

PART II: PUBLIC POLICY AND THE CHARITY SECTOR

CHAPTER 6

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1. INTRODUCTION

There are a number of serious difficulties with the current common law definition of "charity". These are examined in detail in the two next chapters. In this chapter, the Commission sets out the rudiments of a real definition section 2, then identifies the main policy implications of that definition section 3. The discussion in this chapter provides the basis for an evaluation of the current difficulties in the law and the basis for our proposed reforms. We suggest, however, that reform is better effected through further case law development than through statutory enactment. As a consequence, our discussion in this chapter and the next two is intended more for lawyers, government officials, and the judiciary, than for the legislature.

2. DEFINITION OF CHARITY

(a) The Connotations of "Charity", "Philanthropy", and "Altruism"

One approach to the problem of defining "charity" is to begin by noticing various differences in the meaning of two related terms, "charity" and "philanthropy".¹ "Charity", in its main connotation, signifies acts of kindness and consideration that demonstrate concern for the poor and needy; "philanthropy" signifies acts of generosity that demonstrate regard for the achievements of human kind in general.² The first conception emphasizes feelings of empathy for people in emotional, economic, or physical distress; the latter is moved by respect for the higher endeavours of humanity, such as the sciences, philosophy, the arts, and sports. The abstraction uniting these two terms is that they are both concerned with (1) good (2) others. The structure and content of "charity" and "philanthropy" in these senses are, at this level of abstraction, the same. The differences lie at a deeper level: in the identification of the beneficiaries or the clientele of each (the disadvantaged versus the National Ballet, for example); in the types of human well-being pursued (economic and social capacity versus aesthetic and intellectual capacity, for example); and in the emotions associated with each (concern for the poor versus respect for the achievements of science, for example).

There are pejorative connotations of both terms that "altruism", a general term that comprehends both, avoids. "Charity" is sometimes taken to connote pity or disdain for its beneficiaries; by "philanthropy" some people understand aesthetic conceit, or plutocratic and aristocratic arrogance.³ Perhaps to avoid aspects of the first connotation, "*caritas*" in Corinthians 1:13 is invariably translated as "love" not "charity". "Charity" also evokes a religious connection, and in Judeo-Christian religious traditions, among others, in its highest form it is the love of God. "Philanthropy" is more secular. It is commonly associated, for example, with the benefactions of the great robber-baron philanthropists of the United States in the late nineteenth and early twentieth centuries. In the Aristotelian/Thomist tradition, charity is the principal element of the virtue of friendship; philanthropy or "liberality" is an aspect of the virtue of temperance and, in particular, identifies how wealthy persons should spend their money.

Despite these clear differences in both positive and pejorative connotations, "charity" is used by the law to express both meanings. "Altruism" is almost as useful a term in this same context, and it will be used for the purposes of this chapter *only* in the quest for a real definition. "Charity" and "philanthropy", in this chapter *only*, are used in the narrower senses.

Interestingly, the law also marks a distinction between "charity" and "philanthropy"⁴ for certain purposes. That distinction is also manifest in many of the opinions expressed in submissions to the Commission. Some of the submissions from organizations that do charitable work argued that philanthropic work is "different" and somewhat less worthy of favourable consideration. For many on the philanthropy side of the divide, the feeling was mutual, at least to the extent that these organizations accepted the fact that a substantive divide exists. Among the submissions from philanthropically oriented organizations, there were also differences of opinion as to whether, for instance, sports is as worthy as medical research. Finally, there was a body of opinion that religion is a case apart altogether, perhaps a third category.

Despite these differences of opinion, we take the structural and substantive identity of the two aspects of altruism, (1)good (2)others, as the starting point of a real definition. The present difficulty is to identify first meaning of "doing good", and second meaning of "others".

(b) The Meaning of "Doing Good"

To answer the first question, we must look beyond the purely material aspects of the particular thing or service donated, since wealth in almost any form can be used altruistically. The important issues are the designated purpose and/or the actual use of the donated wealth. The first question, then, is: What purposes or what uses are altruistic?

On the whole, the law does a tolerably good job answering this question. Instead of offering a definition, however, the law merely lists three general purposes, and a fourth catch-all purpose:⁵

(1) the relief of poverty; (2) advancement of religion; (3) advancement of education; and (4) advancement of "other causes beneficial to the community."⁶

This is helpful as far as it goes, but a list is not a definition. We need to know what unites the items on the list. This question is usually avoided by judges and textbook writers alike, even if the fourth category has always implicitly suggested a possible answer.

The philosopher John Finnis, writing in the natural law tradition, contributes helpfully in responding to this question. Finnis identifies a range of human goods almost identical in scope and meaning to the common-law list.⁷

Their unifying factor in his view is that they are "basic forms of human flourishing to be pursued and realized" in all practical activity. The basic human goods on Finnis' more complete list are our ultimate purposes; they are the ones that give all our right-thinking actions their point, making them intelligible to ourselves and others. Finnis argues that there are a limited number of such goods. Life is one of them and, using life as an example, he argues that we understand the life-saving or life-sustaining actions of a doctor because we know without doubt that life is to be pursued. Nobody asks, "Why does the doctor want to save the patient's life?" That question is unanswerable except to say, "That life is to be pursued is self-evident: any sane person is capable of seeing that life *as such* is worth having". Finnis lists life, knowledge, play, aesthetic experience, friendship, religion, and practical reasonableness as goods *per se nota*. We would add work to this list.⁸ In moral theory, these basic goods form the first principles of practical reason in making choices. What is helpful in the theory for present purposes are the similarities with some modification between Finnis' categories and the common-law classification of charitable purposes, and, more important, Finnis' isolation of what it is that unites the things on the list, that is, that they are self-evident and underived human goods.

By "life", Finnis means "every aspect of vitality which puts a human being in good shape for self-determination".⁹ Hospitals, medical schools, the work of surgeons and nurses, famine relief, soup kitchens, road safety laws, etc., all participate in the good of life. By "knowledge", Finnis means, simply, the good we achieve when we get "to the truth of the matter", or the good we identify when we speak of "knowledge for its own sake", or what we mean when we say, "It would be good to find out". Thus, for example, we consider the well-informed person, to that extent, to be well off, and not only for the profitable use he can make of his knowledge. Truth, in short, is self-evidently worth pursuing. By "play", Finnis means "performances which have no point beyond the performance itself, enjoyed for its own sake".¹⁰ The performance may be "solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or *ad hoc*".¹¹ It is sufficient to explain the behaviour of people involved in a game to say, "They enjoy playing". The good of "aesthetic experience" points to the self-evident goodness, "the to-be-pursuedness" of beauty. The good of sociability or "friendship" can range from a minimum of peace and harmony among persons, to acting for the sake of one's friend. By "religion", Finnis means the "establishing and maintenance of a proper relationship between oneself and the divine",¹² the arrangement of all orders in an ultimate order of things. Secular humanism has brought with it scepticism over whether religion is a basic human good. Finnis argues that the sceptic must admit, at the very least, that whether

in fact God exists or not, the question of God's existence is crucially important for everyone. Finally, there is "practical reasonableness" or reasonableness, the basic good of being able "to bring one's own intelligence to bear effectively...on the problems of choosing one's actions and life-style and shaping one's own character...[T]his involves that one has a measure of effective freedom;...it [also] involves that one seeks to bring an intelligent and reasonable order into one's own action and habits and practical attitudes."¹³

Altruism, then, is the provision of the material, social, or emotional means to pursue these basic human goods these common or universal goods to others so that they may flourish. When we help the poor, our object is to provide them with the material advantages of shelter and sustenance (life), as well as the means to pursue the other goods (knowledge, play, religion). Material or financial support for a primary school provides the means for others to pursue not only the good of knowledge, but, especially among children, the good of practical reasonableness, that is, the ability to live a balanced, well-ordered life. Donations to hospital foundations go exclusively to the purposes hospitals pursue, such as care of the sick or health research, the point of which is to contribute to health of others.

There are as many ways to assist others in the pursuit of these goods as there are people with the resources to do so. In fact there are many more: the variety in specificity of these goods is as rich as the human imagination; they are certainly richer than the hundreds of cases cited in the always lengthy definition chapters of charity law texts. There is a logic about the connection between the goods and any particular instantiation which Finnis attempts to capture in the concept of "determination" or "implementation". A community, through its laws, provides the conditions for the coordination of the pursuit by its members of these human goods, and therefore a law, in the natural law tradition, is a determination or implementation of these goods. Similarly, altruistic projects, that is, projects formally intended to help and which actually do help others to pursue these goods, are also, according to the definition being advanced, determinations or implementations of the goods. In both cases, practical intelligence is engaged to design and implement a project (of law or charity) that actually instantiates or is a determination of the good.

One aspect of the divide, noted previously, between "charity" and "philanthropy" may now be more easily explained. The divide is based not on a ranking of these goods, but, in part, on the degrees of deprivation of the means of flourishing in the beneficiaries. The economically destitute are bereft of any means; the young dancer's chances of perfecting his art are merely diminished by his lack of resources. True, we can easily imagine cases in which our sympathy and, therefore, even our altruism is directed more strongly towards the promising dancer who lacks means, than it is towards the derelict who will not change his ways. Nonetheless, there are degrees of need and degrees of deprivation of the means to live a fulfilling life. "Charity" in the narrow sense identifies the most wanting end of the continuum, "philanthropy", the least. The critical observation is that what seemed to be a difference in kind is now seen as only a difference in degree. Perhaps this explains the law's wisdom in its more inclusive use of "charity".

(c) The Meaning of "Others"

The second half of our working definition of altruism required that whatever was determined to be good had to be done "for others". Benefits to oneself, one's family, one's relatives, or one's friends are more a matter of obligation (moral or legal) or affection than altruism, even though it is often said that charity begins at home.¹⁴ Indeed, the obligational aspect is recognized by the income tax system in its treatment of the family as, in part, the taxable unit. "Altruism" connotes dispositions towards individuals that are more remote in our affections or to whom we are not otherwise obligated. "Strangers" is perhaps too strong a word to express the distance required, but it is helpful because it does emphasize that some such distance is mandatory.

The requirement of emotional and obligational distance seems easy to accept. Interestingly, it raises a more difficult question regarding the general relevance of the motives of a donor, because, in part, it is the motives of the donor that we are focusing on in requiring an emotional and obligational distance. To be purely altruistic, we seem to be saying, an act has to have as its motive, as well as its form and actual effect, the doing of good for strangers.¹⁵ True altruism, like true liberality or true justice, in this view, is a disposition of the will before it is anything else.¹⁶ Clearly, the case of helping the economically destitute will usually fit this difficult criterion, since any act of aid to the destitute almost certainly has to have as its principal motive helping a stranger.¹⁷ Just as clearly, however, much philanthropic work is motivated by considerations other than or in addition to simply doing good by others, for example, self-aggrandizement, social status, or personal gratification.¹⁸ In this way, an inquiry into motives may help to understand the distinction between charity and philanthropy: these classifications identify two poles on a second continuum, a continuum expressing the purity of the motives of people who help strangers. Charity is at one end, since an act of this nature is invariably quite close to the ideal of pure altruism; philanthropy is at the other, since an act of this nature is probably less purely altruistic in motive.

The legal, if not the moral, practice, however, is very reticent about engaging in any overt consideration of a donor's true motives. For obvious reasons, the law generally focuses only on the donor's formal purpose and the actual effect.¹⁹ Consequently, the law does not recognize any general distinction between charity and philanthropy on this ground either. Nonetheless, the distinction is an important one which ought to be borne in mind in any discussion of the law of charity aimed at its reform.

The observation that charity and philanthropy can be understood as situated on two continuums (first, the degrees of deprivation of the means of living a fulfilling life and, second, the purity of the donor's motives) is evidenced in an interesting and provocative way in the good of religion. The secular humanist argues as follows: "Religion is mere superstition, not really a good, and therefore its absence can in fact cause no real or permanent (only temporary and psychological) deprivation. Moreover, the good if it is good is generally consumed by the members of the faith. Their donations, therefore, go to themselves. In sum, there is no good, and even if there is, it is not for others." Yet, contrary to the sceptic's conclusions about what the law should be, the law treats religion perhaps as the most favoured basic human good of all. This degree of difference of opinion makes for an interesting debate. The sceptic's reading of religion is based on his explicit denial of the self-evident proposition that religion is good. A more positive view maintains that donations for the support of religious institutions are not, as it were, one half of an exchange

transaction in which the institution offers psychological comfort in return for membership dues.

3.POLICY IMPLICATIONS OF THE REAL DEFINITION

There is obviously a great deal more to be said before these arguments for a real definition of charity we revert to that term are acceptable philosophically. The immediate objective in identifying the elements of a real definition is, thus, more limited. The present purpose is to develop a definition that provides the basis for a critique of the common-law definition and the basis for reform proposals. To summarize what has been said about a definition so far: *the truly charitable act is the act whose form, actual effect, and motive are the provision of the means of pursuing a common or universal good to persons who are remote in affection and to whom no moral or legal obligation is owed.* In applying this definition to evaluate a project, we might proceed, *first, by identifying the goods or intended goods; second, by asking whether the particular project is (really) a determination of one or more of the goods; third, by asking whether the project benefits only strangers; and fourth, rarely, by questioning whether the project is also motivated by the desire to be charitable.* There are several policy implications of this conception of charity.

First, this idea provides considerable help in understanding the law's categorical distinction between charity and politics. In a liberal democracy, politics is the process of a society's collaborative effort to make law, to come to some agreement or understanding on a particular determination of the good. By definition, then, a political opinion is not a determination of the good itself. To take a side in a political debate, to support a cause in the political arena, is to argue about in what the good consists, under the circumstances, and to encourage the government to legislate or spend accordingly. In a liberal democracy, only the institutions established for the purpose of making law may say which parties have hit upon the best balance or the best formulation, under the circumstances. The liberal- democratic process of law-making itself assumes that any reasonable opinion as to what the law should be, *might* be right, and concomitantly, each side in the debate must from the outset be prepared to accept that it might be wrong. These are some of the presuppositions of political discourse in a liberal society. A just law, by contrast, represents not only a society's settled convictions as to what purposes, acts, or provisions, if any, are determinations of the good, but is by definition (if it is a *just* law) a determination of the good. Likewise, and this is the point, a charitable act is also a determination of the good. Thus, in this way, the distinction between politics and charity parallels the distinction between politics and law: the debate about the content of the good and a determination of the good itself are two different things.²⁰

Second, the distinction between politics and charity, just described, is largely formal. It relies primarily on the logic of the acts described, and not on the motives underlying them, to make the required distinction. Thus, the formal description of the charitable act (doing good for others) and the formal description of the political act (agitating to affect public awareness or to change the law or policy) are different, even if the motives underlying these activities to help others are often identical. Similarly, practising politics and practising law (interpreting and applying law) are formally distinct activities, even if each is properly motivated by the desire to see justice done. Interpreting and applying the law or pursuing its application, although motivated by

the desire to help others or to see justice done, is likewise formally distinct from charity. The recognition of these formal distinctions is important to the integrity of each of the activities identified. People who argue that there is no distinction between politics and charity generally make the mistake of failing to distinguish the activities at the level of their form. This mistake is as harmful to the activity of politics as it is to charity: it fails to differentiate between *what* is being done and *why* it is being done.

Third, acts do not present themselves in the world with labels identifying their true form. To understand what kind of act is performed in a particular case requires an evaluation that makes use of all the available evidence, including evidence relating to motive and intention. This evaluation or judgment will be more or less valid for cases on the margin, but easily justified for core instances. Neither the open-textured quality of this exercise nor its perennial difficulty detract from the validity of the formal distinctions just established.

Fourth, some acts which appear political or commercial or otherwise non-charitable may, in fact, be formally charitable. Acts which appear political, but which are ancillary and incidental to an act of charity, or are necessary or purely instrumental to it, are essentially charitable. Thus, to pick a mundane example, the donor's writing of the donation cheque and placing it in the envelope are instrumental to the donor's act of giving and therefore a part of his charitable act. Or, more importantly, an organization which is legally required to be exclusively charitable (and therefore do only charitable acts) does not jeopardize that status by engaging in apparently political activities which are, in fact, merely ancillary and incidental to its charitable activities. Similarly, in another important example, when such an organization runs its annual bazaar or charity golf tournament, or invests its savings to generate income, or engages in fund raising, these activities are best described as formally charitable as fund raising or investing *for* charity not businesses, since these activities are purely instrumental to the altruistic purposes and activities of the organization, and are therefore, in essence, charitable.

Fifth, this definition allows one to see that the assessment of whether an act is charitable is a very context-specific question. It helps in coming to an understanding of how certain specific projects come to be included or excluded in the common-law case law on charities. Ideally, the decision-making process ought to engage the community's collective wisdom about the content of the good, under the circumstances, and whether the particular project chosen by the donor in fact tends to its achievement or whether it is plainly impractical. That the motivation is charitable in the sense described is often sufficient for a positive answer. But this is not always so. A project may seem properly motivated, but still not be charitable because it is badly designed or misconceived. For example, there are a number of instances where judges have decided that the donor's project, although charitably motivated, was not practically useful. An interesting example of this is *Re Shaw*.²¹ This case dealt with a bequest by the author G.B. Shaw to fund research into the practicability of implementing a forty-letter alphabet. Harman J. held that the trust was not charitable because, among other reasons, the objective once achieved would be of insufficient "utility".²² Understandably, however, courts are also reluctant to question explicitly the intelligence of charitably motivated persons, so often this issue of the practical usefulness of a project is handled with subtlety and care. Frequently, it is dealt with

using a proxy rule, but this merely masks the true reason for the decision and often leads to considerable doctrinal confusion.²³

Sixth, this context specificity of proper determinations of the good indicates that very little is to be gained by the law in attempting to define charity in any but the most general terms. Although it does not preclude searching for something more definitive than the *Pemsel* definition, it does suggest that significantly more specificity may well be impossible and, in any event, probably would be unhelpful in achieving any greater clarity in the law.

Seventh, we can also understand some of the confusion in the case law if we look at the historical practice of the courts in light of this definition. We can see how inconsistent the practice really was or is, and in this process try to understand why, for example, such things as sports, recreation societies, or the Jewish and Catholic religions were improperly excluded from the list.²⁴ The judicial policy on sports and recreation societies is partially explained by the pretension to seriousness of Victorian judges and their consequent scepticism about the good of play. The position on certain religions is simply a reflection of the chauvinism, or even bigotry, of English society at that time. In these examples we see the community, through its judges, struggling to articulate its best determinations of the good, sometimes failing due to its own, obvious (in retrospect) limitations. This approach now provides a basis for arguing why some associations concerned with the preservation of the natural environment, for example, might be charitable: a heightened awareness of the implications of pollution on the quality of life generally leads to a recognition that the preservation of the natural environment requires a concerted communal effort, and that the ultimate object of such an effort is the preservation of life.²⁵

4.CONCLUSION

This attempt at a real definition of charity, however tentative, does suggest several broad parameters regarding the legal definition of "charity" and the advisability of adopting a statutory definition. We reiterate these broad conclusions in here.

(1) Two broad distinctions emerge from the discussion:

(a) One distinction is that there is a noticeable difference between two types of charitable activity: one designating acts motivated by a desire to help the poor; the other designating acts motivated by a desire to advance human achievement or quality of life. It may or may not be advisable, for reasons of social policy, for instance, to favour the former over the latter (with a larger tax subsidy or a less severe restriction on political activity, for example²⁶). The possibility of drawing a distinction suggests that doing so in a statute is at least feasible. The nature of the distinction, however, which we characterize more as a matter of degree than as a matter of kind, also suggests that utilizing it in a statutory definition may be fraught with difficulties in application. Moreover, because this was an attempt at a *real* definition that is, a definition which people would be inclined to accept after reflection on the true meaning of charity there undoubtedly would also

be considerable political difficulty in drawing lines that appear to rank charitable activities.

(b) The other distinction is between charity and politics. Our argument defined this as a difference in kind. As such, any statutory or other legal definition must respect it or fall into serious confusion. It is a separate question, however, whether a charitable organization should be permitted to undertake political activities, and if so, to what extent. The line suggested in the discussions so far is that political activity be permitted only to the extent that it is purely instrumental to a charitable purpose and, therefore, essentially charitable. Thus, for example, the expression used to designate permissible political activities in the *Income Tax Act*²⁷—those that are "ancillary and incidental to its charitable activities"—is, in the Commission's view, basically correct. Beyond that, an organization ceases to be exclusively charitable in purpose. Whether this is desirable will depend on why the legislator may want organizations to remain exclusively charitable.

(2) Religion emerged as a possible third category. By its own interpretation in our view, the only proper interpretation where matters of legislative policy are in issue religion does not involve charity in the sense of (1) doing good (2) for others, as clearly as does, for example, relief of poverty. Yet, in addition to being a traditional well-spring of such charitable activity, practising a religion *is* good. Although not other-regarding in the same sense as other types of charity, religion is nonetheless other-regarding in its worship of God, obeying His law, and constructing and maintaining a sanctuary for His worship.²⁸

(3) The argument for a real definition also suggests that any statutory definition, first, be broadly inclusive it ought to include the good of play and aesthetic experience, for example and, second, be general, since whether an act is a determination of a good can be determined only in light of all the circumstances. The fact remains that the common-law test as laid down in *Pemsel* is already quite general. Moreover, Canadian courts, if not elements of the public administration, have already shown themselves quite open to further sensible developments.²⁹

(4) The attempt at a real definition is, by nature, conceptually oriented. Nothing yet has been said about function or social policy. Thus, any particular statutory definition, besides complying with the constraints suggested here, may also have to answer to its function in the relevant statute and the social policies underlying that statute.

(5) The motive of the donor and the practicality of his or her project as well as the donor's formal purpose are considerations that influence our evaluation of the donor's act as charitable. The legal practice, for obvious reasons, generally avoids overt consideration of the first two elements. They are, nonetheless, indispensable in understanding that practice.

(6) Acts which are instrumental to, or are ancillary or incidental to, charitable acts are essentially charitable. This level and type of apparently political

activity, of apparently commercial or business activity, of fund raising activity, and of investment activity are best understood as essentially charitable.

End notes:

1

On the definition of "charity", see, generally, N. Brooks, "Charities: The Legal Framework" (Ottawa: Secretary of State, 1983) [unpublished]; M.C. Cullity, Q.C., "The Myth of Charitable Activities" (1990), 10 Est. & Tr. J. 7; T.G. Watkin, "Charity: The Purport of `Purpose'", [1978] Conv. 277; G.H.L. Fridman, "Charities and Public Benefit" (1953), 31 Can. B. Rev. 537; N.P. Gravell, "Charitable Trusts and Ancillary Purposes", [1978] Conv. 92; L.B. Chisolm and D.R. Young, "Introduction" to "What is Charity? Implications for Law and Policy: A Symposium" (1989), 39 Case W. Res. L. Rev. 653; F.H. Newark, "Public Benefit and Religious Trusts" (1946), 62 L.Q.Rev. 234; E.B. Bromley, "Contemporary Philanthropy: Is the Legal Concept of `Charity' Any Longer Adequate", in D.W.M. Waters (ed.), *Equity, Fiduciaries and Trusts* (Scarborough: Carswell, 1993) 59; D. Baker, "Rethinking Charity: What Do We Owe Each Other?" (1991), 10 Philanthrop. 33; and P. Mitchell, "The Political Purposes Doctrines in Canadian Charities Law" (1995), 12 Philanthrop. (No. 4) 3.

2

See D.H. McMullen, S.G. Maurie, and D.B. Parker, *Tudor on Charities*, 6th ed. (London: Sweet & Maxwell, 1967), at 1, citing *Morice v. Bishop of Durham* (1804), 9 Ves J. 399 (S.C.); 32 E.R. 656, aff'd (1805), 10 Ves J. 522, 32 E.R. 947 (L.C.): "In its widest sense `charity' denotes all the good affections that men ought to bear towards each other. In its most restricted sense it denotes relief of the poor." See, also, Chisolm and Young, *supra*, note 1, for a similar distinction. This distinction formed the main basis of the argument of the tax commissioners in *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531, [1891-4] All E.R. Rep. 28 (H.L.) (subsequent references are to [1891] A.C.) and surfaces from time to time in proposals to narrow the scope of the definition. See, for example, B. Whittaker's minority opinion in U.K., National Council of Social Service, *Charity Law and Voluntary Organizations: Report of the Goodman Committee* (London: Bedford Square Press, 1976), at 145. Scots law recognizes a narrower definition of charity as well. See C. de B. Murray, *The Law of Wills in Scotland* (Edinburgh: W. Green & Son, 1945), at 71-74.

3

For the latter perspective, see, for example, L. McQuaig, *Behind Closed Doors* (Markham, Ont.: Penguin Books, 1987), at 57: "[O]ne is struck by how much of the money seems to go to the very established cultural and educational institutions and how little to anything directly helping the poor"; T. Odendahl, *Charity Begins at Home: Generosity and Self-Interest Among the Philanthropic Elite* (New York: Basic Books, 1989); and L.M. Salomon, J.C. Musselwhite Jr., and C.J. DeVita, *Partners in the Public Service: Government and the Non-Profit Sector in the Welfare State* (Washington: Independent Sector and the United Way Institute, 1989).

4

For charities established for the relief of poverty, the public benefit requirement is less stringent. For a discussion of the rule, see *Re Scarisbrick; Cockshatt v. Public Trustee*, [1951] 1 Ch. 622, [1951] 1 All E.R. 822 (C.A.). See the "poor-relations" cases discussed *infra*, ch. 8.

5

See *Inland Revenue Commissioners v. Baddeley*, [1955] A.C. 572, at 583, [1955] 1 All E.R. 525, at 528 (H.L.), *per* Viscount Simonds: "[N]o comprehensive definition of legal charity has been given either by

the legislature or in judicial utterance." See, also, in *Incorporated Council of Law Reporting for England and Wales v. Attorney-General*, [1972] Ch. 73, at 88, [1971] 3 All E.R. 1029, at 1036 (C.A.) *per Russell L.J.*

[6](#)

Commissioners for Special Purposes of the Income Tax v. Pemsel, *supra*, note 2, at 583.

[7](#)

See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) ch. 4. See, also, G. Grisez, *Beyond the New Morality? The Responsibilities of Freedom*, 2d ed. (Notre Dame: University of Notre Dame Press, 1980). For more recent statements of the theory, see R. George, *Making Men Moral* (Oxford: Clarendon Press, 1993), and J. Boyle, G. Grisez, and J. Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987), 32 *Am. J. Juris.* 99.

[8](#)

Different versions of the theory have formulated the self-evident goods in different ways.

[9](#)

Finnis, *supra*, note 7, at 86.

[10](#)

Ibid., at 87.

[11](#)

Ibid.

[12](#)

Ibid., at 89.

[13](#)

Ibid., at 88.

[14](#)

Perhaps this maxim explains the anomalous "poor relations" cases mentioned. For further discussion, see *infra*, ch. 8.

[15](#)

There is a provocative suggestion in economic literature that an act of charity is just another consumption preference of the donor. L.A. Blum, *Friendship, Altruism and Morality*, paperback ed. (London: Routledge & Kegan Paul, 1982), at 5 characterizes a related view in the Kantian tradition this way:

To act from altruistic feeling or emotion is to act out of an inclination or desire. Though the inclination is towards the good of another, action thus prompted is fundamentally egoistic in its motivation. For the agent acts beneficently only because he happens to have a particular inclination to promote the others' good.

16

That purity of will as the foundational element is affirmed in St. Paul, Corinthians I, 1:13.

Consider also Maimonides, "Eight Degrees of Charity":

The first and lowest degree is to give, but with reluctance or regret. This is the gift of the hand, but not of the heart.

The Second is to give cheerfully, but not proportionately to the distress of the sufferer.

The Third is to give cheerfully, and proportionately but not until solicited.

The Fourth is to give cheerfully, proportionately, and even unsolicited, but to put it in the poor man's hand, thereby exciting in him the painful emotion of shame.

The Fifth is to give charity in such a way that the distressed may receive the bounty, and know their benefactor, without their being known to him...

The Sixth which rises still higher, is to know the objects of our bounty but remain unknown to them...

The Seventh is still more meritorious, namely, to bestow charity in such a way that the benefactor may not know the relieved persons, nor they the names of their benefactors...

The Eighth and the most meritorious of all, is to anticipate charity by preventing poverty; namely, to assist the reduced fellowman, either by a considerable gift, or a sum of money, or by teaching him a trade, or by putting him in the way of business, so that he may earn an honest livelihood, and not be forced to the dreadful alternative of holding out his hand for charity.

17

But compare this statement from *Re Campden Charities* (1881), 18 Ch. D. 310, at 327, 50 L.J. Ch. 646 (C.A.): "We know that the extension of doles is simply the extension of mischief."

18

In *Attorney-General v. Tyndall* (1764), Amb. 614, (Ch. D.), Lord Healey stated that "it is indifferent to the donors in what species they give their money: not service to the poor but vanity is their motive".

19

See American Law Institute, *Restatement (Second) of Trusts* (Washington, D.C.: 1957) §368:

If the purposes to which the property is by the terms of the trust to be devoted are charitable purposes, the motive of the settlor in creating the trust is immaterial...Even if the motive of the testator in disposing of his property is to spite his heirs, the trust is none the less a charitable trust if the purposes are charitable.

The motives of the donor, as an object of inquiry in the determination of whether a gift is charitable, is rejected categorically at the outset of the chapter on charitable trusts in A.W. Scott, *The Law of Trusts*, 3d ed. (Boston: Little, Brown & Co., 1967). Professor Scott noted that lawyers tend to become somewhat "lyrical" when they attempt to define what is a charitable trust. He cited the case of *Vidal v. Girard's Executors*, 2 How. 127, 11 Towel. ed. 205 (1844), in which the lawyer arguing in favour of upholding a trust created by Mr. Girard to found a secular school for orphan children argued:

[W]hatever if given for the love of God, or for the love of your neighbour, in the catholic and universal sense given from these motives and to these ends free from the stain or taint of every consideration that is personal, private or selfish.

Professor Scott remarked that, although this "striking statement may appeal to the ear, it is wholly unsound as a definition of a charitable trust". Scott continued, at 2767:

From the legal point of view, perhaps no definition could be worse than this. It makes the matter depend upon the motive of the donor rather than the purpose to which the property is to be applied. It is well settled that the motive of the donor is immaterial. A trust is nonetheless charitable although the donor was actuated by a desire to glorifying himself or by a desire to spite his relatives....St. Paul, it is true, in his tribute to the virtue of charity, was speaking of the motive rather than the purpose; but St. Paul was not attempting to define charitable trusts or to deal with the question of their validity under the Anglo-American system of jurisprudence.

Despite these very strong statements, however, the existing law occasionally does have recourse to the motives of the donor as a relevant determining consideration. The *Income Tax Act*, R.S.C. 1985, c.(5th Supp.), is implicitly sceptical regarding the motives of "philanthropy" in imposing a much more stringent disbursement regime on foundations than on operating charities. In addition, in some circumstances courts are forced to look beyond the apparent charitable form of a transaction to discern its true motive and, thereby, its true nature. Thus, in *R. v. Burns*, [1988] 1 C.T.C. 201, 19 F.T.R. 275 (*sub nom Burns v. Minister of National Revenue*) (F.T.D.); aff'd [1990] 1 C.T.C. 350, 35 F.T.R. 121n (C.A.), it was held that the taxpayer's donation to the Canadian Ski Association was made in response to the Association's expectations that the gift would be made in exchange for ski instructions for the taxpayer's daughter. See, also, *Homa v. Minister of National Revenue*, [1969] Tax A.B.C. 961, where an ostensible gift to an institution providing education to the son of the taxpayer was held not to be a charitable donation.

20

Only in the circumstance where the political effort is aimed at overturning an unjust law, such as Amnesty International working against legalized torture in Chile, or where that effort can be said to be purely instrumental to a charitable purpose, is it essentially altruistic.

21

Re Shaw; Public Trustee v. Day, [1957] 1 W.L.R. 729, [1957] 1 All E.R. 745 (Ch.D.); on appeal [1958] 1 All E.R. 245n (C.A.).

22

This latter test is formulated in the *Restatement (Second) of Trusts*, *supra*, note 19, §368, as follows: a purpose is charitable only if "its accomplishment is of such social interest to the community as to justify the property to be devoted to the purpose in perpetuity".

23

In *Re Shaw*, *supra*, note 21, for example, Harman J. held that the objects were also invalid because the pursuit of knowledge, without a teaching element, was not a charitable purpose. This holding is now agreed to have been mistaken.

24

Some of these impediments were removed and charitable trusts in favour of Jewish, Roman Catholic, and Protestant Dissenters were permitted in a series of statutory reforms in the early to mid-nineteenth century. See *Roman Catholic Relief Act, 1813*, 53 Geo. 3, c.(U.K.); *Roman Catholic Charities Act, 1832*, 2 & 3 Will. 4, c. 115 (U.K.); *Religious Disabilities Act, 1846*, 9 & 10 Vict., c. 59 (U.K.),

Nonconformists' Chapels Act, 1844, 7 & 8 Vict., c. 45 (U.K.); *Places of Worship Registration Act, 1855*, 18 & 19 Vict., c. 81 (U.K.); and *Roman Catholic Charities Act, 1860*, 23 & 24 Vict., c. 134 (U.K.).

[25](#)

Compare *Hobson v. Minister of National Revenue* (1959), 59 D.T.C. 211, 21 Tax A.B.C. 433, in which it was held that the Audubon Society, whose main purpose was to stimulate an interest in the need for conservation, was not charitable.

[26](#)

See, for example, D. Baker, "ViewpointRethinking Charity: What Do We Owe Each Other" (1991), 10 *Philanthrop.* (No. 1) 33. Baker argues that equal subsidization by the tax system distorts charitable giving since those with the resources to give, give to philanthropy rather than charity. Thus he states, at 35, that "[a]t the same time as we allow these elite interests to drive the public agenda, fueled by the tax subsidy..., much harsher treatment is accorded to the `political' activities of charities, particularly those that seek to advance the interests of members of disadvantaged groups in society". In a similar vein, see I. Morrison, "Redefining `Charities' in the Income Tax Act", [1982-83] *Philanthrop.* (Winter) 10; H.G. Intven, "ViewpointPolitical Activity and Charitable Organizations", [1982-83] *Philanthrop.* (Winter) 35.

[27](#)

Supra, note 19.

[28](#)

In any event, there are very substantial constitutional protections which must be considered.

[29](#)

See, for example, *Re Laidlaw Foundation* (1984), 48 O.R. (2d) 549, 13 D.L.R. (4th) 491 (Div. Ct.).

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