p. 3-4 (Introduction), p. 12-25 (Dimensions of the Nonprofit Sector).
- Peter Frumkin, *On Being Nonprofit: The Bigger Picture*, HARVARD BUSINESS SCHOOL WORKING KNOWLEDGE (Sept. 9, 2002), <https://hbswk.hbs.edu/archive/on-being-nonprofit-on-being-nonprofit-the-bigger-picture>.
- ZUNZ, Chapter 1, p. 8-43.

**Week 2: The Purposes of Nonprofit Organizations: Theory
Legal Framework: Categorization and Form**

- Purposes of Nonprofit Organizations
 - o FISHMAN ET AL., Chapter 1, p. 25-33 (Rationales for the Nonprofit Sector)
 - o ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA, Chapter 5, Of the Use Which the Americans Make of Public Associations in Civil Life*. (Posted on Canvas).
 - o Barbara Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J. OF L. AND PUB. POL'Y 555, 571-78 (1998) (full article posted on Canvas).
 - o Peter Dobkin Hall, *Philanthropy, the Nonprofit Sector & the Democratic Dilemma*, 142 DAEDALUS 139, 139-40 (through the paragraph starting with "Practical necessity...") & 153-55 (Spring 2013), https://proxy.library.upenn.edu:3147/doi/pdfplus/10.1162/DAED_a_00209.
- Category and Form
 - o FISHMAN ET AL., 33-48 (Legal framework, Formation).

**Week 3: Legal Framework: State Law
Governance: Introduction**

- State Law
 - o FISHMAN, ET AL., 55-73 (Purposes, Powers, Limitations).
- Governance
 - o FISHMAN, ET AL., 109-114 (Board of Directors).
 - o John M. Bradley, *What History Says About Nonprofit Board Roles*, BROADFIELD INSIGHT (Dec. 2, 2016), <https://www.broadfieldinsight.com/news/2016/12/2/what-history-says-about-nonprofit-board-functions>.
 - o William A. Brown, *Exploring the Association Between Board and Organizational Performance in Nonprofit Organizations*, 15 NONPROFIT MGMT. & LEADERSHIP 317 (Spring 2005).

Week 4: Governance: Fiduciary Duties

- FISHMAN, ET AL., 120-27 (read the notes on p. 127, but skip *Lynch v. John M. Redfield Found.*) & 130-44 (Duty of Care).
- FISHMAN, ET AL., 149-52, 155-79 (Duty of Loyalty).
- FISHMAN, ET AL., 181-84 (Duty of Obedience).

Week 5: Legal Framework: Federal Law

- FISHMAN, ET AL., 291-99 (Affirmative Requirements for Charitable Tax Exemption).
- FISHMAN, ET AL., 337-42 (Disaster Relief).
- FISHMAN, ET AL., 344-71 (The Public Policy Limitation).

Week 6: Legal Framework: Federal Law (con't)

- FISHMAN, ET AL., 416-45, including *United Cancer Inc. v. Commissioner* (p. 226-33) and the STUDENT SUPPLEMENT 2018, at 2-3 (Inurement, Private Benefit and Intermediate Sanctions).
- FISHMAN, ET AL., 445-47 (Limitations on Lobbying and Political Campaign Activities—Background only).

PART II: SPECIFIC ISSUES

Week 7 The Ethics of Philanthropy

- Patricia Illingworth, Thomas Pogge & Leif Wenar, *Introduction*, in *GIVING WELL*, 3-7 <http://proxy.library.upenn.edu:3049/view/10.1093/acprof:oso/9780199739073.001.0001/acprof-9780199739073>. (stop reading at “Book Overview”).
- Georgina White, *The Ethics of Philanthropy*, 23 *THE EUROPEAN LEGACY* 111 (2018) (Posted on Canvas).
- Peter Singer, *What Should a Billionaire Give—and What Should You?*, in *GIVING WELL*, *supra*.
- Mike W. Martin, *Caring within Communities*, in *VIRTUOUS GIVING*, 22-28 (1994), https://digitalcommons.chapman.edu/philosophy_books/9/.

Week 8 The Law of Philanthropy

- FISHMAN, ET AL., 766-93.
- FISHMAN, ET AL., STUDENT SUPPLEMENT 2018, at 7.

Week 9 The Policies Impacting Philanthropic Giving

- FISHMAN, ET AL., 745-66.
- FISHMAN, ET AL., STUDENT SUPPLEMENT 2018, at 6.
- Rob Reich, *Toward a Political Theory of Philanthropy*, 177-95, in *Giving Well*, <http://proxy.library.upenn.edu:3049/view/10.1093/acprof:oso/9780199739073.001.0001/acprof-9780199739073>.
- Zunz, p. 169-80.

Week 10: Trust and Scandals

- Deborah L. Rhode & Amanda K. Packel, *Ethics and Nonprofits*, STANDARD SOCIAL INNOVATION REVIEW (Summer 2009), <https://proxy.library.upenn.edu:2072/docview/217165301/fulltextPDF/71E562167604CB3PQ/1?accountid=14707>.
- Erica Harris, et al, *Why Bad Things Happen to Good Organizations*, 146 J. BUS. ETHICS 149, 149-54, 163-64 (2017). (Posted on Canvas).
- FISHMAN, ET AL., 199-217.

Week 11: Charitable Solicitation

- FISHMAN, ET AL., 219-67.

Week 12: Commercial Activities

- FISHMAN, ET AL., 527-62.

Week 13: Nonprofits and Political Advocacy

- ZUNZ, Chapter 3.
- FISHMAN, ET AL., 447-50 (through note 2); 463-64; 477-83 (*Regan v. Taxation With Representation of Washington*); & 491-94.
- FISHMAN, ET AL., STUDENT SUPPLEMENT 2018, at 3-4 (“Note: Churches...”).

PART III: FINAL THOUGHTS AND QUESTIONS

Week 14: Directions for the Nonprofit Sector

- ZUNZ, 294-99 (*Conclusion*).
- LESTER SALAMON, *The Road Ahead: Toward a Renewal Strategy for Nonprofit America*, in THE RESILIENT SECTOR REVISITED, 99-112 (2d ed., 2015), <https://proxy.library.upenn.edu:2457/lib/upenn-ebooks/detail.action?docID=1793974>.
- Julie Battilana, Matthew Lee, John Walker & Cheryl Dorsey, *In Search of the Hybrid Ideal*, Stanford Social Innovation Review (Summer 2012)

Other Notable Works (Not required reading. Read if you are interested or if it helps you write your paper).

- Elizabeth Ashford, *Obligations of Justice and Beneficence to Aid the Severely Poor*, in GIVING WELL, *supra*.
- Congressional Budget Office, Options for Changing the Tax Treatment of Charitable Giving (May 2011), at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12167/charitablecontributions.pdf>.
- MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION (2004).
- PETER FRUMKIN, ON BEING NONPROFIT : A CONCEPTUAL AND POLICY PRIMER (2002).
- Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000*, at 32-65, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006), <https://proxy.library.upenn.edu:2457/lib/upenn-ebooks/reader.action?docID=3420398&ppg=24>.
- FEMIDA HANDY, & ALLISON R. RUSSELL, ETHICS FOR SOCIAL IMPACT: ETHICAL DECISION-MAKING IN NONPROFIT ORGANIZATIONS (2018), <https://proxy.library.upenn.edu:2457/lib/upenn-ebooks/detail.action?docID=5387383>.
- Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980) (an influential article about the economic role of nonprofit organizations).
- Patricia Illingworth, *Giving Back: Norms, Ethics, and Law in the Service of Philanthropy*, 196-219, in GIVING WELL, *supra*.
- Larry Kramer, *Civil Society as Public Conscience*, STANFORD SOCIAL INNOVATION REVIEW (Aug. 7, 2018), https://ssir.org/articles/entry/civil_society_as_public_conscience.
- WILLIAM MACASKILL, DOING GOOD BETTER: HOW EFFECTIVE ALTRUISM CAN HELP YOU HELP OTHERS DO WORK THAT MATTERS, AND MAKE SMARTER CHOICES ABOUT GIVING BACK (2015).
- Robert Noggle, *Give Till It Hurts? Beneficence, Imperfect Duties, and a Moderate Response to the Aid Question*, 40 J. SOCIAL PHILOSOPHY 1 (2009).
- DAN PALLOTTA, UNCHARITABLE: HOW RESTRAINTS ON NONPROFITS UNDERMINE THEIR POTENTIAL (2008).
- PETER SINGER, THE LIFE YOU CAN SAVE (2009).
- DOUG WHITE, THE NONPROFIT CHALLENGE: INTEGRATING ETHICS INTO THE PURPOSE AND PROMISE OF OUR NATION'S CHARITIES (2010).