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## Introduction

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# WHO PROFITS FROM NONPROFITS? A SYMPOSIUM ON NONPROFIT ORGANIZATIONS

## INTRODUCTION

*Lousie Bohmann\**

The *New York City Law Review*, a scholarly law journal managed and edited by the students of the City University of New York (CUNY) School of Law, chose to focus its 2006 Symposium on the legal complexities of the independent sector by asking, “Who profits from nonprofits?” CUNY School of Law is a public interest law school, and at the heart of its mission lays an inspiration to serve communities and people who cannot represent themselves. Many of the School’s graduates pursue legal careers in the nonprofit field, and many of its professors have also had careers in the nonprofit sector. Professors support organizations both with their personal expertise and by having students work on various projects for organizations as diverse as the Innocence Project, Street Law, and Madre.<sup>1</sup>

In recent years, the nonprofit corporation has been at the center of a growing public interest in its functions, structure, and even its survival. “Nonprofit Organizations Law,” “The Law of Nonprofit Institutions,” “Nonprofit Corporations Law,” “Nonprofit Law,” and “The Law of Charitable Organizations,” are just some titles ascribed to the range of law school classes dedicated to the law governing the nonprofit corporation. Most nonprofit professionals agree that nonprofit law is not one uniform topic, but instead spans several areas of the law including corporations, contracts, administrative, labor, antitrust, and trusts and estates.<sup>2</sup>

Today the charitable sector is a force to be reckoned with. The United States currently counts approximately 1.9 million nonprofit organizations, including 1.5 million 501(c)(3) or 501(c)(4)

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\* CUNY School of Law, J.D. 2006; 2005–2006 Symposium Editor of the *New York City Law Review*.

<sup>1</sup> See generally CUNY School of Law Career Planning Office, Where They Went to Work, <http://www.law.cuny.edu/OurResources/careersvcs/workindex2.html> (last visited Dec. 26, 2006).

<sup>2</sup> JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS, at v (3d ed. 2006).

corporations.<sup>3</sup> According to the American Association for Fundraising Counsel, Americans donated over \$260 billion to charities in 2005, with the majority of donations coming from private individuals.<sup>4</sup> In fact, over 7% of Americans work for nonprofit organizations.<sup>5</sup> These figures not only help explain why there is an ever-increasing interest in the nonprofit sector, but, moreover, they point to why this sector is legally interesting: Organizations ranging from small grassroots movements, family charities, and single-issue groups to large hospitals, religious organizations, and universities are subject to many of the same regulations and demands on their funds and boards of directors.

The key themes for the 2006 *New York City Law Review* Symposium sprung from the overwhelming impact of the independent sector on society as a whole and also from CUNY School of Law's roots as a public interest institution. The first panel was charged with addressing the following questions: What are the current regulatory hurdles that nonprofits must tackle? What is the current state of the regulatory scheme? And what tools are in place to ensure that nonprofits are held accountable to the public from whom they receive their funding? In those discussions, we were privileged to have Bob Pigott, Section Chief of the New York State Charities Bureau, provide an insightful overview of the Charities Bureau's responsibilities and some of the issues the Bureau faces overseeing New York's many charities. In contrast to the perspective of the state regulator, CUNY School of Law Professor Natalie Gomez-Velez discussed the impact such regulation has upon the procurement of services from nonprofits. A comparative perspective on nonprofit-enabling legislation between New York and Canadian law—illustrating another model for regulating nonprofits—was contributed by Doug Surtees, Professor at Saskatchewan College of Law, who also added detailed results of his analysis to this Symposium issue.

The second panel tackled the immensely controversial issue of whether the government's reliance on nonprofit organizations to provide traditional government services constituted constructive privatization of the public sector. This question touches on many

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<sup>3</sup> INDEPENDENT SECTOR, FACTS AND FIGURES ABOUT CHARITABLE ORGANIZATIONS 1 (2006), *available at* [http://www.independentsector.org/programs/research/Charitable\\_Fact\\_Sheet.pdf](http://www.independentsector.org/programs/research/Charitable_Fact_Sheet.pdf).

<sup>4</sup> CTR. FOR PHILANTHROPY AT IND. UNIV., GIVING USA 2006: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2005, at 1 (51st ed. 2006).

<sup>5</sup> Suzanne Perry, *A Robust Jobs Picture*, CHRON. OF PHILANTHROPY, Jan. 11, 2007, at 35.

of the classes and discussions surrounding the mission of CUNY School of Law and the nonprofit sector. Proponents of the view that the public sector is over-relying on nonprofits for services generally believe that private money is able to set the agenda for popular causes and, in turn, dictates which nonprofits the government selects as independent contractors. Jeanne Mulgrav, Commissioner of the New York City Department of Youth and Community Development (DYCD), offered a contrasting view, setting out the intricate procedures that DYCD uses to procure youth and community services from hundreds of nonprofits in New York City. A service provider then countered: Karen Goldstein, General Counsel and Vice President of the Vera Institute, discussed the often difficult position of nonprofits seeking to comply with its customers' requirements and keep true to their charitable missions. Eduardo R.C. Capulong, Assistant Professor of Law at New York University, and Dana Neacsu, head of Public Services at the Columbia University Arthur W. Diamond Law Library and Adjunct Professor at Barnard College, each created a stir by rejecting the traditional analysis of these issues. Mr. Capulong examined the unionization of social service agencies by looking at nonprofits from the perspective of the rarely discussed and often-exploited nonprofit worker. Ms. Neacsu strongly criticized the state's failure to provide a social service network; instead relying on organizations of differing quality for the provision of such services. Ms. Neacsu argued persuasively that the nonprofit sector is placed under undue pressure by having to act as a wholesale substitute for inadequate public social service programs.

Lastly, the third panel opined on the future of nonprofit regulation. The questions posed were whether the one-size-fits-all approach is sustainable and whether Sarbanes-Oxley-like accountability requirements are appropriately expanded to the nonprofit sector. Julie Goldscheid, Associate Professor of Law at CUNY School of Law; Rebekah Diller, Associate Counsel at the Brennan Center for Justice; and Kathleen D. McCarthy, Director of the CUNY Graduate Center on Philanthropy and Civil Society, all rallied against the current system. Ms. Goldscheid, who served as General Counsel at Safe Horizon, a medium-sized organization that assists domestic violence victims, argued that the current regulatory scheme is already challenging for larger organizations and potentially untenable for smaller organizations. Similarly, Ms. Diller attacked the government's attempt to restrict the nonprofit sector's ability to freely engage in advocacy activities, damaging the

sector at its core. Ms. Diller made a strong case that the government is infringing upon core liberties, like free speech, by using the power of funding to restrict dissent—a development which has already adversely affected voter participation, housing, and HIV-advocacy projects. Finally, Ms. McCarthy criticized the Grassley Hearings, which examined fraud in the nonprofit sector, and discussed their impact on the future of foundation funding.

The panels were moderated by three professors from CUNY Law School: Dinesh Khosla, Debbie Zalesne, and Jenny Rivera. Each brought significant experience to the table, making the panel discussions richer by sparking critical debate. In particular, Professor Khosla, who founded the CUNY School of Law's Nonprofit Law Seminar, is a director of his own foundation and has been an active member of the nonprofit community for decades in both the United States and his native India.

In addition to the three panels, we were honored to welcome as our keynote speaker the critically acclaimed scholar Jim Fishman, Professor of Law at Pace Law School and author of a widely used casebook on American nonprofit law. Mr. Fishman gave an entertaining—but also very enlightening—account of the past, present, and future of the charitable sectors. He traced its origins, emphasizing lessons from the past that can be used to solve some of the problems that nonprofits face today. He showed that, not surprisingly, very soon after nonprofit corporations were created, laws curbing nonprofit abuse and corruption became necessary.

The 2006 Symposium was a memorable day that we hope meaningfully analyzed issues affecting the nonprofit sector. The consensus among the panelists appeared to be that the current regulatory scheme fails to adequately address all members of the nonprofit sector. Instead of resolving issues, it creates greater barriers between charities and their missions. Panelists and attendees alike expressed concern about two significant problems: the growing accountability requirements and the increased reliance on nonprofits for the provision of social services.

Although all agreed that some regulation of nonprofits is needed, one broad idea emerged from the Symposium: The public's well-founded concerns about how charities spend donations and how these charities are held accountable may best be solved by applying regulations differently to discrete segments of the sector instead of across-the-board. Clearly, large charities should not necessarily be regulated in the same way as small nonprofits. This approach would enable legislators to develop targeted, results-

oriented laws that would enhance the efficiency of nonprofits and, at the same time, not overly burden smaller organizations.

Answers to the question, "Who profits from nonprofits?" were divided into two camps. One side argued that the public is losing out due to over-regulation of the charitable sector, which causes nonprofits to spend less time fulfilling their charitable missions and serving the people for whom they were created to serve. The other side argued that the current system enables nonprofits to serve the public good by providing social services otherwise unavailable to poor communities. Regardless of the merits of either position, the Symposium sparked debate and offered a forum in which the public interest was at the heart of the discussion.

The *New York City Law Review* is proud to present this year's Symposium issue and sincerely thanks all panelists and authors for their thoughts, contributions, and enthusiasm for our publication. I would also like to extend a personal thank you to all *New York City Law Review* staff; the faculty advisors, Professors Andrea McArdle, Ruthann Robson, and Penelope Andrews; and other law school staff for their support and tireless efforts in making the event and the issue possible. Enjoy this thought-provoking and exciting read!

## AGENDA

Welcome & Opening Remarks	<b>Mary Lu Bilek</b> , Interim Dean, CUNY School of Law
Panel I: The Regulatory Scheme and Its Enforcement 9:25 a.m. – 11:15 a.m.	<p><b>Robert Pigott</b>, Special Litigation Counsel, New York State Attorney General Charities Bureau: <i>“The Regulatory Role of the Attorney General’s Charities Bureau”</i></p> <p><b>Natalie Gomez-Velez</b>, Assistant Professor of Law, CUNY School of Law: <i>“Human Services Contract Monitoring and Evaluation: More than Just Policing Nonprofits”</i></p> <p><b>Doug Surtees</b>, Assistant Professor of Law, Saskatchewan College of Law: <i>“From New York to Saskatoon: A Comparative Perspective on Nonprofit Enabling Legislation”</i></p> <p><b>Clifford Perlman</b>, Partner, Perlman &amp; Perlman: <i>“The Labrynth of Regulation . . . The Actual Burden Placed on Charities by the Regulatory Structure”</i></p> <p>Moderated by <b>Dinesh Khosla</b>, Professor of Law, CUNY School of Law</p>
Panel II: “Privatizing” the Public Sector 11:35 a.m. – 1:00 p.m.	<p><b>Karen Goldstein</b>, General Counsel and Vice President, Vera Institute of Justice: <i>“A Practical Perspective on Government/Nonprofit Partnerships”</i></p> <p><b>Jeanne Mullgrav</b>, Commissioner of the New York City Department of Youth and Community Development: <i>“Government Gets in the Game: Strategic Philanthropy Isn’t Just for Foundations Anymore”</i></p> <p><b>Eduardo R.C. Capulong</b>, Assistant Professor of Law, New York University: <i>“Which Side Are You On? Unionization in Nonprofit Social Services Agencies”</i></p> <p><b>Dana Neacsu</b>, Head of Public Services, Arthur W. Diamond Law Library, Columbia University and Adjunct Professor, Barnard College: <i>“A Brief Critique of the Emaciated State and Its Reliance on Non-Governmental Organizations to Provide Social Services”</i></p>
Keynote Speaker 1:00 p.m. – 2:00 p.m.	<b>James J. Fishman</b> , Professor of Law, Pace Law School: <i>“The Nonprofit Sector: Myths and Realities”</i>
Panel III: Regulation for the Future 2:00 p.m. – 3:30 p.m.	<p><b>Julie Goldscheid</b>, Associate Professor of Law, CUNY School of Law: <i>“Supporting Accountability: Assessing the Costs of Regulation”</i></p> <p><b>Rebekah Diller</b>, Associate Counsel, Brennan Center for Justice at New York University School of Law: <i>“Efforts to Restrict the Advocacy Rights of Nonprofits that Partner with Government”</i></p> <p><b>Kathleen D. McCarthy</b>, Professor of History and Director of the Center on Philanthropy and Civil Society, CUNY Graduate Center: <i>“The Grassley Hearings and Foundation Funding”</i></p> <p>Moderated by <b>Jenny Rivera</b>, Professor of Law, CUNY School of Law</p>
Concluding Remarks 3:30 p.m. – 3:45 p.m.	<b>Andrea McArdle</b> , Associate Professor of Law and Co-Advisor to the <i>New York City Law Review</i> , CUNY School of Law