CHARITY AND RELIGION: HISTORICAL CONNECTIONS IN OUR LAW

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Introduction

Charities hold a privileged position in our law. They enjoy a freedom from most forms of taxation, and they still hold at least a partial immunity against tort and contractual liability that is fastened upon for-profit enterprises. Charities can also take advantage of legal privileges, procedural and substantive, that are not granted to other private organizations. The doctrine of *cy près* is perhaps the best-known example, but there are many others. It is often said in legal textbooks that gifts or trusts established for charitable purposes are favorites of the law, and this is no idle statement. Its veracity and consequences are manifested in many corners of our jurisprudence. Almost always it is to the advantage of donors to be able to claim that their gifts were made with a charitable purpose, and the charitable organizations themselves support these claims—no cause for wonder.

But what constitutes a charity, and what is a charitable purpose? What does it take to qualify for these advantages? Sometimes the answer seems obvious. A gift to one's friends or to the members of one's family may have a benevolent motive, but it is not charitable in nature. It is a private gift. This is common ground among commentators. A donation to a school, by contrast, even the one a donor attended as a youth, counts as a charitable gift. It promotes an educational purpose, and this is so even if the donor's motives have a hint of self-interest—they may stand a little taller, for example, if their school is highly ranked in *U.S. News and World Report*. Still, the alum's predominant motive is to benefit education. So we count the gift as charitable. What about a gift to the school one's children attend? That has been a more contentious question in the law, since it lies somewhere between the two. It can help keep the (nondeductible) costs of tuition a little lower for the parents. It gives them more than bragging rights; it saves them money they would otherwise be obliged to spend on their child's education, at least if other parents do the same. Purposes and circumstances sometimes matter.

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Hard cases thus exist, but the standard that has been widely adopted in modern law for drawing a distinction between purposes that are charitable and those that are not has come to be whether the gift promotes what can be called “a substantial public interest.” The gift to one’s children promotes a private interest; the gift to the school promotes a public interest in the furtherance of the education of the country’s citizens. Thus only the latter qualifies for the various benefits conferred on charities under today’s law. This is why the gift to the school attended by one’s children is a difficult case. It does a little of both. However, there is general agreement that certain purposes are presumed to be charitable no matter the motivation: the relief of poverty, the furtherance of education, the preservation of public health, and the fulfillment of governmental purposes. They obviously qualify as charitable. And with the expansion of modern government into many spheres of life once counted as private—the provision of health services being the most immediately topical today—the scope of charitable purposes has expanded naturally, until it can now be said with some veracity that charitable organizations merit special treatment under the law precisely because they perform functions that would otherwise be left to the government. Charities deserve a tax break, it is said, because they take a financial burden off the taxpayer.

If this is so, gifts to religious organizations present a problem. In what sense can religion be said to fit the definition of a charity as something that provides a public benefit or takes a financial burden off the government? That is a little hard to see. In American life today, religion is widely regarded as a private matter. Indeed, a tide of secularism is sweeping over our constitutional law. In this climate of opinion, it seems natural that the promotion of any specifically religious purpose should be treated with suspicion. To some, granting a privileged status to religious organizations seems contrary to the Establishment Clause of the First Amendment to the Constitution of the United States. That clause bars the establishment of any religion by Congress, and this has made it particularly difficult to fit religion into the current definition of a charity. Religious organizations are established to promote private interests. In fact they do many things the government is constitutionally prohibited from doing. How, then, can they be relieving the government of a financial responsibility that belongs to it?

So far, at least, this apparent inconsistency in logic has caused problems only around the edges of our law. Gifts to churches are treated as charitable despite it. Atheist activists grumble about “tax subsidies,” but so far they have not made much headway in Congress or the courts. It has been interesting, all the same, to

see the answers that have been given to their arguments. One answer, certainly the most common, has been to say that religion is simply "an exception" to the requirement that a charity be organized for a public purpose. However anomalous it seems, it is too well established to be overturned. Another response has been to discern a connection between religious and public purposes. This has been a recurring theme. A bequest in trust for masses to be said for the soul of the donor, for instance, is held by the *Restatement of Trusts* to be charitable because "according to the doctrines of the Roman Catholic Church [the benefit] is not confined to the particular souls but extends to the other members of the church and to the rest of the world" (American Law Institute 1959, 371g). Explanations like these are beginning to sound a little hollow, however, at least when one starts from the language in recent U. S. Supreme Court cases on religion. Who knows? Things may change. Some wish it.

The purpose of this essay is not to enter directly into the debate on this difficult and contentious subject. Its purpose is historical—to consider the nature of European laws of charity as they developed from the Middle Ages to the time of the founding of the American republic in the eighteenth century. It was this law upon which our own was built. It was upon the definition of charity inherited from the past that our own law long depended, and this old law looked very different in its assumptions from that of recent decades. Although our ancestors would have been familiar with the favor accorded bequests for public purposes, they would have regarded the exact equation of governmental and charitable purposes with incomprehension. On this score, we have taken a quite dramatic turn away from the law with which we began.

The European Law of Charity, ca. 1600

On first sight, the similarities between the law of charity in 1600 and today's law seem great. Continuities stand out. Then as now, charities were favorites of the law. Gifts and legacies devoted to charitable purposes enjoyed many privileges. Substantial treatises called "On the Privileges of Pious Donations" (or some variant of that title) were written to discuss and analyze these privileges. A standard bibliography lists eleven of them compiled between 1550 and 1750, and of course the subject was also covered in most general treatments of European law. English law did not differ markedly from that of the Continent on this score, except that it was complicated by the passage of several detailed statutes of charitable uses and by the condemnation of superstitious uses that followed from the English Reformation. I

have been able to consult several from among these treatises, one by Andreas Tiraquellus (d. 1558), a French jurist active in the courts of Paris, the second by Francisco a Mostazo (17th century), a Spanish commentator of the following century, and compare them with the treatment found in two English works written around the same time, the first by Henry Swinburne (d. 1624), the other by Sir Francis Moore (d. 1621). I have also made use of two more general works on testamentary law in the *ius commune*, both of which contain substantial treatments of the subject. One is that of Franciscus Camarella (17th century), and the other of Franciscus Mantica (d. 1614). All of them mentioned the importance of religion in defining and implementing the law of charity. Mostazo, for example, began his treatment by assuming that "Free rein is to be granted in favor of gifts to churches and to other pious purposes, which the laws encourage by both divine and natural law." Gifts are to be counted as charitable, he added, whenever they are made for the honor of God, "to whom we must show ourselves most grateful" (1698, Lib. I, c. 3).

Privileges Accorded to Charitable Gifts

The privileges accorded to charities under the *ancien régime* turn out to have been numerous and valuable, just as in modern law. Tiraquellus provided a long list of 167 of them (1582, 460-85), although one must say that a modern observer would count some of them as slight variations on a theme. The compilation of ever-longer lists of fine distinctions was always a temptation for the European jurists—it could become something like a contest to see who could provide the longest lists, and Tiraquellus seems to have been an eager contestant. In his defense, he did provide a separate legal reference for each privilege, usually a text from the Roman or canon law, supported by at least one learned commentary on the text. It might also be said that all the privileges were distinct from one another. Separating them did no harm. We ought to recognize that advantage. Even making allowance for the disconcerting consequences of prolixity, the list would have been useful in practice. It showed that the privileges of charitable gifts and legacies were many, and it allowed lawyers easy access to authorities supporting each of them.

Even more striking today than their utility or their large number, however, is the overlap in substance with a great many of the early privileges and those still recognized today. Many would be entirely familiar to modern lawyers. Indeed they are the same as those that still exist. It is impossible not to regard them as ancestors, even progenitors, of our modern list of the special privileges accorded to charitable bequests. Here are four representative examples.

One is that a charitable trust will not be held invalid because it lacks an ascertained beneficiary. An essential element of a normal private trust is the existence of a designated, certain and identifiable person or persons to whom the trustee owes a duty to administer the trust property. Furthermore, the identity of this beneficiary must be ascertainable within the period allowed by the Rule against Perpetuities. Without such a beneficiary, one essential element of any obligation—someone with standing to enforce it—is missing. Hence a trust "for the benefit of such persons as the trustee shall select" is invalid from the start, even if the trustee wishes to act under it. With a charitable trust, however, the reverse is true. The lack of any named person to enforce it does not render it invalid, and thus it does not fail. The law allows a public official, typically the attorney general, to bring suit against a negligent or dishonest trustee. Hence a trust "for the benefit of such paupers as the trustee shall select" is valid, simply because its purpose is charitable. On this distinction, Tiraqellus (1582, 41-42) and Swinburne (1590, Pt. I §16, nos. 5-6) were at one.

A second privilege, both modern and medieval, accorded to charitable bequests is the possibility of perpetual existence. The Rule against Perpetuities, even in its weakened modern form, prevents property from being held forever inalienable. A family settlement must eventually come to an end. A charity, however, need not. We see monuments to that generous treatment all around us: charitable institutions that have lasted over the years, some of them still subsisting in part on grants of money and property made long ago. Churches and universities are the most obvious examples. This too was a medieval rule. Gifts to the church were to last (Tiraquellus 1582, 575-76). Indeed, under the canon law the circumstances in which property granted to a church could ever be alienated were subject to strict requirements of need and consent from above. The strictness of these requirements resulted in what was called the "dead hand" control of the church. It resulted in the adoption of mortmain statutes in many European lands; they prohibited unlicensed alienations to the church (Mostazo 1698, Lib. I, c. 3, no. 12). The privilege of perpetuity accorded to charitable bequests thus made a difference in practice, and it has not been altogether abandoned in modern law.

A third illustrative privilege, already mentioned, was the doctrine of *cy près.* It was connected with, and perhaps even required by, the second privilege. Charitable purposes could become obsolete over the course of time. A trust established to find a cure for a specific disease becomes useless when that cure is found. A fund set up to aid the students of one educational institution will be

useless if that school ceases to exist. In such circumstances the doctrine of *cy près* allows the fund to be redirected to a charitable purpose which is "as near as possible" to the donor's original intention. Modern lawyers are sometimes surprised to learn how old this doctrine is, but in fact it is a product of the European *ius commune*. Tiraquellus put it as number 135 on his list, stating: "Gifts for a certain pious use can be converted to another pious use" (1582, 618-619). A legacy to build a church in one location could be used to build a church elsewhere if the first location was impossible or even inconvenient. As an English civilian stated circa 1600, "[I]f it bee not possible to observe the saide use, then the ordinarie may convert the same to some other use" (Civilian's Notebook, Worcester Record Office, MS). Deviations from a donor's original intention—much in the news in the United States in recent years because of the (successful) attempt to move the Barnes Collection of Impressionist art from Merion into the city of Philadelphia—in fact have had a long history.

A fourth is what was called the interpretative privilege, probably as important and valuable in the law of charity as any of the others, even though it has always rested on a presumption rather than a clear rule of law. Presumptions can be rebutted. This was something like a rule of lenity, one with exceptions. Ambiguous or insufficient language in a will or deed would be treated as charitable if possible, particularly where the gift would otherwise fail. "In dubious cases, it was to be presumed that legacies should be interpreted and enforced in a way that promotes charitable purposes" (Tiraquellus 1582, 488-89). Swinburne seemingly had this in mind when he approved wills *ad pias causas* even though they were lacking in certainty of statement (Moore 1676, Ch. VII § 2, no. 9). Similarly, in modern U.S. law it sometimes happens that a donor or testator uses ambiguous language in a conveyance or a will; if so, courts will presume the existence of a charitable purpose where it is compatible with the language used. The early jurists put this preference in a dramatic way. They said that testators should be presumed to have wished to favor their souls over the interests of their kin (Mantica 1735, Lib. V, tit. 14, no 34). It is doubtful that such a rationale would be invoked in modern law, but the presumption lives on.

In all this there is a striking resemblance between the old law and the modern law. The favor accorded to charitable purposes has been a characteristic of our law for many centuries. It continues to appear in legal rules and presumptions in our legal system. They have been remarkably durable over the centuries. Not everything is unchanged, of course. We have a system of taxation today that differs

greatly from that found in the Middle Ages. No "privilege" to take an income tax deduction for charitable gifts could then have existed because there was no income tax. The tithe—the closest equivalent to an income tax—was regarded as being owed to God and to his servants, the clergy, as of right. No privilege not to pay other taxes or meet other societal obligations ensued from its payment. The circumstances of modern life have dictated changes in the law of charity. What seems most noticeable in the lists of legal privileges, however, is how many of them have remained the same.

The Centrality of Religion in the Law of Charity

As has happened in modern law, the existence of so many charitable privileges in early European law required a working definition of exactly what made a gift charitable. Put in medieval form, what was a gift *ad pias causas*? It mattered then, as it does now. An affirmative answer was required before any one of the privileges could be invoked. Here again, there are some remarkable similarities between the old law and our law. The underlying reason given for them has, however, changed to match changes in thought in our own day—principally the secularization of society and the rise in the role accorded to government in our lives.

If one examines the purposes counted as charitable in modern law, comparing them with a similar list from 1600, it quickly becomes obvious that the main categories have remained quite similar. Gifts to hospitals, gifts for the relief of the poor, gifts to promote educational institutions, gifts for the construction and maintenance of public works, and gifts for religious purposes all qualified then, as they do now. True, there have been additions. A trust for the prevention of cruelty to animals is considered charitable today; nothing of the sort appears in the early manuals. There have also been subtractions. A trust for the payment of marriage portions for poor maidens figures in the list Tiraquellus compiled (1582, 449-51), as it did in that of the Englishman Sir Francis Moore (1676, Ch. 7 § 1, no. 5). Such a bequest might not qualify as charitable today unless it could be read as intended solely for the relief of the poor. So the parallels are not exact. Changes in sentiment have made a difference. But most of the medieval categories have remained intact—a wonderful example of a lawyerly habit. It retains the substance of a legal rule but changes the reason given for it.

That change has been in the theory underlying these categories. Today, "public interest" provides the touchstone. Although the promotion of religious

values continues to qualify, it is an exception to the ordinary rule. In earlier centuries, it was the other way around. The basic assumption upon which the various charitable purposes were founded was the promotion of religious values. In this the canon law played an obvious and pivotal role. Its texts were used to show that specific purposes were charitable because they grew out of the dictates of the Christian religion. Far from being an exception, religion, not the needs of government, furnished the starting point for analysis. Mostazo, for example, defined a charitable gift as "whatever is granted for the love of God for divine purposes or other works of mercy for the good of [the donor's] soul" (1698, Lib. I, c. 1). Tiraquellus had begun with a simpler but similar definition: "Whatever is given for the love of God," but Mostazo rejected it as so wide that it might include a gift made to a rich man if the gift were inspired by the love of God. In this he seems to have been "scoring a point" in scholastic fashion, but the similarity between the two is more important than the difference. Both began with religion. Swinburne more succinctly stated the same point. Charitable gifts were those "made for good and godly uses" (1590, Pt. 1 § 13, no. 3). Camarella went even further, holding that, strictly speaking, it was wrong to accord charitable status to a gift made for public purposes; in truth, he said, only a gift made for one's soul qualified (1681, Lib. VII, quaest. 1, no. 2). All of these authors, with varying degrees of intensity, used religion as the main reference point in defining and implementing the law of charity.

This approach made a difference in practice. In England, for example, the ecclesiastical law moved away from its Roman law roots by dispensing with many of the formal requirements once imposed in the law of last wills and testaments. The classical law's requirement of seven witnesses to a formal testament became a dead letter in later practice. Only two were ever required, and this step was justified by the biblical admonition that the testimony of two or three sufficed to prove the truth. The Gospels so stated (Matthew 18:16). In testamentary law, as the English civilian Swinburne put it, "The lawe of God requireth no more" (1590, Pt. I § 9, n. 3). Courts should follow this religious admonition, he thought, and so they did in English practice.

Some of these uses of religion underlying the law of charity now seem to have been exercises characteristic of the medieval Schools. For instance, Tiraquellus held that a gift to support study at a university might qualify as privileged only if it were limited to the study of theology (1582, 452-53). Study of a different subject would not qualify. Mostazo argued that the permissible area might be expanded to include

the study of grammar, if this course was "preparatory" to entrance into the theological faculty (1698, Lib. I, c. 2, no. 25). They both concluded, however, that a gift for scholarships might be classed as charitable if use of the gift was limited to poor students. The poor held a special place in the law of the church. It was said that "the poor were a special treasure of Christ" (Tiraquellus 1582, 441-42). To help with the burden of the expenses of the poor would therefore fulfill a religious duty.

Tiraquellus took a similar position in dealing with gifts to fraternal organizations. In themselves, fraternities did not seem to be charitable in nature. Their primary purpose was human fellowship, not the worship of God. However, if it could be shown that members of the fraternity were in fact devoting their attention to worship or engaging in works of mercy, such as aiding the poor, then he considered that a gift or bequest to the organization would qualify for charitable status (440-41).

The importance of religion for the jurists was particularly evident in the hard cases, situations where a religious purpose was harder to discern. An example was the gift for the repair and maintenance of bridges and roads. Today, such a gift would easily pass muster; it benefits the public. In early centuries, however, it was not so easy. What had bridge repair to do with God? The jurists were up to this challenge, however. Public interest was mentioned as a possible justification. So were several texts from the Roman and canon laws. Some jurists argued for a close connection between municipal purposes and divine purposes. But more was needed. Tiraquellus cemented the argument in favor of this category by finding a connection. Churches were themselves bound to repair bridges and roads, he noted, citing texts from both the canon and Roman laws that so stated. If this was so, bridge and road repair must qualify as a religious obligation in some sense. Perhaps not satisfied with this chain of reasoning, he added that widows and orphans would most especially be benefitted by adequate provisions for their comfort and safety in travelling (1582, 455-56). The poor, widows, and orphans were a special responsibility of the church (Deuteronomy 10:18; James 1:27), so the purposes of the church would be benefitted—indirectly but inevitably—by bequests for road repairs which would permit safer travel for them. The argument here requires a stretch, no doubt. It would be fair to characterize it as asserting that these purposes must have been charitable because they took the financial burden off the church. This is very like the argument we hear today, except that we substitute the word "government" for "church." The connection between religion and charity lay at the foundation of the law's approach.

Conclusion

As a matter of power, modern legislatures have the ability to rewrite virtually any legal rule. The law of charity is no exception. Legislators, perhaps even judges, can fashion a new definition of a charitable purpose if they desire. They should, however, be honest about what they are doing. They should not pretend that the long-accepted definition of charity requires the exclusion of religion. It does just the opposite. American law began with the law of charity just described, one that put religion in the center. It has long been difficult to define a charitable purpose exactly, but defining charity as a substitute form of governmental action is to embrace an assumption that is as false to the history of the subject as it is to the motives of most philanthropists. In fact, religion has been a legitimating force, both in defining and in encouraging charitable acts, from the time our law began to take definitive shape in the twelfth century to the day before yesterday.

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