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Book Reviews

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BOOK REVIEWS

PUBLIC ACCOUNTABILITY OF FOUNDATIONS AND CHARITABLE TRUSTS. By Eleanor K. Taylor. New York, N.Y.: Russell Sage Foundation 1953. Pp. 231. $3.00

This publication was originally a dissertation for Professor Taylor's Advanced Studies at the School of Social Service Administration of the University of Chicago. Submitted to the Russell Sage Foundation for criticism, they

". . . viewed Professor Taylor's manuscript with great interest, since it appeared to be the first comprehensive discussion of actual provisions in various states looking toward the accountability for foundations and charitable trusts.

"After discussion, the Foundation commissioned Professor Taylor to revise her dissertation into a study primarily designed to serve the interests and needs of government officials, foundation officers and trustees, lawyers, and legislators interested in discovering present facts as to the accountability of foundations and charitable trusts and in working out a better future solution."

The topic is one of great present interest. The treatise consists of seven chapters dealing with: Trusts and Trusteeship; State provisions for supervision of trusts; State regulation of charitable corporations; Taxation and Federal supervision; Charitable regulation in England and Canada; Self regulation by foundations; and Regulatory proposals. There are added four appendices consisting of

(a) Questionnaire surveys of State enforcement machinery.
(b) State legislation relating to foundations and charitable trusts.
(c) State registry and reporting forms.
(d) Selections from the Internal Revenue Code.

The document is well written and presents an honest attempt to submit the various problems associated with the creation and management of charitable trusts and foundations, and in particular, the alleged abuses arising from the dishonest use of these devices, including the use of the foundation in tax avoidance. It presumes broad legal knowledge and, therefore, is frequently inaccurate in its reference to specific principles of law.

For example, on page 15, the author blithely discusses the application of the so-called "rule against perpetuities" to private trusts, stating: "The permissible period is governed by the Rule Against Perpetuities," and in the footnote says: "The emphasis is on remoteness of vesting rather than the duration of vested interests." This is not true in New York State where both the rule against remoteness of vesting and the rule against the unlawful suspension of the power of alienation are equally applied. Such flights into the realm of technical law do not mitigate against the merit of the book and I shall proceed to discuss the merits of the publication rather than the technical errors which arise from an attempt to cover the whole field of law applicable to this problem. The purpose of this reference to legal inaccuracies is to avoid a misunderstanding on the part of the reader of this review. My silence on certain of these inaccuracies might be construed as a basis for accord with the statement of legal principles, for example, such as are found in the note on the bottom of pages 24 and 25.

The tenor of the treatise is that both charitable trusts and foundations, which are for the most part membership corporations, affect a public interest and therefore the government should assume broad regulatory powers over them.

It is well before presenting the full question, to make a few observations with reference to the basic premises underlying all discussions of charity. With the spread

of the use of the word "philanthropy"—the love of man—we find more and more evidence of a secular approach. With the secular approach naturally comes the desire to see to it that the government regulates such charities. On the other hand, if we have a proper approach to the problem, we realize that the love of neighbor, which *should* prompt the charitable donor, is based on the love of God. The following statement found on page 78 appears to be the author's philosophy:

"The fact that governmental blessings on philanthropy extend to tax favors raises critical questions of public policy. Support of voluntary organizations has long been justified on the grounds that private philanthropy relieves the state of burdens it would otherwise carry. Tax favors are defended as a natural corollary of this philosophy, especially with regard to assistance of agencies in the field of religion into which the state does not enter. Although the tremendous expansion of the public welfare services within the past decade has brought renewed arguments about the appropriate division of responsibility between governmental and private agencies, the partnership continues. The present preoccupation with the dangers of 'statism' has given the argument for continuing the tradition a new turn. Chambers, for example, interprets governmental assistance as 'consonant with the pluralistic theory of society as distinguished from the doctrine of the monolithic state.' Whether or not such sharing between government and private philanthropy is a necessary ingredient of 'the American way,' it has become an accepted pattern in contemporary life."

Implicit in this statement is a doubt of the necessity of private charity. This is definitely a secularistic approach, without appreciation of the corporal and spiritual works of mercy and their merits in the Divine pattern of salvation.

Furthermore, there is too much sympathy in the treatise with the idea that charities in their broadest sense should be subject to regulation by either the federal or state governments. Without doubt there have been abuses. There is no question but that some charitable trusts and charitable corporations have been created and the moneys not properly used. Witness the testimony before the joint legislative committee of the State of New York during the week of December 14th, 1953.

On the question of regulation, as is indicated in the book, Foundations and Charitable Trusts are now required by the Internal Revenue Code to file annually a form which is popularly referred to as Form 990. This return must be filed pursuant to Section 54-f of the Internal Revenue Code by every organization exempt from tax under Section 101 of the Internal Revenue Code (except under Subsections (6) and (12)). This is a three page form which requires a statement of the nature of the activities of the organization and of its legal form, (that is, whether it is a corporation, a trust or an unincorporated association,) the accounting method used, a statement of income, dues and contributions, specifying the nature of gross receipts from any business activities, and the disposition of the income, dues, contributions and other income, showing expenses, contributions and other dispositions of property, and finally, a detailed balance sheet.

It is the recommendation of some that regulation should be by the Bureau of Internal Revenue.[1] It is stated that the Bureau is in a strategic position to police charities. It would seem unsound to have the Bureau of Internal Revenue police Foundations and Charitable Trusts other than to determine whether or not they have an exempt status under the Code. Once having conceded they have an exempt status, then it would appear that the proper regulation of these Foundations and Trusts would be the province of the states.

A second recommendation of a National Registry has been made. It is said that this would bring basic information into one file. The registration under the Internal Revenue Code is intended only to prevent tax abuse. Other abuses would require a national board with responsibilities comparable with those of the Attorney General on

1. P. 134

the state levels. The author rejects the creation of a group comparable to the British Board of Charity Commissioners as a fantastic break with American tradition, and concludes properly with a belief that supervision of charities is a state responsibility.

The author makes certain recommendations of her own:—(1) A statute should require registration of all charitable endowments, whether set aside by the donor during his lifetime or provided by will. The registry should extend to every type of charitable bequest whether made in the form of a trust or a gift outright to a charitable corporation set up to hold funds or endowments for charitable purposes. Only gifts made to charitable corporations or associations actually operating as functional social agencies would be exempt from enrollment.[2]

Such registration would prevent the *inter vivos* trust from being secret. It would "winnow out" true charitable corporations from the "amorphous group" of benevolent associations and recreational and social organizations with which they are now classified only because they share a declared non-pecuniary purpose. The author further recommends that this registry be in the office of the Attorney General who is charged with trust enforcement. This registry should be annual and should initially identify the funds over which continuous supervision is necessary.

The author contends that the recommended statute should be sufficiently broad to effect its purpose. It should give to the Attorney General the power over charitable trusts and foundations, to audit accounts and to question the trustees. The *cy pres* doctrine should be specified both as to trusts and philanthropic corporations, and the *cy pres* doctrine should particularly be applicable to the dissolution of such corporations. Failure to report for a two year period should be classified as an abuse of trust, and in respect to such charitable corporations, should subject the organizations to involuntary dissolution. On page 138 the following caution is given:

"Care must be taken to provide the necessary administrative machinery. Funds must be allocated for the attorney general to have adequate clerical and accounting staff to audit accounts and conduct necessary investigations. Consultant services should also be available. Effective investment is often related to the program that funds are to serve; the combined skills of the banker, lawyer, and philanthropic specialist may be required to make accounting more than routine auditing."

The author points out two limitations of the proposed statute: (1) It does not attempt to cover types of abuse such as tax avoidance, which, though implying statutory change, are special problems calling for other legislation;[3] (2) it does not attempt to solve problems of accountability outside the legislative field.

The author is to be commended for the following warning on page 139:

"The nature of the trusteeship assumed by foundations not only defines their accountability to government, but commits government to certain responsibilities toward them. Certainly the foundations owe a full and complete reporting of their activities. Only on this basis can the legitimacy of their claims to such privileges as tax exemption be defended. On the other hand, the discharge of this obligation makes government in turn responsible for protecting their freedom. *Reporting should provide a channel of communication, never a means for restriction of program or censorship.*" (Italics Mine.)

The author concludes with this statement:

"At a time when the foundations are increasingly explorers in the area of the social sciences, freedom of inquiry becomes critical. Visibility is low on these controversial fields; yet, it is here that new headlands of knowledge must be won."[4]

2. These are frequently subject to governmental supervision.

3. It might be well to remind the author that tax avoidance is not legal abuse. The abuse exists when there is an evasion of taxes.

4. P. 139

In December 1953 hearings were held in New York City by a Joint Legislative Committee. Evidence here established that there were "charity rackets" and wasteful use of money donated to charity. The recommendations to the Legislature this year by this Committee as a result of these hearings cover the following:—(1) Registration with the Department of Social Welfare of the State of all but religious charities conducting public appeals. (2) Filing of annual sworn statements available for public inspection, showing the amount of money collected, how much went for fund-raising, administrative and other expenses, and the amount which was spent on charity or welfare aid, with penal sanctions. (3) Requiring organizations to obtain written permission from all persons whose names they use as sponsors, with criminal penalties for unauthorized use of names. (4) The licensing of all professional fund-raisers. (5) Authorizing the State Attorney General to take court action to enjoin the operations or revoke the charter of any charity that may be party to a racket or operate in such a way that too little of the money collected in its name goes for charitable work. (6) Amending the State Business Law to cover solicitation by mail or in any other way by organizations outside the State. (7) Permitting cities and other local government units to adopt or retain supplementary controls over charitable and fund-raising groups. (8) Authorizing the Department of Social Welfare to make appropriate regulations.

A WARNING

I would be derelict in my duty if I did not sound a note of caution to legislators and the public generally with reference to the regulation of Foundations and Charitable Trusts. In the State of New York, charitable corporations and charitable trusts are subject to the control of the Attorney General of the State of New York and both are subject to the *cy pres* doctrine. I am concerned because when the information is received as suggested above, and the statutes are placed upon the books, they will be followed by a desire to regulate the use of the money. It has been suggested, for example, that a Foundation or Charitable Trust should be compelled to expend its income within the year received or within a reasonable time after it. This would have a tendency to induce the Foundation to seek out projects on which it *could* spend its income rather than those on which it *should* spend its income. There have been programs of foundations which indicate to the casual observer that there was a fear in the minds of the officers of the foundation that if they did not spend their money immediately, there would be some retaliation from some governmental agency. If there is one thing certain it is that the Legislature and the government generally should keep their hands off the administration of charitable trusts and foundations unless the activity of either of them violates the public policy of the state.

An examination of the recorded cases will disclose that the examples of such charities which are violative of public policy are few and far between.

The Supreme Court of the United States held that polygamy was violative of the public policy of the United States, in the case of the *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*.[5] (This involved the right of the United States to dissolve a Church Corporation advocating polygamy as a fundamental tenet.) "A trust in aid of the Mormon religion would doubtless be sustained as charitable, if freed from the polygamous element." [6]

In the case of *Thornton v. Howe*,[7] an English Court sustained a charitable trust to propagate the writings of Johanna Southcote. Objection to the validity of the trust

5. 136 U.S. 1 (1890), 140 U.S. 665 (1891), 150 U.S. 145 (1893).

6. 2A Bogert, The Law of Trusts and Trustees (1953).

7. 31 Beav. 14 (Eng. Rep. 1862).

was made because she taught that she was about to give birth to a second Messiah, the Son of God, and that her writings were divinely inspired. The Master of the Rolls said he thought she was a foolish ignorant woman and her writings foolish ". . . but nothing which is likely to make persons either immoral or irreligious" was contained therein and, therefore, the trust was not void. He did say, however, "It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void; . . . The general immoral tendency of the bequest would make it void. . . ."

Our courts have consistently followed the principle of *Thornton v. Howe,* and we should hesitate to create the power to regulate the activities of foundations and charitable trusts without being sure that every safeguard exists to prevent every government agency from interfering with the creation and administration of charitable trusts and foundations, except in so far as their purposes and performances are clearly against public policy.

While the recommendations as outlined in the newspapers of the Joint Legislative Committee grant an exemption to religious organizations, I am fearful of the next step and it now appears that the next step is under consideration. In the New York Times Editorial of January 25, 1954, we find the following with reference to the Tompkins-Rabin joint legislative committee's report:

> "The committee would exempt religious organizations from registration and account filing. While there may be grounds for questioning such a blanket exception, Senator Tompkins has indicated that the committee intends next year, if its life is continued, to seek a way of distinguishing between genuine religious charities and rackets which use religious names as a shield. This is a delicate subject, and the committee's wish to study it further is understandable."

Distinguishing between good and bad religious charities is reminiscent of a recommendation once attributed to someone in the Bureau of Internal Revenue. "All charitable organizations should be taxed. Tax exemption is a subsidy; let us tax all charitable corporations and subsidize the good ones." What are the good ones? What are the genuine religions? What religions constitute rackets? What is the objective criterion? How do we reconcile our position in this respect with the constitutional guarantee of the right of freedom of worship?

The author of "Public Accountability of Foundations and Charitable Trusts" has done a great service in presenting the problem to us in a careful study which includes appendices showing a great deal of research and correspondence with the various state governments inquiring as to the existence of state legislation, and in presenting the very warning included herein. Let us hope that the results of such presentation is a reasonable and sensible recognition of the value of charities, both from a religious and secular point of view—a value not only to the individuals who give but to those who receive, and to the community at large.

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