

GETTING NONPROFIT LAW RESEARCH PUBLISHED: THE VIEW FROM THE UNITED STATES

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Introduction

Part I begins by reviewing the development of nonprofit studies and nonprofit law as relatively recent phenomena. Part II discusses nonprofit scholarship in the United States in the legal academy, and reviews the various audiences for nonprofit law research beyond the legal academy. Part III considers whether legal academics might be retreating back into their narrow disciplines (notably, tax, corporate, and trust law) and whether funders are increasingly targeting their grants to subsector issues (such as health care or higher education) rather than broader nonprofit sector identified issues.

I. Nonprofit Studies – Including Nonprofit Law – as a Distinct Discipline

Trained as a tax lawyer and focusing on the law applicable to tax-exempt organisations, I quickly appreciated when I entered law teaching in 1992 that I was catching the wave of an emerging academic field, combining multiple strands of law and multiple disciplines beyond law. Signs of a growing US interest in this important segment of society had already emerged: the creation of Independent

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Sector and the Council on Foundations in response to threats posed by the Tax Reform Act of 1969; the multidisciplinary research association, the Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA), whose roots trace to 1971; the Filer Commission research reports published in the 1970s;¹ and the Program on Non-Profit Organizations at Yale University² and its publication in 1987 of *The Nonprofit Sector: A Research Handbook*.³

First, a shout-out to our ubiquitous founding sponsor: Atlantic Philanthropies

But it cannot be overestimated how much the conception of nonprofit organisations as distinctly worthy of rigorous research in the USA owes to a single source: Atlantic Philanthropies.⁴ Consider where we would be without Atlantic's funding for data gathering and analysis at the National Center for Charitable Statistics (moved from Independent Sector to the Urban Institute to protect it from implications of lobbying); the transparency of IRS Forms 990 made possible by GuideStar; the development of Nonprofit Law as a law school course and the research sponsored by the New York University Law School's National Center for Law and Philanthropy; as well as studies on nonprofit governance, donor behaviour, and public policy supported by the Nonprofit Sector Research Fund,⁵

1 Commission on Private Philanthropy and Public Needs (Filer Commission), Research Papers (5 volumes) (1977 Washington, DC: US Treasury Department), available at <https://archives.iupui.edu/handle/2450/805>.

2 'The Program on Non-Profit Organizations (PONPO) at Yale University was founded in 1978 to foster interdisciplinary research aimed at developing an understanding of nonprofit organisations and their role in economic and political life. Originally an initiative of Yale president Kingman Brewster, PONPO was first directed by Professor John G Simon of the Law School in cooperation with Charles E Lindblom of the Political Science and Economics Departments and director of the Institute for Social and Policy Studies. PONPO spent most of its life at the Institute, but was hosted at the Divinity School from 1998 to 2002. PONPO is currently directed jointly by the Yale School of Management and the Yale Center for International and Area Studies.' Guide to the Program on Non-Profit Organizations, Yale University, Records, RU 950, <http://drs.library.yale.edu/HLTransformer/HLTransServlet?stylename=yul.ead2002.xhtml.xsl&pid=ru.0950&clear-stylesheet-cache=yes>.

3 See Dennis Young's 2007 book review in NVSQ, available at http://woodypowell.com/wp-content/uploads/2012/03/4_review.pdf, of the second edition: 'If the first edition was written at a time when the field of nonprofit research was being discovered and defined, then this second edition appears when nonprofit research is growing explosively, but still in turmoil, even to its definitional core.'

4 During almost the entire period of these activities, however, the Bermuda-based foundation insisted on anonymity in its grant-making. For its current work in this area, see <http://www.atlanticphilanthropies.org/subtheme/effective-nonprofits-philanthropy>.

5 For a description of the Nonprofit Sector Research Fund, see the front matter to Francie Ostrower, *Community Foundation Approaches to Effectiveness: Characteristics, Challenges, and Opportunities* iii (Nonprofit Sector Research Fund Working Paper 2006), available at

and at academic institutions including Indiana University's Center on Philanthropy and the nonprofit research institutes at Harvard University's John F Kennedy School of Government. One of Atlantic's final legal projects in this field was providing seed money for the American Law Institute's project on Principles of the Law of Nonprofit Organizations (continuing, as described below, as a Restatement of the Law project).

In 2003, as it was winding down its focus on Nonprofits, Philanthropy, and Volunteering (NPV), Atlantic produced a fascinating review of its operations and a self-assessment of its influence.⁶ Rivalled only by the Ford Foundation's support for the sector (a distant second in dollar amounts), Atlantic spent \$199.3 million between 1984 and 2002 on NPV activities. The report began by noting that the conception of a nonprofit sector is particularly American:

Until very recently – 25 years ago, maybe less – the very idea of a Third Sector struck some people as whimsical. Foreign observers tended to regard the notion as a quirky American improvisation, something like jazz, perhaps. Americans, if they thought about it at all, usually viewed it as a figment of academe, useful mainly to Tocquevillians and the more restive social scientists.⁷

The report found:

The single largest category of NPV grantees was by far centers of scholarship, including universities and research institutes. The main purpose of these grants was, as several internal memoranda put it, to 'foment ferment' in learned circles — creating useful data and analysis

<https://assets.aspeninstitute.org/content/uploads/files/content/docs/pubs/FINAL%20Ostrower.pdf>:

'The Nonprofit Sector Research Fund (NSRF) was established at the Aspen Institute in 1991 to increase understanding of the nonprofit sector and philanthropy through the support of high-quality research. Since its founding, the Fund has awarded over \$11.5 million in research grants to 420 projects examining a broad range of issues facing nonprofit organisations, philanthropy, and the people they serve. The Fund is a program of The Aspen Institute's Nonprofit Sector and Philanthropy Program, which is supported by the Atlantic Philanthropies, Carnegie Corporation of New York, Ford Foundation, Bill and Melinda Gates Foundation, William Randolph Hearst Foundation, Ewing Marion Kauffman Foundation, W.K. Kellogg Foundation, John D. and Catherine T. MacArthur Foundation, Charles Stewart Mott Foundation, Northwest Area Foundation, The David and Lucile Packard Foundation, Skoll Foundation, and Surdna Foundation.'

6 Tony Proscio, *The Foundations of Civil Society*, Atlantic Philanthropies Research Report (March 1, 2003), available at www.atlanticphilanthropies.org/app/uploads/2016/02/The-Foundations-of-Civil-Society.pdf

7 Ibid at 1.

around how the sector is performing, how it can be improved, how to bring in more capital, and how to make the greatest use of the capital it raises.⁸

Development of a 'law of nonprofit organisations' in the US

There is much for a lawyer interested in the nonprofit sector to write about, but there is as yet no single 'law of nonprofit organisations' or even a 'law of charity'. Marion Fremont-Smith practically created the field single handedly in 1965 with a monograph produced for the Sage Foundation.⁹ Except for the wealth of research prepared for the Filer Commission, however, it is probably fair to say that until Henry Hansmann's breakthrough 1980 and 1981 corporate law articles,¹⁰ most lawyers who studied the subject specialised in tax or trusts and estates law.

The development and nurturing of Nonprofit Law as a distinct law school course traces to the efforts of Harvey Dale's National Center on Philanthropy and Law, which has sponsored mini-conferences on coursebooks, maintains a database of course syllabi, and has created a searchable bibliography.¹¹ NYU itself first offered Nonprofit Law in 1986. Separately, law schools offering a Master's degree in taxation (LLM-Tax) had already been teaching a course in Tax-Exempt Organizations.¹² Nonprofit issues only occasionally find their way into the mainstream doctrinal and statutory courses, such as Property, Wills and Trusts, Corporations, and Taxation (Federal and State). Of course, like businesses, many nonprofits worry about laws on contracting, labour and employment, torts and insurance, employee benefits, antitrust, bankruptcy and political activity, as well as laws that govern specific industries such as health care; I do not know the extent to which organisational form is addressed in those courses. In sum, getting 'respect' for nonprofit issues has always been a challenge within the traditional law school.

8 Ibid at 5. The study commented (at page 26): 'It would be wrong to imply that no research into the Third Sector was under way before Atlantic embraced the topic. Yale University, under the leadership of Yale Law School professor John Simon, had launched its Program on Nonprofit Organizations in the 1970s. But that was, for a time, a solitary, probably unique center of information and thinking about the field.'

9 Marion R Fremont-Smith, *Foundations and Government* (New York: Russell Sage Foundation, 1965).

10 Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE LAW J 835 (1980); Henry Hansmann, *Reforming Nonprofit Corporation Law*, 129 U PENNSYLVANIA LAW REV 497 (1981).

11 Professor Dale served as president and trustee of the Atlantic Foundation. Conference papers and syllabi are available at <http://ncpl.law.nyu.edu/scholarly-research-publications/>. The searchable NCPL Bibliography is available at <http://ncpl.law.nyu.edu/bibliography/>.

12 I suspect that in many JD Nonprofit Law classes, the emphasis remains on the tax issues, with the course typically taught by a lawyer with a tax background.

Many legal reform projects over the last few decades affecting nonprofit organisations have occurred within their subject-matter silos. For nonprofits, of greatest interest are the uniform laws adopted by the Uniform Law Commission (ULC); model acts adopted by the American Bar Association; and restatements and principles of the law issued by the American Law Institute (ALI). All of these are private products, whose influence depends on the willingness of State legislatures and courts to adopt or follow them.¹³ Recent trust law reform projects include the ULC's Uniform Trust Code (adopted in 2000 and amended several times thereafter, and enacted, as of March 2017, in 31 states and the District of Columbia); ALI's four-volume Restatement (Third) of Trusts, published by volume as topics were completed (from 2003 to 2012); and the ULC's Uniform Prudent Management of Institutional Funds Act (2006) – UPMIFA, which became a near instantaneous hit; only Pennsylvania remains a hold-out. For nonprofit corporations, the American Bar Association's 1988 Revised Model Nonprofit Corporation Act has been enacted (sometimes with variation) in over a dozen states; a working group of the Business Law Section of the American Bar Association adopted in August 2008 the Revised Model Nonprofit Corporation Act (Third Edition). In 2001, the ALI opened a project on Principles of the Law of Nonprofit Organizations. In 2014, the ALI replaced that effort with a Restatement of the Law of Charitable Nonprofit Organizations. According to the ALI's website (as of March 2017):

Six Chapters are expected in this project. Portions of Chapter 1 (Definition, Choice of Form, and Autonomy), all of Chapter 2 (Governance), and portions of Chapter 3 (Changes to Purpose and Organization) were approved at the 2016 Annual Meeting. The remaining Chapters are State and Federal Regulation, Enforcement and Remedies, and Gifts.

These various regimes and projects not only reflect a broad interest in and expertise being brought to bear on improving charity governance, but also result in overlapping and potentially conflicting types and levels of law that any charity must take into account. There has been a welcome trend in recent reforms to converge on the same legal standards and remedies – notably, to produce the same results for trustees of charitable trusts and directors of nonprofit corporations – although a tug-of-war remains over whether trust or corporate principles should apply to change in charitable purpose by corporate charities.

¹³ See Evelyn Brody, *US Nonprofit Law Reform: The Role of Private Organizations*, 41 NONPROFIT & VOLUNTARY SECTOR Q 535 (2012).

Other important institutional developments include the creation of the Nonprofit and Philanthropy Law section of the Association of American Law Schools, the Nonprofit Law Prof Blog,¹⁴ and SSRN's Nonprofit e-library.¹⁵

Separately, scholars and policy makers focus on particular industries without necessarily identifying them with a broader nonprofit sector.

II. What Constitutes Nonprofit Legal Scholarship and Who Uses It?

'Traditional' legal scholarship

Traditional legal scholarship is and remains doctrinal: explaining what the law is, whether that law be court made (common law), statutory, or administrative. Such work speaks to the Bench and the Bar as much as to the Academy. In the last few decades, though, doctrinal scholarship has declined relative to theoretical articles, and to interdisciplinary work that hardly resembles law at all. Judge Richard Posner described the 'untheorized' pre-1960s environment:

Oriented as it was toward reform, desiring to communicate effectively with the judges and the leaders of the bar and the other movers and shakers of the legal community, even the most ambitious academic legal scholarship spoke a language that nonacademic lawyers, the members of the judiciary and the practising bar, could understand with ease ... The scholars used the same assumptions, vocabulary, and methods of argument and proof as found in judicial opinions. They identified with the legal profession rather than with their colleagues in other departments of their university. They even dressed like lawyers rather than like professors. They passed easily between the university and nonacademic venues such as the courtroom and the government agency.¹⁶

From the other direction, it is not unusual to find law review articles authored by judges, practising lawyers, and regulators.

The recent explosion in interdisciplinary work is largely theoretical, not empirical – no doubt due to the authors' training (or lack thereof). It must be admitted that legal

14 Nonprofit Law Prof Blog, available at <http://lawprofessors.typepad.com/nonprofit/>.

15 Nonprofit & Philanthropy Law eJournal. Social Science Research Network, available through subscription and searchable at https://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=889928.

16 Richard A Posner, *Legal Scholarship Today*, 115 HARVARD LAW REV 1314, 1315 (2002) (Symposium: Law, Knowledge, and the Academy).

academics show little fear in venturing into fields in which they lack formal training. After all, if law permeates society, surely lawyers must be nimble enough to speak outside their discipline. This is not mere dilettantism. For all its saliency, the law is often a weak force in behaviour. In the mainstream law reviews, public choice theory and institutionalism appear in the writing of those without an economics or sociological background. The little legal empirical work that does exist is largely grounded in what is called 'Law &' – notably the Law and Economics movement, initiated at the University of Chicago, and Law and Society, and usually focuses on legal process questions, such as judicial or jury decision making. Specialty journals for these multidisciplinary fields have proliferated.¹⁷

My nonprofit research agenda grew out of my efforts to teach myself the broader framework in which nonprofits form and operate. My early nonprofit pieces contained very little law: before I could address whether the law should treat nonprofits differently from for-profits, I had to figure out how (or even whether) nonprofits were different from for-profits as a matter of economics, organisational behaviour, and so on. I think of this early work as 'translations' (or 'mappings', as Posner calls them¹⁸) from a field other than law into language that lawyers can understand (and that is comfortingly long and hyper-footed). Fortunately, the law reviews were (and are) receptive to publishing such extra-legal explorations.

In my efforts to address issues of importance to the nonprofit sector, I cannot imagine how I could have succeeded without either PONPO's *The Nonprofit Sector: A Research Handbook* or my membership in ARNOVA. My collaborations with the economists, sociologists, historians, political scientists, and others I have met through ARNOVA allowed for fruitful scholarship, in both directions. To my delight, for example, I explored all the various dimensions of property-tax exemption for charities, not by pretending to be what I am not trained to be, but rather by editing a book whose chapters were written by the leaders in their fields – and most of them ARNOVA members.¹⁹ My constitutional law article grew out of a two-year series of seminars on nonprofit advocacy that I helped to organise with the Urban Institute's Center on Nonprofits and Philanthropy.²⁰ These connections helped me get known to the editors of the second edition of *The Nonprofit Sector: A Research Handbook*: My contribution was a new chapter on, basically, 'laws other

17 See generally, Jack Goldsmith and Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U CHICAGO LAW REV 153 (2002) (Symposium on Empirical Research and the Goals of Legal Scholarship).

18 Posner, *supra* note 16, at 1318.

19 Evelyn Brody, *Property-Tax Exemption for Charities: Mapping the Battlefield* (Washington, DC: Urban Institute Press, 2002).

20 Evelyn Brody, *Entrance, Voice and Exit: The Constitutional Bounds of the Right of Association*, 35 U CAL-DAVIS LAW REV 821 (2002).

than tax', which complements the classic John Simon chapter on taxation (which he revised, along with Harvey Dale and Laura Chisolm).²¹

In my experience, nonprofit legal scholars have more varied publication opportunities than those in many other legal fields. But an important issue remains of what 'counts' in one's home institution, both as legal scholarship (multidisciplinary/interdisciplinary) and in the rankings. While the US academy is not so formalised as those in other jurisdictions, there is a strong, if informal, pecking order – generally, if undeservedly, attributing higher prestige to the student edited law review of the higher ranked schools.

Indeed, the quirks of the tenure process – at those law schools that care about scholarship – enormously affect what type of work is produced and how it is disseminated. Most conspicuous are the oddities of the student edited law reviews in US law schools. With their focus on law review publication, legal academics can be strangely ignorant of original work published in different venues, including books and the disciplinary journals of other fields. (It is not uncommon for a legal academic to get credit among her peers for publishing an idea in a law review article that was widely known outside the law.) Even less explainable is the distrust of co-authored work. Given my perception of the tenure process, I adopted a two-track publication strategy: to devote most of my scholarly efforts to law review publication before tenure (and subsequent promotion to full professor); and afterwards to allow myself to write more for (and with) practitioners and those outside the legal field.

Traditionally, US legal scholars have not faced pressure to raise outside funds for scholarship. Rather, 'summer money' and sabbaticals typically come from the home law school. Part III of this paper raises the question of whether such a situation is stable, in light of recent pressures on law school enrollment and finances.

The peculiar effects of the student edited law reviews

Unfortunately, no simple screening device exists to separate the wheat from the chaff among law review articles. One might think that the Harvard, Yale, Stanford, and University of Chicago law reviews publish all the best articles, but even these journals are not peer-reviewed. It usually comes as a shock to non-US academics that the traditional US law review has a student editorial board – meaning that the students not only edit the articles, but also select articles for publication (not always

²¹ See Evelyn Brody, *The Legal Landscape for Nonprofit Organizations*, and John Simon, Harvey Dale, and Laura Chisolm, *The Tax Treatment of Nonprofit Organizations*, in *The Non-Profit Sector: A Research Handbook* (2nd ed.) (Richard Steinberg Richard and Walter F Powell, editors, 2006).

on a blind basis).²² Most authors take pains to tailor their writing to 25-year-old second-year law students: the same, often obvious, topics seem to be addressed year after year, and a surprisingly high percentage of faculty at the elite schools publish in their own law reviews. While the lifespan of the student editorial board is only a year – thus ensuring a publication date of, at most, 18 months – there is no unique submission requirement. Indeed, an author might send out dozens of copies, and, once an acceptance arrives, begin the frantic process of ‘trading up’.²³ And then the students start the editing process. Judge Posner dubs this state of affairs ‘a world where inexperienced editors make articles about the wrong topics worse’.²⁴

One might think of US academic legal scholarship as samizdat – self-published in the ‘best’ journal in which the piece gets accepted. To continue the analogy, the author typically sends offprints or PDFs of the published piece to colleagues, to those whose work he or she has cited and wants to impress, and to others who would be unlikely to find the piece any other way. In this electronic age, placement in a ‘prestigious’ journal almost does not matter, because a word search in LEXIS or WESTLAW will produce everything published after, say, the early 1990s. Electronic reprints can be found through Google Scholar, and, if posted in draft or published form by the author, in the SSRN database. Indeed, because the student edited law reviews do not specialise in subject matter, keeping up with scholarship in one’s area of interest relies heavily on subscriptions to SSRN’s emailed (and searchable) lists of abstracts with links to full text, notably the eJournals Nonprofit & Philanthropy Law, Tax Law & Policy and Trust Law. The only formal, critical, external review of a piece of scholarship might come years later, when the candidate’s tenure committee solicits outside letters – usually, once again, from law professors.

Strategic responses: research once, write for different audiences

Techniques have developed to work around the shortcomings of student edited law reviews. Faculty at some schools (at least in certain fields, such as tax) assist student editorial boards in reviewing submissions. Most significant is the emergence of peer-reviewed, interdisciplinary journals, notably the *Journal of Legal Studies* and the *Journal of Law and Economics*. Some of these journals require unique submission, and prefer shorter articles targeted to a knowledgeable audience. While

22 For general discussion, criticism, and recommendations, Jason P Nance & Dylan J Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALBANY L REV 565 (2008), and the sources cited therein.

23 The journals at the top schools are rumoured not to even read a paper until it has been accepted elsewhere.

24 Richard A Posner, *Against the Law Reviews*, LEGAL AFFAIRS (Nov-Dec. 2004), available at https://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp.

several schools maintain tax, corporate and trust law reviews, there is no US academic journal devoted to nonprofit organisations.

Other journals occasionally publish symposium issues, for which the symposium editor is a faculty member or invited academic who selects or suggests the symposium contributors. My law school's journal, the *Chicago-Kent Law Review*, adopted an all-symposium format in order to improve the quality of the articles (student notes still appear at the discretion of the student editorial board): The Spring 2005 issue included papers on nonprofit governance and oversight for a symposium that I co-organised with Dana Brakman Reiser, of Brooklyn Law School; two issues of the 2010 (Vol. 85) published the papers on the Symposium on the Law of Philanthropy in the Twenty-First Century (organised by the American College of Trust and Estate Counsel, ACTEC); and in 2016, Volume 91 (Issue 3) contained the papers of the Symposium on Nonprofit Oversight Under Siege: An International Comparison of Regulatory Models (which Professor Brakman Reiser and I again co-organised).

For many technical fields, being invited to participate in a symposium is not only an excellent way for a junior scholar to get published (and get better known to his or her peers) – but also is increasingly the most reliable way for an established scholar to get published in a timely manner. Much of my post-tenure scholarship has been written (or revised) for a symposium. I have even had opportunities to publish in nonprofit law symposia revised articles presented at non-law review symposia (with proper attribution and permission of all parties).²⁵ Finally, to reach the practising bar, I have republished law review articles (again with permission and attribution) in a practitioner journal, *Tax Analysts' Exempt Organization Tax Review*.

Sometimes the cross-pollinating goes in the other direction: Many law review articles are subsequently adapted (often in much shorter form and with appropriate citation style) for a broader readership as chapters in books; some legal scholars make use of earlier research published in law reviews in contributing to edited

²⁵ For a non-legal symposium, see Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLORIDA TAX REV 183 (2012), substantially identical to the version in the proceedings of the 2011 Internal Revenue Service Research Conference, 'New Perspectives on Tax Administration', pp 175-206 (co-hosted with the Urban-Brookings Tax Policy Center), available at <http://www.irs.gov/pub/irs-soi/11rescon.pdf> (article at <http://www.irs.gov/pub/irs-soi/11resconsunshine.pdf>) (2012). For a book chapter, see Evelyn Brody, *The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice*, 76 FORDHAM L REV 521 (2007) (Symposium on Nonprofit Law, Economic Challenges, and the Future of Charities), substantially identical to Evelyn Brody, *The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice: A View from the United States*, in COMPARATIVE NONPROFIT CORPORATE GOVERNANCE (Klaus Hopt and Thomas von Hippel, eds) (Cambridge University Press, 2010).

volumes. Prolific authors might compile their articles into a book or produce a treatise. Legal academics also produce monographs, but this is not so common as in other disciplines (not least because most US legal academics have not produced work for a PhD).

Indeed, while it often seems that members of the legal academy talk primarily to each other, residents of other disciplines seem surprisingly ignorant of any academic legal scholarship that does not appear in a book. Law reviews are not indexed by the social sciences; and economists, sociologists, historians, political scientists and other academics seem unaware of how (or are disinclined) to search the law review electronic databases maintained by WESTLAW or LEXIS. I have noticed that legal academics cite my law review articles, while academics from the social sciences cite my book chapters. The general public, too, might be more aware of work appearing in a book than in a law review article.

With its focus on tenure qualifying scholarship, this article does not cover the extensive dissemination of legal thought presented on an increasing number of blogs and other websites. (Note that the Nonprofit Law Prof Blog posts links to recently published scholarship.) These fora can raise issues of copyright and prior publication, particularly online publication of drafts. Suffice it to say that nowadays the author typically owns the copyright of a law review article (although publication credit must be given in any subsequent use), but the author does not own a book chapter (academic use can be negotiated); ownership of articles in professional journal varies. The lore (uncorroborated) is that once a piece is accepted for law review publication, it can be posted to the author's website and SSRN (the Social Science Research Network) without violating the law review's traditional right to first publication, but many legal academics publish or post drafts as working papers, with no evident problems.

The broader legal audience: legislators, regulators, judges, and practitioners

The line between academic and non-academic research has never been bright. Law schools are primarily trade schools, and tenured faculty are themselves typically 'only' lawyers. The appetite for objective legal analysis can be found not just in law firms and general counsel's offices – and with legislative and regulatory bodies – but also in management suites of nonprofit organisations and associations. Plain English writing about the law is widely available. A nonprofit practitioner can readily find, in trade journals and on the web, guidance on a range of topics, from charitable registration requirements to the advantages of the '501(h)' lobbying election to the intermediate sanctions imposed on 'excess benefits' paid to charity

insiders.²⁶ At the same time, pressure to produce legal scholarship has not only intensified at the elite law schools, but has also migrated down to lesser law schools.

Most law school faculty members have experience practising law – and some continue to practice (up to the standard limit of 20 percent of one's time). Before joining the academy, I was an associate tax attorney at two private firms, and then served as an attorney-adviser in the Office of Tax Policy at the US Treasury Department. Clinical faculty, by definition, continue to practice law. Many law school courses are taught by adjuncts who are full-time practitioners. Even among the tenure track faculty, only a minority have a doctorate (and nearly all of those who do have it in a field other than law). This means that most US legal academics have not learned how to do rigorous research in graduate school, have little statistical training or any ability to perform empirical work, and lack graduate students capable of performing such research. Lacking a thesis adviser, a new tenure track law faculty member must seek out appropriate mentors – and senior faculty must be ever vigilant to spotting junior faculty, whether down the hall or across the country, who need mentoring. The fact that most new hires have several years of practice under their belts, as well possibly as a judicial clerkship or government experience, increases the odds that they have acquired not just maturity but also a network to draw upon.

This experience with how law functions explains the legal academic's interest in policy solutions. Even when reform projects – like Congressman Pickle's proposals in the late 1980s regarding the unrelated business income tax – do not yield legislation, they can influence the understanding (and enforcement) of existing law. The public climate can be more or less responsive to reform efforts, and the press plays an enormous role. The 2004 'Staff Discussion Draft' on nonprofit governance issued by the Senate Finance Committee arrived in a climate of intense interest in improving the legal regime applicable to the governance of nonprofit organisations, notably charities, and was studied by academics, policy makers, and practitioners (legal and nonprofit) alike. Some of its proposals became law as part of the Pension Protection Act of 2006, and other policy concerns motivated much of the Internal Revenue Service's 2008 redesign of the Form 990 (the annual tax return that exempt organisations must submit).

The US does not have a formal process of consultation on legislative proposals.²⁷ However, as previously suggested, much of what a legal academic does is to recommend improvements to the law. Many law review articles are heavily

26 Practically an industry to himself, practicing attorney Bruce R Hopkins has written more than 30 books in the field of nonprofit tax law. See also *his Nonprofit Counsel* at (<http://hopkinsnonprofitcounsel.com>), now in its 34th year.

27 By contrast, the Administrative Procedure Act, a federal statute that applies to regulations issued by administrative agencies, requires a process of public notice and comment.

normative and prescriptive. Academics usually are designated the ‘reporter’ of legal reform projects undertaken by professional associations, whether national, statewide, or local (for example, the Bar of the City of New York). In addition, academics are often appointed to serve as members of any appurtenant advisory or drafting group.

Whether they are writing for scholars or practitioners, good legal scholars are ever cognizant of the limits of the law. For nonprofits, this means keeping in mind the distinction between legal dictates and ‘best’ practices. For example, good corporate governance often requires more than satisfying the legal threshold. The admitted gaps between the legal requirements and sound business practices do not necessarily mean that formal laws should be expanded or reformed to mandate those practices, and legal academics (as well as practitioners) help draft peer or self-regulatory guidelines, standards and recommended practices.

A separate issue is how much influence scholarship has on judicial decisions. While Judge Posner and others have criticised the utility of much academic writing, in the nonprofit field – where little case law is available to offer precedential value – legal scholars can serve as a useful guide. Moreover, judges hire recent law school graduates as their clerks; as (if?) law students are exposed to nonprofit law in school, they are aware of the literature in preparing their draft opinions for the court.²⁸ Regulators and litigants are also increasingly knowledgeable about legal scholarship, and sometimes retain nonprofit academics as advisers or expert witnesses.

III. The Future of Nonprofit Scholarship in the US

Current financial pressures on research funding in general, and on law schools in particular, raise serious concerns: Will the emphasis on scholarship in law schools – particularly at those outside the top tier – shift to an increased teaching load or to retooling pedagogy towards time consuming skills and experiential courses? For funded research – often multidisciplinary – will foundations have the interest to support theoretical and empirical research by academics and think tanks on nonprofit issues?

According to Proscio’s 2003 report for Atlantic Philanthropies, Atlantic’s contribution to nonprofit sector research and infrastructure ‘was unparalleled in its

²⁸ My publications have been cited in 16 reported judicial opinions, for the court or in dissent (including the US Supreme Court; the 7th (twice) and 9th Circuits; the Minnesota, Oklahoma, South Carolina, and Washington Supreme Courts; and various lower federal and state courts).

breadth, dollar volume, and perseverance'. At the end of the report, he quotes from an interview with one scholar:

Atlantic's withdrawal [from Nonprofits, Philanthropy, and Volunteering] is widely seen as a disaster in a struggling field with very few leaders, in which Atlantic has been absolutely pivotal. There is nobody out there in a position to take the place of Atlantic Philanthropies in this field. Their withdrawal is really premature, in a field whose credibility is still very much open to question. As a result, there will be a lot of gloating from the skeptics, a lot of 'I told you so's – this isn't really a field, there's no future in it.' Certainly in the research enterprise, it probably won't continue to have the dynamic of the last 10 years, and it may well regress. In the history of academic work, 10 years is a real short time, and it hasn't been nearly enough to establish nonprofit studies as a respected, stable feature of American academia.²⁹

However, Atlantic was not the only source of foundation funding for nonprofit research (including legal scholarship), and the work continues, albeit in generally more tailored form to suit the interests of the funders.³⁰ See the Foundation Center's *Foundation Giving for Nonprofit and Philanthropic Infrastructure, 2004-2012*.³¹ As that report explains, infrastructure support includes grants to academic centres and research institutions (including the Urban Institute and the Hudson Institute); nonprofit and philanthropic information service providers (such as GuideStar and the Foundation Center); providers of nonprofit governance and management assistance; associations of nonprofit organisations (usually within a state); grantmaker networks; and public policy and advocacy organisations (including the National Association of Nonprofits). See Appendix B for charts from that 2015 report identifying the largest funders and recipients by size. Recent years have seen the emergence of conservative funders (notably the Philanthropy Roundtable and its advocacy affiliate, the Alliance for Charitable Reform), which focus particularly on the interests of donors – not just in the tax area, but also on donor control and privacy.

²⁹ Proscio, *supra* note 6, at 64.

³⁰ I am an advisory board member of 'Tax Policy and Charities', a joint project of the Urban Institute Center on Nonprofits and Philanthropy and the Brookings Institute-Urban Institute Tax Policy Center, funded largely by the Bill and Melinda Gates Foundation. See <http://www.urban.org/policy-centers/cross-center-initiatives/tax-policy-and-charities>.

³¹ Available at http://foundationcenter.org/gainknowledge/research/pdf/foundation_giving_nonprofit_philanthropic_infrastructure.pdf. Nick Deychakiwsky tells me that an updated edition of this March 2015 report, funded by the William and Flora Hewlett Foundation, is in process.

The nonprofit sector does not now seem to be reliving the cohesiveness (and sense of threat) of the 1969 Tax Reform Act era. Yet today's tax proposals sound alarming enough: possible loss of (or severe caps on) the charitable contribution deduction; endowment spending requirements for public charities (notably, university endowments); and repeal of the 'Johnson Amendment', which prohibits 501(c)(3) charities from engaging in partisan politics. Perhaps the reason that we are not seeing a large-scale response and a new Filer Commission commissioning research papers is that the ground is fairly well-ploughed, and the policy issues much better understood. Or perhaps we are seeing the funding decisions of a new generation that is more interested in subsectoral or specific issues, and is unaware of the possible broader consequences of policy change. (Notably, at year-end 2017 higher-education advocates are targeting proposals of the proposed Tax Cuts and Jobs Act that specifically affect students and their institutions.) Some funders – such as the Robert Wood Johnson Foundation, focused on health care, or the Center for Effective Philanthropy, focused on philanthropic foundations and donor control – might not think of themselves engaged in 'nonprofit research'. One new funder, the Fidelity Charitable Gift Fund, might still be viewed as an interloper by the community foundations, while some of the old-line membership associations (notably the Council on Foundations and Independent Sector) have seen falling memberships and cutbacks in research and other staff.

Concluding Comments

With apologies to those from more structured academic backgrounds, the ad hoc nature of legal academic scholarship lends a personal tone to this article. Perhaps most practically, the financial pressures of the law school academic's home institution (as well as the relationship between the law school and its university) might have a larger effect on the production of legal scholarship that focuses on nonprofit issues, at least in the US. Given that many US legal scholars do not apply for research support apart from 'summer money' from their law schools, recent declining enrollments might jeopardise this source of funding. More broadly, shrinking enrollments could temper the visibility of nonprofit research as a legal field in the United States. As a 'boutique course', nonprofit law perhaps is vulnerable in both good times and bad: I started teaching 25 years ago in a boom time for my school, requiring me to devote all of my teaching time to my core subject area, taxation; after creating my Nonprofit Law class in 2001, I have not taught it since 2014 because our shrinking faculty has left me the only teacher of our basic tax courses. Of course, teaching and scholarship need not correspond completely, and I published a great deal of research on nonprofit topics long before I started teaching it – but, as described above, the existence of Nonprofit Law as a law school elective made it easier for nonprofit pieces to find placement.

APPENDIX A

SELECTED US NONPROFIT LEGAL VENUES BY AUDIENCE

NB Search the legal bibliography at <http://ncpl.law.nyu.edu/bibliography/>

I. Legal Academics

General (usually student edited) law reviews: Blind submission or symposium issue

Harvard Law Review

Chicago-Kent Law Review (all-symposium format; faculty editors select articles)

Tax law reviews:

The Tax Law Review (NYU School of Law)

Virginia Tax Review

Florida Tax Review

Pittsburgh Tax Law Review

Columbia. J Tax Law

Trust law reviews:

American Council of Trust & Estate Counsel Journal

Corporate law reviews:

Iowa Journal of Corporate Law (U. of Iowa Law School)

Constitutional law reviews:

Hastings Const. Law Quarterly

University of Pennsylvania Journal of Constitutional Law

‘Law &’ Journals (typically peer-reviewed):

Journal of Legal Studies

Journal of Law and Economics

Law & Society Review

II. Legal Practitioners

A. Tax

Exempt Organization Tax Review (Tax Analysts, publisher of *Tax Notes*)

Taxation of Exempts

The Tax Lawyer (American Bar Association Section on Taxation)
Tax Adviser

B. Trust Law

Real Property, Trust and Estate Law Journal (ABA RPTE Section)
(formerly *Real Property, Probate and Trust Journal*)

C. Corporate Law

The Business Lawyer (ABA Business Law Section)
Nonprofit Counsel (for in-house corporate counsel)

III. Nonprofit Scholars, Including ‘Pracademics’ (generally peer-reviewed)

Nonprofit and Voluntary Sector Quarterly (ARNOVA)
Voluntas (ISTR)
Nonprofit Management and Leadership
Nonprofit Policy Forum
National Tax Journal (National Tax Association [largely economists])

IV. Nonprofit Practitioners

Chronicle of Philanthropy (original news stories and links to national media reports on nonprofit legal developments; limited op-ed opportunities)
Nonprofit Quarterly (daily emails, with links to own articles and sources)
National Council of Nonprofits (emails, with links, to legal developments)
Stanford Social Innovation Review

V. Nonprofit Subsector Academic Publications

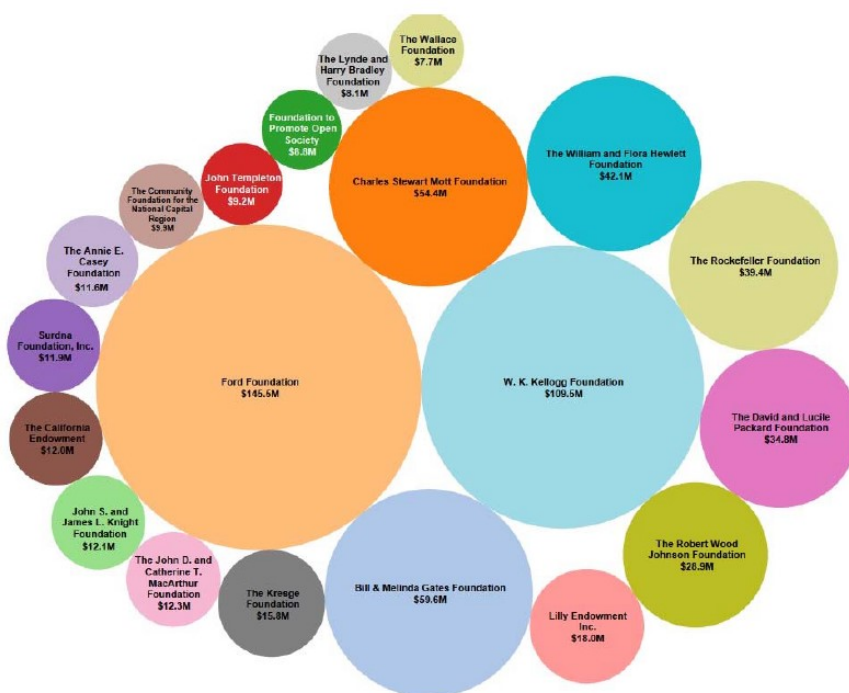
Many – e.g., *Health Affairs* (academic)
Chronicle of Higher Education (sister publication of *Chronicle of Philanthropy*)

APPENDIX B**NONPROFIT INFRASTRUCTURE SUPPORT**

Pages 13, 16, 18, and 20 from Foundation Center, *Foundation Giving for Nonprofit and Philanthropic Infrastructure, 2004-2012*, available at

http://foundationcenter.org/gainknowledge/research/pdf/foundation_giving_nonprofit_philanthropic_infrastructure.pdf (update in progress).

Top 20 Foundations Funding Infrastructure, 2004-2012*

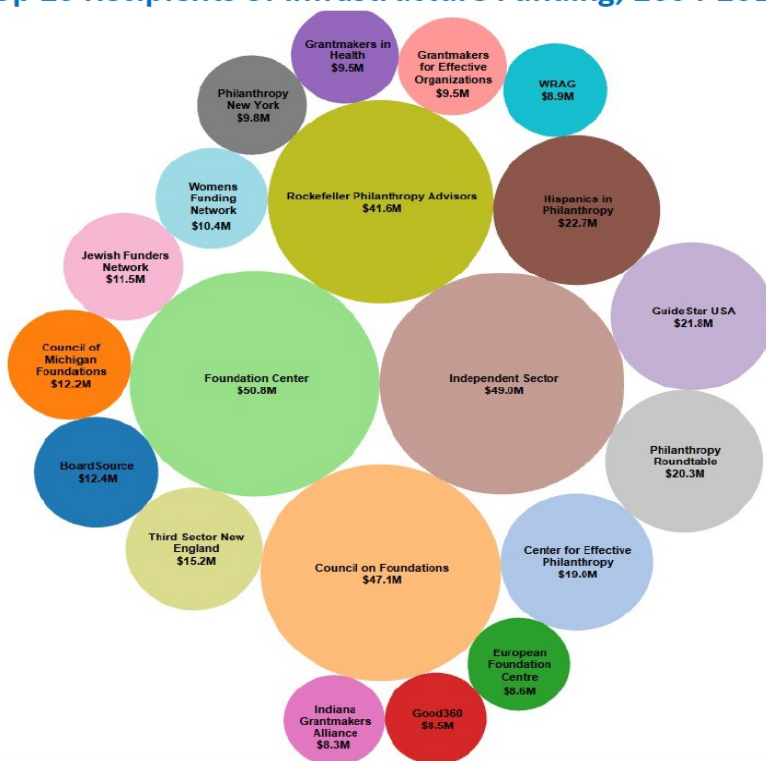


KEY FINDINGS:

- The New York-based Ford Foundation and Michigan-based W.K. Kellogg Foundation ranked as the largest funders of nonprofit and philanthropic infrastructure between 2004 and 2012.
- Together, the top 20 funders gave \$652 million or 63% of the more than \$1 billion supporting the field during this period.

*Source: Foundation Center, 2015. Based on all grants of \$10,000 or more awarded by a national sample of larger U.S. foundations.

Top 20 Recipients of Infrastructure Funding, 2004-2012*

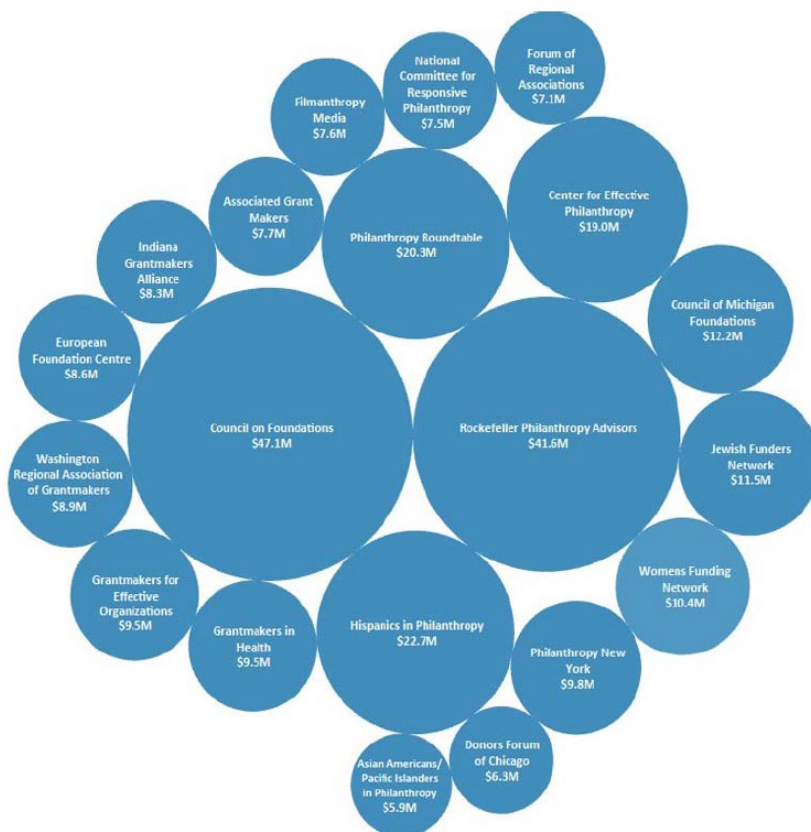


KEY FINDINGS:

- Four organizations—Foundation Center, Independent Sector, Council on Foundations, and Rockefeller Philanthropy Advisors—captured \$188.6 million, close to one-fifth of total U.S. foundation funding for nonprofit and philanthropic infrastructure between 2004 and 2012.
- Overall, the top 20 recipients organizations received 38% of total funding reported by all 1,158 unique organizations receiving infrastructure grants during this period.

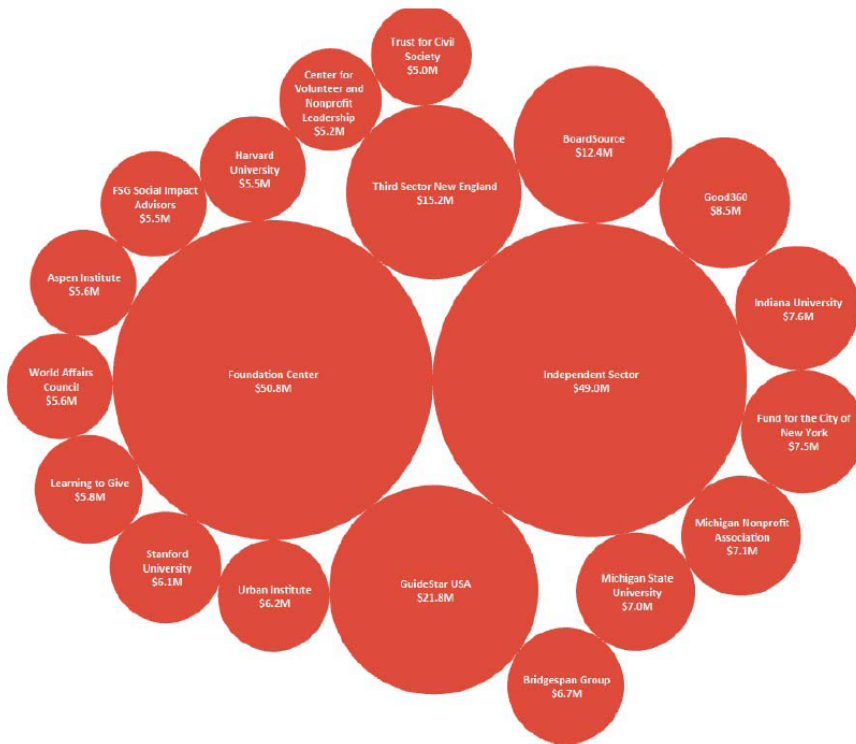
*Source: Foundation Center, 2015. Based on all grants of \$10,000 or more awarded by a national sample of larger U.S. foundations.

Top 20 Recipients: Philanthropy-specific Organizations and Networks, 2004-2012*



*Source: Foundation Center, 2015. Based on all grants of \$10,000 or more awarded by a national sample of larger U.S. foundations.

Top 20 Recipients: Other Nonprofit Infrastructure Organizations, Networks, and Services, 2004-2012*



*Source: Foundation Center, 2015. Based on all grants of \$10,000 or more awarded by a national sample of larger U.S. foundations.

20 Foundation Giving for Nonprofit and Philanthropic Infrastructure 2004-2012