

# CHICAGO-KENT LAW REVIEW

---

---

VOLUME 80

2005

NUMBER 2

---

---

## CONTENTS

### SYMPOSIUM: WHO GUARDS THE GUARDIANS?: MONITORING AND ENFORCEMENT OF CHARITY GOVERNANCE

SYMPOSIUM EDITORS  
DANA BRAKMAN REISER AND EVELYN BRODY

INTRODUCTION	<i>Dana Brakman Reiser and Evelyn Brody</i>	543
THERE OUGHT TO BE A LAW: THE DISCLOSURE FOCUS OF RECENT LEGISLATIVE PROPOSALS FOR NONPROFIT REFORM	<i>Dana Brakman Reiser</i>	559

This Article explores and evaluates the disclosure focus of recent legislative proposals for nonprofit reform. It begins by describing legislative proposals under consideration in various states and the U.S. Senate Finance Committee. This summary demonstrates the emphasis these proposals place on disclosure as a technique for enhancing nonprofit accountability. The Article then evaluates the ability of such disclosure mechanisms to achieve nonprofit accountability gains, by improving the behavior of nonprofit actors, facilitating nonprofit enforcement by regulators or others, or both. Unfortunately, due to the structure and characteristics of nonprofit organizations and the resources available for nonprofit enforcement, this analysis reveals that disclosure-based reforms alone will do little to improve nonprofit accountability. Thus, the Article concludes by urging legislators to refocus their reform energies around invigorating enforcement, and to adopt disclosure-based reforms only when they will complement enforcement efforts without undermining nonprofits' ability to pursue their missions.

NONPROFIT INTERJURISDICTIONALITY	<i>Norman I. Silber</i>	613
----------------------------------	-------------------------	-----

The federal system of "dual sovereignties" guarantees that most American legal regimes tolerate jurisdictional overlap between the enforcement authority of federal and state agencies. This Article explores interjurisdictional overlap in the context of nonprofit legal supervision. Notwithstanding the common assumption that "states police mission while the IRS polices money," it is suggested here that the overlap has become much broader than generally has been supposed; that over a wide range of common misconduct among the preponderance of organizations in the nonprofit sector, either the Internal Revenue Service or state authorities could, if they wanted to and in no particular order, exercise statutory or common law authority to prosecute nonprofit charities, including their officers and directors. As a policy matter, this overlap has generally been viewed as positive by both state and federal officials, who can defer or shift the burden of supervision to avoid spending scarce resources, to avoid political difficulty, or for other reasons. In many cases, they can build on one another's work, use the legal precedent established by one another's litigation, or act in independent disregard of it. They can act first, second, or not at all. If legislation currently being considered becomes law, furthermore, it may become easier than ever for regulators to coordinate their activities and to share information; but the lines of authority will not (as a general matter) become more sharply drawn. This Article raises several disadvantages that result from the increasing breadth of overlap, including erratic and inconsistent growth in the law, unpredictable law enforcement, a lack of accountability and responsibility for supervision, and some confusion among nonprofit

counselors and the organizations they advise. It offers some suggestions for new lines and for redelineating authority along historical lines.

CHARITY GOVERNANCE: WHAT'S  
TRUST LAW GOT TO DO WITH IT?

*Evelyn Brody*

641

The traditionally distinct regimes for governing charitable trusts and nonprofit corporations have been conforming. At the same time, by continuing to make distinctions based on organizational form rather than structure and operations, we might be asking the wrong questions. To what extent do trusts and corporations have irreducible legal differences? Key issues that initially appear unique to trust law on closer inspection turn out to apply to some or all corporate charities – and corporate doctrine might be more appropriate for charitable trusts having a broad governing board. In the end, the distinction between “trust law” and “corporate law” might make less sense than identifying what legal principles of governance should apply to charities with multiple, independent fiduciaries, and what (if any) different legal principles should apply to charities governed by only a single fiduciary, or a small number of fiduciaries (particularly if they are related).

LET CHARITABLE DIRECTORS DIRECT:  
WHY TRUST LAW SHOULD NOT CURB  
BOARD DISCRETION OVER A  
CHARITABLE CORPORATION'S MISSION  
AND UNRESTRICTED ASSETS

*Robert A. Katz*

689

What are the legal limits on a charity's ability to change its mission and redirect donations to new purposes? The answer often turns on the charity's legal form, whose essential elements are encapsulated in a few nonmandatory default rules. Absent extraordinary circumstances, a charitable trust's controllers (a.k.a. “trustees”) may not deviate from the specific charitable purposes selected by the trust's creator (a.k.a. the “settlor”), unless the settlor expressly expanded the trustees' discretion. By contrast, a nonprofit corporation's controllers (a.k.a. its “board of directors”) are typically free to change the charitable purpose and redeploy donations, unless the corporate charter or a gift instrument expressly curtails its authority to do so. In recent years, the wide scope of board discretion has aggravated concerns about nonprofit accountability. To address these concerns, some commentators seek to import more restrictive, trust law default rules into nonprofit corporate law. This Article criticizes this program of “trust law parallelism” on grounds that it will increase the costs of charitable activity and thereby deter philanthropy. It will curtail the diversity of off-the-rack legal forms available for charitable endeavors, and therefore increase the transaction costs of philanthropists who favor more discretion for controllers. Moreover, because many philanthropists will be unaware of the restrictive default rules, they will not know to opt out of them, even if they favor more discretion or have no opinion on the matter. As a result, boards will be restrained to an extent that does not enhance accountability. At bottom significant restraints on board discretion over the mission are socially costly: they impair a board's ability to respond to changing needs and fresh opportunities, which facilitates the application of charitable resources to more socially valuable uses.

CHARITABLE ACCOUNTABILITY AND  
REFORM IN NINETEENTH-CENTURY

ENGLAND: THE CASE OF THE CHARITY  
COMMISSION

*James J. Fishman*

723

Fraudulent behavior by charitable fiduciaries brings universal condemnation. However, disapprobation by itself never has translated into an efficient system for the accountability of charitable assets. This Article examines the nineteenth-century struggle to form a charity commission to oversee English charitable endowments and the ultimately disappointing result. Administrative reform can have an interminable germination as the creation of the Charity Commission demonstrates. Even though the need for reform of charitable trust administration was long recognized and a consensus reached on the structure of the oversight body though not its scope, the resulting agency came under almost immediate criticism and was disliked, disrespected, deprived of resources, and ultimately ineffective.

Why is it so difficult to carry out effective institutional change? Why did the principle of charitable accountability, a nearly unanimously supported ideal, ring so hollow in practice? This Article offers hypotheses about the difficulties of administrative reform through the prism of the nineteenth century that may apply more broadly. Many of the problems that hindered the Charity Commission: inadequate resources, increasing numbers of charities, resistance to increased oversight by affected interest groups, and a lack of influence in government face contemporary regulators of the nonprofit sector.

NEW CHARITY REGULATION  
PROPOSALS FOR ENGLAND AND WALES:  
OVERDUE OR OVERDONE?

*Debra Morris*

779

One of the most important aspects of modern governance of any organisation, whether a charity, a commercial entity or a governmental department is the emphasis upon greater openness and accountability. This is partly a response to a breakdown of trust in government processes, which is evident, for example, in the intense media scrutiny of the decision to go to war with Iraq. It is also a response to the breakdown in trust in commercial governance and professional self regulation, as demonstrated, for example, by the collapses of Enron in the USA and what might yet be regarded as its European counterpart, Parmalat.

The fact that many charities receive public subsidies in one form or another (from government funding, to funds raised from the public, through to reliance upon volunteers) makes it all the more important that they operate in a transparent manner. This paper will consider recent attempts in England and Wales to improve accountability within the charitable sector.

In May 2003, a draft Charities Bill was published taking forward the long-awaited review of charity law. The draft bill, which will 'modernise charity law and better enable charities to prosper' contains a series of measures outlined by the British government in July 2003. This was in response to the consultation document from the Prime Minister's Strategy Unit, published in September 2002, in which wide-ranging changes in the law and regulation of the charitable and wider not-for-profit sector were proposed.

This paper will focus on two of the main aims of the proposed reforms: developing greater accountability and transparency to build trust in the sector; and, maintaining that trust by independent, open and proportionate regulation.

THE GUARDIANS GUARDING  
THEMSELVES: A COMPARATIVE  
PERSPECTIVE ON NONPROFIT SELF-  
REGULATION

*Mark Sidel*

805

This Article explores regulation of the nonprofit sector by the sector itself—what we generally call “self-regulation.” This is an increasingly important topic as federal and state legislators and executive branch officials, as well as the press and investigative organizations, call for stricter scrutiny and oversight of the American nonprofit sector in the wake of a host of scandals and glaring failures—and as the nonprofit sector and reasonable regulators seek to balance the role of government regulation with appropriate efforts by the sector to police itself. The Article discusses several detailed models for nonprofit self-regulation in Asia, as well as issues involving nonprofit self-regulation in the United States and in Asia. It seeks to analyze several emerging trends in nonprofit self-regulation, including the emergence of nonprofit associational entrepreneurs that have taken up self-regulation with vigor, and the increasing role of government in sponsoring and supporting self-regulation initiatives.

**THE KENNETH M. PIPER LECTURE**

KNOWLEDGE WORK: NEW METAPHORS  
FOR THE NEW ECONOMY

*Catherine L. Fisk*

841

Metaphor and narrative have played a crucial role in shaping perceptions of the nature of employment relations. Lawyers, judges, and firms have long been “narrative entrepreneurs,” deploying metaphor and story strategically to shape the legal culture of work. When AT&T cut 40,000 jobs in one year, its Vice President of Human Resources said from then on all workers should regard themselves as “self-employed . . . vendors who come to this company to sell their skills.” The metaphor suggested that all formerly career employees were now “contingent” in the sense that they suddenly had the same employment contract as day laborers. The law of employment contracts has been powerfully influenced by the metaphor of the corporation as a person, which conceptualizes an internal labor “market” as a ladder. The legal obligations of corporate managers vis-à-vis shareholders (greater) and employees (lesser) likewise have been affected. An alternative metaphor—that a corporation is a network of people bound by a variety of contractual and other relationships—might have led to dramatically different laws regarding ownership and control of employee innovation, protections for low-level but nominally supervisory workers, and the structure of proof in discrimination cases.

The new economy is characterized by dramatic changes in the labor market brought about by globalization, the decline of career jobs, and the steady decline of union density. This Article explores the ways in which dominant legal metaphors about corporations, about work, and about workplace knowledge and the nature and origins of innovation have become increasingly inapt in the new economy. The principal focus of the Article is the metaphors surrounding innovation and intellectual property, and the metaphors concerning employment security and the allocation of risk of unemployment, poor health, or old age. Building on empirical literature showing that most innovation occurs among a network of people at multiple firms, rather than solely among the employees of a single firm, the Article suggests a modification of the dominant metaphor of corporate authorship of

patents, copyrights, and other “proprietary information.” The “networks of innovation” metaphor suggests the plausibility of a metaphor of “joint authorship” of workplace knowledge and the desirability of a system allocating credit, as screen credit is given in movies or on TV. New metaphors about the formation and content of employment “contracts” are also explored. Finally, the Article suggests that publicly subsidized and privately administered “social insurance” is a better metaphor than “employee benefits” for capturing the enormous social and economic importance of health, disability, and retirement income.

## THE LOUIS JACKSON NATIONAL STUDENT WRITING COMPETITION

THE QUEST FOR A LACTATING MALE:  
BIOLOGY, GENDER, AND  
DISCRIMINATION

*Maureen E. Eldredge*

877

This paper analyzes employment discrimination faced by women due to unique biological characteristics, such as breastfeeding, contraception, and infertility. The paper discusses protection from discrimination provided by the Pregnancy Discrimination Act, gaps in that protection, and provides suggestions for ways to improve equal opportunity in the workplace.

ERISA SECTION 404(C) AND  
INVESTMENT ADVICE: WHAT IS AN  
EMPLOYER OR PLAN SPONSOR TO DO?

*Stefanie Kastrinsky*

905

When Enron collapsed, many of its employees were not only out of a job, but those who had invested a portion of their retirement savings in Enron stock watched those funds dissipate. This unfortunate event engendered a renewed interest in ERISA section 404(c). Under ERISA section 404(c), as long as employee-participants are in control of their 401(k) investment decisions, and the plan sponsor is prudent in selecting fund options, the plan sponsor bears no responsibility for investment losses incurred in participants’ accounts. Although studies show that many people cannot make truly educated investment choices, plan sponsors currently cannot offer investment advice without themselves becoming liable for the negative consequences of that advice. In this paper, I review ERISA’s statutory and regulatory framework and outline alternatives to the investment advice dilemma, some of which would require plan sponsors to bear fiduciary responsibility for the investment selections of 401(k) participants.

THE BENCH TRIAL: A MORE  
BENEFICIAL ALTERNATIVE TO  
ARBITRATION OF TITLE VII CLAIMS

*Dianne LaRocca*

935

An increasing percentage of the workforce in the United States is covered by pre-dispute mandatory arbitration agreements through which employees waive their right to bring suit under Title VII. Although these agreements are an important avenue for the resolution of disputes between employers and employees, these agreements have proved unsatisfactory. In this Article, I describe the advantages and disadvantages of arbitration agreements for employers and employees. I then explore whether pre-dispute mandatory arbitration agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a more beneficial alternative. After deducting that such agreements should be held enforceable in the Title VII context, I explore the advantages and disadvantages of the bench trial alternative. I find the bench trial alternative avoids the disadvantages mandatory arbitration agreements pose while maintaining most of the advantages mandatory arbitration agreements offer. Thus, it seems that pre-dispute mandatory arbitration agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims present a more beneficial alternative.

## STUDENT NOTES AND COMMENTS

AN END TO EMPTY DISTINCTIONS: FEE  
SHIFTING, THE INDIVIDUALS WITH  
DISABILITIES EDUCATION ACT, AND  
*DOE V. BOSTON PUBLIC SCHOOLS*

*Michael Giuseppe Congiu*

965

The long-standing “American Rule” precludes courts from awarding attorneys’ fees absent statutory authorization. Courts are also restrained by the Supreme Court’s determination that in order to “prevail” under a statute permitting a fee award, a party must obtain some measure of judicially sanctioned relief. This Comment examines the various distinctions that courts have made between judicial and non-judicial relief, and argues that in the context of the Individuals with Disabilities Education

Act (“IDEA”), the distinction between privately settling plaintiffs and those obtaining court-ordered relief lacks legitimacy. The IDEA was drafted with the purpose of ensuring appropriate educational placement for special-needs children as well as ensuring that disputes regarding such placement be settled promptly and free of unnecessary disruption. Using *Doe v. Boston Public Schools* as an analytical backdrop, this Comment argues that the IDEA’s purpose, which is amply reflected in the text and legislative history of the statute, demonstrates that privately settling IDEA plaintiffs should be entitled to recoup their attorneys’ fees.

CONTEXT IS IN THE EYE OF THE  
BEHOLDER: ESTABLISHMENT CLAUSE  
VIOLATIONS AND THE MORE-THAN-  
REASONABLE PERSON

*Kirsten K. Wendela*

983

The Establishment Clause prohibits any law “respecting an establishment of religion.” One example of a potential Establishment Clause violation is a display of the Ten Commandments on governmental property. The Supreme Court is on the brink of deciding whether such a display violates the Establishment Clause, and one important question to ask when making this determination is whether a reasonable observer would view a Ten Commandments display as a governmental endorsement of religion. The answer to this question will change based on the definition of the reasonable observer.

In *Freethought Society v. Chester County*, the Third Circuit Court of Appeals concluded that a display of the Ten Commandments affixed to a county courthouse did not violate the Establishment Clause because a “reasonable observer” would not view the display as an endorsement of religion. However the Third Circuit used the heightened standard of a more-than-reasonable person. This standard was improper and led to the Third Circuit reaching an erroneous conclusion. The Supreme Court should not use this more-than-reasonable-person standard as it rules on the constitutionality of Ten Commandments displays.

WHAT’S THAT MEAN? A PROPOSED  
CLAIM CONSTRUCTION METHODOLOGY  
FOR *PHILLIPS V. AWH CORP.*

*Jessica C. Kaiser*

1011

The Federal Circuit has granted en banc review in *Phillips v. AWH Corp.* to decide the appropriate methodology for patent claim construction. This Note examines the different approaches taken by Federal Circuit panels for claim construction: the intrinsic/extrinsic dichotomy, holistic approach, and the “dictionary first” approach. This Note tests these approaches against the policies underlying patent law and concludes that both the holistic approach and the “dictionary first” approach fail to adequately further these policies.

Instead, this Note proposes a modified intrinsic/extrinsic dichotomy. The proposed approach for claim construction looks first to the intrinsic evidence. If the meaning of the disputed term in the claim is clear from the intrinsic evidence, the inquiry concludes. If the term is unclear from the intrinsic evidence, the court would then evaluate the plausibility of the interpretations put forward by each side by examining the supporting evidence introduced by the parties. If one interpretation is unsubstantiated by the evidence while the other is substantiated, the court should adopt the plausible, substantiated interpretation. If, however, both interpretations are equally plausible, the proposed methodology would have the court construe the term against the patentee. This Note argues that this modified intrinsic/extrinsic dichotomy best furthers the policies of certainty and public notice underlying patent law.