CHARITY MISPLACED: THE FORMATION IN COMMON LAW OF A DEFICIENT FISCAL CONCEPT

Calum M. Carmichael[1]

Abstract

The origins and evolution of charity in common law have made its legal meaning neither teleological nor gradational. Because of these qualities, legal charity is a deficient fiscal concept, at least for governments that wish to detect and rank the consequences of providing particular fiscal privileges to particular third-sector organisations.

1 Introduction

In many common-law countries, governments provide a range of fiscal privileges to the third-sector organisations whose purposes comply with the legal meaning of charity. Such privileges may include exemption from the taxation of income, capital gains, or supplies bought and sold. They may also include subsidisation of the financial contributions made to those organisations by individuals or corporations.
For more than a century and a half, the link between purposes that comply with the legal meaning of charity and the provision of fiscal privileges has been an object of controversy and criticism.[2] Much of the criticism rests on the premise that the link

1 Calum M. Carmichael, School of Public Policy and Administration, Carleton University, 1125 Colonel By Drive, Ottawa, Ontario K1S 5B6, Canada. Phone: 613.520.2600x2631. E-mail: calum_carmichael@carleton.ca . This paper and the author have benefited greatly from the comments and encouragement offered on earlier drafts by Alison Dunn, Adam Parachin, and Donovan Waters, and by attendees of the session on Civil Society and the State at the 2010 conference of the International Society for Third-Sector Research, Istanbul.

2 William Gladstone, as Chancellor of the Exchequer, was an early critic of this link as it applied to endowed charities: W.E. Gladstone, *The Financial Statements of 1853, 1860-1863*, 2nd ed., London, 1864, 435, 456, 461. Gladstone argued that these institutions received fiscal privileges not available to charities that relied upon voluntary contributions: the bequests they received were exempt from the legacy tax; their capital income was exempt

was forged and has been perpetuated without due consideration having been given to the public-policy consequences of providing those privileges[3]. Indeed, a basis for this premise can be found in the 1891 decision by the House of Lords that confirmed the link between legal charity and fiscal privileges. Speaking for the majority in *Commissioners for Special Purposes of the Income Tax v Pemsel*, Lord Macnaghten made clear that his support for extending the legal meaning of charity to fiscal matters did not take into account the policy consequences of doing so: 'With the policy of taxing charities I have nothing to do. It might be right, or it might be wrong ...'[4]

Critics of the link between legal charity and fiscal privileges have presented different concerns and offered different remedies. Some, for example, have proposed that there are third-sector organisations with purposes that do not comply with the legal meaning of charity, but that nevertheless deserve fiscal privileges.[5] Others have proposed that there are organisations with purposes that do comply, but that nevertheless do not deserve the privileges.[6] For these critics, remedies normally involve introducing a separate statutory definition of charity for fiscal matters that is either wider or narrower than the legal meaning.[7] Still others have proposed that the extent of deserving or not deserving fiscal privileges differs across or within

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from the income tax. He estimated that these privileges amounted to government expenditure – in the form of foregone tax revenue – in excess of £216,000 per year (approximately £12.6 million at today's prices). This expenditure, he claimed, went to institutions 'not in want', prone to 'bad and wasteful management', and engaged in work that was 'doubtful or indifferent' or 'positively, sometimes even virulently, bad'. For a summary of Gladstone's position, see David Owen, *English Philanthropy 1660-1960*, Cambridge MA, 1964, 331-332.

3 See, e.g., Charles Mitchell, 'Redefining charity in English law', 13 *Trust Law International*, (1999), 21, at 39-44; Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed., London, 1999, 733-735; Graham Moffat, *Trusts Law*, 4th ed., Cambridge, 2005, 990-993.

4 *Commissioners for Special Purposes of the Income Tax v Pemsel* (1891) AC 531, at 591.

5 See, e.g., Eleanor Burt, 'Charities and political activity: time to re-think the rules', 69 *The Political Quarterly* (1998), 23; Arthur B.C. Drache, *Hostage to history: the Canadian struggle to modernize the meaning of charity*, Ottawa, 2001.

6 See, e.g., Royal Commission on the Income Tax – the Radcliffe Commission, *Report*, Cmd 615, London, 1920, paras. 305-309; Royal Commission on the Taxation of Profits and Income – the Colwyn Commission, *Report*, Cmd 9474, London, 1955, paras. 168-175; Geoffrey Cross, 'Some recent developments in the law of charity', 72 *The Law Quarterly Review* (1956), 187.

7 Schedule 6 of the 2010 Finance Act (59 Eliz II c.13) introduced a new definition of 'charity' for most UK tax purposes that is narrower than the legal meaning. However, this definition did not alter the meaning of charitable purposes in UK tax law which continues to be derived from its charity law meaning under the law of England and Wales.

charitable purposes.[8] For these critics, remedies normally involve providing not a uniform set of fiscal privileges, but rather differential sets that vary on the basis of, say, the type of service or activity being performed, or the number and type of people being served.

This paper acknowledges but does not rehearse or expand upon the criticism that the prevailing link between legal charity and fiscal privileges gives scant consideration to the public-policy consequences. Instead, it concludes that in order to take such consequences into account, any remedy should involve not simply amending, working with, or even working around the legal meaning of charity; rather, any solution should involve dispensing altogether with legal charity as a fiscal concept. It reaches this conclusion with reference to the origin and evolution of charity within common law – a provenance that largely pre-dates the provision of fiscal privileges to organisations with purposes officially deemed charitable. Because of this provenance, legal charity is neither teleological nor gradational. Instead, it is a distinction attributed to purposes – or the intentions behind them – that are considered meritorious on their own terms; and it is either present or not. As a result, it cannot be used to anticipate or detect, let alone approximate or rank, the consequences of any corresponding fiscal privileges.

As described in the following section, the deontological and all-or-nothing qualities of legal charity originated in a late Tudor statute that created local commissions to enforce certain uses having certain objects described as 'charitable and godly'. Given the statute's task of identifying the uses that fell within or beyond the purview of these commissions, the all-or-nothing quality that it attributed to charitable objects was appropriate. Moreover in the immediate historical context of the statute, that quality was normatively neutral in the sense that it neither implied nor required that the governing authorities assign the same priority to the various objects that fell within the commissions' purview, and a different priority to those that fell beyond. And, correspondingly, it was fiscally benign in the sense that it restricted neither the ability of those authorities to allocate tax revenues across different charitable objects in accordance with their diverse priorities, nor the ability of donors to allocate private wealth in accordance with theirs. Such benignancy does not necessarily hold in other historical or institutional contexts, particularly where the link exists between legal charity and fiscal privileges. To be sure, the legal meaning of charity was associated from the outset with a concept of public benefit; and, as interpreted by the courts, public benefit has the potential to be both teleological and gradational.

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8 See, e.g., A.J. Culyer, J. Wiseman, and J.W. Posnett, 'Charity and public policy in the UK – the law and economics', 10 *Social and Economic Administration* (1976), 32; Susan Bright, 'Charity and trusts for the public benefit – time for a re-think?', 53 *The Conveyancer* (1989), 28; HRH The Duke of Edinburgh, *Charity or public benefit*, 11th Arnold Goodman Charity Lecture, Kent, 1994; Michael Chesterman, 'Foundations of charity law in the new welfare state', 62 *The Modern Law Review* (1999), 333.

However, as applied in common law, public benefit is of secondary importance: its existence – presumably above some threshold – is treated as a necessary but not sufficient condition for the all-or-nothing presence of charity. And it is that presence or its absence that can determine whether or not certain third-sector organisations receive certain fiscal privileges.

To be clear: this paper describes the origin and evolution of charity in common law in order to identify and account for qualities inherent to its legal meaning that make legal charity a deficient fiscal concept – deficient at least for governments that wish to select and configure their tools of taxation and spending in order to pursue normative goals, such as increasing social welfare.[9] It concludes that such governments, in designing the fiscal treatment of third-sector organisations, should dispense altogether with the legal meaning of charity. Note, however, that the paper does not argue that governments should necessarily dispense with that meaning in other applications. Indeed, the very non-gradational and non-teleological qualities that make legal charity deficient in fiscal applications can make it effective in others: specifically, in determining if a particular trust remains valid in spite of the objects being purposes rather than persons, or the purposes being uncertain, or the property being inalienable for longer than the perpetuity period. In such circumstances validity hinges on whether or not the purposes of the trust fall within or beyond the boundaries of legal charity.[10] Further, the paper does not argue that governments adopt a fiscal definition of charity that is distinct from the legal meaning. Alternative definitions of charity might relocate its boundaries, but would not remove its non-teleological and non-gradational qualities. And further still, it does not argue that governments differentiate the fiscal treatment of third-sector organisations without dispensing with charity as a fiscal concept beforehand. Reforming the fiscal treatment of the third-sector, with the prospect of increasing social welfare thereby, would require governments to take into account the means of taxation and spending, as well as the organisations, the activities, and the populations involved. The perpetuation of charity as a category of entitlement would risk not only obscuring the need and rationale for differential treatment, but also restricting its extent and form. In order to design a tax and expenditure system with the greatest potential for increasing social welfare, governments should at the outset dispense with charity as a fiscal concept.[11]

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9 Throughout the paper, social welfare is interpreted as the weighted sum of individuals' well-being arising from their consumption, where the weights are determined by the government's distributional priorities. For a description of the concept, see Richard W. Tresch, *Public Finance: A Normative Theory*, 2nd ed., Boston, 2002, 65-86.

10 D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed., Toronto, 1984, 501-531.

11 Although dispensing with charity as a fiscal concept would assist governments in reforming the fiscal treatment of third-sector organisations with the prospect of increasing social

2 Legal charity as a non-teleological and non-gradational concept

The modern legal meaning of charity has been shaped by the 1601 Charitable Uses Act, subtitled *An Act to redress the Misemployment of Land, Goods, and Stocks of Money heretofore given to Charitable Uses*.[12] Although the longest-lived portion of the Act – its preamble – was finally repealed by the 1960 Charities Act, its influence has extended, and now endures, through common law.[13] Accordingly, if legal charity is inherently non-teleological and non-gradational – as argued here – then one should look to the 1601 Act in order to understand why this is the case. It might seem surprising that such qualities would originate during the Tudor era (1485 to 1603), since over that period the central government's priorities across different charitable objects appear to have diverged on the basis of their anticipated consequences: the priority on religious objects decreasing, that on eleemosynary ones increasing, and that on other objects ranging somewhere in between. As argued here, however, the deontological and all-or-nothing qualities of legal charity originated from the Act's narrow tasks of creating enforcement commissions and staking out their jurisdiction. Subsequent judicial decisions perpetuated these qualities, as most famously typified by the four but equal divisions of charity 'in its legal sense', as laid out in 1891by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel*.

2.1 The divergence of priorities across charitable objects

The medieval church encouraged the faithful to bequeath portions of their estates 'to pious causes' – *ad pias causas*.[14] Under canon law, these causes honoured God and his church, and hence could be served by bequests for the maintenance of churches and monasteries, or for the foundation of chantries.[15] However, pious causes also involved the relief of temporal distress and suffering. Given this latitude, medieval wills included bequests for the poor and injured, as well as for the repair of hospitals, bridges, roads, and dykes. At the outset of the Tudor era, the authority to enforce wills was shared by the ecclesiastical courts (administering canon law, with the Bishop as ordinary) and the Courts of Chancery (administering equity, with the Chancellor as presider). However, the authority to enforce uses or trusts that might

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welfare thereby, it would not by itself result in that reform or outcome. Dispensing with charity as a fiscal concept would, at best, facilitate a means to an end.

12 43 Eliz I c.4. For a discussion of the Act's influence, see Picarda, *Law and Practice*, 3rd ed., 3-34.

13 9 Eliz II c.58.

14 Gareth Jones, *History of the Law of Charity 1532-1827*, Cambridge, 1969, 3-9.

15 Chantries were endowments in support of the priests and chapels that would ensure the regular singing of a requiem mass for the souls of the founders.

have been created by testators resided exclusively with Chancery. A testator or *inter vivos* donor could create a use by conveying his property to *feoffees in uses* who would then, as its legal owners, be responsible for managing the property and directing its proceeds to named or described beneficiaries in accordance with the purposes set out in the instrument of enfeoffment (a will or deed).[16]

Early in the Tudor era, therefore, the Chancellor would have recognized pious causes or charitable objects as being synonymous. Late in that era, however, this was not the case.[17] In the context of the English Reformation, certain religious causes ceased to be lawful, let alone charitable. A statute of 1532 declared invalid all chantries that exceeded twenty years, and transferred their endowments to the feudal lord.[18] The 1534 Act of Supremacy made Henry VIII and his successors 'the only supreme head on earth of the Church in England', formally separating that Church from papal authority.[19] Under a series of legal and administrative initiatives between 1536 and 1541, monasteries, nunneries, and friaries in England were disbanded, and their assets appropriated and disposed of by the Crown. A statute of 1545 declared invalid all remaining chantries, and transferred their endowments to the Crown.[20] It justified this on fiduciary grounds, claiming that the uses had been mismanaged and the income directed 'contrary to the wills, minds, intents, and

16 For a summary account of the use's origin and its evolution into the trust, see Jill E. Martin, *Modern Equity*, 17th ed., London, 2005, 8-11. Starting in the 11th century, several functions – apart from charitable ones – encouraged the practice of conveying to feoffees legal title to land for the use of designated beneficiaries. Some functions were for convenience: the original title holder may go on a crusade and wish someone to perform and receive the feudal services in his absence. Others were by necessity: the Franciscan order could not own property, and hence required another party to hold legal title. Others were precautionary: the original title holder may wish to convey the property and designate himself as the beneficiary, so as to prevent the legal title from being seized by creditors. Other functions were, in essence, for tax avoidance. Feudal lords were entitled to various payments when the heir succeeded to land. Such payments might be dodged if the tenancy was conveyed to two or more replaceable feoffees, so that they – not the feoffor – held possession of the property. The 1536 Statute of Uses (27 Hen VIII c.10) attempted to curtail this dodge by eliminating upon the death of the beneficiary the role of passive feoffees holding legal title. By 1560, the practice of conveying by way of a use upon a use became a tactic to circumvent the 1536 Statute: N.G. Jones, 'The use upon a use in equity revisited', 33 *Cambrian Law Review* (2002), 67. The property would be conveyed to feoffees A for the use of beneficiary B who would hold it in trust for a third party C. Although the first use might be suppressed under the Statue, the second would not. By the early 18th century the first use was phased out, leaving only the trust in place: the property would simply be conveyed to the use of B in trust for C.

17 Jones, *History of the Law*, 57.

18 23 Hen VIII c.10.

19 26 Hen VIII c.1.

20 37 Hen VIII c.4.

purposes of the founder, donors, or patrons of the same'. A statute of 1547 revived the suppression of chantries, but justified this on theological rather than fiduciary grounds, claiming that 'superstition and errors in Christian Religion have been brought into the minds and estimation of men, ... by the abuse of trentalls, chantries, and other provisions made for the continuance of the said blindness and ignorance'.[21] Under Mary I, such legislation was enforced lightly, if not repealed. Under Elizabeth I, however, it was reactivated and reinforced: a statute at the outset of her reign transferred to the Crown all property belonging to any monasteries and chantries that had been restored or founded under her sister.[22]

Thus by the outset of the reign of Elizabeth I, the central government – the Crown, Privy Council, and Parliament – conceived of particular religious or superstitious causes as challenging its power. During that reign (1558-1603), however, it came to conceive of particular eleemosynary objects as being allies and instruments of its power. Over the course of the 16th century, certain developments increased if not the incidence of poverty and its social consequences, then at least the political importance assigned to them.[23] Population growth, the end of the manorial system, and the enclosure of land for sheep farming – such phenomena contributed to the expansion of a rural, landless, and under-employed labour force. Sure enough, the burgeoning cloth industry increased employment opportunities in urban areas; but these opportunities fell short of the numbers seeking work, and were themselves subject to slumps in overseas trade (1551, 1563, and 1568). Over the second half of the century, price inflation held in check the living standards of labourers and wage earners. At particular times and in particular places, epidemic disease (1551, 1557-59, 1593, and 1603) and harvest failures (1550, 1562, and 1595-97) worsened those standards precipitously. The period witnessed an increase in crimes against property, and a series of actual or threatened local uprisings (1549, 1569, and 1596).

In this environment, the central government came to place a greater priority on addressing poverty, interpreting it as a threat to security and social well-being. The government introduced a range of statutes in response to this threat, amending and consolidating these in 1597 and 1601. Underlying this legislation was the assumption that the poor consisted of two types. The first type comprised the legitimate or deserving poor – those whose poverty could be attributed to age, infirmity, casualty, or other factors beyond their control that prevented them from working, and hence from supporting themselves or their dependents. The second type comprised the illegitimate or undeserving poor – those who were able-bodied, but who chose vagrancy, beggary, or thievery, rather than work. The statutes, as

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21 1 Edw VI c.14. A trentall was a type of chantry that required the singing of thirty masses.

22 1 Eliz I c.24. Jones, *History of the Law*, 10-15.

23 P. Slack, *Poverty and Policy in Tudor and Stuart England*, London, 1988, 43-52.

amended and consolidated in 1597 and 1601, had three objectives: first to punish the sturdy, mendicant, undeserving poor, and confine them to their parish of birth; second, to reduce their ranks by rehabilitation (offering or requiring education, skills-development, and employment); and third, to relieve the deserving poor.[24] The central government recognized that uses for eleemosynary objects – if protected from the types of mismanagement and misappropriation that had been associated with certain religious causes – could promote the latter two goals.[25]

2.2 The 1601 Charitable Uses Act and the shaping of legal charity

The 1601 Charitable Uses Act, and the 1597 Act it replaced, were passed near the end of the Tudor era.[26] Both statutes established a process to identify and remedy the maladministration or misappropriation of certain uses. They did so by establishing local commissions, and awarding them the enforcement authority that resided with the Chancellor, as delegated by the Crown.[27] Each commission comprised the Bishop of the diocese and at least three 'other persons of good and sound behaviour' who resided in the county and were not beneficiaries of any use. It was to summon a local jury comprising twelve or more men who had no claims on the property devoted to the use in question. The jury, under oath, was to offer evidence or personal knowledge of the alleged breach – evidence that could be challenged by the feoffees or other interested parties. On the basis of this inquiry, the commission would then issue a decree that identified any negligence or fraud, and outlined the steps needed both to correct matters and to ensure that the property would henceforth be employed responsibly and in accordance with the intentions of the donor.

The enforcement authority awarded by the 1601 Act was not exclusive. It did not extend to uses for which the founders had appointed 'special visitors or governors or overseers' to identify and correct breaches of trust. It originated from the Chancellor and thus the Crown, and the Act stipulated that nothing within would 'be any way prejudicial or hurtful to the jurisdiction or power of the ordinary'. Parties aggrieved by a commission's decree could appeal through a bill of review in Chancery; and, if not satisfied with the Chancellor's decision, could appeal to the Crown by petition in Parliament. Alternatively, parties could skirt the commission procedure altogether and access the Chancellor's authority directly through an original bill in Chancery or, later, through an information related by the Auditor General.

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24 39 Eliz I c.4; 39 Eliz I c.3; 43 Eliz I c.2.

25 39 Eliz I cc.5, 6; 43 Eliz I c.4.

26 43 Eliz I c.4; 39 Eliz I c.6.

27 Jones, *History of the Law*, 26-52.

The jurisdiction of the commissions was not comprehensive. It did not extend to eleemosynary or ecclesiastical corporations (specifically, universities, colleges, city or town corporations, hospitals, cathedrals, churches) that could hold property for charitable objects, but hold it free of uses. If property was held by these corporations in uses, it remained under the exclusive jurisdiction of the Chancellor. The preamble to the Act listed certain 'charitable and godly' objects of the uses that could fall under the commissions' jurisdiction.[28] As described in subsection 2.3, these objects corresponded to certain responsibilities of civic authorities at the parish or county level; and these responsibilities centred on relieving the deserving poor, rehabilitating the undeserving poor, and bettering municipal infrastructure.

The list of 'charitable' objects in the preamble, being tied to particular responsibilities of local authorities, was in itself partial and idiosyncratic. It omitted property held by corporations even if the donors had specified objects with 'charitable intent'; and it omitted uses for which mediate enforcement authorities already existed. On the basis of what it excluded and included, the list cloaked the diverse priorities that the central government might have assigned to different charitable objects. Absent were religious objects, but for reason that these remained under the enforcement authority of the Bishop (who also served as a commission member) with appeal to the Chancellor, and thus fell beyond the commissions' jurisdiction. Present were eleemosynary objects interpreted broadly so as to include not only the relief of the poor through such things as alms, basic provision, and tax exemption, but also their rehabilitation through apprenticing and education. Also present, however, were objects linked to the betterment of municipal infrastructure. As argued in subsection 2.3, the presence of the latter was a consequence not of the central government assigning the same importance to the repair of bridges as to the relief and rehabilitation of the poor, but rather of parish revenues being fungible.

Notable for the purposes of this paper: the 1601 Act and its preamble, in staking out the jurisdiction of the commissions, attributed a two-fold status to charitable objects that was independent both of their consequences, and of any differences in priority

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28 'Whereas lands tenements rents annuities profits hereditaments goods chattels money and stocks of money, have been heretofore given limited appointed and assigned, as well by the Queen's most excellent majesty and her most noble progenitors, as by sundry other well disposed persons, *some for relief of aged impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, some for repair of bridges ports havens causeways churches sea banks and highways, some for education and preferment of orphans, some for or towards relief stock or maintenance of houses of correction, some for marriages of poor maids, some for support aid and help of young tradesman handicraftsmen and persons decayed, and other for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes*; which ... nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds breaches of trust and negligence in those that should pay deliver and employ the same ....' 43 Eliz I c.4; emphasis added.

that might have been assigned to them by the central government or local authorities. Either the objects fell within the commissions' purview and thus were listed in the preamble; or they fell beyond it and thus were excluded either implicitly by omission, or explicitly. The later portions of the Act outlined the duties and powers of a commission, and limited these by inserting restrictive adjectival phrases: they applied only to 'the charitable uses *above mentioned*' or 'the charitable uses *before expressed*'.[29] The all-or-nothing status that the 1601 Act attributed to charitable objects was appropriate, given the narrow task of staking out a jurisdiction. As argued in subsection 2.5, the modern legal meaning of charity, as shaped by the Act, has taken on this quality, but applied it differently: not to define the border of a jurisdiction, but rather to define the border of legal charity. Because of this quality, legal charity is neither teleological nor gradational: it can not be defined or assessed on the basis of particular outcomes or consequences, and it can not be valued or measured on the basis of degree or extent.

2.3 The priorities and choices of parish authorities

The 1601 Charitable Uses Act established commissions to investigate and correct mismanagement and breaches of trust, and staked out their jurisdiction in part by listing in its preamble the objects of charitable uses over which the commissions could have authority. These objects were for either the rehabilitation of the undeserving poor, the relief of the deserving poor, or the betterment of municipal infrastructure. Each of these three ends reflects the importance the central government then placed on addressing poverty and its social consequences. The third does this indirectly, given the means chosen by the central government to address the problems associated with poverty.

Those means were laid out in companion statutes: the 1601 Act for the Relief of the Poor, and the 1597 Act which it replaced.[30] These statutes gave civic parish authorities the responsibility and power to attend to the poor in their locality. The later Act listed these as the Churchwardens and up to four 'Overseers of the Poor' who were to be 'substantial householders' of the parish and nominated by the Justices of Peace for the county. These authorities were to set to work the able-bodied persons in the parish who lacked the resources to support either themselves or their dependents. They were to determine and collect rates from parish residents in order to raise the 'competent sum of money' needed to offer relief and lodging for the deserving poor, provide a stock of materials for the able-bodied poor to work

29 39 Eliz I c.4; emphasis added.

30 43 Eliz I c.2; 39 Eliz I c.3.

with, and assist county hospitals, almshouses, and poor prisoners in national jails.[31] They were either to imprison parish residents that did not pay these rates, or to confiscate their property. And finally, they were to draw up annual accounts for the Justices of Peace. The Justices supervised the local authorities. Moreover, they monitored and could adjust the parish rates, and, if necessary, transfer revenue between parishes in order to moderate any disparities in rates and services across the county.

The poor rates existed alongside other sources of revenue managed by the local authorities. These sources included a variety of taxes and rates, some of which were levied without statutory sanction.[32] Starting in the 14th century, for example, church rates were levied on land and livestock, and the revenues used to repair church buildings. Fifteenths and tenths were locally-administered taxes on movable property, calculated as a fifteenth of the assessed value in rural areas, and a tenth in urban ones. Their revenues were used for such things as building mills, providing sanitation services, paying the salary of the Member of Parliament, or, by the early 16th century, relieving the poor. Other local rates were levied under statutory sanction.[33] The corresponding Act would identify the local authorities responsible for setting and collecting the rates, the base of assessment, a mechanism for accountability, and the objects of expenditure.[34] Many of these objects of expenditure were subsequently listed in the preamble of the 1601 Charitable Uses Act.[35] For example: from 1530 to 1532 they included the repair of bridges, the construction of county jails, and the reconstruction of sea walls, causeways, ditches, and sewers; in 1555, the maintenance of local highways; and in 1592, the relief of returned soldiers.[36]

The revenue from these statutory and non-statutory taxes and rates existed alongside the income from uses, for which the parish or county authorities were often the

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31 For a comparison of local rates and taxes, see Edwin Cannan, *The History of Local Rates in England*, 2nd ed., London, 1912, 4-6. Both are applied to a defined base; however, rates are determined by the target amount of revenue to be raised, whereas taxes determine the amount of revenue raised.

32 Ibid., 1-26.

33 Ibid., 27-53.

34 The local authorities were typically identified as churchwardens, constables, county Justices of Peace, or 'honest inhabitants' nominated by the Justices. The base of assessment was typically property or the income derived from property, assigned either to the owner whether or not he was a resident, or to the occupier whether or not he was the owner. Such bases supposedly measured either the ability to pay or the benefit from the associated expenditure.

35 See n. 28.

36 22 Hen VIII c.5; 23 Hen VIII c.2; 23 Hen VIII c.5; 2 Mary I c.8; and 35 Eliz I c.4.

feoffees.[37] Table 1 presents data, derived from those compiled by Jordan, that record the average annual donations to uses in ten counties from 1480 to 1660.[38] Over the six decades that preceded and followed 1540 there was, as regards the proportion of donations to different uses, a pronounced decrease in donations going to uses with religious objects, overall stability in donations to uses with educational objects, and a pronounced overall increase in donations to uses with objects that were or were to become the responsibilities of parish authorities. Among the latter, the donations for municipal betterment decreased, whereas those for the relief of the poor increased, and those for the rehabilitation of the poor increased and then decreased. See Table 1.[39]

Thus by the close of the 16th century, the parish authorities could draw upon a diverse and adaptable range of revenue sources. Sure enough, in adjusting their reliance on these sources, they were limited by the types and sizes of uses in existence, as well as by the amount of assessed property in the parish, and the taxation tolerance of its land-owners and residents. However, in order for the parish authorities to spend more on the relief and rehabilitation of the poor – as directed under the 1601 Act for the Relief of the Poor – the objects listed in the preamble of the 1601 Charitable Uses Act for the 'relief of aged, impotent, and poor people', or for the 'stock or maintenance of houses of correction', would have been comparable to that for the 'repair of bridges, ports, havens, causeways, churches, sea banks, and highways'. Given the fungibility of parish revenue, any of the charitable objects listed in the preamble would have enabled the authorities to spend more on eleemosynary purposes. Uses with those various objects could have financed that spending either directly, or indirectly by generating income for other parish responsibilities that would have enabled the authorities to lower another statutory or non-statutory rate in order to raise the poor rate.[40] Thus, the equal status that the 1601 Charitable Uses Act attributed to the various objects listed in the preamble not

37 Cannan, *History of Local Rates*, 2nd ed., 7; Slack, *Poverty and Policy*, 170.

38 W.K Jordan, *Philanthropy in England 1480-1660*, New York, 1959, 367-387.

39 Table 1 is annexed at the end of this article

40 Dunn argues that the motivation behind the enforcement of charitable uses for poor relief was not simply, let alone primarily, 'philanthropic ideals', but rather 'reducing financial burdens' of parish authorities: Alison Dunn, 'As "cold as charity"?: poverty, equity and the charitable trust', 20 *Legal Studies* (2000), 222, at 232. The argument here is a more general one: the enforcement of all charitable uses with objects that were the responsibilities of those authorities would have enabled them to adjust parish rates in order to raise and allocate funds for whatever objects they held in priority, including the relief and rehabilitation of the poor. The relative reliance between endowments and rates varied greatly across parishes. Overall, however, Slack estimates that uses for the relief and rehabilitation of the poor generated twice the funds as did the poor rates by the outset of the 17th century, the same by its middle, and half by its end: Slack, *Poverty and Policy*, 172.

only corresponded to the task of staking out a jurisdiction as argued in subsection 2.2. It also corresponded to the fiscal equivalence of those objects from the perspective of the parish authorities charged with the power and responsibility to relieve and rehabilitate the poor. It does not suggest that the central government necessarily assigned a two-fold priority to the charitable objects listed in the preamble and to those not listed. Nor does it suggest that the central government or the parish authorities necessarily assigned an equal priority to the various objects listed.

2.4 The priorities and choices of donors

Accordingly, the all-or-nothing quality that the 1601 Charitable Uses Act attributed to charitable objects did not limit the abilities of parish authorities to allocate the revenue at their disposal in accordance with their priorities. As argued in this subsection, the same quality did not limit the ability of donors to allocate private wealth in accordance with theirs. Table 1 indicates pronounced shifts from the late 15th to the mid 17th centuries in the level and allocation of donations across charitable uses. The data, however, reveal little if any effect of the 1601 Act. Admittedly, the quantity of donations was greater in the four decades following 1600 than in the four decades preceding. However donations increased as much to the uses with objects falling beyond the jurisdiction established by the Act, as to those with objects falling within it.[41] The former included donations to uses for clergy support, Puritan lectureships, universities and colleges, and hospitals that were either creatures of a city or town corporation, or under the enforcement authority of the Bishop or of special visitors or governors.

In part, the 1601Act having had little effect on the allocation of donations can be tied to it having had little effect on the motives of donors, whether these were moral or aggrandizing. First, there was no reason for the motives to have been any more or any less pious before 1601– or, for that matter, before 1540 – as after.[42] As noted in subsection 2.1, canon law allowed for a broad and elastic interpretation of *pias causas.* The claim that the charitable objects listed in the preamble of the Act complied with that interpretation – particularly as it was commonly held – finds support in the noted similarity between those objects and the ones listed in *The Vision of Piers the Ploughman*.[43] Although this allegorical work dates from the mid 14th century, it was first published in print in the mid 16th century, and thereafter

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41 Jordan, *Philanthropy in England*, 368-375.

42 Slack, *Poverty and Policy*, 163.

43 Jordan, *Philanthropy in England*, 112.

gained notoriety particularly in Puritan circles.[44] Its final chapter cited various objects – including poor relief, dowry subsidies, apprenticing youth, as well as road and bridge repair – to which merchants could donate and thereby send their souls safely to the 'saints in their bliss', even without the Pope's blessing.[45] Protestant moralists of the 16th century, both clerical and lay, repeated this theme in sermons, tracts, and funeral orations, exhorting their audience to undertake good works, presenting these as being expected by God and the necessary consequence of receiving his grace. Although directing one's wealth to the relief and rehabilitation of the poor was central to these exhortations, directing it to the other needs of society would have enabled one to avoid the sin of covetousness.[46]

Just as the 1601 Act did not impinge upon the moral motives for donation, so it did not impinge upon the aggrandizing ones.[47] As of the middle of the 16th century, members of the gentry and wealthy mercantile classes could no longer endow chantries in order to found enduring and conspicuous memorials of themselves and their benefaction. Nevertheless, they could and they chose to found such memorials by endowing and naming either almshouses, workhouses, and houses of correction that were probably covered by the Act, or hospitals, schools, and colleges that were possibly not covered. Indeed, their doing so was made easier by statutes of 1572

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44 John N. King, 'Robert Crowley's editions of *Piers Plowman*: a Tudor apocalypse', 73 *Modern Philology* (1976), 342.

45 Merchants I' th' margin had many long years,
But 'from pain and from guilt' would the Pope none grant;
For they keep not their holidays, as holy church teacheth,
And they swear 'by their sole', and 'so God be their help',
Clear against conscience, their chattels to sell.
But under secret seal Truth sent them a letter,
Full boldly to buy what best they could choose,
And sell it soon after and save well the profit,
Therewith to build hospitals, helping the sick,
Or roads that are rotten full rightly repair,
Or bridges, when broken, to build up anew,
Well marry poor maidens, or make of them nuns,
Poor people and pris'ners with food to provide,
Set scholars to school, or to some other crafts,
And relieve the religious, enhancing their rents; –
'I will send you Myself then Saint Michael Mine angel,
Lest fiends should assault you, or fright you when dying,
To help you from hopeless despair, and to send
In safety your souls to My saints in their bliss.'
William Langland, *The Vision of Piers the Plowman*, trans. by Walter W. Skeat, New York, 1966, 114-115; emphasis added.

46 Jordan, *Philanthropy in England*, 165-179.

47 Slack, *Poverty and Policy*, 165.

and 1597 that allowed such institutions to be founded not only in spite of errors in the conveying of the property, but also by deed enrolled in Chancery which avoided the delay and expense of obtaining a Royal charter and letters patent.[48]

In part, the 1601 Act having had little effect on the level and allocation of donations can also be tied to the enforcement authority that it awarded being neither exclusive, nor comprehensive, nor necessarily effective. Donors who believed that their intentions would have been better followed if a mediate enforcement authority was in place were not limited to the uses covered by the Act: they could have made their gift or bequest to, say, a college overseen by the Bishop, or to a free school or hospital with a special visitor, or conceivably to a livery company under the City of London Corporation for which a special governor existed.[49] Although the commission procedure appears to have functioned well in most instances over the first half of the 17th century, this was not everywhere and always the case. Indeed, by the middle of that century the procedure had ceased to be generally regarded as an expeditious and effective means of correcting maladministration. Petitioners were at pains to demonstrate why their particular uses had objects outside the preamble, or otherwise not 'within the remedy of the statute', in the hope of sidestepping the commissions altogether and accessing the immediate authority of the Chancellor, either by an original bill or an information brought in the name of the Attorney General.[50]

2.5 From staking out a jurisdiction to defining legal charity

The 1601 Charitable Uses Act was one of several statutes from the late Tudor era that reflected the priority that the central government and local authorities assigned to the relief and rehabilitation of the poor. The Act established local commissions to enforce uses with objects that were among the parishes' responsibilities, and for which no mediate enforcement authority already existed. These uses, if managed well, would allow the parish authorities to direct more revenue to the relief and rehabilitation of the poor, either by generating that revenue directly, or by freeing up funds that would otherwise be needed for municipal infrastructure. The all-or-nothing status that the Act attributed to charitable objects was appropriate, given the task of staking out a jurisdiction. It was also normatively neutral in its implications and fiscally benign in its effects. In other words, it did not imply or require that the central government or local authorities assigned the same priority to the objects

48 14 Eliz I c.14; 39 Eliz I c.5.

49 Francis Moore, in his 1607 *Reading* of the 1601 Charitable Uses Act, argued that in order not to be under the authority of the commissions, the use should be under the corporate name of the city or town: it was not adequate that it be under the name of one of its members: Jones, *History of the Law*, 37-39.

50 Ibid., 36, 54-56.

listed in the Act's preamble, and a lower priority to those not listed. And it did not limit the discretion exercised either by the parish authorities in allocating the revenue at their disposal, or by donors in allocating their private wealth.

As stated at the outset of section 2, the 1601 Act has shaped the modern legal meaning of charity. In part, this has been in determining which objects are deemed legally charitable, and which ones are not. In part, however, it has been in attributing an all-or-nothing quality to those objects that is independent of their effects. Attributing this quality has involved the separation of legal charity from public benefit: the former involving the intent of an actor, and being largely inscrutable; the latter involving the consequence of an action, and being potentially gradational.

Over the two hundred years that followed the 1601 Act, legal thought considered charitable uses and uses that benefited the public to be one and the same.[51] Francis Moore, in his 1607 *Reading* of the Act, asserted this equivalence, arguing that the preamble should be interpreted widely, so as to include all uses of public benefit. Such uses, he proposed, would provide goods or services that were temporal and essential rather than spiritual or superfluous. These goods and services would be available to the community as a whole, rather than an individual or group only; and although they could benefit the rich, they would not do so exclusively or deliberately.[52] By the end of the 17th century, the procedural significance attached to the particular objects listed in the preamble of the Act had disappeared: all charitable uses could be enforced by an information, without the commissions being involved. In the 18th century, judicial decisions recognized the preamble as an important historical compendium, but acknowledged the existence of charitable objects that were outside both its letter and spirit.[53] The defining characteristic of legal charity resided less in its object being found in or inferable from the preamble, and more on the intent, possibility, or existence of public benefit.

The 1736 Mortmain and Charitable Uses Act reinforced the judicial predisposition to infer charity from public benefit.[54] In order to keep land in production and to protect heirs-in-law from impulsive or pressured instances of 'deathbed charity', the 1736 Act declared invalid any devise of realty to a charitable use, unless it was made

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51 Ibid., 20-22.

52 Ibid., 27-39.

53 For example: the decisions in *Jones v Williams* (1767) Amb 651 and in *Turner v Ogden* (1787) 1 Cox Eq Cas 316 held bequests to be charitable, in spite of their objects – the provision of spring water to a town; the delivery of sermons, singing of psalms, and repair of church bells in a church – not being listed in the preamble; ibid, 122 n.1, 128.

54 9 Geo II c.80; ibid., 109-119.

by a deed that had been executed before two or more witnesses at least twelve months before the donor's death, and enrolled in Chancery within six months (bequests to universities and colleges were exempted). A broad definition of charity – one tied to public benefit – would widen the scope of the 1736 Act. Such a definition underlay the 1801 decision in *Townley v Bedwell*: Lord Eldon declared void the devise of land to establish a botanical garden that the testator hoped to be 'a public benefit'.[55] The phrase identified the bequest as charitable *ipso facto*.

Over the more than two hundred years that have followed this decision, legal thought has rarefied the meaning of charity and distinguished it from public benefit. This has involved two shifts. The first was to promote the preamble of the 1601 Act from being an anachronistic catalogue of certain charitable objects, to being the touchstone of legal charity. The second shift was to separate legal charity from public benefit: some indication or measure of the intent, possibility, or existence of the latter became a necessary but not a sufficient condition for an object to be considered legally charitable. Decisions in two cases – one in the first decade of the 19th century, and one in the last decade – advanced and anchored these shifts.

The first of these was the 1804 decision in *Morice v Bishop of Durham*, confirmed on appeal.[56] The case concerned the validity of a residuary bequest 'in trust for such objects of benevolence and liberality as [the trustee] the Bishop of Durham in his own discretion shall most approve'.[57] The trust founded by the bequest would be declared invalid for uncertain objects, unless it was judged to be charitable. Sir Samuel Romilly, representing the heirs-in-law, upheld the traditional equivalence of charity and public benefit. He argued that although 'benevolence' implied charity, 'liberality' did not because it was 'not even importing any thing of a public nature; from which the public is to derive any benefit'.[58] On appeal, Romilly argued that the case was without legal precedent, but that the particular 'construction' of the word charity to be recognized by the court was indistinguishable from 'the sense in which it is used by mankind in general'.[59] Thus in order to construct a legal meaning of charity, he could and did turn to 'authorities in the *English* language'.[60] By his estimate, that philological meaning embraced four categories of objects 'within one of which all charity, to be administered in this Court, must fall: 1st, relief

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55 *Townley v Bedwell* (1801) 6 Ves 194, at 198. Jones, *History of the Law*, 122.

56 *Morice v Bishop of Durham* (1804) 9 Ves 399; (1805) 10 Ves 522.

57 Ibid., (1804) 9 Ves 399, at 399.

58 Ibid., (1804) 9 Ves 399, at 400.

59 Ibid., (1805) 10 Ves 522, at 527.

60 Ibid., (1805) 10 Ves 522, at 530.

of the indigent; in various ways: money: provisions: education: medical assistance; &c.: 2dly, the advancement of learning: 3dly, the advancement of religion; and, 4thly, which is the most difficult, the advancement of objects of general public utility'.[61] On first instance, Sir William Grant judged the bequest not to be charitable, and thus to be invalid for uncertainty. However, in deciding that the legal meaning of charity was narrower than 'objects of benevolence and liberality', he did not follow Romilly's line of argument. Instead, he narrowed the definition of legal charity by tying it to the preamble of the 1601 Act: 'in this Court ... [t]hose purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; ... it is clear liberality *and* benevolence can find numberless objects, not included in that Statute in the largest construction of it'.[62] On appeal, Lord Eldon affirmed Grant's decision: legal charity originated from neither public benefit nor any philological meaning; rather, it involved 'charitable purposes as are expressed in the Statute or to purposes having analogy to those ..., not because they can with propriety be called charitable, but as that denomination is by the Statute given to all the purposes described'.[63] Thus the preamble that originally staked out the jurisdiction of local enforcement commissions came to be the touchstone of legal charity.

The second decision was that of 1891 in *Commissioners for Special Purposes of the Income Tax v Pemsel*.[64] The 1799 Income Tax Act had exempted the 'rents and profits of lands, tenements, hereditaments or heritages … vested in trustees for charitable purposes'.[65] Although the tax was repealed in 1816, it was re-introduced by the 1842 Income Tax Act with the same exemption.[66] Neither statute offered a definition of 'charitable purposes' as these applied to fiscal matters. Under a deed executed in 1816, land had been devised on trust that half of the rents and profits be spent on the international missionary activities of the Moravian Church, and the other half be spent on the education of poor children and the support of poor single persons who were Church members. In 1886, the Income Tax Commissioners stopped exempting the first half of the trust's income, maintaining that the word

61 Ibid., (1805) 10 Ves 522, at 532.

62 Ibid., (1804) 9 Ves 399, at 405; emphasis added.

63 Ibid., (1805) 10 Ves 522, at 540; emphasis added.

64 *Commissioners for Special Purposes of the Income Tax v Pemsel* (1891) AC 531.

65 39 Geo III c.13.

66 5&6 Vict c.35.

charity in the 1842 Act necessarily involved the relief of poverty.[67] The trustees brought the matter to court in order to have the exemption reinstated; they lost in first instance, but succeeded both on first appeal, and on second appeal to the House of Lords by a four-to-two majority.

Speaking for that majority, Lord Macnaghten explicitly ignored and declared himself agnostic toward the issue of whether or not the government should provide fiscal privileges to organisations whose purposes were deemed to comply with the legal meaning of charity: 'With the policy of taxing charities I have nothing to do. It might be right, or it might be wrong ...'.[68] He limited his attentions to whether or not the 'technical meaning' of charity as used in law also applied to fiscal matters; and in his opinion, it did.[69] That meaning encompassed more than the eleemosynary purposes that might be implied by the 'popular meaning' and 'vulgar use of the word'.[70] And although it included the objects identified or implied by the preamble of the 1601 Act, it was not limited to these.[71] He categorized the purposes that complied with the technical meaning of charity by paraphrasing – but not crediting – Romilly:

> 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. It seems to me that a person of education, at any rate, if he were speaking as the [1842 Income Tax] Act is speaking with reference to endowed charities, would include in the category educational and religious charities, as well as charities for the relief of the poor. Roughly speaking, I think he would exclude the fourth division.... If a gentleman of education, without legal

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67 The Commissioners' interpretation drew support from the decision by the Scottish Court of Session in *Baird's Trustees v Lord Advocate* (1888) 15 R 682. According to Lord President Inglis, in the context of a taxation act the meaning of 'charity' and 'charitable' is limited to the 'ordinary familiar and popular use' of the words. That is to say: 'charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word "charity" as it occurs in this statute [of 1842]'; ibid., at 688.

68 *Commissioners for Special Purposes of the Income Tax v Pemsel* (1891) AC 531, at 591.

69 Ibid., at 587

70 Ibid., at 574.

71 Ibid., at 581.

> training, were asked what is the meaning of 'a trust for charitable purposes', I think he would most probably reply, 'That sounds like a legal phrase. You had better ask a lawyer'.[72]

This often-quoted passage came to replace the preamble of the 1601 Act as the touchstone of legal charity.[73] Just as the preamble attributed an equal and non-normative status to the objects that fell within the jurisdiction of the local commissions, so Macnaghten attributed an equal but normative quality to the four divisions that composed the technical and legal meaning of charity: charity, so defined, is an all-or-nothing deontological concept. It is distinct from the potentially gradational and teleological concept of public benefit. Macnaghten implies that the possibility or actuality of public benefit is either a matter of definition for purposes falling under the first three divisions; or a necessary but not sufficient condition for purposes to be considered legally charitable under the fourth division.[74]

The potential for public benefit being a gradational concept can be inferred from aspects of its meaning as formed under case law.[75] The meaning of 'public', for example, is taken to be the public at large, or a substantial segment of it.[76] Although the population eligible to benefit can be restricted, any restrictions must be required by the purpose or benefit itself (say, according to academic ability, financial need, location, disability, age, or health status), must be defined on the basis of impersonal links (not personal ones stemming from family or professional affiliation), and must not explicitly preclude the poor – although fees may be charged.[77] The meaning of

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72 Ibid., at 583-584.

73 There is some irony tied to this passage. For one thing, although allegedly summarizing the legal or technical meaning of charity – as opposed to a linguistic or popular meaning – Macnaghten paraphrased what Romilly had presented more than eight decades earlier as a philological definition, *in lieu* of a legal meaning that did not exist. For another, although asserting the independence of the legal meaning of charity from its popular meaning, Macnaghten endorsed the former either as being in compliance with an educated version of the latter, or as being deferred to by it.

74 For England and Wales, the 2006 Charities Act (55 Eliz II c.50) subdivided Macnaghten's fourth division into ten, and no longer assumes the existence of public benefit on the basis of purposes falling under his first three divisions.

75 Charity Commission for England and Wales, *Analysis of the law underpinning "Charities and Public Benefit"*, Liverpool, 2008; Jean Warburton, 'Charities and public benefit – from confusion to light?', 10 *The Charity Law & Practice Review* (2008), 1.

76 *Verge v Somerville* (1924) AC 496.

77 For impersonal as opposed to personal links, at least for the advancement of education, see *Re Compton* (1945) Ch 123, or *Oppenheim v Tobacco Securities Trust Co Ltd* (1951) AC 297, or *IRC v Educational Grants Association Ltd* (1967) Ch123; for not excluding the poor, see *Re Macduff* (1896) 2 Ch 451, or *Re Resch's Will Trusts* (1969) 1 AC 514.

'benefit' requires it to be demonstrable as fact and capable of proof.[78] It can be discounted on the basis of uncertainty.[79] And it can be expressed in units that would allow the comparison and net calculation of positive betterments versus negative detriments, or public benefits versus private ones.[80]

However, the possibility of public benefit being ***applied*** as a gradational concept – in order to rank purposes or activities according to their consequences – is stymied by its role in common law. The existence of public benefit, by itself, is of secondary importance: it is not a sufficient condition for a purpose to be considered legally charitable.[81] Rather, the existence of public benefit above some supposed threshold is only a necessary condition for a purpose to be so considered. Moreover, that threshold varies across charitable purposes, thereby undercutting the possibility of uniformly applying public benefit as an indicator of extent or degree.[82] The requirement that the meaning of 'public' precludes personal ties, for example, does not hold as much for the relief of poverty as for the advancement of education.[83] Or the requirement that the meaning of 'benefit' involves being demonstrable as fact and capable of proof does not hold as much for the advancement of religion as for the advancement of education.[84]

3. Conclusion

Governments that wish to use their fiscal tools of taxation and spending in order to pursue normative goals such as increasing social welfare should choose, configure, and apply those tools with reference to normative criteria that are both teleological and gradational. In other words: in deciding the means, levels, and targets of taxation and spending, those governments should use concepts and indicators that are capable of not only detecting the consequences of their decisions on social

78 *Re Hummeltenberg* (1923) 1 Ch 237; *IRC v City of Glasgow Police Athletic Association* (1953) AC 380; *Gilmour v Coats* (1949) AC 426.

79 *Re Shaw's Will Trusts* (1952) Ch 163.

80 *National Anti-Vivisection Society v IRC* (1948) AC 31; *Joseph Rowntree Memorial Trust Housing Association Ltd v AG* (1983) Ch 159.

81 *Williams' Trustees v IRC* (1947) AC 447; *National Anti-Vivisection Society v IRC* (1948) AC 31.

82 *Gilmour v Coats* (1949) AC 426. Michael Chesterman, *Charities, Trusts and Social Welfare*, London, 1979, 135-191.

83 *Dingle v Turner* (1972) AC 601; *Re Cohen* (1973) 1 All ER 889; *Re Segelman* (1996) Ch 171.

84 *Thorton v Howe* (1862) 26 JP 774; *Re Watson* (1973) 3 All ER 678.

welfare, but also ranking or grading those consequences, not simply categorizing them.

On these terms, charity as it has originated and evolved in common law is a deficient fiscal concept: it is neither teleological nor gradational. That being said, governments in many common-law countries have come to use charity as a fiscal concept, providing a range of fiscal privileges to the third-sector organisations whose purposes comply with its legal meaning. In the particular historical and institutional context where the legal meaning of charity originated, its deontological and all-or-nothing qualities were normatively neutral and fiscally benign. In other words, those qualities neither implied nor required that the governing authorities assign the same priority to different charitable objects. And, correspondingly, they restricted neither the ability of those authorities to allocate revenue across different charitable objects in accordance with their diverse priorities, nor the ability of donors to allocate private wealth in accordance with theirs. Such benignancy does not necessarily hold in other contexts, particularly where a link exists between purposes that comply with the legal meaning of charity and the provision of fiscal privileges.

The third sector presently comprises a diversity of organisations, activities, goods and services, and groups receiving and affected by those goods and services. Given this diversity, it is unlikely that a government – and the population it represents – would assign the same priority across the range of purposes being pursued in the sector, or a dichotomous priority between the purposes that comply with legal charity and the purposes that do not. And given this diversity, it is unlikely that the level and allocation of financial resources across the third sector – as affected by the fiscal privileges presently provided – would best serve the needs and priorities of the population. In this context, a government could raise social welfare by using its fiscal tools to increase or re-allocate financial resources across the sector: adding them where the marginal benefits are highest; removing them where they are lowest. In order to do this, however, a government would need to decide upon the means, levels, and targets of taxation and spending with reference to fiscal concepts and indicators that could detect or rank the welfare consequences of its decisions. Legal charity is inherently incapable of performing those functions. Thus, in order to reform the fiscal treatment of third-sector organisations with the prospect of increasing social welfare thereby, governments at the outset should dispense with charity as a fiscal concept.

Table 1 - Contributions to charitable uses, 1480-1660

Time Period	Average Annual Donations to Charitable Uses in Ten English Counties by Time Period and Category of Object (in current pounds)[1]					
	Relief of the poor[2]	**Rehabilitation of the Poor[3]**	**Municipal Betterment[4]**	**Education[5]**	**Religion[6]**	**Total**
1480-1540	1,149 (13.33 %)	176 (2.04 %)	2,369 (27.49 %)	2,150 (24.96 %)	2,773 (32.18 %)	8,616 (100.00 %)
1541-1560	3,069 (27.04 %)	3,429 (30.21 %)	1,673 (14.74 %)	2,416 (21.28 %)	764 (6.73 %)	11,352 (100.00 %)
1561-1600	4,349 (39.03 %)	1,653 (14.83 %)	1,372 (12.32 %)	3,499 (31.40 %)	270 (2.42 %)	11,142 (100.00 %)
1601-1640	15,512 (43.16 %)	2,984 (8.30 %)	5,399 (15.02 %)	9,590 (26.68 %)	2,453 (6.82 %)	35,937 (100.00 %)
1641-1660	10,174 (43.58 %)	2,735 (11.72 %)	1,967 (8.43 %)	6,523 (27.94 %)	1,946 (8.33 %)	23,345 (100.00 %)

1. These data have been derived from Tables I to VI of Jordan, *Philanthropy in England*, 368-375, by transferring donations for the construction and maintenance of churches from 'Religion' to 'Municipal Betterment', and by expressing donations as annual averages over each time period. The ten counties are Bristol, Buckinghamshire, Hampshire, Kent, Lancashire, London, Norfolk, Somerset, Worcestershire, and Yorkshire. Because of price and population increases, the data do not allow for comparisons of 'generosity' across periods as might be measured by real or per capita donations. Nor do they allow for comparisons of 'services funded' as might be measured by the income generated by the total endowments. For a discussion of these issues, see H.F Hadwin, 'Deflating philanthropy', 31 *Economic History Review* (1978), 105.

2. Includes: outright relief; construction, maintenance and provisioning of almshouses; general assistance; and support for the aged.

3. Includes: relief of prisoners; construction, maintenance and provisioning of workhouses; apprenticeships; hospitals and care of the sick; loan subsidies; and dowry subsidies.

4. Includes: public works (construction and maintenance of roads, bridges, docks, breakwaters, etc.); companies for public benefit; parks; fire fighting; tax relief for poor; and construction and maintenance of municipal buildings and churches.

5. Includes: universities; colleges; schools; libraries; and scholarships and fellowships.

6. Includes: prayers; support of clergy; Puritan lectureships; and provisioning of churches.