Dispensing charity? The fiscal limitations of an all-or-nothing legal concept
– draft and partial –

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Abstract

This paper summarizes the origin and evolution of charity as an all-or-nothing concept within English common law – a process that largely pre-dates the provision of fiscal privileges to organizations deemed as charitable. It does so as a draft section from a larger work that will make a theoretical case for – and provide examples of – the limitations posed by such a concept in designing the fiscal treatment of third-sector organizations. Although I would welcome comments and suggestions, I ask that this paper not be quoted or cited, given its preliminary and partial nature.

1 Context and introduction

In many jurisdictions, governments provide a range of fiscal privileges to organizations in the third sector whose purposes or activities are deemed charitable or publicly beneficial. Such privileges may include exemption from taxes on income, capital gains, or purchases of goods or services. And they may include subsidies on the financial contributions that natural or legal persons make to these organizations. The subsidies reduce the price to the donor of conferring a certain quantity of financial resources to an eligible donee, either by offering the donee a matching grant, or by offering the donor a deduction from income otherwise taxable, or a credit against taxes otherwise payable.

This paper is a draft section of larger paper that will make a three-fold argument concerning the choice and design of such fiscal privileges. First, that paper will argue that if governments use their fiscal tools to pursue normative goals, then they should choose and design those tools with reference to normative concepts that are both teleological and differentiable. More specifically, in deciding the means, levels and targets of taxation and spending, such governments need to consult and apply concepts and indicators that would allow them to represent the consequences of their decisions on, say, social welfare. Moreover, they need concepts and indicators that would allow them to rank those consequences, not simply categorize them.

Second, it will argue that charity, as its definition has originated and evolved in common

law, is a normative concept that is both deontological and non-differentiable. Charity is a quality attributed to a civic purpose or activity that is considered meritorious on its own terms; and it is either present or not. To be sure, the legal definition of charity is linked with a concept of public benefit. And admittedly, the latter could be construed as both consequentialist and differentiable. 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 existence of charity.

And third, in light of the previous two points, the larger paper will argue that if the government uses its fiscal tools to pursue social welfare, and if third-sector organizations engage in a range of purposes and activities that are diverse in terms of either the goods and services produced or the populations affected, then the government should not base its fiscal treatment of those organizations on the legal concept of charity. This argument stands in contrast with the practices of governments in many common-law jurisdictions: it is often the case that organizations, whose purposes and activities may have very different consequences for social welfare, will nevertheless receive similar fiscal privileges because those organizations have all been deemed legally charitable. To be sure, several governments have side-stepped providing such uniform treatment, either by denying certain fiscal privileges to charitable organizations, or by extending those privileges to certain non-charitable organizations, or by providing different privileges to different charitable organizations. Such measures, however, are few and ad hoc. The legal concept of charity – by being deontological and non-differentiable – limits the opportunities for, or obscures the option of, designing the fiscal treatment of third-sector organizations in ways that could increase social welfare.

The larger work will advance these arguments in sequence. Section 2 will summarize a case for the government to provide different fiscal privileges to third-sector organizations that have distinct purposes and activities. It does this from the perspective of optimal tax and expenditure theory which assumes that the government could and should use its fiscal tools of taxation and spending in order to increase social welfare. Section 3 will summarize the origin and evolution of the legal definition of charity within English common law – a process that largely pre-dates the provision of fiscal privileges to organizations deemed as charitable. It argues that the all-or-nothing quality of legal charity originates from a statute of the late Tudor era that identified the charitable objects falling within or outside the jurisdiction of newly-established enforcement commissions. In the task of staking out a jurisdiction, the all-or-nothing status that the statute attributed to charitable objects was appropriate. Moreover in the broader context of the statute, that status was neutral in the sense that it neither implied nor required that the governing authorities assigned the same priority to the objects falling within the jurisdiction, and a different priority to those falling outside. And it was benign in the sense that it did not limit the discretion exercised either by those authorities in allocating public revenues across different charitable objects, or by donors in allocating their private wealth. Section 4 reviews the fiscal practices in five common law jurisdictions – Australia, Canada, England, India and Singapore – focusing on how legal definition of charity affects the subsidization of contributions to third-sector organizations. Section 5 will provide a summary and conclusion.

The present paper is a draft version of section 3. It has been prepared for the second

annual conference of ANSER, 27-29 May 2009, in Ottawa. Sections 2 and 4 will parallel sections 2 and 4 from Carmichael (2009).

2 An economic case for fiscal charity being a differentiable concept

3 The origin of legal charity as an all-or-nothing concept

The modern legal concept of charity has been shaped by the 1601Charitable Uses Act (43 Eliz I c. 4), subtitled *An Act to redress the Misemployment of Land, Goods, and Stocks of Money heretofore given to Charitable Uses*. Although the longest-lived portion of the Act – its preamble – was repealed by the 1960 Charities Act (9 Eliz II c. 58), its influence has extended, and continues to endure, through common law. As explained by Lord Simonds in *Gilmour v. Coats* [1949]:

> It is a commonplace that that statute, as its title implied, was directed not so much to the definition of charity as to the correction of abuse which had grown up in the administration of certain trusts of a charitable nature. But from the beginning it was the practice of the court to refer to the preamble of the statue in order to determine whether or not a purpose was charitable. The objects there enumerated and all other objects which by analogy 'are deemed within its spirit and intendment' and no other objects are in law charitable (cited by Sheraton and Keeton 1970, p. 24).

Accordingly, if the modern legal concept of charity bears an all-or-nothing quality – as argued here – then one should look to the 1601 Act in order to understand why this is the case. At first blush, it might seem odd that such a quality 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: the priority it placed on religious objects decreasing, that on eleemosynary ones increasing, and that on other objects ranging somewhere in between. As argued below, however, the all-or-nothing quality emerged from the Act's task of staking out the jurisdiction of enforcement commissions. Subsequent judicial decisions perpetuated this quality, as most famously typified by the four but equal divisions of charity 'in its legal sense', as laid out by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891].

3.1 The divergence of priorities across charitable objects

The medieval church exhorted the faithful to bequeath portions of their estates 'to pious causes' – *ad pias causas*. Under canon law, these causes honoured God and his church, and hence could be served by bequests for the maintenance and provisioning of churches and monasteries, or for the foundation of chantries and trentalls.[1] However, pious causes also involved the relief of

[1] Both refer to endowments in support of the priests and chapels that would ensure the regular singing of a requiem mass for the souls of the founders. A trentall was a more specific

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 common law and equity, with the Chancellor as presider). However, the authority to enforce uses or trusts that might be created by testators resided exclusively with the Courts of Chancery (Jones 1969, 3-6).[2] A testator or other donor could create a use by conveying a portion of his property to feoffees who would then be responsible for 'using' it – owning and managing the property, but directing its proceeds for certain beneficiaries in accordance with the general purposes or specific objects, as these were declared by the donor in the will or deed.[3]

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 (Jones 1969, 57). In the context of the English Reformation, certain religious causes ceased to be lawful, let alone charitable. A statute of 1532 (23 Hen VIII c. 10) declared invalid all chantries that exceeded twenty years, and transferred their endowments to the feudal lord. The 1534 Act

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version of a chantry, requiring thirty masses to be sung on the same day or different days.

[2] Prior to the last two centuries, the privileges associated with an institution being officially deemed charitable were primarily, if not exclusively, legal ones that had been established under medieval canon law, and subsequently adopted under common law. Such legal privileges enabled uses or trusts that were deemed charitable to remain valid under circumstances that would have otherwise invalidated them. These circumstances included: imperfections in the conveyance of property; or a duration exceeding twenty years; or objects being or becoming incapable of execution; or objects being sufficiently uncertain that a beneficiary could not be identified to enforce the trust.

[3] Martin (2005, 8-11) describes the origin of the use, and its evolution by the 18th century into the trust. Starting in the medieval period, several functions – apart from serving charitable objects – encouraged the practice of conveying to feoffees the legal title to land for the use of a designated beneficiaries. Some functions were convenience: the original title holder may go on a crusade and wish someone to perform and receive the feudal services. 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 avoid the land being claimed by creditors. Others were, in essence, for tax avoidance. Feudal lords were entitled to payments when land tenancy succeeded to an heir. Such payments could be avoided if the tenancy was conveyed to set of replaceable feoffees. Indeed, the 1536 Statute of Uses (27 Hen VIII c. 10) attempted to curtail the latter function of uses by eliminating the role of passive feoffees upon the death of the beneficiary. One of the ways around this statute was to stack uses. As a standard practice, land would be conveyed to feoffees A for the use of beneficiary B who would hold it in trust for a third party C . By the early 18th century, the role of A was dropped, and property would simply be conveyed to the use of B in trust for C. Accordingly, although the first of the uses was phased out, the second – identified as a trust – was maintained.

of Supremacy (26 Hen VIII c. 1) made Henry VIII and his successors 'the only supreme head on earth of the Church in England', formally separating that Church from papal authority. 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 (37 Hen VIII c. 4) declared invalid all remaining chantries, and transferred their endowments to the Crown. It justified this on fiduciary grounds, claiming that the uses had been mismanaged and the income directed 'contrary to the wills, minds, intents, and purposes of the founder, donors, or patrons of the same'. A statute of 1547 (1 Edw VI c. 14) 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'. 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 (1 Eliz I c. 24) transferred to the Crown all property belonging to any monasteries and chantries that had been restored or founded under her sister (Jones 1969, 10-15).

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 posing challenges to its power. During that reign (1558-1603), however, it came to conceive of particular eleemosynary causes 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 attributed to it (Slack 1988, 43-52). Population growth, the demise of the manorial system, and the enclosure of land for sheep farming – such phenomena contributed to the expansion of a rural, landless, and underemployed labour force. Sure enough, the burgeoning cloth industry increased employment opportunities in urban areas; but these opportunities fell short of the numbers of rural underemployed, 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).

Under Elizabeth I, the central government placed great priority on addressing poverty and its social consequences, interpreting these as a threat to security and social well-being. It 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 impotence (age, illness), casualty, or other factors beyond their control that prevented them from working, and hence supporting themselves or their dependents. The second type comprised the illegitimate or undeserving poor – those who were able-bodied, but who chose to pursue vagrancy, beggary, or thievery, rather than work. The statutes, as amended and consolidated in 1597 and 1601, were directed toward three goals: first to punish the sturdy, vagrant, mendicant, undeserving poor, and confine them to their parish of birth (39 Eliz I c. 4); second, to reduce their ranks by rehabilitation (offering or imposing education, apprenticeships,

and work); and third, to relieve the deserving poor (39 Eliz I c. 3; 43 Eliz I c. 2). 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 (39 Eliz I cc. 5,6; 43 Eliz I c. 4).

3.2 The role of the Charitable Uses Act of 1601

The 1601 Charitable Uses Act (43 Eliz I c. 4), and the 1597 Act it replaced (39 Eliz I c. 6), were passed near the end of the Tudor era. 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 (Jones 1969, 26-52).[4]

The enforcement authority of the commissions was not exclusive. It did not apply 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.

What is more, the jurisdiction of the commissions was not comprehensive. It did not extend to donations 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 included a list of the 'charitable and godly' objects that fell under the commissions' jurisdiction.[5] These

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[4] Each commission consisted of 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. The commission was to call for and then 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 identifying any negligence or fraud, and outlining the steps needed both to correct matters and to ensure that the property henceforth would be employed responsibly and in accordance with the intention of the donor.

[5] '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*

referred to ones then in existence (as indicated by the subtitle of the Act) that were directed either to: the relief of the deserving poor; the rehabilitation of the undeserving poor by offering or requiring education, skills-development, and work; or the betterment of municipal infrastructure.

The list of charitable objects in the preamble is partial and idiosyncratic. First, it omits property held by corporations even if the donors specified objects with 'charitable intent', and it omits uses for which mediate enforcement authorities already existed. Second, on the basis of what it excludes and includes, the list both implies and cloaks the diverse priorities that the central government placed on different charitable objects. Missing are religious objects: these remained under the authority of the Bishop (who also served as a commission member), with appeal to the Chancellor. Included are eleemosynary objects interpreted broadly so as to include not only alms and basic provision, but also the apprenticing, education, and tax relief of the poor. Also included, however, are objects linked to the betterment of municipal infrastructure, not because these were necessarily as important to the central government as those for the relief and rehabilitation of the poor, but of the fungibility of parish revenues (see section 3.3).

In staking out the jurisdiction of the commissions, the 1601 Act assigns a two-fold status to charitable objects – a status that is independent of any gradations of priority that the government may have placed on them. The objects either fall within the jurisdiction, and thus are listed in the preamble; or they fall outside it, and thus are not listed or are specifically excluded. The later portions of the Act that outline the responsibilities and powers of a commission limit these by inserting restrictive adjectival phrases: they apply only to 'the charitable uses *above mentioned*' or 'the charitable uses *before expressed*' (italics added). The all-or-nothing status that the Act assigns to charitable objects is appropriate, given the task of staking out a jurisdiction. As argued in section 3.5, the modern legal concept of charity, as shaped by the Act, has taken on this quality, but has applied it differently, not to define the border of a jurisdiction, but rather to define the border of legal charity. Accordingly, as shaped by the Act, the legal concept of charity is not differentiable: it is not capable of gradation in terms of degree or extent.

3.3 The priorities and choices of parish authorities

The 1601 Charitable Uses Act established local commissions to investigate and correct mismanagement and breaches of trust, and staked out their jurisdiction in part by listing in its

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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; italics added)

preamble the objects of the charitable uses over which the commissions had 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 priority 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 those problems.

Those means were laid out in a statute that accompanied the Charitable Uses Act: the 1601 Act for the Relief of the Poor (43 Eliz I c. 2), and the 1597 Act which it replaced (39 Eliz I c. 3). They entailed giving civic parish authorities the responsibility and power to attend to the poor in their vicinity. As specified in the Act for the Relief of the Poor, these authorities comprised the Churchwardens, together with 2 to 4 'Overseers of the Poor' who were to be 'substantial householders' of the parish and nominated by the Justices of Peace for the county. They 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 with, and contribute to county hospitals and almshouses as well as to the relief of the poor prisoners in national jails.[6] And they were to imprison or confiscate the property of the parish residents who did not pay these rates, and to provide annual accounts to the Justices of Peace. The Justices supervised the parish authorities. Moreover, they monitored and could adjust the parish rates, and, if necessary, require transfers of tax revenues between parishes, in order to moderate any disparities in rates and services across the county.

The poor rates existed alongside other sources of revenue available to and managed by parish authorities. These included a variety of local taxes and rates levied without statutory sanction (Canaan 1912, 1-26). 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. The revenues were used for such things as building a mill, 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 (Canaan 1912, 27-53). 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.[7] From 1530 to 1532, for example, these objects

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[6] Rates are distinguishable from taxes (Canaan 1912, 4-6). The former are applied to a known base, and are determined by the target amount of revenue to be raised. The latter are applied to a known base, and determine the amount of revenue raised.

[7] 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

included the repair of bridges (22 Hen VIII c. 5), the construction of county jails (23 Hen VIII c. 2), and the reconstruction of sea walls, causeways, ditches, and sewers (23 Hen VIII c. 5); in 1555, the repair of local highways (2 Mary I c. 8); and in 1592, the relief of returned soldiers (35 Eliz I c. 4).

The revenues 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 feoffees (Canaan 1912, 7; Slack 1988, 170). Table 1 presents data, compiled by Jordan (1959), recording the average annual donations to uses in ten counties from 1480 to 1660. Over the sixty years that preceded and followed 1540 there was a pronounced decrease in the proportion of donations going to uses with religious objects, general stability to those with educational objects, and a pronounced overall increase to those with objects that were or were to become the responsibilities of parish authorities. Among the latter, the donations to uses 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.

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 or 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 be comparable to that for the 'repair of bridges, ports, havens, causeways, churches, sea banks, and highways'. Given the fungibility of parish revenues, uses for any of the objects listed in the preamble would enable the authorities to allocate more spending toward eleemosynary objects. They would 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.[8] Thus, the equal status that the 1601 Charitable Uses Act attributes to the various objects listed in the preamble not only corresponds to the task of staking out a jurisdiction as

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supposedly measured either the ability to pay or the benefit from the associated expenditure.

[8] Dunn (2000, 232) 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. 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 or rehabilitation of the poor. The relative reliance between endowments and rates varied greatly across parishes. Overall, however, Slack (1988, 172) estimates that uses for the relief and rehabilitation of the poor generated twice the funds as the poor rates at the outset of the 17th century, the same by its middle, and half by its end.

argued in section 3.2. It also corresponds to the fiscal equivalence of those objects from the perspective of the parish authorities charged with the power and responsibility to attend to the poor. It does not suggest that the central government necessarily placed a two-fold priority on the charitable objects listed in the preamble and those not listed. Nor does it suggest that the central government or the parish authorities necessarily placed an equal priority on the objects listed.

3.4 The priorities and choices of donors

As argued above, the all-or-nothing status that the 1601 Charitable Uses Act assigned to charitable objects did not limit the abilities of the parish authorities to allocate public revenues in accordance with their priorities. As argued here, the same characteristic did not limit the ability of donors to allocate their private wealth in accordance with their priorities.

As already noted, the data from Table 1 illustrate 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 Charitable Uses Act. Sure enough, the quantity of donations was greater in the forty years that followed 1600 than in the preceding forty years that preceded. However, donations increased as much to the uses with objects falling outside the jurisdiction established by the Act, as to those falling within it (Jordan 1959, 368-75). The former include 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 special visitors or governors.

In part, the 1601Act having scant effect on the allocation of donations can be linked to it having scant effect on the motives of donors, whether moral or aggrandizing. First, there was no reason for those motives to be any more or any less pious before 1601– or, for that matter, before 1540 – as after (Slack 1988, 163). As noted above, 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 Plowman* (Jordan 1959, 112). Although this allegorical work originated in the mid 14th century, it was first published in print in the mid 16th century, and rapidly gained notoriety particularly in Puritan circles (King 1976). 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 in order to send their souls safely to 'the saints in their bliss', even without the Pope's blessing.[9] Protestant moralists of the 16th century, both clerical and lay, repeated this theme in

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[9] 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,

sermons, tracts and funeral orations, exhorting their listeners or readers 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 also enable one to avoid the sin of covetousness (Jordan 1959, 165-79).

Just as the 1601 Act did not impinge upon the moral motives for donation, it did not impinge upon the aggrandizing ones (Slack 1988, 165). 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 (uses likely to be covered by the Act), or hospitals, schools, and colleges (uses unlikely to be covered). Indeed their doing so was made easier by a statute of 1597 that allowed such institutions to be founded without the delay and expense of obtaining charters and letters patent (39 Eliz I c. 5).

In part, the 1601 Charitable Uses Act having scant effect on the level and allocation of donations can also be linked to the enforcement authority that it awarded being neither exclusive, nor necessarily effective. Donors who believed that their intentions would be better followed if a mediate enforcement authority was in place were not limited to the uses covered by the Act: they could make 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.[10] What is more, 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

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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." (Langland 1966, 114-15; italics added)

[10] Francis Moore, in his *Reading* of the 1601 Charitable Uses Act which he delivered in 1607, 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 1969, 37-39)

had ceased to be generally regarded as an expeditious and effective means of correcting the maladministration of uses. Petitioners were at pains to demonstrate why their particular uses had objects outside the preamble, or were otherwise not 'within the remedy of the statute', in hopes of sidestepping the local 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 (Jones 1969, 36, 54-56).

3.5 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 placed by the central government and parish authorities on 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 allowed the parish authorities to direct more funds to the relief and rehabilitation of the poor, either by generating those funds directly, or by freeing up funds that would otherwise be needed for municipal infrastructure. The all-or-nothing status that the Act assigned to charitable objects was appropriate, given the task of staking out a jurisdiction. It was also neutral in its implications and benign in its effects. It did not imply or require that the central government or local authorities placed the same priority on the objects listed in the Act's preamble, and a lower priority on those not listed. And it did not limit the discretion exercised by either parish authorities in allocating public revenues, or donors in allocating their private wealth.

As stated at the outset of this section, the 1601 Act has shaped the modern concept of charity within common law. In part, this has been through the determination of which objects are deemed legally charitable, and which ones are not. In part, however, this has been through the assignment of an all-or-nothing quality to those objects: the legal concept of charity is not differentiable. Assigning this quality has involved the separation of the legal concept of charity from public benefit: the former referring to the intent of an actor, and being largely inscrutable; the latter referring to the consequence of an action, and being potentially differentiable.

Over the two hundred years that followed the 1601 Act, legal thought considered charitable uses and uses that benefitted the public to be one and the same (Jones 1969, 120-22). 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 that would benefit the public. These, he proposed, would provide goods or services that were temporal and essential rather than spiritual or superfluous. Such 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 (ibid., 27-39). By the end of the 17th century, the procedural significance attached to the particular objects listed in the preamble of the 1601 Act had disappeared: all charitable uses could be enforced by an information, without the local 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. The defining characteristic of legal charity resided less in its object being found in or inferrible from the preamble, and more on the intent, possibility, or

existence of public benefit. Such reasoning underlay the 1801 judgement in *Townley v. Bedwell* that declared void the devise of land to establish a botanical garden that the testator hoped to be 'a public benefit'. That phrase identified the bequest as being charitable *ipso facto*, and thus declared invalid under the 1736 Mortmain Act.[11]

Over the more than two hundred years that have followed that 1801 judgement, legal thought has rarified the concept 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 primary indicator of legal charity. The second 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. Judgements 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 judgement on *Morice v. Bishop of Durham*, confirmed on appeal in 1805 (Vesey 1827, v. IX 399-406, v. X 521-92). 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' (ibid., v. IX 399). The trust founded by the bequest would be declared invalid for uncertain objects, unless it was to be judged charitable. Sir Samuel Romilly, representing the heirs-in-law, upheld the traditional equivalence of charity and public benefit. He argued that although 'benevolence' could be thought to imply charity, 'liberality' could not because it was not confined to 'any thing of a public nature; from which the public is to derive any benefit' (ibid., v. IX 400). On appeal, Romilly argued that the case was without legal precedent, and that the meaning of charity to be recognized by the court, and indeed 'by mankind in general', resided not in law but in philology. That linguistic meaning embraced four categories of objects –

> within one of which all charity, to be administered in this Court, must fall: 1st, relief 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 (ibid., v. X 531).

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 that 'objects of benevolence and liberality', he did not follow Romilly's line of argument. Instead, with no invitation by counsel, 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

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[11] The 1736 Mortmain Act (9 Geo II c. 80) declared invalid any devise of land to a charitable use, unless it was made 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. Universities and colleges were specifically exempted. The intent was to protect heirs-in-law from impulsive or pressured acts of 'deathbed charity' (Jones 1969, 109-19).

clear liberality *and* benevolence can find numberless objects, not included in that Statute in the largest construction of it' (ibid., v. IX 405; emphasis added). On appeal, Lord Eldon affirmed Grant's judgement: 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' (ibid., v. X 540).

The second judgement was that of 1891 on *Commissioners for Special Purposes of the Income Tax v. Pemsel*. The 1799 Income Tax Act (39 Geo III c. 13) exempted the income of any 'corporation, fraternity, or society of persons established for charitable purposes only'. The tax was repealed in 1816, but re-introduced by the 1842 Income Tax Act (5&6 Vict c. 35) with the same exemption. Neither statute offered a fiscal definition of 'charitable purposes'. 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 members of the Church. In 1886, the Income Tax Commissioners stopped exempting the first half of the trust's income, arguing on the basis of recent judicial decisions in Scotland that the fiscal definition of charity within the 1842 Act involved only eleemosynary purposes, not the 'propagation of moral, political, or religious opinions' (Stone 1891, 534). 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.

Speaking for the majority on the last judgement, Lord Macnaghten decided that the 'technical meaning' of charity as used in law also applied to fiscal matters (ibid., 587). It encompassed more than the eleemosynary purposes that might be implied by the 'popular meaning' and 'vulgar use of the word' (ibid., 574). And although it included the objects identified or implied by the preamble of the 1601 Act, it was not limited to these (ibid., 581). 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] 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 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'... (ibid., 583).

This often-quoted passage subsumed the preamble of the 1601 Act, and came to replace it as the

touchstone of legal charity.[12] Just as the preamble assigned an equal status to the objects that fell within the jurisdiction of the local commissions, so Macnaghten attributed an equal quality to the four divisions that corresponded to the technical and legal meaning of charity: charity, so defined, is an all-or-nothing concept. It is distinct from the potentially gradable 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.

The potential for public benefit to be a differentiable concept can be inferred from aspects of its meaning as formed under case law (Charity Commission 2008). The meaning of 'public', for example, is taken to be the public at large, or a sufficient section of it.[13] 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.[14] The meaning of 'benefit' requires it to be demonstrable as fact and capable of proof.[15] It can be discounted on the basis of uncertainty.[16] 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.[17]

However, the potential for public benefit being applied as a differentiable and teleological concept – in order to rank purposes or objects or activities according to their consequences – is undercut by its role under common law. The existence of public benefit, by itself, does not characterize a purpose. As stated above, at most its existence is a necessary condition for a

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

[13] See *Verge v. Somerville* [1924].

[14] For impersonal as opposed to personal links, see *re Compton* [1945], or *Oppenheim v. Tobacco Securities Trust Co Ltd* [1957]; for not excluding the poor, see *Re Macduff* [1896], or *Re Resch's Will Trusts* [1969].

[15] See *Re Hummeltenberg* [1923].

[16] See *Re Shaw's Will Trus*t [1952].

[17] See *National Anti-Vivisection Society v. IR* [1948], or *Joseph Rowntree Memorial Trust Housing Association Ltd v. AG* [1983].

purpose to be considered charitable in an all-or-nothing sense.[18] What is more, the standard for determining its existence varies across charitable purposes (Chesterman 1979, 135-91).[19] 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.[20] 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.[21]

4 The limitations of fiscal charity as an all-or-nothing concept

5 Conclusion

[18] See *Sir Howel Jones Williams Trustees v. IRC* [1947], or *National Anti-Vivisection Society v. IRC* [1948]. For England and Wales, the 2006 Charities Act (55 Eliz II c. 50) subdivided the 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.

[19] See *Gilmour v. Coats* [1949].

[20] See *Dingle v. Turner* [1972],or *Re Cohen* [1973].

[21] See *Thorton v. Howe* [1862], or *Re Watson* [1973].

Table 1

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 are derived from Tables I to VI of Jordan (1959, 368-75). The counties are Bristol, Buckinghamshire, Hampshire, Kent, Lancashire, London, Norfolk, Somerset, Worcestershire, and Yorkshire. Jordan's data have been adjusted by placing donations for the construction and maintenance of churches under 'Municipal Betterment' rather than'Religion', and by expressing donations as annual averages over each time period. 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 (Hadwin, 1978).

[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.

References

Cannan, E. (1912). *The History of Local Rates in England* (2nd ed.). London: P.S. King & Son.

Carmichael, C.M. (2009). 'Doing good better? The differential subsidization of charitable contributions'. manuscript.

Charity Commission for England and Wales (2008). Analysis of the law underpinning *Charities and Public Benefit*. Liverpool: Charity Commission.

Chesterman, M. (1979). *Charities, Trusts and Social Welfare*. London: Weidenfeld and Nicolson.

Dunn, A. (2000). As 'cold as charity'?: poverty, equity and the charitable trust. *Legal Studies*, 20, 222-40.

Hadwin, J.F. (1978). Deflating philanthropy. *Economic History Review*, 31, 105-17.

Jones, G. (1969). *History of the Law of Charity 1532-1827*. Cambridge: Cambridge University Press.

Jordan, W.K. (1959). *Philanthropy in England 1480-1660*. New York: Russell Sage.

King, J.N. (1976). Robert Crowley's editions of *Piers Plowman*: a Tudor apocalypse. *Modern Philology*, 73, 342-52.

Langland, W. (1966). *The Vision of Piers the Plowman* (trans. W.W. Skeat). New York: Cooper Square.

Martin, J.E. (2005). *Modern Equity* (17th ed.). London: Sweet & Maxwell.

Sheridan, L.A., and Keeton, G.W. (1983). *The Modern Law of Charities* (3rd ed.). Cardiff: University College Cardiff Press.

Slack, P. (1988). *Poverty and Policy in Tudor and Stuart England*. London: Longman.

Stone, A.P. (1891). *Law Reports: House of Lords, Judicial Committee of the Privy Council and Peerage Cases* (v. 16). London: Clowes and Sons.

Vesey, F. (1827). *Reports of Cases Argued and Determined in the High Court of Chancery from the year 1789 to 1817* (v. IX,, v. X). London: Sweet and Steven and Sons.