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PUTTING THE FEAR OF GOD INTO BANKRUPTCY CREDITORS: A REPLY

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The Spring 1999 *American Bankruptcy Institute Law Review* contained a Note: *Religious Liberty and Charitable Donation Act of 1998: Putting the Fear of God into Bankruptcy Creditors*, [1] which argued that the Religious Liberty and Charitable Donation Act of 1998 (hereinafter "Religious Liberty Act" or "Act") violated core principles of bankruptcy law and was poor public policy, in part, because it provided a broader "loophole" for tithing than studies show is actually tithed. [2] The Note misses the point, as do some of the recent developments and comments in this area.

Much as I do not belong to any organized political party, [3] I subscribe to no religious denomination that mandates tithing. When the Religious Liberty Act was proposed, [4] I scoffed and opposed it as an example of special interest meddling in the Bankruptcy Code. In practice, I generally represent consumer debtors. Often the last thing I want my clients to do is give money to their church when they already have trouble paying their mortgages. The last thing consumer debtors attorneys need is Congress licensing such behavior. Perhaps predictably, many debtors are willing to give up secular charitable giving but not their religious tithes. [5] I still believe charity should begin at home and personally, I have great difficulty with any creed that demands a tithe during periods when families may be deprived of necessities. But I had forgotten that among the few strong—dare I say religious—beliefs at the core of this nation are those identified in the Bill of Rights. [6] So despite practical qualms aplenty, I have become a born−again Religious Liberty Act convert.

The Act may reduce the distribution to some creditors [7] but it does not inherently violate the major goals of bankruptcy law identified in Mr. Walsh's Note. The Act certainly does nothing to limit a debtor's ability to obtain a fresh start, except insofar as tithing may reduce disposable income. [8] The Act also does not prevent an orderly and equal distribution to creditors. [9] Rather, the Act limits what property there is to be distributed. [10] The Note pointedly argues that the Act amounts to an exemption of property beyond that which either Congress or the States, through their exemption statutes, found necessary to facilitate a fresh start. [11] "Contributing to a charitable or religious organization is not a basic necessity of life . . . [and by allowing a tithe or contribution the Act] grants the debtor more than a fresh start." [12] To those with deeply held spiritual beliefs, this assertion is profoundly insulting. It implies that God is not a basic necessity. It further implies that by allowing a debtor to keep faith with her church and keep God's commandments, that debtor is getting more out of bankruptcy than those debtor's who do not have faith or do not tithe. Perhaps she is. [13] But it is purely a spiritual enrichment, at least as far as the debtor is concerned. Certainly her church or charity may retain the benefits of her gift and therefore *someone* is doing better than would be the case were it not for the Act, but it is only the reflected glory of that benefit glowing on the cheeks of our fair debtor. Perhaps her tithe is an investment in an eternal retirement plan—the ultimate 401(k) plan—but it hardly amounts to a quantifiable economic improvement in her fresh start. Indeed, her *financial* fresh start is effectively no better than that of the non−tithing filer.

The Note also argues that "allowed" contributions be limited to the national averages of 1 − 3% of gross income. [14] Statistics are wonderful, but potentially dangerous. [15] The fact that this country is pathetically unsupportive of its charitable institutions should not be used as an argument to limit the exercise of a constitutional right or discourage support of worthy causes. A national average does not indicate what a

particular faith's tenets actually dictate, it merely reflects, in many cases, the laxity of the congregation in abiding by them. Statistically, I suppose, some Jews will often eat non−Kosher, but that statistic should not be used as a bludgeon to coerce the strictly observant into the same behavior. The point of the Free Exercise Clause [16] —and the Act as its extension—was not to bring the high principles of the faithful down to the level of the apathetic average but to do precisely the opposite: to protect their faithful exercise of belief. [17] The conscientiousness of a few should not be deterred by the mediocrity of the many.

It is certainly true that bankruptcy courts should be alert for debtors attempting to use the 15% "allowance" as a method of simply shielding an alternative entertainment budget. [18] Gifts should be given, not sent to Switzerland for a skiing holiday. It is certainly reasonable for a court to ask probing questions about gifts and verify their authenticity. The First Amendment does not bar inquiry into the veracity of a debtor's disclosure. [19] It may even allow a chapter 13 trustee to "audit" the on−going giving of a tithing debtor during a chapter 13 plan. Obviously, Congress was not trying to encourage the development of 1.4 million Holy Churches of the Divine Tax Shelter, with judges turning a blind eye; the Act is not likely to be interpreted that way, however.

The Act should not license a federal judge to be the arbiter of the reasonableness of the debtor's beliefs, though. [20] The Note argues that a "bright−line test" should be imposed limiting the debtor's contributions to the average of a prior five−year period and concedes that this would protect the long−term adherent at the expense of the debtor who "merely `found religion'" a year or less prior to bankruptcy. [21] Such a bright−line creates a presumption that the debtor who discovered his faith relatively recently is not in the same category as the long−term believer. Or, to be less delicate, the implication is that the recent convert is insincere. Under such circumstances, we could develop a whole industry setting up and tracking escrow accounts for churches with new converts in order to hold their tithes until the set aside periods expire, just in case the convert goes broke along the way.

While a judge or trustee should be suspicious of the debtor who has no track record of giving, it is a profoundly offensive idea that a public official should be ultimately able to decide what constitutes a reasonable exercise of a religion. History is often made by the sinner who "finds religion" and becomes more zealous than the highest priest. Are we to now say Muhammad was not a true believer in Islam in the first year of his conversion simply because he had not yet completed the Koran or led his armies to unite much of the Middle East under the Crescent? Or because only a few followed him in the early days? Will a bankruptcy judge tell a latter−day Moses that a burning bush is insufficient evidence of true faith? [22] I make light of the possibilities, but they are disturbing to imagine with an historical eye. A faith that may sweep a nation can be awakened in the mind and heart of just one person, yet be worthy of the greatest constitutional respect at the moment of the twinkling in the mind. The Free Exercise Clause and the Act's spirit are meant to protect that lasting vision of personal spiritual freedom, not only because it is the right thing to do in a freedom−loving (or at least tolerant) society, [23] but because it reflects the intellectual vibrancy of a nation—and our certainty that there is nothing certain enough in spiritual matters that government should have a hand in it. [24] So perhaps a new Moses will one day file for bankruptcy—perhaps because he is obeying the tithing dictates of his religion and can no longer shoulder the burden of his credit card bill as well. His choice to seek relief from his debt *in order to* continue to exercise his religious belief may very well be an appropriate public policy choice on the part of Congress.

The policy decision Congress made is also designed to provide some certainty and protection to non−profit charities and religious institutions. [25] Although very large congregations or charities can likely absorb a refund mandated by a fraudulent transfer action without seriously impairing their charitable mission, many smaller institutions live hand−to−mouth. [26] In the era of Big Government downsizing, it is practically an article of faith that charities perform better in delivering social services to the needy than government. [27] Of course, practicing bankruptcy lawyers have all encountered creditors, particularly individuals, who are horribly impacted by a bankruptcy filing. Such people would no doubt prefer that a trustee recover substantial tithes or gifts to a local humane society so his own family can avoid bankruptcy. But it is profoundly within the province of Congress to make the policy judgment. [28] It is not irrational by any means to determine that such charities, on the whole, are deserving of protection from the absolute rules of bankruptcy laws because of the effective social function that they serve, quite apart from any religious context. It is quite reasonable to posit

that such institutions are far less able, on the average, to absorb fraudulent transfer givebacks than the commercial and lending community. After all, most charities have no customers to whom they can ultimately pass on the cost of such givebacks.

Although lenders may not appreciate it, perhaps Congress was correct in deciding that the protection of religious expression and charitable institutions is such a deeply important aspect of our culture, our legal tradition, and our society's needs that it justifies a few more write−offs.

It may be true that the Act has drafting flaws that could be abused. But at the heart of the Act is a sound principle and even we bankruptcy lawyers at times must raise our eyes beyond the Code's purpose and consider the core rights of the individual in society. We do not have to like the idea of someone giving away his money when he already cannot pay his bills. But perhaps even a beggar ought to be protected in his right to do so when it is part of his heartfelt religious belief and perhaps his lawyer will not be so distracted by the advanced calculus of means−testing to miss the message.

FOOTNOTES:

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[1] Thomas M. Walsh, Note, 7 Am. Bankr. Inst. L. Rev. 235 (1999).Back To Text

[2]

Id. at 251 (quoting statement by National Bankruptcy Conference before Judiciary Subcommittee on Administrative Oversight and Courts); *see also* id. at 252 (arguing that because average contribution from households making charitable contributions was only 2.2% of gross income, 15% allocation of Religious Liberty and Charitable Act of 1998 is excessive).Back To Text

[3] Which, as any Will Rogers fan knows, means I am a Democrat.Back To Text

[4] In introducing to the Senate the Religious Liberty and Charitable Donation Protection Act of 1997, Senator Grassley expressed the aims of the proposed statute in the following remark: "[I]n addition to preventing Federal judges from ordering churches to pay refunds of previous tithes, the legislation . . . will protect post bankruptcy tithing in Chapter 13 cases." 143 Cong. Rec. S10294 (daily ed. October 1, 1997) (Statement of Sen. Grassley). Representative Ronald Packard introduced the bill to the House the following day. 143 Cong. Rec. H8320 (daily ed. October 2, 1997). Upon signing the bill into law on June 19, 1998, President Clinton remarked, "[i]t is a great loss to all of our citizens for creditor's to recoup their losses in bankruptcy cases from donations made in good faith by our citizens to their churches and charitable institutions." 34 Weekly Comp. Pres. Doc. 1178 (June 19, 1998).Back To Text

[5] See

Christians v. Crystal Evangelical Free Church (In re Young), 148 B.R. 886, 887−88 (Bankr. D. Minn. 1992), aff'd 152 B.R. 939 (D. Minn. 1996), rev'd 82 F.3d 1407 (8th Cir. 1996), reh'g denied, 89 F.3d 494 (8th Cir. 1996), *vacated and remanded*, 119 S.Ct. 2502 (1997) (noting that faced with bankruptcy, debtors continued to pay their tithe in response to teachings of their church). Apparently, some bankruptcy judges agree that tithing is not just another contribution; *see also* In re Bien, 95 B.R. 281, 282 (Bankr. D. Conn. 1989) (requiring that religious tithes and secular contributions be treated differently). *But c.f.* Geltzer v. Crossroads Tabernacle (In re Rivera), 214 B.R. 101, 108 (Bankr. S.D.N.Y. 1997) (suggesting avoidance of sums paid as tithes does not burden exercise of religion, but rather burdens debtors to live within their means).Back To Text

[6] See

U.S. Const. amend. I (stating "congress shall make no law respecting establishment of religion, or prohibiting free exercise thereof"); *see also* Mary Jo Newton, *A Statute of Disbelief?: Clashing Ethical Imperatives in* Fraudulent Transfer Law, 48 S.C. L. Rev. 771, 771−73 (1997) (arguing trustee violated debtor's rights under Constitution by trying to recoup tithes); Walsh, supra note 1, at 241 (observing it has been argued that bankruptcy powers conflict with free exercise clause when trustee voids charitable donations).Back To Text

[7] See

Walsh, supra note 1, at 256 (stating "[a]lthough charitable and religious organizations are extremely worthy causes . . . the Religious Liberty Act is unfair because it favors charitable and religious organizations over all other creditors"); s*ee also* Miller v. Grave Fellowship Inc. (In re Witt), 231 B.R. 92, 95 (Bankr. N.D. Okla. 1999) (stating "Liberty Act was passed which severely restricts ability of bankruptcy trustee to avoid pre−petition transfers by debtors to charitable institutions, including but not limited to religious entities through certain amendments to §§ 544 and 548 of the Bankruptcy Code" which may reduce distribution to some creditors).Back To Text

[8] See

In re Young, 141 F.3d at 861 (holding reason why Congress enacted Religious Freedom Restoration Act, which led to enactment of Religious Liberty and Charitable Donation Protection Act of 1998, was to preserve First Amendment values by protecting exercise of religious beliefs from substantial burdens imposed by operation of otherwise neutral laws); In re Sullivan, 195 B.R. 649, 654 (Bankr. W.D. Tex. 1996) (recognizing fresh start is essence of bankruptcy law). *But see* Walsh, supra note 1, at 256 (stating bankruptcy exemptions are designed to provide debtor with "fresh start" and contribution to charitable or religious organization is not covered "basic necessity of life" for which exemptions were designed).Back To Text

[9] See

In re May, 12 B.R. 618, 620−21 (Bankr. N.D. Fla. 1980) (noting bankruptcy has twofold purpose in providing equitable distribution of debtors assets to creditors and giving debtor opportunity for fresh start); *see also* In re Buxton, 228 B.R. 606, 610 (Bankr. W.D. La. 1999) (finding "disposable income" may now include charitable contributions). *But see* Walsh, supra note 1, at 257 (noting Religious Liberty Act essentially creates exemption for debtor that does not qualify as basic necessity of life or as necessary to promote debtor's fresh start and places charitable and religious organizations above payments of debts).Back To Text

[10] So do exemptions, yet as a policy matter Congress has seen fit to allow most debtors to keep the clothes on their back. *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105−183, 112 Stat. 517 (amending 11 U.S.C. § 548 to allow debtors to donate up to 15% of their gross income to charitable organizations and this donation prevents bankruptcy from including contribution in bankruptcy estate); s*ee also* 11 U.S.C. § 548(a)(2)(A)(1994) (stating transfer of charitable contribution to qualified religious or charitable entity or organization shall not be considered violation of statute where amount of contribution does not exceed 15% of the gross income of the debtor in the year that the contribution was made); Walsh, supra note 1, at 235 (noting Religious Liberty and Charitable Donation Protection Act of 1998 allows debtors to donate up to 15% of their gross income to charitable and religious organizations).Back To Text

[11] See

Walsh, supra note 1, at 255−56. We may debate the efficacy of exemption statutes, which, as in my home state of Missouri, have not seen increases in statutory amounts in many categories in almost 20 years. Even with only a 1−2% inflation rate, a 1982−dollar does not go as far as it used to.Back To Text

[12] See

Walsh, supra note 1, at 256.Back To Text

[13] I hope not, given my lack of tithing.Back To Text

[14] Walsh, supra note 1, at 253−54; *see also* Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407, 1417 (8th Cir. 1996), rev'd, 141 F.3d 854 (8th Cir.**)** (listing average percentage of household organizations by denominations as between 1.3% and 3.8%). Back To Text

[15] For example, many of the studies cited in the Note rely on surveys of charities and churches. *See* Walsh, supra note 1, at 252−53 (describing results of such surveys as Independent Sector's 1996 Giving and Volunteering Survey, a recent Gallup Poll, and the General Social Survey). A voluntary survey of charities is likely to yield what charities would want people to know −− that they do not receive as much as we would like them to. Such surveys certainly depend on the rigor of the statistician and the honesty of the responses.Back To Text

[16] U.S. Const. amend I.Back To Text

[17] See

Engel v. Vitale, 370 U.S. 421, 430 (1962) (stating purpose of free exercise clause is to protect people's religious choices from government interference); School Dist. of Abington Tp., Pa. v. Schemp, 374 U.S. 203, 223 (1963) (noting purpose of free exercise clause is "to secure religious liberty in the individual by preventing any invasions thereof by civil authority"); *see also* City of Boerne v. Flores, 521 U.S. 507, 546 (1997) (O'Connor, J. dissenting) (arguing Free Exercise Clause is "best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible government interference, even when such conduct conflicts with a neutral generally applicable law").Back To Text

[18] See

In re Cavanaugh, 175 B.R. 369, 374 (Bankr. D. Idaho 1994) (arguing charitable contributions should be considered with other discretionary funds when determining reasonableness); In re Reynolds, 83 B.R. 684, 685 (Bankr. W.D. Mo. 1988) (stating amount or percentage of charitable contribution court will construe as "reasonably necessary" will depend on circumstances of each case); s*ee also* In re Buxton, 228 B.R. 606, 610−11 (Bankr. W.D. La. 1999) (applying test of reasonableness in holding debtor's charitable contributions unreasonable).Back To Text

[19] See

U.S. Const. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); s*ee also* In re Tabibian, 289 F.2d 793, 795 (2d Cir. 1961) (noting discharge is privilege granted only to honest debtor and is conditioned on full and truthful disclosure of assets, liabilities and financial transactions); In re Calder, 93 B.R. 734, 738 (Bankr. D. Utah 1988) (discussing necessity of chapter 7 debtor to file accurate statements and schedules evidencing full disclosure of debtor's financial affairs as prerequisite to obtaining discharge).Back To Text

[20] One of the first published opinions on the Act, In re Buxton, 228 B.R. 606 (Bankr. W.D. La. 1999), adopts pre−Act standards in limiting a chapter 13 debtor to his prior history of giving based on the "reasonableness" of the amount, *see* id. at 610. In re Smihula, 234 B.R. 240, 242−43 (Bankr. D.R.I. 1999), also takes the position that there must generally be a history of giving in order to defend against a § 707(b) allegation. So what Congress creates, judges continue to undo; *see also* In re Reynolds, 83 B.R. at 685 (observing reasonableness of allowing all or part of discretionary spending—even if spent on charitable contributions—will be based upon totality of debtor's circumstances).Back To Text

[21] Walsh supra, note 1, at 258 (arguing bright−line test must be added to Religious Liberty Act); *see also Bankruptcy Issues in Review*: *The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary United States Senate*, 105th Cong. 44 (Sept. 22, 1997) (statement of Donald S. Bernstein, Esq., member of the Executive Committee of the National Bankruptcy Conference) (suggesting that "bright−line test" to establish debtor's pattern of giving and to determine if fraudulent transfer has been made should cover two or three−year look−back period).Back To Text

[22] History is not kind to government officials sitting in judgment of youthful zealots. *See John* 18:33 (referencing Pilate's prosecution of Jesus Christ); *Matthew* 14:2 (observing Herod's prosecution of John the Baptist).Back To Text

[23] See

U.S. Const. amend. I (indicating Congress shall make no law respecting establishment of religion); *see also* In re Newman, 183 B.R. 239, 259 (Bankr. D. Kan. 1995) (observing Free Exercise Clause of First Amendment prevents government from adopting laws designed to suppress religious beliefs or practices); Miller v. Grace Fellowship, Inc. (In re Witt), 231 B.R. 92, 95 (Bankr. N.D. Okla. 1999) (noting Religious Liberty Act was enacted for permissible legislative purpose, did not advance or inhibit any particular religion or favor religious institutions above charitable institutions, and did not foster excessive government entanglement of religion, but, in fact, significantly reduced litigation relating to monies received by charitable organizations).Back To Text

[24] There were not ten righteous men in all of Sodom but the majority, we are told, discovered God does not listen to pollsters. *Genesis* 18:32, 19:23; *see also* U.S. Const. amend. I (prohibiting Congress from enacting any law respecting establishment of religion); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (finding First Amendment prohibits government involvement in religious activity); Gillette v. U.S., 401 U.S. 437, 449 (1971) (noting that First Amendment ensures government neutrality in religious matters).Back To Text

[25] See

Statement by President William J. Clinton upon signing S.1244, 1998 WL 477102 (Leg. Hist.) Bankruptcy − Religious Liberty and Charitable Donation Act of 1998, 1998 U.S.C.C.A.N. 230 (explaining purpose of Act to provide relief for non−profit charities and religious institutions); *see also* In re Witt, 231 B.R. at 97 (recognizing purpose of Act is to reduce likelihood of litigation by bankruptcy trustees against non−profit charities and religious organizations); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, not the* Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe, 1998 Wis. L. Rev. 1223, 1225 (1998) (identifying policy goal of Act to protect churches against disgorged contributions).Back To Text

[26] See

Zywicki, supra note 25, at 1232, 1275 (explaining most churches and charities operate on tight budgets); *see also* In re Witt, 231 B.R. at 97 (recognizing charitable institutions reliance on donated funds for survival); *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 12, 13 (1997) (prepared statement of Richard E. Flint) (testifying that parishes in respective diocese operated on extremely tight budgets).Back To Text

[27] It should be noted that the federal government has even allowed states to distribute welfare benefits through charitable, even religious, organizations in part in recognition of their efficiency. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) (recognizing important role of charitable institutions in society); In re Witt, 231 B.R. at 97 (noting charities carry out valuable missions in our society); Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses), 59 B.R. 815, 816 (Bankr. N.D. Ga. 1986) (identifying social services provided by church included educational facilities, day care center, drug and alcohol counseling services).Back To Text

[28] See

U.S. Const. art. I, § 8, cl. 4 (granting Congress power to establish uniform bankruptcy laws); *see also*, Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (explaining Congress's authority under Bankruptcy Clause); Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 861−62, (8th Cir. 1998), cert. denied, 119 S.Ct. 43 (1998) (discussing Congress's power under Bankruptcy Clause).Back To Text