Cleveland State University
EngagedScholarship@CSU

Cleveland-Marshall
College of Law Library

Cleveland State Law Review | Law Journals

1972

Nonprofit Corporations - A Survey of Recent Cases

Lizabeth A. Moody

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev

Part of the Business Organizations Law Commons

How does access to this work benefit you? Let us know!

Recommended Citation

Lizabeth A. Moody, *Nonprofit Corporations - A Survey of Recent Cases*, 21 Clev. St. L. Rev. 26 (1972)
available at https://engagedscholarship.csuohio.edu/clevstlrev/vol21/iss3/3

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Nonprofit Corporations — A Survey of Recent Cases

*Lizabeth A. Moody**

THE RELATIVELY FEW PERSONS who write or teach in the field of non-profit organizations are chronic complainers about the lack of case law in the area.[1] The sparseness of authority leaves practitioners without adequate guidelines with which to advise clients, and leaves academicians without visible trends on which to develop theories.

A survey of the cases involving non-profit corporations reported during recent months confirms this complaint and belies the prediction made by Robert Lesher in 1967[2] that the non-profit corporation was about to come of age. One would have thought that the hearings of the Patman Committee, and then the Mills Committee, which called nationwide attention to the vast resources controlled by foundations, would have produced judicial and other activity in the area. The Mills hearings[3] did result in the adoption of the Tax Reform Act of 1969.[4] This produced a period of intensive interest on the part of the bar on a "how-to-do-it" level, as lawyers sought to save clients from that worst of all fates—tax classification as a "private foundation",[5] but little interest in the larger problem of the societal effect of the operation of non-profit entities.

When tax law is eliminated from consideration (as it is in the cases here surveyed) and one looks to the nuts and bolts of non-profit corporation law, the pickings are paltry. Recent cases, with only a few exceptions, mainly concern themselves with peculiarities of local law or merely catch up with long-established trends in other jurisdictions. We omit, as merely repetitious, the many cases in many states, granting or denying local property tax exemptions to various specific items of land or structures—the exemption almost always being granted only to property *actually used* for *charitable* purposes.[6]

---

*Associate Professor of Law, Cleveland State University College of Law.

1 *See,* Oleck, *Non-Profit Types, Uses and Abuses*: 19 CLEVE. ST. L. REV. 207 (1970); Lesher, *The Non-Profit Corporation—A Neglected Stepchild Comes of Age,* BUS. LAWYER 951 (1967); Note, *Corporations—Illegal Activities by Non-Profit Corporations,* 8 ARK. L. R. 110 (1954).

2 Lesher, *supra* note 1, at 451.

3 *Hearings before the Committee on Ways and Means, House of Representatives on the Subject of Tax Reform,* 91st Congress 1st Session (1969). *Hearings before the Committee on Finance, United States Senate, on H.R.* 13270, 91st Congress 1st Session (1969).

4 Pub. L. 91-172, (Dec. 30, 1969) 83 Stat. 532.

5 *See,* Note, *Private Foundationss Tax Reform Act of* 1969, 26 THE CORPORATION J. 245 (Sept.-Nov. 1971).

6 For typical cases *see In re* Estate of Allen, 17 Cal. App. 3d 401, 94 Cal. Rptr. 648 (no tax exemption for a fraternal order); Milton Hospital & Conv. Home v. Board of Assessors, 271 N.E. 2d 745 (Mass. Sup. Jud. Ct. 1971) (leased portions of charitable corporation building); Friendship Manor Corp. v. Tax Comm'n., 26 Utah 2d 227, 487 P. 2d 1272 (1971) (apartment house owned by non-profit corporation).

Definitional problems are a common ague. Generally they arise in the context of a statute providing for the incorporation of non-profit entities, or in statutes (or case law doctrines) providing special rules applicable to non-profit corporations.[7]

For example, in *Peters v. Poor Sisters of Saint Frances Seraph*,[8] the fundamental question for decision was whether or not a charitable not-for-profit hospital was included within the provisions of the Indiana Anti-Injunction Statute. The hospital sought to enjoin a strike by its employees. The court's power to grant relief depended upon the application of the Act, which had no express exemption for charitable hospitals. The same question had been raised in other jurisdictions with similar legislation and the Indiana Court (sitting *en banc*) confronted split authority.[9] It concluded that there was no such exemption in Indiana, on two grounds:

(a) The purpose of the legislation was to minimize strife in labor relations, and to exempt hospitals would not serve that end; and

(b) The familiar doctrine that exemptions to statutes should be strictly construed.

Exemption from workmen's compensation acts presents similar issues. In *Georgia Osteopathic Hospital Inc. v. Strickland*,[10] the court was concerned with the interpretation of the state Workmen's Compensation Act's definition of "employer" as, ". . . any individual, firm, association or corporation engaged in any business operated for gain or profit . . . ."[11] The State Board of Workmen's Compensation ruled, in making an award to the employee of a hospital, that it was "operated for gain" in that it showed net worth increases each year, its income exceeding its operating expenses. Previously the Supreme Court of Georgia had ruled, with respect to the *same* hospital, that it was not a "charitable" institution within the meaning of state statutes exempting charities from *ad valorem* taxes.[12] The Board thought the decision decisive, but the Supreme Court of Georgia disagreed, reversing its decision. In so doing it emphasized that "charitable" and "non-profit" are *not* synonymous terms. The test of "non-profit" is not a function of accounting ("whether it has an excess

---

[7] *See generally*, DiMarco and Kane, *Privileges and Immunities of Non-Profit Organizations*, 19 CLEVE. ST. L. REV. 264 (1970).

[8] 267 N.E. 2d 558 (Ind. App. 1971).

[9] Massachusetts, New York, and Pennsylvania Courts had held similar statutes to exclude charitable hospitals. *See*, St. Luke's Hospital v. Labor Relations Comm., 320 Mass. 467, 70 N.E. 2d 10 (1946); Jewish Hosp. of Brooklyn v. Doe, 252 App. Div. 581, 300 N. Y. S. 1111 (1937); Western Pennsylvania Hosp. v. Lichliter, 340 Pa. 382, 17 A. 2d 206 (1941); Petition of Salvation Army, 349 Pa. 105, 36 A. 2d 479 (1944). The court in the principal case (at 567) stated, by way of summation, that in these jurisdictions the purpose of the statutes was to prevent imposition on labor and to assist it in, "bargaining with employers over the products and profits of their labors," and that, "the charitable hospital has no such profits to bargain with." *But, cf.* Billington, *Hospitals, Unions, and Strikes*, 18 CLEV.-MAR. L. REV. 70 (1969).

[10] 123 Ga. App. 86, 179 S.E. 2d 560 (1970).

[11] GA. CODE ANN., § 114-101 (1956).

[12] Georgia Osteopathic Hospital, Inc. v. Alford, 217 Ga. 663, 124 S.E. 2d 402 (1962).

of income over expenses for several years"), but one of distribution of gains ("no part of the income or profit of which is distributable to its members, officers and directors").[13] The court further ruled that, "the fact that member-doctors clearly benefit in their private practice from the hospital's operation does not make this a business run for gain".[14] A strong dissenting opinion argues that a "non-profit" corporation under the contemplation of the Act was a "purely charitable institution." As the dissent pointed out, the Board had found the institution to be operated merely for the purpose of providing facilities for members of the staff and for training doctors of osteopathic medicine.[15]

In holding that "non-profit" does not necessarily mean "charitable" the majority opinion is clearly consistent with holdings in similar cases.[16] A more complex question is the one raised by the dissent: How much may members benefit from the corporation before the courts will pierce the veil of non-profitability and classify the entity as a corporation for gain?

Professor Oleck, in an article[17] dealing with recently enacted New York legislation asserts that the use of a non-profit corporation for individual gain is an "abuse of non-profit status."

> . . . a non-profit organization is, by definition, one that nobody owns, in that nobody is supposed to get from it any personal profit (in the pecuniary sense) such as *owners* get from theim property . . . .[18]

He concludes that:

> Probably half of all no-profit organizations are run by individuals or small groups (very often almost conspiratorial in nature) who are interested and active solely or almost solely in their own profit or advantage therefrom, while they loudly proclaim their altruism.[19]

and warns that legislation similar to that of New York encourages such activities. The dissenting opinion in the *Strickland* case sounds the same warning note.

On the other hand, *Santos v. Chappel*,[20] one of the first cases to deal with the New York Act, indicates that the courts may be tacitly responsive to the problems raised by Professor Oleck. Even under

---

[13] 123 Ga. App. 86 at 87, 179 S.E. 2d 560 at 562 (1970).

[14] *Id.*

[15] Compare the approach taken by the dissent in Strickland with the prohibitions on private foundations imposed by the Tax Reform Act of 1969, in particular 26 USCA § 503; Pub. L. 91-172, Title I §§ 101(j) (7)-(14), 121(b)(B), 83 Stat. 527, 542.

[16] *See* 1 FLETCHER CYCLOPEDIA CORPORATIONS (1963) § 112, Model Non-Profit Corporation Act (1964).

[17] Oleck, *Proprietary Mentality and the New Non-Profit Corporation Laws*, 20 CLEVE. ST. L. REV. 145 (1971).

[18] *Id.* at 146. Misuse of charitable status is, of course, *ultra vires* too: *See*, Good Will Home Assn. v. Erwin, 266 A. 2d 218 (Me. 1970) (a "boys' home" that ran a school that charged $2800 tuition fee). *See* discussion in text below, at note 57.

[19] *Supra* note 17 at 165.

[20] 318 N. Y. S. 2d 570 (Sup. Ct. 1971).

the liberal provisions of the Act, there are some limits to the profit-making activities of a not-for-profit organization.

The *Santos* case involved the Long Island Board of Realtors, Inc., a trade association organized, according to its certificate of incorporation, to unite and upgrade realtors and improve their community image. As one of its activities the corporation operated a multiple listing service which had netted the corporation $300,000 and its members $6,000,000 in 1969 alone.

Under the New York Act there are four types (designated Types A, B, C and D) of not-for-profit corporations. The statute contemplates the formation of not-for-profit corporations not only of the traditional type formed for a purpose not for financial gain or pecuniary profit but also of a kind formed for a lawful business purpose and in fact what is referred to as an "adapter" corporation which may be formed for any purposes whatsoever when authorized by any other corporate law of the state.[21]

The court found that the corporation in question could not qualify as any of the specified types of a not-for-profit corporation and operate the multiple listing service: Types A and B required that the activity be for nonbusiness purposes. (Since the essential nature of the service was business, it could not qualify.) Type C allowed business purposes but only to achieve a public or quasi-public objective. (The individual participants were making money in this case.) Type D was ruled totally unsuitable. (There was no legislation authorizing such a corporation.)

---

[21] N. Y. NOT-FOR-PROFIT CORP. LAW § 201 (McKinney 1970) provides:

(a) * * *

(b) A corporation, of a type and for a purpose or purposes as follows, may be formed under this chapter, provided consents required under any other statute of this state have been obtained:

Type A—A not-for-profit corporation of this type may be formed for any lawful non-business purpose or purposes including, but not limited to, any one or more of the following non-pecuniary purposes; civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, animal husbandry, and for a professional commercial, industrial, trade or service association.

Type B—A not-for-profit corporation of this type may be formed for any one or more of the following non-business purposes: Charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.

Type C—A not-for-profit corporation of this type may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective.

Type D—A not-for-profit corporation of this type may be formed under this chapter when such formation is authorized by any other corporate law of this state for any business or non-business, or pecuniary or non-pecuniary, purpose or purposes specified by such other law, whether such purpose or purposes are also within types A, B, C above or otherwise.

(c) If a corporation is formed for purposes which are within both type A and type B above, it shall be considered a type B corporation. If a corporation has among its purposes any purpose which is within type C, such corporation shall be considered a type C corporation. A type D corporation shall be considered a type B corporation unless provided to the contrary in the other corporate law authorizing formation under this chapter of the type D corporation.

In *Santos*, the operation of the multiple listing service was clearly so tainted with profit making for members that it gives little guidance to just how much of an umbrella the New York statute may provide to such activities. On the other hand, *People ex rel Groman v. Sinai Temple*[22] (dealing with the seemingly much simpler provisions of California law) clearly approved precisely the type of behavior which Professor Oleck would characterize as non-profit for profit.

The defendant Sinai Temple was organized for religious and cemetery purposes. It acquired a cemetery and mortuary operation which it operated at a considerable profit in competition with others who operated for gain. The profits were used to give a discount on cemetery plots to members of the congregation and to subsidize the religious activities which reduced the members' dues.

The court held that the statute did not expressly prohibit the earning or accumulating of profits by corporations but the "distribuion of gains, profits, or dividends to the members." The key, of course, is the conclusion that furnishing benefits to members *without charge* is not *per se* the payment of a dividend, gain or profit by the corporation (the same result reached by the Supreme Court of Georgia in *Strickland.*)

In *Borden v. Baldwin,*[23] the court carefully distinguished the difference between distributions to members while the corporation is still operating, and distributions on dissolution. The case presented a situation in which a non-profit corporation organized for fox hunting sold its property and moved its operations to another county. The members had agreed at the time of the sale that all debts would be paid from the proceeds and the remainder put in trust. The income would be used to support the operations in the other county for three years. At the end of the three year period, each member at the date of sale would have the option to terminate his membership and withdraw his pro rata share. When the time came for distribution, the new members did not want to allow the funds to be withdrawn. The court held the distribution provision invalid, relying on the Pennsylvania Non Profit Corporation Law prohibiting dividends to members.[24] The court said:

> In granting the privilege of incorporation to qualified non-profit groups, the Legislature has rightfully imposed certain duties and safeguards, one of which is the requirement of formal dissolution before such corporation can disburse its funds to its membership. That which should have

---

[22] 20 Cal. App. 3d 614, 99 Cal. Reptr. 603 (1971).

[23] 444 Pa. 577, 281 A. 2d 892 (1971).

[24] PA. STAT. ANN. *tit.* 15, §§ 7304 (1933) provides: "No dividends shall be directly or indirectly paid on any such shares nor shall the shareholders be entitled to any portion of the earnings of such corporations derived through increment of value upon its property or otherwise incidentally made, but upon dissolution of any such corporation the shareholders shall be entitled to a *pro rata* distribution of the assets thereof."

been done to bring about the desired result of distribution of pro rata shares was not, and for this reason the law will not permit recovery by appellants.[25]

Spokane Methodist Homes, Inc. v. Department of Labor & Industry[26] also involved the application of a Workmen's Compensation Act. An employee of a retirement home for elderly people was injured when a furnace exploded and filed a claim with the Washington Department of Labor & Industries. Contrary to the *Strickland* case where the evidence indicated the corporation in fact made profits, here the court did not concern itself with distinctons between "charitable" and "non-profit" corporations, ruling simply that the corporation was organized *in fact* operated "in accordance with its charitable purposes and not for profit or pecuniary gain.[27] Thus it did not come within the statute which applied only to a corporation *in fact*, "operated for profit or pecuniary gain."

Of greater interest was the claimant's contention that, since the doctrine of charitable immunity had been abrogated in the state, charitable institutions were properly, as a policy matter, within the coverage of the Act. Although the court rejected this theory (saying, "If charitable institutions are to be covered by the Workmen's Compensation Act, it must be done by legislative enactment and not by the courts."),[28] the relationship between such exemptions and the doctrine of charitable immunity is clear. The abolition of charitable immunity has come about in the same way it was created, for the most part, by court-made legislation and not by statutory enactment. If the theory is no longer needed to protect the charity from tort, it is no longer needed to protect against other claims. Thus we may anticipate that, sooner or later, abolition of the immunity doctrine may have an effect on these "definitional problems."

The doctrine of charitable immunity itself is a strong contender for one of the most litigated questions in the non-profit corporation field. Over the past twenty years, one by one the states have rejected the doctrine and have held charities liable for the torts of their servants.[29] While the trend continues, those jurisdictions in which the question is now settled are faced with secondary issues as claimants seek to bring themselves within the scope of the abolition cases. Typically the question is posed in a case filed subsequent to the abolition ruling involving a cause of action accruing previously. Generally courts have abolished the doctrine of charitable immunity only prospectively. The rationale of prospective application according

---

[25] 444 Pa. 577, 581, 281 A. 2d 892, 896 (1971).

[26] 4 Wash. App. 598, 483 P. 2d 168 (1971).

[27] *Id.* at 599, 483 P. 2d at 169.

[28] *Id.*

[29] *See,* Horty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases,* 25 OHIO ST. L. J. 343, 353 (1964); Annot. 25 ALR 2d 29 (1952); 2 HARPER & JAMES, THE LAW OF TORTS § 29.17 (1956).

to most courts is the protection of charities who have not obtained insurance, reasonably relying on prior decisions establishing immunity.[30]

Three cases during the past years indicate the kind of hazard which has accompanied the prospective nature of these rulings. *Christy v. Schwartz*,[31] was an action for personal injuries sustained by the plaintiff allegedly due to the negligence of a hospital's agents and employees, at the time of his birth in 1947. In 1961, Wisconsin, by judicial decision, abolished the doctrine of charitable immunity prospectively only.[32] Within one year of becoming 21 years of age, plaintiff commenced the suit. The issue before the court was when plaintiff's cause of action "accrues". (It was acknowledged by both parties that the proper rule of law was the one recognized when the cause of action accrued.) The court held that the plaintiff's cause of action "accrued" at the time of his injury in that a cause of action during his infancy could have been pursued by a guardian or guardian *ad litem*. The statute[33] allowing persons to bring an action upon reaching majority was construed by the court as only suspending the running of the time within which a lawsuit must be commenced, not changing the time of its "accrual" which the result in *Christy* clearly accords with the reasoning underlying the prospective abolition cases.

A more substantial argument was presented in *Bodard v. Culver-Stockton College*.[34] The plaintiff, a college student, had been injured by caustic marking material which he was using to mark lines on an athletic field. The injury occurred prior to November 10, 1969, the date charitable immunity was abolished in Missouri.

Plaintiff made the interesting and not illogical argument that the abolition of charitable immunity was substantive rather than procedural and thus could not be made prospective, pointing out that the college had not relied on the doctrine of charitable immunity but in fact had purchased liability insurance. Although the court agreed that the change was substantive, it rejected the contention that a substantive change could not be prospective on the basis of prior rulings in other jurisdictions, and held the fact of liability insurance to be immaterial.[35] The court did not comment on the rationale for holding immune an entity which apparently had not felt itself to be immune and had taken the normal steps to protect itself.

---

[30] Abernathy v. Sisters of St. Mary's, 446 S.W. 2d 599 (Mo. 1969) (*en banc*); President and Directors of Georgetown College v. Hughes, 130 F. 2d 810 (D. C. Cir. 1942).

[31] 49 Wis. 2d 760, 183 N.W. 2d 81 (1971).

[32] Kojis v. Doctors Hospital, 12 Wis. 2d 367, 107 N.W. 2d 131, 107 N.W. 2d 292 (1961).

[33] WIS. STAT. ANN. § 893.33 (1966).

[34] 471 S. W. 2d 253 (Mo. 1971).

[35] A study of prior Missouri cases, however, would indicate that there was substantial authority to support the procedural-substantive distinction with respect to prospective application. *See*, Note, *Charitable Immunity: A Final Answer?*, 35 MO. L. REV. 418 (1970) which discusses Abernathy v. Sisters of St. Mary's, 446 S. W. 2d 599 (Mo. 1969) (*en banc*) the case on which the court in *Bodard* relies.

A third case involving a cause of action accruing prior to the abrogation of charitable immunity is *Clark v. Faith Hospital Association*.[36] A husband and wife sued for personal injuries sustained by the wife as a result of a slip and fall while visiting the husband in the hospital. The court reversed a decree of summary judgment in favor of the hospital on the ground that a charitable corporation is not conclusively presumed to be such on the sole basis of the objectives of its articles of agreement. The court, although affirming the rule that the abolition of charitable immunity was only prospective, held that the plaintiffs might propound interrogatories to the defendant to show it was not, in fact, a charitable institution. Thus the approach is to attempt to avoid the prospective aspect by claiming that charitable immunity was never applicable in the first place. The same type of reasoning was used by the defendant charitable institution in *Maniaci v. Marquette University*.[37] The defendant university was sued by a student who had determined to leave the university. Several university employees invoked a state statute providing for temporary detention in the event of mental illness to detain plaintiff until they could inform her father she was leaving. When the plaintiff sued for false imprisonment, the university claimed charitable immunity although the state supreme court had abolished the exemption for *negligent* torts of employees of charitable institutions. It asserted that charitable immunity was still in effect for *intentional* torts. Charitable institutions, said the court, had *never* been immune from responsibility for intentional torts.

Some jurisdictions, of course, are still debating the essential vitality of the charitable immunity doctrine itself. In *Howe v. Camp Amon Carter*[38] an intermediate appellate court refused to hold that the doctrine had been abolished in Texas, merely because in an earlier Supreme Court case applying the law of charitable immunity, some members of the court had indicated the doctrine might be reconsidered and changed in the future.[39]

The *Howe* case was a suit brought against a camp and its parent association to recover for the loss of sight of a camper struck in the eye by a sinker on a fishing line cast by a fellow camper. The defense was charitable immunity. The more interesting question in the case (even though not the more practical one from the point of view of future litigants against charities) is the argument that charitable immunity violates the due process clauses of the Texas and United

---

[36] 472 S. W. 2d 375 (Mo. 1971).

[37] 50 Wis.2d 287, 184 N.W.2d 168 (1971).

[38] 462 S. W. 2d 624 (Tex. Civ. App. 1971).

[39] Watkins v. Southcrest Baptist Church, 399 S. W. 2d 530 (Tex. 1966). In Villarreal v. Santa Rosa Medical Center, 443 S. W. 2d 622 (Tex. Civ. App. 1969) another Texas intermediate court reached the opposite result and refused to apply the doctrine of charitable immunity to bar suit. *See, "Where the Defense of Charitable Immunity Has Been Abolished Prospectively It Will Also Be Applied Retroactively When The Charity is Covered by Liability Insurance."* 7 HOUS. L. REV. 394 (1970).

States Constitutions. The court afforded no consideration to the argument on the basis that no authority was presented to support the plaintiff's contention.[40] Although clearly a novel theory, the court's refusal to deal with its merits solely because of its novelty is unsatisfactory especially in an era where stare decisis on constitutional issues is less than conclusive.[41]

A somewhat more lengthy (if not more searching) discussion of a constitutional issue appears in a recent New York case. The issue is the relationship between non-profit corporations and those organized for profit. In *S.P.S. Consultants, Inc. v. Lefkowitz*[42] a "for-profit" abortion referral agency claimed *inter alia* that it was denied equal protection by a state criminal statute prohibiting "for-profit referral or recommendation of persons to a physician, hospital health related facility or dispensary . . . for medical care or treatment." The policy statement appended to the statute declared:

> The security of the health and welfare of the residents of this state requires that the utmost attention be given to assure that persons seeking medical care and treatment in this state receive adequate care rendered within the standards of ethics and public policy applicable to all practices of medicine.[43]

The plaintiffs contended that the distinction between profit and non-profit was arbitrary in relation to the statement of policy and that the state could show no compelling interest which would justify the profit-non-profit dichotomy. A three-judge court upheld the constitutionality of the statute finding it rationally related to a legitimate state end.[44] To justify its decision the court stated that the practice of medicine requires a higher standard of conduct than that traditional in the "competition of the market place," and cited the evidence adduced at legislative hearings on the statute in question with respect to practices of "for-profit" abortion referral agencies (as compared to those of non-profit agencies). Interestingly the court expressly says that had it found (as plaintiffs contended) that the non-profit agencies' operations were *identical* to those of the for-profit agencies it still would have found no invidious discrimination. This conclusion, it said, was based on the "special" nature of the medical profession permitting the state to outlaw commercial practices "to free the profession to as great an extent as possible from all taints of commercialism," (i.e., "profit" is a dirty word in New York).

---

[40] A similar argument was made in Carroccio v. Roger Williams Hospital, 104 R. I. 617, 247 A. 2d 903 (1968).

[41] The United States Supreme Court has on numerous occasions emphasized the changing nature of due process. Lochner v. New York, 198 U.S. 45 (1905); Malloy v. Hogan, 378 U.S. 1 (1964); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[42] 333 F. Supp. 1373 (S. D. N. Y. 1971).

[43] *Id.* at 1375.

[44] *Cf.* cases holding it unconstitutional to discriminate between public and private schools for zoning restrictions cited in I. RATHKOPF, THE LAW OF ZONING AND PLANNING 18-21 (3rd Ed. 1972); and I. YOKLEY, ZONING LAW AND PRACTICE 89 (2nd Ed. 1956).

Although the court's argument is somewhat sympathetic in the abstract, the practice of medicine in this country, to date, has hardly been regarded as "non-profit" and the decision raises questions as to how much this court was influenced by the fact that the very sensitive area of abortion was involved. How far such a doctrine could be extended when other statutes granting privileges or prohibiting activities on the basis of a non-profit, for-profit distinction are attacked on the basis of equal protection is problematic. This is particularly true where the court is relying so heavily on United States Supreme Court cases prior to the expansion of notions of equal protection and privilege and immunity over the past two decades.[45]

Another case in which the sensitive nature of the subject involved may have resulted in a decision dictated by the court's reaction to the issue rather than any objective appraisal of the merits is *Gay Activists Alliance v. Lomenzo*.[46] The case resulted from the Secretary of State of New York's refusing to file a certificate of incorporation pursuant to the New York Not-For-Profit Corporation Law,[47] on the basis that the proposed corporation's name had unacceptable connotations and that the purposes of the corporation promoted illegal activities. The petitioners on the other hand contended that the inclusion of the word "gay" (a word in wide used to denote homosexuality) is neither illegal nor obscene[48] and that the purpose of the corporation was to work toward legal reform not to advocate breaking any law.[49]

---

[45] The court relied on Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, (1955). *See*, Carpenter, *Our Constitutional Heritage: Economic Due Process and the State Courts*, 45 A.B.A.J. 1027 (1959) which criticizes the result in *Williamson*. An Appendix to the article collects state court cases invalidating regulation of business as violations of due process under state constitutions.

[46] 66 Misc. 2d 456, 320 N.Y.S. 2d 994 (Sup. Ct. 1971).

[47] N. Y. NOT-FOR-PROFIT CORP. LAW § 403 (McKinney) 1970).

[48] N. Y. NOT-FOR-PROFIT CORP. LAW §§ 301-308 contain no restrictions which would exclude the corporation name proposed.

[49] N. Y. NOT-FOR-PROFIT CORP. LAW § 201(b) provides: "A corporation of a type and for a purpose or purposes may be formed under this chapter . . . for any lawful non-business purposes . . . ."
The purposes of the proposed corporation in Gay Activists Alliance v. Lomenzo, 66 Misc.2d 456, 457, 320 N.Y.S.2d 994, 995-96 (Sup. Ct. 1971), were:

> (a) To safeguard the rights guaranteed homosexual individuals by the constitutions and civil rights laws of the United States and the several States, through peaceful petition and assembly and nonviolent protest when necessary.
>
> (b) To speak out on public issues as a homosexual civil rights organization, working within the framework of the laws of the United States and the several States, but vigilant and vigorous in fighting any discrimination based on sexual orientation of the individual.
>
> (c) To work for the repeal of all laws regulating sexual conduct and practices between consenting adults.
>
> (d) To work for the passage of laws ensuring equal treatment under the law of all persons regardless of sexual orientation.
>
> (e) To instill in homosexuals a sense of pride and selfworth.
>
> (f) To promote a better understanding of homosexuality among homosexuals and heterosexuals alike, in order to achieve mutual respect, understanding and friendship.
>
> (g) To hold meetings and social events for the better realization of the aforesaid purposes enunciated in (a) through (f) inclusive, above, and

(Continued on next page)

The court affirmed the Secretary of State's action, reasoning: Homosexual activity is illegal in New York. Members of a "homosexual civil rights organization" by membership profess a "present or future intent to disobey a penal statute of the state . . . ." The corporation was therefore formed for an illegal purpose. The court said:

> While the court has no personal experience upon which to reply, it would seem that in order to be a homosexual the prohibited act must have at some time been committed or at least presently contemplated . . . . If a lawful purpose is sprinkled with unlawful activity a refusal to provide such activity with corporate status cannot be an abuse of discretion.[50]

Although giving lip service to the general rule that working for the appeal of particular legislation is a lawful purpose, the court assumes that in the present case one cannot do so without violating or contemplating a violation of the law. This is clearly the minor premise of the court's syllogism. The court's approach, if anything, is to apply New Testament thinking[51] carried to an extreme, never contemplated in our jurisprudence. To do so is clearly out of step with modern legal thinking which encourages responsible law reform: *e.g.*, trusts for such purposes are usually held to be charitable[52] and income tax exemptions are afforded under federal law.[53]

A case of particular human interest is *Paglia v. Staten Island Little League*[54] which included a grab bag of claimed violations of federal rights in addition to questions involving New York's membership corporation laws.

A member of a little league baseball team was threatened with expulsion because his father, without excuse, failed to participate in required parental "work sessions." The team was incorporated under

---

(Continued from preceding page)

to achieve, ultimately, the complete liberation of homosexuals from all injustices visited upon them as such, that they may receive ultimate recognition as free and equal members of the human community.

[50] 66 Misc.2d 456, 459, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971).

[51] *Matthew* 5:27, 28. (The New Scofield Reference Bible).

> Ye have heard that it was said by them of old, Thou shalt not commit adultery; but I say unto you whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.

[52] Annot., 22 A. L. R. 3d 886 (1968).

[53] INT. REV. CODE of 1954, § 501(c)(4);

As one court dealing with the question of charitable trusts has said:

> We are led to conclude that a trust for a public charity is not invalid merely because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general or to a class for whose benefit the trust is created. To hold that an endeavor to procure by proper means a change in a law is in effect an attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. Such view is opposed to every principle of our government based on the theory that it is a government 'of the people, by the people and for the people', and fails to recognize the right of those who make the laws to change them at their pleasure when circumstances seem to require. With the wisdom of the proposed change the courts are not concerned. Taylor v. Hoag, 273 Pa. 194, 116 A. 826, 827 (1922).

[54] 66 Misc. 2d 626, 322 N.Y.S. 2d 37 (Sup. Ct. 1971).

the New York membership corporation law and was franchised by the national organization, incorporated by an Act of Congress.

The national organization had a policy that parents must accept responsibility for the program. The local corporation had adopted the rule:

> A father must make the work party calls of the league. Failure to attend or notify the league of reasons why he cannot attend will lead to the suspension of the boy.

There was no misconduct on the part of the member of the organization and the key question was its right to expel him for his father's sins of omissions.[55] The court did not find enough state involvement to invoke the provisions of the Fourteenth Amendment to the United States Constitution;[56] nor a right of action under the Civil Rights Acts[57] due to the fact of federal incorporation of the national body, holding that the issues were to be determined under the provisions of the New York laws governing the local corporation.[58] It found that under those laws the local corporation had the power to adopt the questioned by-laws and regulations.[59] The board of directors being vested by the by-laws with the power to suspend and expel members could do so "for cause" when the conduct was destructive of the organization. Since the little league could not survive without the voluntary work done by the parents of the members, the regulation was clearly justified according to the court. The board of directors had not acted with respect to the member so that there was no final determination for the court to review.[60] The court did state that it

---

[55] The case clearly grew out of a telephone conversation which "got out of hand." The court recites the facts as follows: "Dr. Paglia testified in substance that in his telephone conversation with William Caines, League President, on May 5 following receipt of the card, [notifying him] his son Arnold would be suspended unless the father made arrangements for a work session and in the early part of his conversation the Doctor consented to a Sunday, May 9, work session. Later the entire tone changed and resulted in Dr. Paglia bringing the instant proceeding in lieu of either participating in said work session or appearing before the Staten Island Little League's Board of Directors." *Id.* at 629, 322 N.Y.S.2d at 40. This raises the question "How far should the state consent to settle through its courts the internal affairs of these non-profit making associations?" which Chafee raised in his seminal article, *The Internal Affairs of Association Not For Profit,* 43 HARV. L. REV. 993 (1930).

[56] With respect to the issue of state action, *see,* Pasley, *Exclusion and Expulsion From Non-Profit Organizations—The Civil Rights Aspect,* 14 CLEV.-MAR. L. REV. 203 (1965). Both Professor Pasley and the court in *Paglia* assume that strictly private action cannot be reached by constitutional prohibitions. Recent cases may question this assumption. *See,* note 57 *infra; See,* discussion of Tillman v. Wheaton Haven Recreation Ass'n., Inc., *infra.*

[57] THE PUBLIC HEALTH & WELFARE, 42 USC. § 2000 (1970); In *Paglia* petitioners did not raise the issue of 42 U. S. C. A. § 1981 which applies to private action. Boudreaux v. Baton Rouge Marine Contracting Co., 437 F. 2d 1011 (5th Cir. 1971); Walacz v. Brewer, 315 F. Supp. 431 (M. D. Ala. 1970).

[58] Although the corporation was incorporated prior to the New York legislation the court held the new law applicable. Paglia v. Staten Island Little League, 66 Misc.2d 626, 322 N.Y.S.2d 37 (Sup. Ct. 1971).

[59] *See,* cases on invalidity of regulation governing expulsion collected in Annot., 20 A. L. R. 2d 344, 374 (1951).

[60] *See,* Frieden, *Judicial Review of Expulsion Actions in Voluntary Associations,* 6 WASHBURN L. J. 160 (1966).

found no evidence of prejudicial, capricious or arbitrary treatment of the members. The court does not deal in any satisfactory way with the issue of expulsion of a member for the conduct of another, this (at least) raises a question of draftsmanship. Should by-laws be so structured as to make this result possible?

Tillman v. Wheaton-Haven Recreation Ass'n. Inc.[61] is another in the voluminous number of cases[62] testing the extent to which private racial discrimination is sanctioned by the Civil Rights Act of 1964 by exempting from its operation "a private club or other establishment not in fact open to the public."[63] In this case the plaintiffs were denied membership in a neighborhood swimming pool organized as a non-profit corporation. The court significantly held that the exemption applied to the civil rights Act of 1866[64] as well as to that of 1964 and devoted most of its attention to an examination of whether the "club" was in fact *private* on the basis that it was owned, operated and controlled by its members and financed by their payment of substantial dues for the exclusive use of members and their guests and despite the fact it was exempt from state income taxation, constructed under special exceptions to local zoning ordinances and lack of significant standards other than racial for admission to membership. In so holding it would appear that the court has departed from the standards which at least one author predicted would be applied to the exemption, i.e., genuine selectivity, absence of an integral part in the recreational activity of community and lack of public support.[65] All were lacking ingredients in the case and the court chose instead the standard of membership control.[66]

Questions of standing and *ultra vires* are recurring in non-profit corporation cases. *New Liberty Medical and Hospital Corporation v. E. F. Hutton and Co.*[67] involved both. The issue was whether a Missouri not-for-profit corporation could finance the building of a hospital by issuing a debenture and then lease it to a public hospital district.[68]

---

[61] 451 F. 2d 1211 (9th Cir. 1971).

[62] *See,* cases cited in Note, *The Private Club Exemption to the Civil Rights Act of* 1964: *A Study in Judicial Confusion,* 44 N.Y.U. L. REV. 1112 (1969).

[63] THE PUBLIC HEALTH AND WELFARE 42 U. S. C. § 2000a(e) (1970).

[64] 42 U. S. C. §§ 1981-82.

[65] *See,* note 62 *supra* at 1133-1134.

[66] In Moose Lodge No. 107 v. Irvis, 92 S. Ct. 1965 (1972), the United States Supreme Court ruled that racially discriminatory "guest" policies of a membership club (conceded to be private) did not violate the equal protection clause of the fourteenth amendment in that state action was not involved. The fact that the lodge was licensed by the state liquor board did not sufficiently implicate the staff in the lodge's discriminatory practices. The court did hold, however, that the state liquor board's requirement that every club licensee adhere to its by-laws involved the state in sanctioning discriminatory practices and that any action by the state to enforce such a rule would be enforced.

[67] 474 S. W. 2d 1 (Mo. 1971) (*en banc*).

[68] The opposite situation occurred in Murphy v. Erie County, 28 N. Y. 2d 80, 268 N. E. 2d 771 where a county under a state enabling act built a stadium through the issuance of bonds, and then entered into a 40 year lease and 20 year management contract with a private corporation for the use of the facility. The court rejected the taxpayers contention that the agreement was a gift of county property in aid of a

(Continued on next page)

The court took a mechanistic view that the corporation held a certificate of incorporation as a non-profit corporation and could only be challenged as such in a direct proceeding by the state.[69]

To the claim that it had no power to lease, the court countered that the state statute expressly permitted what the corporation undertook to do, specifically authorizing not-for-profit corporations to, "sell, convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets."[70]

Standing was the key to the decision in *Miller v. Aldenhold*[71] although the majority and concurring opinions differ as to rationale. Students at a private college incorporated as a charitable corporation brought suit against the trustees of the college for alleged failure in their duties. The majority of the court held that the relationship between the students and the college was purely contractual and that the former had no standing to enforce the duties of the trustees. On the other hand, the concurring opinion found the students to be beneficiaries of a charitable trust but without standing inasmuch as the Attorney General had the sole and exclusive power under the local statutes to represent them.[72]

The relationship between non-profit and similar unincorporated entities is still not satisfactorily delineated. In *Boozer v. United Auto Workers of America, Local* 457,[73] the court rejected the arguments of plantiff that an association might be sued in its name on the grounds that (1) several state statutes recognize unincorporated associations as legal entities for purposes of the particular acts; and (2) ". . . modern unincorporated associations such as labor unions are, except for a corporate charter, as a practical matter in no way differ from modern corporations . . . ." The court was clearly impressed with plaintiff's argument and rejected it solely on the basis of stare decisis.

Ultra vires, although nearly completely dead as a business corporation theory, has a continuing vitality in the realm of the nonprofit corporations where purposes are central to the whole concept. These cases often involve charitable corporations which desire to

---

(Continued from preceding page)

private undertaking holding that the lease was in furtherance of a public purpose. According to the court the fact that a private entity might incidentally benefit from it did not invalidate the transaction, as long as the primary object is to achieve a public objective. The court distinguished the case from previous cases which had invalidated similar arrangements on the basis that the prior "deals" involved only a private benefit.

69 On the question of self-designation as a test of status, *see,* H. Oleck, *supra* note 1, at 214.

70 Mo. Ann. Stat. § 355.090(6) (1969); H. Oleck, Non-Profit Corporations, Organizations and Associations § 40 (2d ed. 1965); 6 Fletcher Cyclopedia Corporations § 2478 (1968).

71 228 Ga. 65, 184 S. E. 2d 172 (1971).

72 This is in conflict with the rule adopted in other jurisdictions that any person having a sufficient special interest may bring an action to enforce a charitable trust. *See,* Holt v. College of Osteopathic Physicians and Surgeons, 61 Cal. 2d 750, 394 P. 2d 932, 40 Cal. Rptr. 244 (1964); Restatement (Second) of Trusts § 391 (1959); 4 A. Scott, Trusts § 391 (3d Ed. 1967).

73 279 N. E. 2d 428 (Ill. App. 1972).

expand their areas of activity or to merge with another organization with related purposes.

An example is *Bertram v. Berger*[74] where a charitable corporation having charter purposes; "to provide and operate a churchly home for the aged and to engage in other churchly and charity work" deeded land and gave money to another charitable corporation whose purpose was "to provide and operate as a not-for-profit corporation of a churchly home for the nursing care of the aged and chronically ill persons without discrimination on account of race, creed or color."

As a part of the arrangement the donor corporation was to get first preference in use of the donee's convalescent facilities. Moreover, the donor had the right to designate a majority of the members of the board of the donee. The court held the gift to be well within the stated purposes of the donor corporation especially in the light of evidence showing the difficulty the donor had in placing residents who became ill in convalescent homes. The court said:

> We have some difficulty in restricting the term "aged" to those who are physically well and able-bodied and eliminate from its meaning those who are sick or physically or mentally incapacitated.... Indeed one of the arguments that the appellants present is that if St. Paul's wants to provide for a convalescence wing to its existing facilities, they may do so and that is the more appropriate method of accomplishing the purpose of aid to the convalescent aged of St. Paul's. It would therefore seem to be the thrust of the appellants' argument that care for the convalescent aged is not *ultra vires* if done by St. Paul's itself, but is *ultra vires* if attempted through a subsidiary corporate entity.[75]

The problem of whether or not a corporation might amend its purpose clause to make *intra vires* those actions previously *ultra vires* was presented in *Good Will Home Association v. Erwin.*[76] A prior decision had held plaintiff's operation of a college preparatory school was *ultra vires.*[77] The lower court was to approve a plan for the future operation of the corporation. Following the state procedures for amendments the corporation's board of directors approved an enlarged purpose clause, which would cover the *ultra vires* acts. The Attorney General took exception to the procedure as not within the spirit or intent of the Supreme Court's prior decree, but the court itself disagreed. According to the Supreme Court, while the activity was *ultra vires*, the amendment to permit it was not. The court concluded that power to amend its charter was well within the lawful authority of the corporation, and that the earlier decision imposed no limitation on the authority of the board of directors to change the purposes.

The *Erwin* case is less significant for its conclusion on the merits than as a warning to the draftsmen of corporate articles. If there is

[74] 1 Ill. App. 3d 743, 274 N. E. 2d 667 (1971).
[75] *Id.* at 746, 274 N. E. 2d at 669.
[76] 285 A. 2d 374 (Me. 1971).
[77] Goodwill Home Association v. Erwin, 266 A. 2d 218 (Me. 1970).

a serious desire to limit purposes, care must be taken to limit the amending power.

If there is any discernible trend in the types of not-for-profit corporations which are being organized it is what might be characterized as the quasi-public corporation.[78] This type of entity is often organized under local not-for-profit corporation laws to administer grants of federal moneys for particular programs. The local laws provide a structure for the operation of the program reducing to a minimum the effort which must be devoted to organizational apparatus. The other side of the coin, however, may be that the local law may be used by local officials hostile to the project as a means to obstruct the corporation's activities.[79] *Williams v. Tri-County Community Center*[80] raises this issue in the context of a removal procedure. The case concerns a not-for-profit corporation organized under the Mississippi Code, for the purpose of providing services for the poor. The corporation had received a federal grant from the Office of Economic Opportunity to institute a health care delivery program. The governor of Mississippi then brought an action in *quo warranto* on the basis that the corporation was exercising powers *ultra vires*.

The corporation removed the case to the federal court claiming removal jurisdiction under a federal statute providing for removal where the removal petitioner is unable to enforce a right under a law providing for equal rights or where an official has acted under color of authority derived from a law providing for equal rights.[81] The rights claimed by petitioner were those under civil rights legislation passed in 1968 providing criminal penalties for whoever by force or threat of force wilfully interferes with any person in the right to participate in and enjoy the benefits of federally financed assistance,[82] and rights denied under the Thirteenth and Fourteenth Amendment to the United States Constitution and their complementing legislation. The defendant claimed that the *quo warranto* proceeding had been brought for the sole purpose of harrassing the corporation and preventing its operating a health service program for the poor. The federal district court granted the plaintiffs motion to remand, holding that defendant was anticipating the action of the state court. According to the court, § 2 of the statute was applicable only to federal officers and § 1 required a showing *both* that (a) a federal right existed and (b) the right had been denied or could not be enforced in state courts. "A corporation has no federal right to be free of a state *quo warranto* proceeding." The motivation of the officers in

[78] *See*, Lesher, *supra* note 1, 964-73.

[79] For a general view of various types of local interference in such activities, *see* Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L. J. 231 (1971).

[80] 323 F. Supp. 286 (S. D. Miss. 1971).

[81] JUDICIAL CODE OF 1948, 28 U. S. C. § 1443 (1970).

[82] CIVIL RIGHTS ACT OF 1968, 18 U. S. C. § 245 (1970); CIVIL RIGHTS ACT OF 1870, 16 Stat. 144 (1871), 42 U. S. C. § 1981 (1970); CIVIL RIGHTS ACT OF 1866, 14 Stat. 27 (1868), 42 U. S. C. § 1982 (1970); CIVIL RIGHTS ACT OF 1871, 17 Stat. 13 (1873), 42 U. S. C. § 1983 (1970).

bringing the action is irrelevant.[83] The court took a more positive attitude toward the alleged behavior of state officials with respect to attempts by the defendant to amend its charter or obtain a new charter which would expressly provide for the operation of the health service. The Attorney General had held any action on the applications in abeyance pending the outcome of the case at bar.

The court indicated that federal injunctive relief might well be available if either the state court refused relief or the state officials continued to refuse to act. The court said:

> Under state law, and not necessarily because of a federal right, defendant is entitled to a decision from the respective officials whose duty it is to act on the proposals without unreasonable delay. See § 5310.1, Mississippi Code of 1942. The court feels that if the state court does not give relief on this issue, and if the action by state officials is unduly delayed, or arbitrarily or discriminatorily made, the doors may then open to federal jurisdiction. And further, if, in the course of a state trial on the *quo warranto* proceedings, defendant is denied equal rights under color of law then the circumstances may be such as to require federal injunctive relief.[84]

Strongweil Inc. v. Muncin,[85] also raises the problem of the relationship of state law to the activities of federally funded non-profit corporations. There the defendant in a law suit was represented by Morrisania Legal Services, also an O.E.O. funded activity. The plaintiff asked for an order directing defendant's attorney to withdraw on the ground that defendant's income was in excess of $10,000, the standard of indigency set up by the appellate division. Clearly reluctant to face the issue head-on the court used local not-for-profit law to avoid a decision by holding plaintiff had no standing to raise the question. According to the court, the plaintiff was really raising the question of whether the representation was *ultra vires* under the state not-for-profit corporation laws which restrict the right to raise the issue to members and creditors.

---

[83] The district court relied on the United States Supreme Court's holding in Greenwood v. Peacock, 384 U.S. 808, 827 (1966) where Justice Stewart stated:

> It is not enough to support removal under § 1443(1) to allege or show that the defendant's federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court. The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be 'denied or cannot enforce in the courts' of the state any right under a federal law providing for equal civil rights. The civil rights removal statute does not require and does not permit the judges of the federal courts to put their brothers of the state judiciary on trial.

[84] 323 F. Supp. 286 (S. D. Miss. 1971).

[85] 67 Misc. 2d 731, 325 N. Y. S. 2d 252 (Sup. Ct. 1971).

Conclusion

The seventies will not erupt into a golden era of non-profit corporation case law no more than did the sixties or fifties. Questions of charitable immunity and statutory exemption will continue to be regularly litigated inasmuch as there is a money judgment or money saving reward for doing so. In the meantime the activities of this rapidly increasing number of entities go unregulated either from the public or from internal sources. Non-profit corporation acts provide only the most formal remedies against abuse (such as *quo warranto*) and depend upon enforcement by public officials whose interest is marginal or non-existent. It is only where a private feud develops that members will put their cash on the line and take to the courts for vengeance and vindication. Otherwise they prefer to pick up their marbles and either go home or join another "club."

Even when interesting points of law do develop (as did in the *Strickland* and *Howe* and *S.P.S. Consultants Inc.* cases) judges are reluctant to be adventuresome. With sparse case law in the field, they seem reluctant to look to other areas for precedent and keep to what is safe and well established.

One sign of life, however, is the developing quasi-public corporation. The activities of such corporations are of sufficient interest either to the public in general or to groups and business entities which they oppose or which oppose them that we may expect to see law develop as a corollary to their proliferation. Otherwise, progress (or change which is not always the same thing) will come only through legislation—and then only when a general awareness develops as to vastness of the resources and activities of such corporations.