What is the Point of Charity Law?

Matthew Harding*

1. Introduction

Charity law – the legal rules, doctrines, principles and practices that apply to 'charity' as such – remains remarkably under-theorised despite its great age.[1] While there is a vast and rich literature on the theory of civil society from a variety of disciplinary perspectives, scholars who have turned their attention to that part of civil society regulation that is made up of charity law have typically taken either historical or doctrinal approaches to the subject,[2] or recommended the abandonment of charity law for a broader regulatory framework built upon foundations that the legal conception of charity cannot provide.[3] Rarer are theoretical approaches to charity law that seek to explain and justify it on terms specific to it.[4] The under-theorisation of charity law is a matter of more than academic concern; at a time when charity law across the

* Associate Professor, University of Melbourne.

[1] The best account of the history of charity law, but only up to the nineteenth century, remains Gareth Jones, *History of the Law of Charity 1532-1827* (Cambridge University Press, Cambridge, 1969).

[2] See, eg, ibid; Peter Luxton, *The Law of Charities* (Oxford University Press, Oxford, 2001); Jean Warburton, Debra Morris and NF Riddle, *Tudor on Charities* (9th ed, Sweet and Maxwell, London, 2003); Hubert Picarda QC, *The Law and Practice Relating to Charities* (paperback ed, Bloomsbury, London, 2010); Gino Dal Pont, *Law of Charity* (2nd ed, LexisNexis Butterworths, Chatswood NSW, 2010).

[3] See, eg, Jonathan Garton, *The Regulation of Organised Civil Society* (Hart Publishing, Oxford, 2009). But note also Matthew Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, QUT, 2009), which recommends a regulatory framework for civil society that builds on, even though it goes beyond, the legal conception of charity.

[4] Two examples are Francis Gladstone, *Charity, Law and Social Justice* (Bedford Square Press, NCVO, London, 1982) and Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicholson, London, 1979). Both books consider how charity law might be reconciled with the requirements of social justice, a question that I touch on several times in this paper.

English-speaking world is being subjected to scrutiny and change, perhaps as never before,[5] it is especially important that we have a clear sense of the theoretical dimensions of charity law. What does charity law tell us about the social functions of law in general? What does it tell us about the role and the limits of the state? And, perhaps most fundamentally, what is the point of having charity law in the first place? Only in the light of answers to questions like these may we evaluate proposals for the reform of charity law with a clear view of what charity law is and of what it could and should be.

In this paper, I wish to set out some preliminary thoughts in response to the third question I just posed: what is the point of charity law? In other words, why would the state go to the trouble of enacting, maintaining and supporting the legal rules, doctrines, principles and practices that, taken together, make up charity law? I think that this question is an important one: indeed, if the question were unimportant or irrelevant in some way, the existence or non-existence of charity law would be a matter of indifference, a conclusion so implausible that its premises simply cannot be accepted. Moreover, I think that any account of the point of charity law must be robust enough not only to reveal the goals of that body of law, but also to explain why those goals must be achieved notwithstanding the costs to the state that are entailed in achieving them. Like all law, charity law costs the state time, money and personnel to administer and enforce. And unlike most law, charity law costs the state revenue that

[5] A good indicator of this is the fact that statutory reform of charity law has taken place in recent years in New Zealand (Charities Act 2005), Scotland (Charities and Trustee Investments (Scotland) Act 2005), England and Wales (Charities Act 2006), Northern Ireland (Charities Act 2008), and the Republic of Ireland (Charities Act 2009), and is now on the agenda in Australia (see Commonwealth of Australia, *Budget Paper No 2* (Budget, 2011-2012) 37, at http://budget.australia.gov.au/2011-12/content/download/bp2.pdf) and Hong Kong (see Law Reform Commission of Hong Kong, *Consultation Paper: Charities* (June, 2011), at http://www.hkreform.gov.hk/en/docs/charities_e.pdf).

it would have collected if there were no charity law; this is because charity law invariably incorporates rules extending advantageous treatment for taxation purposes to those who, in one way or another, are 'doing' charity. In light of these costs to the state, I think it is reasonable to assert that the point of charity law had better be a good one.

The details of charity law are notoriously tricky, and Lord Simonds' statement that '[n]o-one who has been versed … in this difficult and very artificial branch of the law can be unaware of its illogicalities'[6] remains as true today as it was in 1951 when it was uttered. However, when reflecting on the point of charity law, it is not necessary to descend to the level of detail. Instead, the inquiry can begin by concentrating on features that charity law displays when it is viewed at a greater level of generality; in light of these features, the details of charity law may then be evaluated and arguments made for or against their retention. For present purposes, I wish to concentrate on two such general features.

First, charity law is organised around what is usually called the 'legal definition of charity'. The legal definition of charity is a set of criteria that must be satisfied if a purpose is to be regarded as charitable according to law, and only a gift, trust, entity or association whose purpose is charitable according to law is itself regarded in law as charitable. The function of the legal definition of charity is therefore directed at the conferral or withholding of a certain status in law, a status that is described using the word 'charity'. The criteria by which charitable status is conferred or withheld in law vary in detail from jurisdiction to jurisdiction, but in all jurisdictions the criteria are

[6] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 (HL), 307.

broadly similar. To begin with, the purpose under scrutiny must fall within one of a set of general descriptions of purpose like 'relief of poverty', 'advancement of education' and 'advancement of religion'.[7] The set is open-ended in that it includes a 'catch-all' description capturing purposes that do not fall within any of the other descriptions but are analogous to purposes that have, in the past, been found by state officials to be charitable.[8] And, in addition, with the exception of purposes answering the description 'relief of poverty', it must be proved as a matter of fact – on the evidence, or by way of a presumption, depending on the purpose and on the jurisdiction – that carrying out the purpose under scrutiny will benefit the public in some way. This criterion is known as the 'public benefit test' of charity law.

Secondly, through charity law the state extends special, favourable treatment to those whose purposes satisfy the legal definition of charity.[9] With limited exceptions, gifts and trusts for purposes are valid and enforceable in law only if they are for charitable purposes.[10] The state also puts at the disposal of those who must administer a gift or trust for charitable purposes resources that enable the terms of the gift or trust to be

[7] In this way, the legal definition of charity is broader than the non-legal understanding of that concept as confined to poor relief: see *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL).

[8] In England and Wales, the 'catch-all' description is set out in ss 2(2)(m) and 2(4) of the Charities Act 2006. In Australia, it takes the form of the so-called 'fourth head' of charity referred to by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. For a purpose to fall within the 'fourth head' of charity under Australian law, it must not only be analogous to an existing charitable purpose; it must also be within the 'spirit and intendment' of the preamble to the Statute of Charitable Uses 1601: see *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 (HCA). The requirement that a purpose be within the 'spirit and intendment' of the preamble has been frequently criticised and is likely to be abandoned once a statutory definition of charity is introduced (see above n 5).

[9] Although it is worth noting that the opposite was once the case: see the discussion of the Mortmain Act 1736 in Jones, above n 1, Chapters VII and IX.

[10] *Morice v Bishop of Durham* (1804) 9 Ves Jun 399; 32 ER 656 (Sir William Grant MR); (1805) 10 Ves Jun 522; 32 ER 947 (Lord Eldon LC); *Re Endacott* [1960] Ch 232 (CA).

varied if this is appropriate.[11] Moreover, through those rules of the tax and transfer system that are also part of charity law, an organisation with a charitable purpose may be exempt from paying certain taxes that it would otherwise have had to pay or may qualify for certain transfers that it would otherwise not have qualified for.[12] And gifts to organisations with a charitable purpose may attract state subsidies by being counted as deductions for the purposes of calculating taxable income or in other ways.[13] Finally, an entity with a charitable purpose may thereby come within the purview of a regulatory authority established to oversee the 'charitable sector', and may benefit from this. For example, an authority may be empowered by government to register charitable trusts, entities and associations for regulatory and other purposes, and it may be that when raising funds or awareness of purposes in the community there are reputational benefits to be gained by being a registered charity.[14]

I think that any account of the point of charity law must be sensitive to these two features of charity law. Consequently, it must explain why the state might extend special, favourable treatment through the law of gifts and trusts, the tax and transfer system, and regulatory law, but only to gifts, trusts, entities and associations whose purposes both fall within certain general descriptions of purpose and, except in the case of purposes within the description 'relief of poverty', satisfy a public benefit test. In what follows, I begin the task of providing such an explanation from a liberal

[11] For the Australian rules, see Dal Pont, above n 2, Chapters 13, 15 and 16.

[12] See, eg, Income Tax Assessment Act 1997 (Cth), s 50-50.

[13] See, eg, Internal Revenue Code (US), Section 170 (deductions); Income Tax Act 2007 (UK), ss 414-430 ('Giftaid').

[14] Note that a large number of charities choose to remain on the register in England and Wales even though their annual income is less than £5,000 and consequently they are not required to be registered by the Charities Commission. To perform a search of the register, see http://www.charity-commission.gov.uk/showcharity/registerofcharities/registerhomepage.aspx?&=&

philosophical perspective. From that perspective, I argue that charity law reflects and expresses the state's commitment to the liberal value of individual freedom. I also argue that charity law expresses the state's endorsement of certain purposes in light of certain goods, and is the means by which the state provides incentives to pursue the purposes that it endorses. I explain how these expressive and incentive aims may be reconciled with – indeed how they might be demanded by – a liberal perspective. Ultimately, the point of charity law is to be found in the value of individual freedom and in the range of goods the realisation of which is made more likely by the pursuit of charitable purposes. And one of the first tasks of any liberal theory of charity law is to understand that proposition more fully.

2. Charity Law as a Set of Power-Conferring Rules

Charity law makes possible, to those whose purposes have achieved a certain legal status, what would not otherwise be possible, and this is a characteristic of what HLA Hart famously identified as 'power-conferring' rules.[15] For Hart, the power-conferring rules of a legal system do not impose duties or obligations, but instead empower individuals to bring about, usually by following certain procedures and satisfying certain conditions, changes in the legal position of themselves and others.[16] The changes might take the form of the creation or extinguishment of rights, powers, duties, obligations, privileges or immunities.[17] In the case of charity law, the legal

[15] HLA Hart, *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) 27-28. See also HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford University Press, Oxford, 1982) 218-219.

[16] Ibid.

[17] See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, New Haven, 1919) 36.

definition of charity, setting out the criteria according to which charitable status is conferred or withheld, establishes conditions that must be met by those who would invoke the power-conferring rules of charity law to change the legal position both of themselves and of others.[18] By meeting those conditions, individuals are enabled to bring about an array of legal changes, from generating the rights, powers and obligations that characterise a charitable trust, to acquiring the right to claim tax exemptions, to acquiring the right to be registered as a charity by a regulator. An analogy might be drawn with the power-conferring rules of family law, under which those whose relationships achieve a certain status – marriage, or civil partnership, or perhaps some broader status triggered by cohabitation as a couple – may thereby change their legal position in respect of matters such as asset division in the event of relationship breakdown.[19]

If charity law is best understood as a set of power-conferring rules, then the point of charity law is likely to become clearer in light of reflection on the point of power-conferring rules. According to Hart, the 'social function' of power-conferring rules is to 'provide individuals with *facilities* for realizing their wishes'.[20] For Hart, this is 'one of the great contributions of law to social life'.[21] As Joseph Raz has pointed out,

[18] As Neil MacCormick argues, among the formal features of power-conferring rules is that they must be 'invoked' if they are to be effective in bringing about changes in the legal position of the person who invokes them or of any other person: *HLA Hart* (2nd ed, Stanford University Press, Stanford, 2008) 99. A person invokes the power-conferring rules of charity law by claiming charitable status.

[19] It may be that family law is best conceived as both power-conferring and the expression of communitarian norms: see Carolyn J Frantz and Hanoch Dagan, 'Properties of Marriage' (2004) 104 *Columbia Law Review* 75; Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 819-824. However, it can scarcely be denied that it is power-conferring at least in part, especially in jurisdictions where couples are free to opt out of family law regimes by mutual consent: see *Radmacher v Granatino* [2010] UKSC 42.

[20] Hart, *The Concept of Law*, above n 15, 27 (Hart's emphasis).

[21] Ibid, 28.

talk of the social function of power-conferring rules is apt to confuse, because the phrase 'social function' may be understood in at least two senses: on the one hand, it might refer to the social effects of power-conferring rules; and on the other hand, it might refer to the normative function of such rules.[22] By 'social effects', Raz is thinking of the intended or foreseen consequences of a power-conferring rule (eg, reducing the incidence of fraud, encouraging people to form relationships of a certain type); by 'normative function' he has in mind the reasons why the state might choose to bring about intended or foreseen consequences by deploying power-conferring rules rather than in some other way. In light of Raz's analysis, it is clear that when Hart talks about the social function of power-conferring rules being to provide individuals with facilities for realising their wishes, he is referring to the normative function of such rules.[23] Hart and Raz show us that the point of power-conferring rules, qua power-conferring rules, is revealed not in light of the results that such rules might yield; it is revealed by reflection on the way in which the state intends or anticipates those results being brought about.

As I discuss in Part 3, the state clearly aims to achieve results – what Raz calls 'social effects' – through charity law, and the point of charity law is revealed fully only once those aims are taken into account and properly understood. However, for present purposes, my attention is more narrowly focused on charity law as a set of power-conferring rules whose normative function is to bring about results in a certain way: by, as Hart says, providing individuals with facilities for realising their wishes. To my mind, this normative function is part of the point of charity law, and I want to

[22] Joseph Raz, *The Concept of a Legal System* (Clarendon Press, Oxford, 1970) 158.

[23] Indeed, Hart subsequently adopted the phrase 'normative function': Hart, *Essays on Bentham*, above n 15, 219.

spend the rest of this part of the paper trying to understand it better from a liberal perspective. From that perspective, the obvious starting point is the value of individual freedom. How can the normative function of charity law as a set of power-conferring rules be understood in light of that value? Here it is necessary to introduce the distinction, familiar to philosophers in the liberal tradition, between negative freedom and positive freedom; this is the distinction between the freedom that comes of being able to live one's life in the absence of the depredations or interference of others, and the freedom that comes of living a life that is the product of self-directed choices across time among a range of genuine, plausible and valuable options.[24]

The point of charity law, as a set of power-conferring rules, is revealed in light of the value of positive freedom, which I will now call the value of autonomy.[25] To some extent, engaging with the value of an autonomous life is a matter for each individual and depends on a willingness to cultivate and realise virtues, skills and capacities as well as a preparedness to make decisions and commitments. However, the value of autonomy also grounds principles of political action, including principles specifying what the state needs to do in order to bring about the conditions that make it possible for individuals to live autonomous lives. Charity law, as a set of power-conferring rules, serves the value of autonomy by making a contribution to these conditions. Among the conditions for autonomy is the presence of an adequate range of options to

[24] See Isaiah Berlin, 'Two Concepts of Liberty' in *Liberty* (Henry Hardy ed, Oxford University Press, Oxford, 2002) 166. See also Charles Taylor, 'What's Wrong with Negative Liberty?' in his *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, Cambridge, 1985) 211, 213, discussing liberty as an 'opportunity-concept' and as an 'exercise-concept'.

[25] This paragraph, and my understanding of the value and demands of autonomy generally, owes a great deal to the work of Joseph Raz: see generally *The Morality of Freedom* (Clarendon Press, Oxford, 1986) and 'Autonomy, Toleration and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (Clarendon Press, Oxford, 1987) 313.

choose from; because autonomous lives are, among other things, lives characterised by choices among options, autonomous lives are possible only to the extent that an adequate range of options exists for those whose lives they are. Charity law enlarges the number of options available to individuals whose purposes fall within its purview. For example, it is because of charity law that I have the option of creating a trust for the purpose of relieving poverty; in the absence of charity law, I would lack that option and would be confined to relieving poverty in other ways. If I choose to relieve poverty through a corporate entity, charity law gives me the option of applying all the income of the entity to its purposes, rather than paying some to the state in the form of income tax. And in a jurisdiction where a regulator registers charities, it is through charity law that I gain the option of pursuing my purpose of relieving poverty through a registered charity, gaining access to reputational and other benefits that flow from receiving this form of endorsement from the state. The provision of these options is not just a consequence of charity law; to the extent that charity law consists of power-conferring rules, the provision of these options is its very point, because the normative function of power-conferring rules is to provide options or, as Hart would have it, 'facilities'. And the contribution that such options make to the full range of options available to those whose purposes fall within the purview of charity law is a contribution to the conditions for autonomy.

As a set of power-conferring rules, then, charity law reflects and expresses the commitment of the liberal state to the value of individual freedom, understood in its positive sense as the value of autonomy. But I must immediately introduce three qualifications to this proposition. First, it is important not to make too much of the argument that charity law helps to secure the conditions for autonomy. The

conditions for autonomy obtain where an adequate range of options is available: it is not necessary that the greatest possible number of options be available, nor is it necessary that any particular option be available.[26] Therefore, it simply cannot be said, in the absence of further argument, that the value of autonomy demands the options made possible by charity law such that the state has a duty to enact charity law in something like its current form. But even if the state has no such duty, it may still be maintained that the point of charity law, as a set of power-conferring rules, is to serve autonomy. Rules of law can have a point even though the state has no duty to enact them.

Secondly, to view charity law as a set of power-conferring rules that serve the value of autonomy is to view it in isolation from goals of the state other than those shaped by the value of autonomy, goals that might come into conflict with the value of autonomy and, in certain circumstances, override it. For example, while facilitating autonomous choice via the power-conferring rules of charity law is a worthy goal in a liberal state, it might conflict with the goal of efficiency in the provision of collective goods in circumstances where the state could supply collective goods more efficiently than the charitable sector could.[27] Similarly, the demands of social justice might weigh in favour of the state carrying out wealth redistribution to improve the position of the worst-off, even though the charitable sector might be able to achieve similar results for the worst-off equally efficiently and in a way that generates a dividend in

[26] Raz, *The Morality of Freedom*, above n 25, 410.

[27] See Lester M Salamon, 'Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State' (1987) 16 *Nonprofit and Voluntary Sector Quarterly* 29.

terms of autonomy.[28] I take no position here on how such conflicts ought to be resolved, although I suspect that, ultimately, choices among incommensurable moral and political values will be necessary.[29] I do wish to point out, however, that in any case where the state chooses to pursue goals like efficiency or social justice by narrowing the scope of the power-conferring rules of charity law, one of the consequences might be a cost in terms of autonomy. In a liberal state, this possibility should not be viewed with indifference. And I believe that this point is worth bearing in mind when thinking from a liberal perspective about certain recent developments in the field of charity law. One is the development of the 'contract culture' that now characterises relations between government and the charitable sector;[30] another – specific to the Australian setting – is the recent recommendation of the Standing Committee on Economics of the Commonwealth Senate that, in the interests of efficiency, those who would do charity be confined to carrying out their purposes via a single type of entity rather than the wide range of relationships, entities and

[28] See John Rawls, *A Theory of Justice* (revd paperback ed, Oxford University Press, Oxford, 1999).

[29] A Rawlsian liberal might insist that there will be no need for a choice among incommensurables, at least insofar as the demands of social justice are concerned, because the demands of social justice come first. After all, as Rawls famously said, '[j]ustice is the first virtue of social institutions': ibid, 3. But there are reasons to think that justice is not the first virtue of social institutions, leaving open the possibility that a choice among incommensurables may have to be made: see, eg, John Gardner, 'The Virtue of Justice and the Character of Law' (2000) 53 *Current Legal Problems* 149; Jeremy Waldron, 'The Primacy of Justice' (2003) 9 *Legal Theory* 269; Leslie Green, 'The Germ of Justice' (2010) available on SSRN at http://ssrn.com/abstract=1703008.

[30] For discussion, see: Jean Warburton and Debra Morris, 'Charities and the Contract Culture' [1991] *The Conveyancer* 419; Jane Lewis, 'Reviewing the Relationship between the Voluntary Sector and the State in Britain in the 1990s' (1999) 10 *Voluntas* 255; Michael Chesterman, 'Foundations of Charity Law in the New Welfare State' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart Publishing, Oxford, 2000) 249; Luxton, above n 2, [1.18]-[1.19], [1.28]-[1.29]; Commonwealth, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) Chapters 6 and 7; The Charity Commission for England and Wales, *Stand and Deliver: The Future of Charities Providing Public Services* (February 2007); Alison Dunn, 'Demanding Service or Servicing Demand? Charities, Regulation and the Policy Process' (2008) 71 *Modern Law Review* 247; Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559. See also *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168 (HCA).

associations that currently they may choose from.[31] When thinking about what the state might achieve by controlling the activities of charities through contracts, or by channelling charitable activities through a single entity type, the possible cost to autonomy should at least be brought into view.

Finally, to make the point that charity law is made up of power-conferring rules that serve autonomy, and to leave matters at that, is to pay insufficient attention to the two distinctive features of charity law that I referred to earlier: the special, favourable treatment that charity law extends to those whose purposes are charitable; and the requirement that purposes meet a certain description and satisfy a public benefit test in order to be charitable. For one thing, the strategy of extending special, favourable treatment is not necessary to charity law as a set of power-conferring rules. Although all power-conferring rules make possible what would otherwise not be possible and, in that sense, treat favourably those who would invoke them, they do not always confer privileges or substantive benefits on those persons. For example, the power-conferring rules of the law of contract enable people to put themselves under legally enforceable obligations and thereby make possible what would otherwise not be possible, but being under a legally enforceable obligation is not a privilege or benefit in either a formal or a substantive sense. In addition, the criteria entailed in the legal definition of charity are a constraint on the normative function of charity law as a set of power-conferring rules; they ensure that the facilities that charity law offers are made available only to some, and not to all, who desire to access them. A constraint on the operation of power-conferring rules cannot be explained by pointing to the normative function of those rules; it can be explained only in light of external factors.

[31] Senate Standing Committee on Economics, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (Commonwealth of Australia, 2008) Chapter 7, especially [7.59].

And the same is true of the strategy of conferring privileges or benefits via power-conferring rules. It is therefore necessary to look beyond the normative function of power-conferring rules, to what Raz would call their 'social effects', in order to provide anything like a full account of the point of charity law. Recall that for Raz the 'social effects' of power-conferring rules are revealed in light of their intended or foreseen consequences. It is therefore time to turn to the results that the state aims to achieve through charity law.

3. The Expressive and Incentive Aims of Charity Law

In this part of the paper, I consider what I will call the expressive and incentive aims of charity law. The expressive aim of charity law is reflected in that component of charity law that marks out certain purposes as charitable: the legal definition of charity. By marking out certain purposes in this way, the state expresses its endorsement of those purposes, simply by naming them as charitable but also by signalling that those who pursue them may access the special, favourable treatment that charity law offers. And this leads to the incentive aim of charity law. Charity law aims not only to express endorsement of charitable purposes; it aims also to increase the likelihood that charitable purposes will be carried out, by making available to those whose purposes are charitable privileges and benefits that would not otherwise be available to them. It would be possible, at least against a cultural backdrop of respect and admiration for charitable purposes, for the state to achieve the expressive aim of charity law without also pursuing the incentive aim. However, in the common law world, the two aims are intertwined and there is little doubt that the

expressive aim of charity law is achieved in part precisely because the state extends, and is widely known to extend, special favours to charity.

Why would the state have these expressive and incentive aims when it comes to charity law? I think that the answer is that the state takes the view that certain purposes are likely to generate certain goods – by 'goods' I mean contributions to human wellbeing – that the state endorses and, in light of that view, the state wishes to encourage people to carry out those purposes and thereby realise those goods. In what follows, I explore the idea that the state, through charity law, endorses and encourages the realisation of two sets of goods: first, collective goods that are likely to be realised, in different ways, by the pursuit of a variety of charitable purposes; and secondly, individual goods that are likely to be realised by purposes meeting the description 'relief of poverty'. By 'collective goods', I mean goods that have a public character in the sense that they may be accessed by all members of the community, or at least all members of the community who desire and qualify to access them. Such goods include clean air, a safe environment, and even a public culture of a certain type (a matter to which I return in Part 4), but also education, health care and the benefits of other social services available to all qualifying comers.[32] By 'individual goods' I mean goods that have a private character in the sense that they may not be accessed by everyone who desires and qualifies to access them. I begin by considering the ways in which the state endorses and encourages the realisation of collective goods through charity law: first, by identifying two different sorts of link between purposes and collective goods that might be drawn by state officials, whether

[32] This understanding of 'collective goods' is intended to capture 'public goods' that are nonrivalrous and nonexcludable (see Henry Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89 *Yale Law Journal* 835, 848), but also goods of a public character that are not 'public goods' in the strict sense.

they be legislators, judges or bureaucrats charged with the responsibility of fashioning or applying the legal definition of charity; and secondly, by thinking about strategies that state officials might deploy, within the framework of the legal definition of charity, in order to establish links between purposes and collective goods. I then turn to the special case of 'relief of poverty', in respect of which the expressive and incentive aims of charity law have to do with individual rather than collective goods.

A. Two Sorts of Link between Purposes and Collective Goods

The expressive and incentive aims of charity law are pursued against the backdrop of the state's view that the pursuit of certain purposes is likely to realise collective goods that the state has endorsed; taking this view requires that state officials, whether they be legislators, judges or bureaucrats, draw links between purposes and collective goods when developing the legal definition of charity or applying that definition to individual cases. The history of charity law reveals that state officials might draw at least two different sorts of link between purposes and collective goods. First, and most obviously, a link between a purpose and collective goods might be – indeed is likely to be – established in cases where the purpose in question aims to provide a collective good. Many charitable purposes fall into this category, including purposes to do with preserving or improving the environment in which people live,[33] enriching the cultural life of a community,[34] and supporting academic research.[35] Purposes

[33] *West v Knight* (1669) 1 Ch Cas 134; 22 ER 729; *Howse v Chapman* (1799) 3 Ves Jr 542, 551; 31 ER 278 (Lord Loughborough LC); *Attorney-General v Heelis* (1824) 2 Sim & St 67-77; 57 ER 270 (Sir John Leach VC).

[34] *Re Delius* [1957] 1 Ch 299 (Roxburgh J).

[35] *Re Hopkins' Will Trusts* [1965] 1 Ch 669 (Wilberforce J), but see also *Re Shaw (Dec'd)* [1957] 1 All ER 745 (Harman J).

aiming at the prevention of social or economic disadvantage might also be understood as aiming at collective goods, given that the benefits of living in a community that is free of such disadvantage are enjoyed by all the members of the community. That said, to the extent that such purposes meet the description 'relief of poverty', the state is prepared to endorse and encourage them even if they are not likely to generate collective goods.[36] I discuss below the reasons why the state might take this view.

A second way in which state officials might establish a connection between a purpose and collective goods is by forming the view that carrying out the purpose is likely to realise collective goods indirectly, even though the purpose does not itself aim to provide a collective good. The history of charity law shows that the types of collective goods that state officials have in mind when they are thinking along these lines tend to be intangible and difficult to identify or measure. For example, fee-charging schools and hospitals do not aim to provide collective goods but state officials considering whether the purposes of such organisations are charitable have taken the view that the pursuit of those purposes is likely to realise collective goods through, for example, taking pressure off the state to fund the education or health care services that the organisations provide.[37] A religious group that worships in private has been found by a judge to have purposes that indirectly generate collective goods through the example that its members set when they are out in the community.[38] And

[36] In Australia, it appears that purposes aiming at the prevention of social and economic disadvantage do not fall within the description 'relief of poverty': see Dal Pont, above n 2, [19.14]-[19.15] for discussion. In contrast, in England and Wales the relevant general description is 'prevention or relief of poverty': Charities Act 2006 (UK), s 2(2)(a).

[37] *Re Resch's Will Trusts, Le Cras v Perpetual Trustee Co Ltd* [1968] 1 AC 514 (PC). The current view in England and Wales is more sceptical of such 'wider or remote benefits': see Charity Commission, *Public Benefit and Fee-Charging* (December, 2008) [C2]. See also below n 48.

[38] *Neville Estates Ltd v Madden* [1962] 1 Ch 832 (Cross J). See also *Joyce v Ashfield Municipal Council* [1975] 1 NSWLR 744 (NSWCA).

the purpose of protecting animals from cruelty, although it does not aim at any human good, has been recognised by state officials as charitable because of its propensity to contribute to a humane public culture.[39]

None of the views expressed in the cases I just raised have been uncontroversial. However, taken together, they show that state officials are prepared to draw links between purposes and collective goods even in cases where the purposes themselves do not aim to provide collective goods. Arguably, this preparedness was again on display in the recent decision of the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*, a case in which an incorporated association ostensibly had the purpose of campaigning for the reform of government policy relating to the delivery of foreign aid.[40] On one reading of the decision, a majority of the Court found that the true purpose of the association was the 'generation … of public debate … concerning the efficacy of foreign aid';[41] if this reading is accepted, the majority thought that the purpose of the association was to facilitate collective goods likely to be realised by public debate on important matters of government policy, collective goods associated with an informed and engaged

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[39] *In re Wedgwood* [1915] 1 Ch 113 (CA). See also *In re Grove-Grady* [1929] 1 Ch 557 (CA), in which the purpose of creating and maintaining a park in which animals could be left undisturbed was found not to be charitable because it would generate no indirect benefit to people. And note *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL), in which the collective good of a humane public culture was found to be outweighed by collective goods associated with medical research.

[40] [2010] HCA 42. For more detailed discussion of the case, see: Matthew Harding, 'Finding the Limits of *Aid/Watch*' (2011) 3 *Cosmopolitan Civil Societies Journal* (forthcoming); Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Commissioner of Taxation* (2011) 35 *Melbourne University Law Review* (forthcoming).

[41] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [47] (per French CJ, Gummow, Hayne, Crennan and Bell JJ).

citizenry.[42] However, as Heydon J pointed out in his dissenting judgment, the association sought not to facilitate public debate, but rather to contribute to such debate a particular point of view;[43] this suggests that the majority in *Aid/Watch* recognised that agitating for the reform of government policy, while not itself a purpose that aims to provide a collective good, has a propensity to trigger or sustain public debate about the policy in question and therefore has the potential indirectly to realise collective goods associated with democratic political culture.

B. Strategies Deployed in Linking Purposes and Collective Goods

I hope to have shown in the previous section that state officials are prepared to draw two types of link between purposes and collective goods: first, the obvious link that exists in a case where a purpose aims to provide a collective good; and secondly, an indirect link in a case where a purpose, although not itself aimed at providing a collective good, is likely to generate collective goods if carried out. I now turn to strategies that state officials might deploy in order to establish a link of either type between purposes and collective goods. These strategies are made available via the conceptual framework of the legal definition of charity, in particular the general descriptions of purpose that are entailed in that definition and the public benefit test.

One strategy that traditionally has been adopted is the strategy of identifying a general description of purpose as prima facie charitable, and then permitting those who would

[42] For a philosophical discussion, see Joseph Raz, 'Free Expression and Personal Identification' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, Oxford, 1994) 147, 149-153.

[43] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [58]-[59].

pursue purposes that fall within the description to rely on a presumption of public benefit in order to satisfy the public benefit test. In England and Wales this strategy was deployed until recently, and in Australia it continues to be deployed, with respect to purposes meeting the description of 'advancement of religion'.[44] By marking out religious purposes as prima facie charitable and then finding by presumption that such purposes satisfy the public benefit test, the state expresses the view that the pursuit of religious purposes is likely to realise collective goods, whether directly or indirectly, even in the absence of evidence to establish that proposition. For the moment, I leave to one side the question of what collective goods are in fact generated by the pursuit of religious purposes. I return to that question in Part 4. The point I wish to make just now is that the strategy of marking out a general description of purpose as prima facie charitable and then presuming public benefit, which has traditionally been deployed in the case of religious purposes, is one that appears to reflect the view that there is a strong or obvious connection between purposes that meet the description and collective goods that the state endorses.

It is perhaps surprising that such a view about the propensity of religious purposes to generate collective goods would be expressed by a liberal state in the present day, given the diversity of religious, non-religious and even anti-religious beliefs that characterises modern liberal communities.[45] And this is one reason why it is perhaps

[44] See Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159. The same strategy is sometimes, but not always, adopted in respect of purposes within the general description 'advancement of education': see *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

[45] Interestingly, in the Republic of Ireland the view that religious purposes clearly generate collective goods has been emphatically reaffirmed by the state in the form of s 3(4) of the Charities Act 2009. This sub-section makes clear that, under Irish law, purposes within the description of 'advancement of religion' are presumed to be for the public benefit. However, note that under s 3(10) the state also expresses the view that purposes entailing profit-making or 'oppressive psychological manipulation' do not meet the description of 'advancement of religion'.

unsurprising that in England and Wales, the traditional strategy of identifying general descriptions of purpose as prima facie charitable and then applying a presumption of public benefit to purposes within those descriptions has been abandoned. Since the passage of the Charities Act 2006, in England and Wales those who seek charitable status for their purposes must satisfy a public benefit test by argument and proof, even if those purposes are within one of the Act's general descriptions of prima facie charitable purpose.[46] This development reveals a second strategy that state officials might deploy in order to establish a link between purposes and collective goods, in circumstances where they wish to be more circumspect about the likelihood of those purposes realising collective goods. This is the strategy of marking out a general description of purpose as prima facie charitable, and thereby expressing the view that specific purposes within the description are likely to make some sort of contribution to human wellbeing, but nonetheless requiring proof of public benefit and thereby remaining sceptical about whether or not the goods that are likely to be generated by pursuit of the purposes within the description are collective goods. This strategy was not unknown to English charity law, even in respect of religious purposes, prior to the advent of the Charities Act.[47] However, its adoption in respect of all purposes signals that in England and Wales the state is now more reluctant than it used to be to express a view linking prima facie charitable purposes and collective goods.[48]

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[46] Charities Act 2006 (UK), ss 2(1)(b) and 3(2).

[47] See *Gilmour v Coats* [1949] AC 426 (HL); *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

[48] In this regard it is interesting to note that in England the Independent Schools Council is challenging the view of the Charity Commission as to the link between purposes meeting the description 'advancement of education' and collective goods. See http://www.bbc.co.uk/news/education-13468322.

A third strategy might be used to draw a link between purposes and collective goods in cases where state officials have to determine whether or not a particular purpose is charitable, but the purpose does not fall within any general description of prima facie charitable purpose except possibly the 'catch-all' description that invariably completes the set of descriptions of purpose within the legal definition of charity. In these circumstances, state officials – judges and bureaucrats – have always refused to rely on presumptions to establish a link between the purpose under scrutiny and collective goods. Instead, they have sought an analogy with a purpose that has, in the past, been regarded as charitable, and then they have applied the public benefit test to establish on the evidence whether or not collective goods are likely to be realised, directly or indirectly, by the pursuit of the purpose under scrutiny. Where this strategy is adopted, a link with collective goods may not be established on the basis that there is no analogy between the purpose under scrutiny and a previously-recognised charitable purpose;[49] arguably, this expresses a view that the purpose under scrutiny lacks the propensity to realise goods of any sort, let alone collective goods.[50] But more often an analogy will be found or even assumed and the purpose will stand or fall as charitable according to whether or not it satisfies the public benefit test.[51] If several cases entailing purposes of a similar type are dealt with over time in this way, and if the public benefit test is satisfied in each of them, then eventually the state may decide to express its endorsement of a new general

[49] *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304.

[50] Note, however, that in *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, the High Court of Australia recognised that the purpose in question – breeding and racing homer pigeons – was likely to realise collective goods. The purpose was found not to be charitable because it was not within the 'spirit and intendment' of the preamble to the Statute of Charitable Uses 1601.

[51] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 was such a case, leaving to one side the rule against political purposes that was applied.

description of purpose, enabling the incentives of charity law to be made available to all purposes within the description so long as the public benefit test is met.[52] In this way, the state may shift from one strategy to another in pursuing the expressive and incentive aims of charity law.

C. The Special Case of 'Relief of Poverty'

A short summary of the discussion of this part of the paper so far might be in order. Through charity law, the state pursues expressive and incentive aims: the expressive aim is achieved by the endorsement of certain purposes as charitable; the incentive aim is achieved by the encouragement that charity law provides to pursue charitable purposes. Both the expressive and the incentive aims make sense in light of the state's view that certain purposes are likely to realise certain goods that the state endorses. One set of such goods is made up of collective goods; state officials of various sorts are prepared to draw links between purposes and collective goods both in cases where purposes aim to provide collective goods, and in cases where purposes do not aim to provide collective goods but nonetheless are likely indirectly to realise such goods. Several strategies are deployed by legislators, judges and bureaucrats in order to draw direct or indirect links between purposes and collective goods; these strategies make use of the conceptual tools of the legal definition of charity, viz, the general descriptions of purpose that characterise the legal definition and the public benefit test.

[52] Arguably, this is what happened in England and Wales with respect to purposes falling under general descriptions that were expressed as such for the first time in the Charities Act 2006 (UK): for example, 'advancement of the arts, culture, heritage or science' (s 2(2)(f)) and 'advancement of animal welfare' (s 2(2)(k)).

This account of the expressive and incentive aims of charity law is, in one important respect, incomplete. The range of purposes – to do with alleviating social and economic disadvantage – that meet the description 'relief of poverty' are regarded as charitable in law even in circumstances where they are not likely to generate collective goods. This is because purposes within that description need not satisfy a public benefit test, even by way of a presumption.[53] In my view, it follows from the fact that the public benefit test does not apply to purposes satisfying the description 'relief of poverty' that the expressive and incentive aims of charity law when it comes to 'relief of poverty' cannot be, or at least cannot only be, to endorse and encourage the pursuit of purposes that are likely to realise collective goods. And I think this is the case notwithstanding that, to a certain extent, purposes within the description 'relief of poverty' are likely to realise collective goods like safer communities or more aesthetically satisfying urban environments.[54]

If we are to understand the expressive and incentive aims of charity law when it comes to 'relief of poverty', I think we must shift our attention away from collective goods and towards the individual goods that are likely to be realised by purposes meeting that general description. Those individual goods are numerous, including nourishment, housing, clothing, warmth, employment and a myriad of other contributions to the wellbeing of the disadvantaged in the community. By accepting that purposes that aim to provide such individual goods are charitable even if no collective goods are likely to result, even indirectly, from the purposes being carried

[53] *Re Compton* [1945] Ch 123 (CA); *Dingle v Turner* [1972] AC 601 (HL).

[54] Arguably, purposes meeting the description 'relief of poverty' were pursued in order to generate collective goods even in Tudor times: see generally WK Jordan, 'The English Background of Modern Philanthropy' (1961) 66 *American Historical Review* 401. However, as Jordan notes, they were also pursued out of an 'increased sensitivity to human suffering': ibid, 403.

out, the state expresses the view that the individual goods entailed in 'relief of poverty' make an especially fundamental or significant contribution to human wellbeing. Indeed, the acceptance of 'relief of poverty' as charitable even in the absence of a link to collective goods suggests that in the view of the state, purposes meeting the description 'relief of poverty' are likely to realise goods so important to human wellbeing that to ask questions about the propensity of those purposes to generate collective goods would be obtuse.

At this point, a liberal – at least one with egalitarian tendencies – might ask the question: is not the state's aim for charity law when it comes to 'relief of poverty' really to endorse and encourage the pursuit of social justice? For an egalitarian liberal, the provision of individual goods that improve the lives of the worst-off in the community is of interest from the perspective of social justice, the requirements of social justice being fixed by what is necessary to maximise equality in the distribution of resources, opportunities and the rights and duties of citizenship under conditions of human freedom.[55] That charity law enables those with a sense of social justice to work towards a more equal society can scarcely be doubted; as a set of power-conferring rules, charity law facilitates those who would exhibit the virtue of justice in responding to social and economic disadvantage.[56] However, it is important to remember that charity law also enables those who would respond to disadvantage by exhibiting virtues other than justice. Most obviously, charity law enables those who would exhibit the virtue of charity (in the non-legal sense) in alleviating the suffering

[55] See generally Rawls, above n 28.

[56] On the virtue of justice, see Gardner, above n 29.

of others irrespective of any dividend in terms of equality.[57] So it cannot be said that the expressive and incentive aims of charity law are confined to endorsing and encouraging the pursuit of social justice.

But the egalitarian liberal may wish to make a bolder claim, to the effect that the aim of charity law, at least in respect of purposes within the description 'relief of poverty', is directly to realise distributive patterns that are demanded by the requirements of social justice, rather than simply to facilitate those with a sense of social justice in their provision of individual goods to the disadvantaged. Those who would make this claim might insist that in addition to expressive and incentive aims, charity law has distributive aims. I do not think that the point of charity law is illuminated by arguing that the state pursues distributive aims through charity law. Recall that charity law is made up of power-conferring rules, the normative function of which is to facilitate individual autonomy. As such, charity law is a poor choice of vehicle for achieving distributive aims, at least from an egalitarian liberal perspective; as egalitarian liberals accept, there can be no guarantee that autonomous choices will deliver distributive patterns consistent with those demanded by the requirements of social justice.[58] If, as egalitarian liberals believe, there is no necessary, or even likely, connection between autonomous choices and just distributions, then it makes little sense for the state to pursue just distributions via autonomous choices. And so I think that from an egalitarian liberal perspective, the point of charity law is not distributive; such

[57] On the virtue of charity (in the non-legal sense) and what distinguishes it from the virtue of justice, see John Gardner, 'The Virtue of Charity and its Foils' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart, Oxford, 2000) 1.

[58] Liberals who reject egalitarianism, on the other hand, may reject this proposition: see Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974).

distributive aims as the state has are properly pursued through other legal frameworks and perhaps even despite charity law.[59]

4. Goods, Autonomy and Charity Law in the Liberal State

In Part 3, I sought to reveal the point of charity law by exploring its expressive and incentive aims. However, the discussion of Part 3 was in two respects incomplete. First, it did not consider whether the state's practice of endorsing and encouraging the realisation of certain goods through charity law is justified. From a liberal perspective, such a practice calls for justification, given the traditional liberal view that the state should remain neutral with respect to at least controversial conceptions of the good. Secondly, the discussion of Part 3 did not attempt to set out grounds on which the state might choose the goods that it wishes to promote through charity law, assuming that the state is justified in choosing goods to promote at all. It is possible to talk about the point of charity law, with reference to its expressive and incentive aims, without also tackling questions about the proper stance of the liberal state towards various conceptions of the good: answers to those questions can be assumed for the sake of analysis. However, no liberal theory of charity law would be complete in the absence of some account of why the state may be non-neutral with respect to the good and which goods the state should promote. In this final part of the paper, I

[59] This of course raises the question whether the state should cease to maintain charity law, regardless of its point, precisely because of its tendency to deliver distributive patterns at odds with the requirements of social justice: see Alan Gewirth, 'Private Philanthropy and Positive Rights' (1987) 4 *Social Philosophy and Policy* 55. I cannot deal fully with this difficult question here, but I would note that several considerations bear on it. What is the scope of the requirements of social justice as understood from an egalitarian liberal perspective? What are the requirements of social justice from that perspective? And are the distributive patterns delivered by charity law consistent or inconsistent with those requirements? In my view, it is not clear that the answer to any of these questions calls into question the state's commitment to charity law.

begin the task of providing such an account with reference to the liberal value of autonomy.

Earlier, I discussed the normative function of charity law as a set of power-conferring rules, and I argued that, from a liberal perspective, that normative function was to make a contribution to the conditions for autonomy. As a set of power-conferring rules, charity law makes a contribution to the conditions for autonomy by providing options to those whose purposes fall within its purview. By maintaining charity law as a set of power-conferring rules, therefore, the liberal state expresses its commitment to the value of individual freedom, understood in its positive sense as the value of autonomy. I now want to suggest that in light of such a commitment, an argument can be made not only for the maintenance of power-conferring rules including those of charity law, but also for the state's practice of endorsing and encouraging the realisation of certain goods through charity law.[60] If individual freedom is understood in its positive sense as autonomy, there is no need for a liberal who values individual freedom to insist on state neutrality with respect to the good. Instead, from a liberal perspective the state may and indeed should promote goods that are autonomy-enhancing, because they make a contribution to the conditions for autonomy for specific individuals, groups of individuals or the community as a whole. To the extent that the state does this through charity law, charity law serves the value of autonomy in two ways: it makes more likely the realisation of autonomy-enhancing goods; and, as a set of power-conferring rules, it enables the realisation of autonomy-enhancing goods by autonomous action.

[60] I note that such an argument is consistent with the harm principle, which constrains state action in pursuit of coercive, but not expressive or incentive, aims: see Raz, *The Morality of Freedom*, above n 25, 412-429; Raz, 'Autonomy, Toleration and the Harm Principle', above n 25, 330.

From this perspective, the interesting question is not whether the state is justified in endorsing and encouraging the realisation of certain goods, but rather which goods are autonomy-enhancing and consequently to be promoted by the liberal state through charity law given the state's commitment to the value of autonomy. The first point to note is that this question can be answered, in respect of any particular good, only by reflection on the character of the good in question. Take for example a life of monastic seclusion, lived out of a sense of religious duty. It is certainly arguable that such a life realises significant human goods. However, reflection on the character of such goods as are realised by the life of dutiful monastic seclusion reveals that they are not autonomy-enhancing; indeed, they make sense as goods only within a belief system that does not place great value on autonomy. The liberal state may or may not be justified in promoting these goods but it is not justified in promoting them because of its commitment to autonomy.[61] Another point to note is that the propensity of a good to be autonomy-enhancing is a matter of degree. Some goods are autonomy-enhancing in a profound or significant way, while other goods make a minor or negligible contribution to autonomy. This is because the value of autonomy attaches more to large or important plans, goals and preferences in individuals' lives than it does to small or trivial ones. For example, the collective goods associated with a democratic system of government are autonomy-enhancing for everyone in the community in an obvious and substantial way. By contrast, a given option on the menu at my local restaurant is autonomy-enhancing only in the trivial sense that it

[61] Interestingly, in *Gilmour v Coats*, a case in which the purposes of a Carmelite priory of nuns were under scrutiny, an argument was brought to the effect that the priory enabled women who chose to enter it to live in accordance with their beliefs and commitments. Notwithstanding that this argument made an appeal to the value of autonomy, it was rejected by the House of Lords on the basis that the priory delivered no discernible benefit to the wider community: [1949] AC 426, 449 (Lord Simonds).

gives me and other diners one more thing to choose from.[62] That goods can serve autonomy to different degrees is important when thinking about the state's choice of goods to promote though charity law, a matter I return to below.

If the liberal state is justified in endorsing and encouraging the realisation of goods that are autonomy-enhancing, and if the state's choice of goods to promote is to be guided by the propensity of those goods to be autonomy-enhancing, including the degree to which they are likely to be autonomy-enhancing, then in my view it should be possible to develop a liberal theory of charity law, one that points ultimately to the value of individual freedom and to the goods that make it possible. To test such a theory, it would be necessary to consider in detail the nature of the goods that are likely to be realised by the pursuit of charitable purposes, asking in what ways and to what extent those goods make a contribution to the conditions for autonomy for specific individuals, groups of individuals or the whole community. If the theory is sound, this inquiry should yield the conclusion that the goods promoted through charity law are autonomy-enhancing in some significant way such that they ground a justification for the liberal state pursuing the expressive and incentive aims of charity law.

I do not know for certain whether an inquiry into each of the particular goods promoted through charity law would yield such a conclusion. As I said earlier, the propensity of a particular good to be autonomy-enhancing is a matter of reflection on the character of that good. However, the general character of the goods promoted through charity law suggests that those goods might well make significant

[62] See Raz, *The Morality of Freedom*, above n 25, 409-410.

contributions to the conditions for autonomy. The goods that are likely to be realised by the pursuit of purposes within the description 'relief of poverty' are goods that entail the provision of basic necessities and opportunities to disadvantaged members of the community. In the absence of these necessities and opportunities, autonomous lives are inhibited and, in extreme cases such as starvation and homelessness, practically impossible.[63] It is therefore plausible that the goods associated with 'relief of poverty' make an especially fundamental contribution to the conditions for autonomy for disadvantaged individuals. This may justify choosing those goods for promotion through charity law, even in circumstances where the goods in question make no contribution to the conditions for autonomy for the community as a whole, or even for a substantial number of the community.

Arguably, goods entailed in the pursuit of purposes other than those meeting the description 'relief of poverty' might make an especially fundamental contribution to the conditions for autonomy for specific individuals or groups of individuals, without at the same time contributing to the conditions for autonomy for the whole community. The goods entailed in education, health care and the provision of a variety of social services provide excellent examples. Learning to read and write, being cured of cancer, or having access to respite care for a disabled child or parent, obviously gives a person significant, potentially life-changing, options that they would otherwise lack. In light of the value of autonomy, such goods are analogous to, indeed overlap with, those that are entailed in 'relief of poverty'. And yet, unlike the

[63] See ibid, 373-374, discussing the 'Man in the Pit' and the 'Hounded Woman'. The analogies between these imaginary cases and a life of extreme social and economic disadvantage are not difficult to grasp. See also Jeremy Waldron, 'Homelessness and the Issue of Freedom' in his *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press, Cambridge, 1993) 309, arguing that homelessness is intolerable even from the perspective of a liberal who values only negative liberty.

goods entailed in 'relief of poverty', the state is prepared to promote through charity law the goods entailed in education, health care and social services only in circumstances where they have a collective character, being goods for the community as a whole or for anyone in the community who desires and qualifies to access them. In a charity law guided by the value of autonomy, this insistence on a collective character may be misplaced in the case of at least some goods entailed in education, health care and social services either because those goods are fundamental to having any real options for the individuals who enjoy them or because the goods make a significant contribution to the conditions for autonomy for a substantial number of people, even though the goods are unavailable to all who wish and qualify to access them.[64]

That said, various collective goods that the state promotes through charity law do make a special contribution to the conditions for autonomy for the community as a whole. As Charles Taylor has argued, autonomous lives can be achieved only within a society that provides and nurtures a certain type of public culture: a public culture in which the virtues, commitments, choices and life-paths that are entailed in living autonomously are both possible and valued.[65] Such a public culture is multi-faceted and its precise incidents are sure to vary from one community to the next, depending on the history, traditions, beliefs and practices of the community in question. That said, in most if not all communities that value autonomy the public culture would surely entail collective goods such as: environmental and political stability; the rule of

[64] Cases like *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 and *Inland Revenue Commissioners v Baddeley* [1955] AC 572 (HL) illustrate both the state's insistence on collectivity and the difficulties to which I allude in the text.

[65] See generally Charles Taylor, 'Atomism' in his *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge University Press, Cambridge, 1985) 187.

law; institutions like the free market and private property; democratic government; scientific knowledge; awareness and knowledge of history, religion, philosophy, the arts, and other important dimensions of human understanding and inquiry; appreciation or at least toleration of different ways of living and being; free political engagement and expression; and dynamism and openness to change. Arguably, these are the sorts of collective goods that are likely to be realised by the pursuit of a variety of charitable purposes, for example those within descriptions like 'advancement of environmental protection or improvement',[66] 'advancement of citizenship or community development'[67] or (the rather clumsy) 'advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity'.[68] Charity law, to the extent that it aims to endorse and encourage the realisation of these sorts of collective goods, is arguably one of the liberal state's most important vehicles for sustaining a public culture of the type that Taylor argues is necessary to the living of autonomous lives.

From a liberal perspective, it is in light of the demands of an autonomy-enhancing public culture that the state's promotion of goods entailed in various religious purposes may best be understood.[69] Obviously, the state's pursuit of the expressive and incentive aims of charity law in respect of religious purposes should be of particular concern to liberals, given that in communities characterised by religious pluralism it is in matters of religion that controversy tends to arise over conceptions of

[66] Charities Act 2006 (UK), s 2(2)(i).

[67] Charities Act 2006 (UK), s 2(2)(e).

[68] Charities Act 2006 (UK), s 2(2)(h).

[69] For a similar argument, see Turnour, above n 3, 335-341.

the good. However, in light of the value of autonomy, the state is justified even from a liberal perspective in endorsing and encouraging the pursuit of religious purposes to the extent that carrying out those purposes is likely to contribute to a public culture of religious diversity and understanding and toleration of religious difference. This is because the conditions for autonomy are substantially enhanced in circumstances where a variety of religious beliefs and practices coexist peacefully. But note: where religious beliefs and practices are likely to undermine the conditions for autonomy, because they demand seclusion from the wider community (especially for those who have not chosen it),[70] or because they seek to suppress or eliminate other secular or religious belief systems,[71] or because they entail the sort of discrimination on grounds like race and sex that undermine the conditions for autonomy for everyone,[72] the liberal state should refuse to promote them unless there are compelling reasons to do so based on values other than autonomy.

I hope to have said enough to suggest that, from a liberal perspective, the point of charity law – in light of its expressive and incentive aims – is to be found in the value of individual freedom, understood in its positive sense as autonomy, and in the range of goods the realisation of which is made more likely by the pursuit of charitable purposes. I have, however, avoided one pressing question. What is the scope of

[70] *Gilmour v Coats* [1949] AC 426; *Holmes v Attorney-General*, The Times (London) 12 February 1981, 8.

[71] Note the remarks of Sir John Romilly MR in *Thornton v Howe* (1862) 31 Beav 14; 52 ER 1042, about purposes 'adverse to the very foundations of all religion'.

[72] See Matthew Harding, 'Some Arguments against Discriminatory Gifts and Trusts' (2011) 31 *Oxford Journal of Legal Studies* 303 for further discussion. Also note Michael Walzer, 'Equality and Civil Society' in Simone Chambers and Will Kymlicka (eds), *Alternative Conceptions of Civil Society* (Princeton University Press, Princeton, 2002) 34, arguing against state support for civil society organisations that discriminate in certain ways, but basing the argument on equality rather than autonomy.

charity law in light of its point? This question proves remarkably difficult to answer. If the point of charity law is to endorse and encourage the pursuit of purposes that are likely to realise autonomy-enhancing goods, why is it that many purposes that are likely to realise autonomy-enhancing goods are not regarded in law as charitable? Showing that charity law is confined to purposes that are pursued autonomously via power-conferring rules takes us only so far: it must still be explained why the purposes of those who interact autonomously via power-conferring rules in the market and family spheres, and who realise autonomy-enhancing goods as a result, are not within the province of charity law.[73] Arguing that the expressive and incentive aims of charity law are directed at purposes that are likely to realise autonomy-enhancing goods and that are pursued altruistically[74] raises the question: why are purposes pursued from a sense of religious duty, or even out of self-interest, also endorsed and encouraged through charity law? And suggesting that charity law is confined to those purposes likely to realise autonomy-enhancing goods including the bonds of fellowship and trust that are often described as 'social capital' does not assist in understanding why many civil society purposes with the tendency to generate such ties are not regarded as charitable. Indeed, social capital may be generated primarily by associational purposes, which do not always or even often coincide with charitable purposes.[75] Moreover, if the expressive and incentive aims of charity law are

[73] Although it would appear that at least some purposes pursued within the market sphere can be regarded as charitable in Australian law: *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 (HCA).

[74] See Rob Atkinson, 'Altruism in Nonprofit Organisations' (1990) 31 *Boston College Law Review* 501.

[75] See Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civil Life* (University of Oklahoma Press, Norman, 2003).

somehow tied to the creation of social capital, then in light of recent trends charity law may be failing to live up to its point.[76]

Encouraging people to be altruistic and to form trusting relations with others are worthy social goals. However, I do not think that these goals taken on their own illuminate the proper scope of charity law. Ultimately, the proper scope of charity law can be determined only by state officials deliberating on the character of various goods, the extent to which the state wishes to promote them, and the extent to which the best way to promote those goods is by pursuing the expressive and incentive aims of charity law. As I hope to have shown in this part of the paper, in a liberal state the value of autonomy can and should inform those deliberations. But it cannot determine their outcome in a mechanical or analytic way. Even a liberal state must have regard to values other than autonomy, and reasonable minds may disagree about what autonomy requires, especially during times of social, economic, political and cultural change. That we are living in such times is hardly a controversial proposition; neither should it surprise us that deliberations about the proper scope of charity law in the present day are likely to be characterised by disagreement and debate. To say that the proper scope of charity law is not a matter of theoretical analysis, but rather of the exercise of practical reason by a range of state officials who may well deliberate reasonably and yet decide differently from each other, may seem a disappointing conclusion. But it is one that is consistent with the history of charity law as a body of law that has developed incrementally over centuries. And it is a reminder of the responsibility of the holders of political authority in a liberal

[76] See Rob Reich, 'Toward a Political Theory of Philanthropy' in Patricia Illingworth, Thomas Pogge and Leif Wenar (eds), *Giving Well: The Ethics of Philanthropy* (Oxford University Press, Oxford, 2011) 177, referring to Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (paperback ed, Simon and Schuster, New York, 2000).

community constantly to review and adjust that community's institutions, including its laws, to ensure that they meet the demands of individual freedom.