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# CHARITY AND LAW: PAST, PRESENT AND FUTURE

MATTHEW **HARDING***

In this article, I focus on the role of law in constituting what I call 'legal charity' as a mode of social action. I begin by reflecting on how law has played a key role historically in defining a charity sector with its own distinctive character. I then turn to recent developments putting pressure on the doctrine by which law has constituted legal charity as a distinctive mode of action. Finally, I explore how law should respond to these recent developments, imagining several possible futures for the charity sector as I go, and considering whether law should continue to constitute legal charity as it has done historically, or now allow legal charity to wither and die in favour of other modes of social action.

## I. INTRODUCTION

Let me begin with a seemingly unremarkable proposition: there are different ways of benefitting other people. By this I do not mean that there are different benefits, or different goods, with which one might provide other people, although that surely is the case. Rather, I mean exactly what I say: there are different *ways*, different modes of action, by which one might provide benefits to others. To illustrate, consider how I might improve the life of a homeless person. If I am a property owner, I might lease my flat to her. If I am a government official, I might grant her access to public housing. If I am politically inclined, I might lobby my Member of Parliament to fix homelessness in my district. If I have a charitable disposition, I might pay for a hotel room or even, if I am an energetic type, set up a homeless shelter. These are all ways of achieving a particular outcome: putting a roof over a homeless person's head. But they are nonetheless significantly different, because the modes of action they entail—namely, market capitalism, government administration, political activism, and charity—embody and express different normative incidents and ideals. In this article, I want to explore the law's contribution, in common law countries, to constituting and maintaining a particular mode of action, which I call 'legal charity'. Legal charity overlaps, but is far from coextensive, with acts of lay charity such as

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providing shelter to a homeless person: one can do legal charity by benefitting others in a multitude of ways that extend well beyond what we would regard as charity in any lay sense. Legal charity is an artifice of law; as a mode of action, it would not exist but for the law that creates and sustains it. Nonetheless, as we will see, it has a life outside of the law, in regulatory practice, in the self-understanding of not-for-profit organisations, and in public culture more generally.

The article is in four parts. The first is the introduction. In the second part, I take you to the past, to the history of charity law, to try to understand how, in the common law world, law came to constitute legal charity as a distinctive mode of action. In the third part, I reflect on the present, on some contemporary developments putting pressure on law to weaken and even abandon the doctrine that has constituted legal charity as a particular way of benefitting others. In the fourth and final part, I consider the future, asking whether law should continue to maintain legal charity or whether it should now allow legal charity to wither and die in favour of other modes of action.

## II. Past

Legal charity as we know it today emerged from the crucible of Tudor England. Prior to the English reformation, the concept of legal charity was closely connected with the doctrines and teachings of the Roman Catholic Church: law enabled and supported donors to effect pious causes securing their own salvation and bringing honour to God and His Church. In this world, legal charity, as a mode of action, was indistinguishable from religious observance.[1]

The English reformation and the events that followed severed this connection between religious observance and legal charity. The dissolution of the monasteries and the enactment of the Elizabethan poor laws brought about profound social and economic changes and a felt urgent need to relieve parishes of their legal duties to attend to the indigent poor. At the same time, legislation outlawing superstitious uses forced charitable donors to channel their energies into purposes unconnected with Catholic piety.[2] Of course, social, economic and political changes influenced, and were influenced by, a fundamental shift in the religious and cultural profile of the population: as Gareth Jones puts it in his seminal treatment of the history of English charity law, "the majority of Englishmen reflected less on the fate of their souls and became more concerned with the worldly needs of their fellow men".[3]

The *Statute of Charitable Uses of 1601*[4] was enacted against this backdrop of rapid and far-reaching upheaval. The purpose of the statute was to set up regulatory

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1 See generally Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge: Cambridge University Press, 1969) at ch I; WK Jordan, *Philanthropy in England 1480–1660* (Westport: Greenwood Press, 1978) at ch 1. See also Will Kymlicka, "Altruism in Philosophical and Ethical Traditions: Two Views" in Jim Phillips, Bruce Chapman & David Stewart, eds, *Between State and Market: Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) at 87, 106, referring to Aquinas's view of charity as "the movement of the soul towards the enjoyment of God for His own sake".

2 See further Jones, *ibid* at ch II.

3 *Ibid* at 10.

4 (UK) 43 Eliz I, c 4.

safeguards against fraud and neglect on the part of charity trustees.[5] However, the Statute's preamble, listing a number of what it described as "charitable and godly" purposes, has proven its lasting legacy to the concept of legal charity. Rendered in modern English, the preamble refers to:

> [T]he relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.[6]

As Jones points out, the purposes listed in the preamble have a flavour of public benefit when read in the late Elizabethan setting in which the Statute was enacted, and they all seem in their different ways to alleviate the burdens of parishes in looking after the poor.[7] The preamble, then, may be viewed as a legislative snapshot of the philanthropic concerns of the time, animated by an anxiety over poor relief and community responsibilities.

The concept of legal charity embedded in the Elizabethan preamble was thus responsive to, and consonant with, donor preferences in late Tudor England. To that extent the preamble did not constitute legal charity as a mode of action; rather, it captured in a description of legal charity the contours of a mode already constituted by changing donor behaviour. And Jones argues that, with one notable exception, law and donor preferences remained aligned via the preamble throughout the 17th Century.[8] The exception was superstitious uses: donors whose religious preferences were at odds with the established church might find that their gifts were applied, cy-pres, to supporting the Church of England.[9] But the intolerance of superstitious uses was embedded in statute rather than in the charity law of the Court of Chancery, and once the statutory restrictions were lifted, legal charity came quickly to accommodate even the preferences of non-Anglican donors.[10]

If we want to see judges in Chancery developing the concept of legal charity in spite of donor preferences, we need to look to the 18th and 19th Centuries. For example, consider the impact of the *Mortmain Act of 1736*.[11] According to that Act, testamentary devises of land for charitable purposes were void. The primary policy objective was to protect the interests of heirs. In a number of cases decided

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5 *Ibid* at ch III, IV; Jordan, *supra* note 1 at ch 4. The Statute was repealed by the *Mortmain and Charitable Uses Act 1881* (UK), s 13(1).

6 For the full text of the preamble, see Jones, *supra* note 1 at 224–228.

7 *Ibid* at 27.

8 *Ibid* at ch VIII.

9 See *eg*, *Attorney-General v Baxter* (1684) 1 Vern 248.

10 See *eg*, *Attorney-General v Hughes* (1689) 2 Vern 105, decided after the passage of the *Act of Toleration 1689* (UK), 1 Will & Mary, c 18, which accommodated purposes connected with dissenting Protestants. Statutory intolerance of superstitious uses persisted for longer in relation to Catholic and non-Christian purposes: see *eg*, *Da Costa v Da Paz* (1754) 1 Dick 259; *Cary v Abbott* (1802) 7 Ves Jr 490.

11 (UK), 9 Geo II, c 36 [*Mortmain Act*].

in the 18th Century, Chancery judges declared purposes to be charitable precisely in order to invoke the *Mortmain Act* and invalidate devises of land for those purposes. As a result, the range of purpose types recognised as charitable in law expanded considerably.[12] This expansion was so great that in 1767, in *Jones v Williams*,[13] Lord Camden felt able to declare that a charitable gift was "a gift to the general public use, which extends to the poor as well as the rich".[14] Legal charity had come to bear a meaning arguably much broader than that reflected in the Elizabethan preamble, but at the same time was at odds with donor preferences given the implications of the *Mortmain Act*.

For present purposes, the more interesting divergence of law and donor preferences was generated by the decisions of Sir William Grant MR and Lord Eldon LC in *Morice v Bishop of Durham*,[15] a landmark case that worked its way through Chancery in the early 19th Century. There, it was decided that legal charity encompasses the pursuit of only those purposes that are within the equity of the Elizabethan preamble.[16] On this approach, even public benefit purposes cannot be charitable in law if they are not within the preamble's "spirit and intendment",[17] or, to put it another way, if they do not have the flavour of the purposes listed in the preambular text. Trying to work out what it means for purposes to be within the equity of the Elizabethan preamble has been one of the great preoccupations of charity law since *Morice* was decided. But the general idea that purposes must lie within the equity of the preamble, whatever that means, has enjoyed broad consensus around the common law world since the early 19th century.

The ruling in *Morice* recognises that a donor might have a preference for a public benefit purpose that does not align with the concept of legal charity. Indeed, the facts of *Morice* itself, in which the donor specified "objects of benevolence and liberality", seem to exemplify this very scenario;[18] not all objects of benevolence and liberality are within the equity of the Elizabethan preamble.[19] In contrast, in the 17th Century, there was no real possibility that a donor's preference might diverge from the concept of legal charity, thanks to the settled and predictable preferences of donors and the accuracy with which the preamble recorded those preferences.[20] The important point to note about the ruling in *Morice* is that, in light of it, a donor whose preferences are not consonant with legal charity must make a choice, to channel their energies into purposes within legal charity, or find other ways of achieving their objectives, or

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12 See Jones, *supra* note 1 at ch VI, VII and especially IX.

13 (1767) Amb 651.

14 *Ibid* at 652.

15 (1804) 9 Ves Jr 399 [*Morice (Court of Chancery)*]; (1805) Ves Jr 522 [*Morice (High Court of Chancery)*]; collectively, [*Morice*].

16 *Morice (Court of Chancery)*, *ibid* at 405 (*per* Sir William Grant MR); *Morice (High Court of Chancery)*, *ibid* at 541 (*per* Lord Eldon LC).

17 The phrase comes from the judgment of Sir William Grant MR in *Morice (Court of Chancery)*, *ibid* at 405.

18 For a full account of the facts of the case, informed by archival work, see Joshua Getzler, "*Morice v Bishop of Durham* (1805)" in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in Equity* (Oxford: Hart Publishing, 2012) at 157.

19 See also, in relation to 'benevolent objects', *Chichester Diocesan Fund and Board of Finance Incorporated v Simpson* [1944] AC 341.

20 In Jones, *supra* note 1 at 133, the author argues that the distinction recognised in *Morice* between charitable and public benefit purposes would have seemed strange to Chancery lawyers of earlier times.

indeed give up on those objectives altogether.[21] To the extent that the donor chooses the path of legal charity, the ruling in *Morice* influences and shapes donor preferences rather than simply reflecting and recording them. That ruling thus represents a key moment in charity law, a moment at which law began the work of constituting legal charity as a mode of action.

No treatment of charity and law in the common law world could neglect to mention the 1891 House of Lords decision in *Commissioners for Special Purposes of Income Tax v Pemsel*.[22] Much could be said about this seminal case, but I will confine myself to two observations about it.

First, in his judgment in *Pemsel*, Lord Macnaghten interpreted the demand that charitable purposes must lie within the equity of the Elizabethan preamble to mean that such purposes must answer one of four general descriptions: relief of poverty; advancement of education; advancement of religion; and other purposes beneficial to the community (that are analogous to purposes in the preamble).[23] The role of this taxonomy in giving shape to legal charity ever since *Pemsel* was decided cannot be overestimated. Indeed, the four 'heads' of charity articulated by Lord Macnaghten form the basis not only for the common law conception of legal charity developed and applied by judges, but also for the statutory definitions of legal charity that have been enacted in several common law jurisdictions in recent years,[24] and in Singapore for the conception of legal charity first articulated by the Minister of Finance in his 2005 Budget Speech and now adopted by the Commissioner of Charities and his staff.[25]

Secondly, the key question in *Pemsel* was whether an organisation had 'charitable purposes' within the meaning of section 61 of the United Kingdom's *Income Tax Act of 1842*[26] and was therefore eligible for an income tax exemption. The case arose after the Commissioners for Special Purposes of Income Tax decided, after decades of interpreting section 61 as referring to purposes within the equity of the Elizabethan preamble, to interpret section 61 as referring only to purposes connected with the relief of poverty.[27] By a slender majority, the House of Lords upheld the more expansive interpretation in accordance with *Morice*.[28] *Pemsel* thus stands as the first in an extensive line of cases in which legal charity has been developed not in order to determine the validity of a purpose trust—the question at issue in *Morice* and other earlier cases—but rather to ascertain whether an organisation may access

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21 Thus, Getzler, *supra* note 18 at 160, describes the ruling in *Morice* as establishing a '*numerus clausus*' for charity.

22 [1891] AC 531 [*Pemsel*].

23 *Ibid* at 583.

24 See *Charities Act 2005* (NZ) 2005/39, s 5(1); *Charities Act (Northern Ireland) 2009* (NI), ss 3(1), 3(11); *Charities Act 2011* (UK), c 25, s 3(1); *Charities Act 2013* (Cth), ss 12, 14–17.

25 See further Rachel PS Leow, "Four Misconceptions about Charity Law in Singapore" (2012) Sing JLS 37 at 41–48. The Commissioner of Charities sets out the heads of charity as he understands them in his annual reports: see *eg*, Sing, Ministry of Culture, Community and Youth, *Commissioner of Charities Annual Report for the Year Ended 31 December 2018* (June 2019) [MCCY, *Annual Report*] at 12.

26 (UK), 5 & 6 Vict, c 35.

27 In his judgment in *Pemsel*, *supra* note 22 at 591, Lord Macnaghten was unimpressed by this administrative record.

28 I address this aspect of the case more fully in Matthew Harding, "Equity and Statute in Charity Law" (2015) 9 J Equity 167 at 173–175.

some fiscal privilege. I will return to the tax preferments of charity towards the end of the article.

While law's contribution to constituting legal charity as a distinctive mode of action may be traced back to *Morice* in the early 19th Century, it was really in the 20th Century that the contribution was largely made. The key developments all have a common theme: a judicial concern to demarcate the boundaries of legal charity.

One expression of this judicial concern was the development of an independent public benefit requirement standing alongside the ruling in *Morice*. In a series of landmark cases following the Second World War, the House of Lords confirmed that for a purpose to count as charitable in law it is not enough that the purpose be within the equity of the Elizabethan preamble. According to these post-war cases—*National Anti-Vivisection Society v Inland Revenue Commissioners*,[29] *Gilmour v Coats*,[30] and *Oppenheim v Tobacco Securities Trust Co Ltd*,[31] to name three—a charitable purpose must be shown, according to certain legal rules, to be public in character, and it must be proven to be beneficial to people as opposed to detrimental or of no consequence.[32] The development of an independent public benefit requirement is as significant as the ruling in *Morice* to understanding the contribution of law to the constitution of legal charity as a mode of action. For just as the ruling in *Morice* channels donor energies into purposes within the equity of the Elizabethan preamble, the public benefit requirement channels those energies into purposes that judges, and latterly legislators and regulators, consider sufficiently public and sufficiently beneficial.

During the 20th Century, courts also declared and developed rules providing that certain purposes are not charitable irrespective of whether they are public benefit purposes within the equity of the Elizabethan preamble. The best known of these is the rule, first referred to obiter dicta by Lord Parker in the 1917 case of *Bowman v Secular Society Ltd*,[33] to the effect that the purpose of attaining a political object cannot be charitable. This rule against political purposes has been given a relatively broad scope of operation in the years since *Bowman* was decided, and is now acknowledged, at least in the jurisdictions where it operates, to be directed against purposes of agitating for law or policy reform or against administrative decisions,[34] as well as purposes of advocating in public debate for a particular viewpoint on a contested issue.[35]

Less well known, and certainly less well understood, is the rule of charity law providing that at least some purposes of government are not charitable, even though many government purposes are straightforwardly public benefit purposes within the preamble's purview. In determining whether a purpose is too governmental to be recognised as charitable, factors such as government control and funding, and whether the organisation whose purpose is in view was formed by an act of parliament or by executive action, are relevant. But there seems no clear test for weighing and taking account of these various factors.[36]

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29 [1948] AC 31 [*National Anti-Vivisection Society*].

30 [1949] AC 426.

31 [1951] AC 297.

32 See also, in relation to the benefit requirement, *Charities Act 2013* (Cth), *supra* note 24, s 6.

33 [1917] AC 406 at 442 [*Bowman*]. See also *National Anti-Vivisection Society*, *supra* note 29.

34 See *McGovern v Attorney-General* [1982] 1 Ch 321 at 333–340.

35 See *Human Life International in Canada Inc v Minister of National Revenue* [1998] 3 FC 202.

36 I deal more fully with charity law's treatment of government purposes in Matthew Harding, "Distinguishing Government from Charity in Australian Law" (2009) 31 Syd LR 559.

Finally, during the 20th Century, courts emphasised that the purpose of generating profits or other benefits for members or other stakeholders is not within the concept of legal charity.[37] Before the 20th Century, when charitable purposes were pursued largely through donative trust structures, the question of member or stakeholder gains tended not to arise. However, in the 20th Century, many charities were formed as companies or associations (or indeed trusts) with an operational as opposed to a donative character. Thus the felt need to render explicit rules against for-profit or member benefit arrangements.

By the turn of the 21st Century, the concept of legal charity had developed to a point where it articulated a distinctive mode of action, a way of benefitting other people with its own normative incidents and ideals quite different from those embedded in other modes. What are these normative incidents and ideals? Legal charity is confined to the pursuit of only certain public benefit purposes and not others: this is the legacy of *Morice*. Legal charity is confined to the pursuit of purposes that judges, legislators or regulators decide are sufficiently public and sufficiently beneficial: this is the legacy of the post-war public benefit cases. Legal charity excludes the pursuit of political purposes, government purposes, and purposes the gist of which is member or stakeholder gains. Legal charity therefore organises around a particular conception of altruism—generating benefits for a 'stranger' class defined in virtue of its public character[38]—and it opposes itself to the norms of family and associational loyalty, political activism, government administration, and market capitalism. This mode of action would not exist but for the law that has constituted and maintained it.

Legal charity as a mode of action would be of limited interest if no one actually engaged with it. However, the evidence suggests that this is far from the case. In most common law jurisdictions—including Singapore—government authorities now register and regulate charities for various legal purposes.[39] These regulators work with the concept of legal charity when making registration decisions.[40] Large numbers of organisations seek to register, even in circumstances where they need not, and therefore choose to adopt the mode of action that is legal charity as opposed to other modes that might be available to them.[41] Moreover, evidence suggests that for many organisations being a registered charity is an important element of their identity,[42] and donors often limit their gifts to registered charities, reinforcing the sense that there is something special about legal charity as a mode of action. And

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37 See *R v The Assessors of the Town of Sunny Brae* [1952] SCR 76; *Incorporated Council of Law Reporting of the State of Queensland v Federal Commissioner of Taxation* (1971) 125 CLR 659; *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 [*Incorporated Council*].

38 See further Rob Atkinson, "Altruism in Nonprofit Organizations" (1990) 31 Bos Col LR 501; Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014) [Harding, *Charity Law and the Liberal State*] at 88–108.

39 In Singapore, the objectives and general functions of the Commissioner of Charities are set out in the *Charities Act* (Cap 37, 2007 Rev Ed Sing), s 4.

40 See *Charities (Registration of Charities) Regulations* (Cap 37, Reg 10, 2008 Rev Ed Sing), r 3(1)(a).

41 For example, as at 31 December 2018, there were 2,277 registered charities in Singapore: MCCY, *Annual Report*, *supra* note 25 at 12.

42 Thus, the Australian Charities and Not-for-Profits Commission ("ACNC") permits registered charities to display a 'Registered Charity Tick' to promote their status as registered charities. See Austl, Commonwealth, ACNC, *Registered Charity Tick*, online: ACNC <www.acnc.gov.au/charity/tick-charity-registration>.

in public culture generally there is a sense that registered charities form a 'charity sector' with a distinctive profile and contribution to make to society. Legal charity is an artifice of law, but thanks to regulatory practice and sector behaviour, and the impact of these on public culture, legal charity has salience as a mode of action well beyond law itself.

Let me conclude this brief overview of the history of charity and law in the common law world with a few summative thoughts. The concept of legal charity in the Elizabethan preamble was both responsive to and consonant with donor preferences in late Tudor England. In contrast, in the early 19th Century ruling in *Morice*, legal charity departed from donor preferences in a way that enabled law to influence and shape those preferences. *Morice* is thus the beginning of the story of law constituting legal charity as a mode of action. The development of charity law across the 20th Century reveals law articulating and refining the various incidents of that mode, setting it apart from a range of other modes. And in recent years, in various common law jurisdictions, regulatory practice and sector behaviour have contributed to a public culture in which legal charity has traction as a mode of action well beyond the law.

## III. Present

In this third part of the article, I want to turn to the present day. I want to take stock of some contemporary developments putting pressure on law to weaken or even abandon the doctrine that has constituted legal charity as a distinctive mode of action. These developments are playing out differently in different common law jurisdictions, but I think the developments are sufficiently discernible across the common law world to justify discussing them in general terms.

One development is the changing nature of the relationship between the charity sector and government. Since the 1980s, governments across the common law world have withdrawn from the direct provision of social welfare and public goods, preferring instead to fund indirect provision through intermediaries, many of which are located within the charity sector. On one view, this profound shift in government practice has generated great opportunities for charities.[43] On another view, it has generated great costs to charity independence.[44] For present purposes, I want to focus on the difficult questions it raises about the distinction between legal charity and government administration as modes of action.

To illustrate, consider a case from Australia: *Central Bayside General Practice Association Limited v Commissioner of State Revenue*.[45] The Association had been

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[43] For instance, opportunities may be inferred from the dramatic growth in charity sector revenue whose source is government. In Australia, in 2017, for example, well over 40% of the revenue of large charities came from government: Austl, Commonwealth, ACNC, *Australian Charities Report 2017* (2019), online: ACNC < https://www.acnc.gov.au/tools/reports/australian-charities-report-2017> at 24.

[44] See *eg*, Debra Morris, "Paying the Piper: The 'Contract Culture' as Dependency Culture for Charities?" in Alison Dunn, ed, *The Voluntary Sector, the State and the Law* (Oxford: Hart Publishing, 2000) at 123; Kathryn Chan, "The Co-Optation of Charities by Threatened Welfare States" (2015) 40 Queen's LJ 561; Matthew Harding, "Independence and Accountability in the Charity Sector" in John Picton & Jennifer Sigafoos, eds, *Debates in Charity Law* (Oxford: Hart Publishing, 2020) [Harding, "Independence and Accountability in the Charity Sector"] at 13, 27–30.

[45] (2006) 228 CLR 168 [*Central Bayside*].

formed voluntarily for charitable purposes, but over time had come to rely almost exclusively on the Australian federal government for its funding. Indeed, some 93% of its revenue was from government.[46] Moreover, a significant proportion of the government funding was pursuant to contracts under which government exercised considerable influence and control over the activities of the Association. In 2006, the High Court of Australia found that the Association remained a charity notwithstanding its financial dependence on government and the facts of government influence and control. That the Association was voluntarily founded and could, in theory at least, walk away from government entanglements weighed heavily in the Court's decision.[47]

Arguably, the decision in *Central Bayside* reflected comfort with the proposition that an organisation may pursue legal charity as a mode of action and at the same time pursue elements of government administration, so long as, theoretically, the organisation may make a voluntary choice to exit relations with government. If this is a fair interpretation of the decision, then in *Central Bayside* law succumbed to pressure to relax the boundaries of legal charity.

Let me now move to a second current development putting pressure on charity law. This is the growing desire of organisations to combine the pursuit of charitable purposes with profit-making. This trend is one emanation of a wider social and economic movement in which not-for-profit organisations seek to take up business methods and objectives, and for-profit organisations seek to articulate and pursue purposes other than maximising shareholder gains. The trend is also connected with the notion of 'social enterprise' that has captured imagination across the common law world and is now sometimes spoken of as a category that should, or inevitably must, supersede legal charity.[48]

Once again, a recent Australian case will serve to illustrate. In 2008, in *Federal Commissioner of Taxation v Word Investments Ltd*,[49] the High Court of Australia was asked to decide whether a company running a funeral services business and distributing the profits to a Christian missionary organisation was a tax-exempt charity. The Court found that the company was established for charitable purposes, and that its profit-making business was merely a means to the achievement of those purposes. There was no need for the company to pursue its charitable purposes directly; it was sufficient that the company gave its profits to an organisation that did.[50]

Does the decision in *Word Investments* destabilise legal charity as a mode of action? The idea that an operational charity might pursue its charitable purposes by means of profit-generating transactions is hardly new or controversial: think, for

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46 *Ibid* at para 157 (*per* Callinan J).

47 *Ibid* at paras 39 (*per* Gleeson CJ, Heydon and Crennan JJ), 144 (*per* Kirby J), 181 (*per* Callinan J).

48 For scholarship examining these recent developments, see Dana Brakman Reiser & Steven A Dean, *Social Enterprise Law: Trust, Public Benefit, and Capital Markets* (Oxford: Oxford University Press, 2017); Benjamin M Leff, "The Boundary between the Not-for-Profit and Business Sectors: Social Enterprise and Hybrid Business Models" in Matthew Harding, ed, *Research Handbook on Not-for-Profit Law* (Cheltenham: Edward Elgar Publishing, 2018) at 171.

49 (2008) 236 CLR 204 [*Word Investments*].

50 *Ibid* at paras 19–39 (*per* Gummow, Hayne, Heydon and Crennan JJ).

example, of fee-charging schools, private hospitals and universities.[51] However, the idea that a charity's principal activity might be running a profit-making business unconnected with its charitable purposes, the profits of that business being given to another organisation to pursue the charitable purposes in question, seems more problematic. What, except for the existence of a formal non-distribution constraint, is to distinguish such a charity from non-charitable businesses that nonetheless give all their profits to charities? At this point, the whole project of distinguishing the modes of action that are legal charity on the one hand and market capitalism on the other seems questionable.[52]

A third development that has recently called into question the law's commitment to maintaining legal charity as a distinctive mode of action is the growing involvement of the charity sector in politics. The causes of this seem to be various. Operational charities delivering social welfare and public goods, especially with government funding, feel they have a stake, and should have a voice, in political debates. At the same time, governments consult the charity sector when formulating law and policy, drawing the sector into the political sphere. As trust in political institutions and organisations collapses around the world, citizens are drawn more and more to non-traditional forms of political engagement. And social media enables effective issue advocacy as never before.

To illustrate the implications of these trends for legal charity, consider yet another recent Australian case: *Aid/Watch Incorporated v Commissioner of Taxation*.[53] Aid/Watch was a self-proclaimed activist organisation seeking to compel changes to Australian federal government policy on foreign aid.[54] Under the old rule from *Bowman*, Aid/Watch could not be a charity to the extent that it had a political purpose. However, in 2010 a majority of the High Court of Australia declared that the *Bowman* rule no longer applied in Australian law, that political purposes could sometimes be charitable, and that Aid/Watch had a charitable purpose. In its reasoning, the majority said that, in Australia at least, free political expression is of great public benefit because of the contribution that it makes to the system of representative and responsible government established by Australia's Constitution.[55]

The *Bowman* rule constitutes legal charity as a mode of action in opposition to political activism. The ruling in *Aid/Watch*, which effectively signals law's withdrawal from policing the boundary between legal charity and political activism,

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51 The idea that such a charity might, by charging fees, exclude the poor from the services on offer is more controversial: see *R (Independent Schools Council) v Charity Commission for England and Wales* [2012] 2 WLR 100 [*Independent Schools*].

52 This thought might lead in two directions. On the one hand, the thought might point towards more stringent treatment for charities that run unrelated businesses, for example via an unrelated business income tax: see the discussion in Miranda Stewart, "The Boundaries of Charity and Tax" in Matthew Harding, Ann O'Connell & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2014) at 232, 234–243. On the other hand, the thought might suggest more accommodating treatment of businesses donating profits to charity: see further Anup Malani & Eric A Posner, "The Case for For-Profit Charities" (2007) 93 Vir LR 2017.

53 (2010) 241 CLR 539 [*Aid/Watch*].

54 The activist character of Aid/Watch was emphasised in Heydon J's judgment, *ibid* at paras 52–57. It is also emphasised in a scholarly article on the case written by a member of Aid/Watch's committee of management: James Goodman, "Inside the Aid/Watch Case: Translating Across Political and Legal Activism" (2011) 3(3s) Cosmopolitan Civ Soc Interdisciplinary J 46.

55 *Aid/Watch*, *ibid* at paras 39–49.

collapses the two modes of action. And this approach to legal charity and political activism is not unique to Australia. In 2014, in *Re Greenpeace of New Zealand Inc*,[56] the Supreme Court of New Zealand declared that the *Bowman* rule had no application in New Zealand law, and that political purposes might be charitable if they satisfy charity law's public benefit requirement.[57] In New Zealand as in Australia, judges dealing with cases of political purposes have weakened the doctrinal structure constituting legal charity as a distinctive mode of action.

In the heartland of charity law, in the ruling from *Morice* and the public benefit requirement, it seems less clear that law has in any significant way yielded to pressure to weaken or abandon doctrine that has constituted legal charity as a mode of action. In Canada, the requirement that charitable purposes be within the equity of the Elizabethan preamble has been affirmed by the Supreme Court more than once in recent decades.[58] Elsewhere, legislative restatements of the 'heads' of charity have purported to sever links to the Elizabethan preamble, but continue to enumerate purpose types that are in substance within the preamble's spirit and intendment.[59] In England and Wales, charity law's public benefit requirement has been strengthened in recent years, with controversial consequences.[60] In New Zealand too there seems to be renewed interest in public benefit inquiries in the wake of the *Greenpeace* decision repealing the *Bowman* rule.[61] And in the recent Singaporean case of *Koh Lau Keow v Attorney-General*,[62] the Court of Appeal applied the public benefit requirement with full rigour against a trust for the purpose of facilitating private religious devotion, continuing a long tradition in the Straits of maintaining the integrity of the public benefit requirement notwithstanding its lack of fit with local religious practices.[63]

On the other hand, courts and legislatures have been willing to abandon even the public benefit requirement in response to pressure to accommodate charities serving Indigenous communities in post-colonial settings. According to the public benefit requirement, if the class of persons who stand to benefit from a purpose share descent from a common ancestor, then the purpose is not sufficiently public to be charitable.[64] For Indigenous communities defined by kinship ties, this aspect of the public benefit requirement is problematic. Legal charity as a mode of action does not align with the traditional worldviews of such communities, according to which there

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56 [2015] 1 NZLR 169 [*Greenpeace*].

57 *Ibid* at para 3.

58 *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* [1999] 1 SCR 10; *AYSA Amateur Youth Soccer Association v Canada Revenue Agency* [2007] 3 SCR 217.

59 See *eg*, *Charities Act 2011* (UK), *supra* note 24, ss 2(1)(a), 3; *Charities Act 2013* (Cth), *supra* note 24, ss 12, 14–17; *Charities Act (Northern Ireland) 2009*, *supra* note 24, ss 3(1), 3(10), 3(11); *Charities Act 2005* (NZ), *supra* note 24, ss 5(1), 5(2A).

60 See *Attorney-General v Charity Commission for England and Wales* [2012] UKUT 420 (TCC) (20 February 2012); *Independent Schools*, *supra* note 51; Charity Commission for England and Wales, *Preston Down Trust* (3 January 2014).

61 *In re Family First New Zealand* [2018] NZHC 2273; *Better Public Media Trust v Attorney-General* [2020] NZHC 350.

62 [2014] 2 SLR 1165 (CA).

63 For the history, see Rachel PS Leow, "The Evolution of Charity Law in Singapore: From Pre-Independence to the 21st Century" (2012) 26 Trust L Intl 83 at 86–88.

64 *In re Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

is no sharp distinction between family and public life and consequently a different understanding of altruism than that embedded in legal charity.[65]

One possible response to Indigenous communities whose traditional worldviews do not align with the public benefit requirement, but who nonetheless wish to form charities, is to demand that they set aside their worldviews and instead adopt the perspective of legal charity with its central commitment to a particular conception of altruism.[66] This response is in keeping with *Morice* and the overall project of constituting and maintaining legal charity as a distinctive mode of action. But in New Zealand and, more recently, Australia, courts and legislators have eschewed this response and have instead changed the public benefit requirement to accommodate the Indigenous worldview. In its 2002 decision in *Latimer v Commissioner of Inland Revenue*,[67] the New Zealand Court of Appeal pointed out that the public benefit requirement is "insufficiently responsive to values emanating from outside the mainstream of the English common law", and found that a purpose of assisting Maori communities defined by common descent was charitable.[68] New Zealand's *Charities Act of 2005* now reflects this ruling,[69] and a similar—but not identical—approach may be found in Australia's *Charities Act of 2013*.[70]

So the present day offers a picture of changing social, economic, political and cultural conditions and corresponding pressures on key elements of doctrine supporting legal charity as a mode of action. The distinctions between legal charity and government administration, legal charity and market capitalism, legal charity and political activism, and even legal charity and certain external conceptions of public benefit, are being questioned and challenged. Law is responding in ways that weaken, and in some cases even abolish, the distinctions on which legal charity has come to depend. And yet the core doctrinal elements supporting legal charity —the ruling in *Morice* and the public benefit requirement—seem largely undisturbed, and legal charity as a distinctive mode of action continues to have traction beyond the law.

The present day thus seems an appropriate moment to ask the question: is legal charity worth the effort? The state expends scarce resources to maintain legal charity and the notoriously complex and intricate body of doctrine on which it depends. Indeed, since the turn of the 20th century, legislators in many common law jurisdictions have gone to a great deal of trouble to enact statutes designed to consolidate and update legal charity for future use.[71] They could have decided to abandon legal

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65 See further, in respect of Maori communities, Joseph Williams, "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Waikato LR 1.

66 In Australian charity law, jurisprudence has been developed according to which purposes for the benefit of Indigenous communities are regarded either as falling within the head 'relief of poverty' or as public benefit purposes according to other orthodox charity law principles: see the discussion in *Groote Eylandt Aboriginal Trust Inc v Deloitte Touche Tohmatsu (No 2)* [2017] NTSC 4 at paras 162–203. Purposes within the description 'relief of poverty' can benefit a family group, as is evidenced in the 'poor relations' and 'poor employees' cases: see generally *Attorney-General v Charity Commission for England and Wales* [2011] UKUT 420.

67 [2002] 3 NZLR 195 [*Latimer*].

68 *Ibid* at 208 (*per* Blanchard J).

69 *Supra* note 24, s 5(2).

70 *Supra* note 24, ss 7, 9.

71 For an overview of the changes, see Debra Morris, "The Heads of Charity in Comparative Perspective" in Matthew Harding, ed, *Research Handbook on Not-for-Profit Law* (Cheltenham: Edward Elgar Publishing, 2018) at 343.

charity and develop legislative agendas around other organising ideas. Why persist with legal charity? This question requires reflection on the normative arguments for constituting and maintaining legal charity as a distinctive mode of action, and in the fourth and final part of this article, I want to explore some of those normative arguments with reference to the future of charity and law.

## IV. Future

What, then, are the arguments for constituting and maintaining legal charity as a mode of action?

Legal charity was developed historically in Chancery. There, legal charity was developed as a means of determining whether or not a purpose trust is valid and enforceable in law, a question to which legal charity continues to be directed even today.[72] The idea—which comes to us once again from *Morice*—is that purpose trusts have no beneficiaries and therefore lack stakeholders with sufficient interest to bring enforcement questions before the court.[73] But because charitable purpose trusts have a public benefit character, the state has an interest in them and may take steps through the office of the Attorney-General to ensure enforcement and judicial control.[74]

So one argument for constituting and maintaining legal charity is that it provides an answer to the question: when is a purpose trust valid and enforceable in law? However, while legal charity is an answer to that question, it is not the only possible answer. Another answer—the one that was rejected in *Morice*—is that the state has an interest in all public benefit purposes, not just those that are also within the equity of the Elizabethan preamble, and that trusts for all public benefit purposes are therefore legally valid and enforceable.[75] Yet another answer—one that is given in certain offshore jurisdictions—is that purpose trusts, irrespective of the character of their purposes, are valid and enforceable wherever they have a legally recognised enforcer, who may be the Attorney-General in the case of charitable purpose trusts but may be a private party in the case of trusts for other purposes.[76] Legal charity has been associated historically with purpose trust enforcement, but the answer to the question, 'Why legal charity?' cannot be found in that historical association. What is needed is an argument for preferring to resolve the question of purpose trust enforcement via legal charity than by other doctrinal means.

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72 Historically, the development of legal charity in Chancery was not solely a product of Chancery jurisdiction over trusts. The Lord Chancellor also exercised a prerogative jurisdiction on behalf of the King as *parens patriae*. For present purposes, we may note this historical fact and move on.

73 *Morice*, *supra* note 15. See also *Re Astor's Settlement Trusts* [1952] Ch 534.

74 For a detailed analysis of the Attorney-General's function as the protector and enforcer of charitable trusts, see Kathryn Chan, *The Public-Private Nature of Charity Law* (Oxford: Hart Publishing, 2016) at ch 4.

75 Decision-makers have, from time to time, flirted with the idea that all public benefit purposes should be regarded as prima facie charitable: see eg, *Incorporated Council*, *supra* note 37 at 88, 89 (*per* Russell LJ), 94 (*per* Sachs LJ); *Bob Jones University v US* 461 US 574 (1983), 609 (*per* Powell J); *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (NZCA); *Latimer*, *supra* note 67; *Greenpeace*, *supra* note 56.

76 See *eg*, *Trusts Law (2011 Revision)* (Cayman Islands), ss 99, 100.

Another argument for constituting and maintaining legal charity emerges from the migration of legal charity into tax law. Tax legislation across the common law world has long exempted charities from obligations to pay various taxes. For example, charities have been exempted from income tax since that tax was first introduced in the United Kingdom in 1799.[77] And as I mentioned earlier, according to *Pemsel*, when tax statutes refer to charity, they refer to legal charity as it has been developed in Chancery.[78] So it might be argued that the state ought to constitute and maintain legal charity to ensure that valuable fiscal privileges are handed out only to those with public benefit purposes that the state wishes to endorse and promote.

For at least two reasons this argument is a weak one. First, the proposition that tax legislation refers to legal charity is contestable. As we have seen, in *Pemsel*, two of the five Law Lords who decided the case would have interpreted references to charity in section 61 of the *Income Tax Act of 1842* not to mean legal charity but rather to mean lay charity in the sense of relief of poverty.[79] In the 1923 case of *Chesterman v Federal Commissioner of Taxation*,[80] a majority of the High Court of Australia found that references to charity in an Australian estate duties statute were to lay charity,[81] only to be overruled two years later by the Privy Council.[82] And more recently, in *Central Bayside*, the case about a charity receiving almost all of its funding from government to which I referred earlier, Kirby J of the Australian High Court once again questioned the assumption that references to charity in tax legislation must be to legal charity as opposed to charity in some other sense.[83] If the minority in *Pemsel*, the majority of the Australian High Court in *Chesterman*, and latterly Kirby J in *Central Bayside* are right, and on the best interpretive approach tax legislation refers to lay charity, then we should not look to tax policy for an answer to the question: 'Why legal charity?'

Secondly, to the extent that the state has a tax policy objective of endorsing and promoting certain public benefit purposes, the achievement of this objective does not depend on legal charity. Other doctrinal categories may work equally well and perhaps even better. For example, under Division 50 of Australia's *Income Tax Assessment Act of 1997*, income tax exemptions are available not only to charities but also to a range of other organisations with a public benefit orientation. And in Singapore, tax deductions for donors are triggered not by gifts to charities as such, but instead by gifts to a subset of charities called 'Institutions of a Public

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77 See Michael Gousmett, "A Short History of the Charitable Purposes Exemption from Income Tax of 1799" in John Tiley, ed, *Studies in the History of Tax Law: Volume 5* (Oxford: Hart Publishing, 2012) at 125. In 1863, William Gladstone attempted to withdraw the income tax exemption from charities, but failed: see David Owen, *English Philanthropy 1660-1960* (Massachusetts: Belknap Press, 1964) at 330–332.

78 *Pemsel*, *supra* note 22 at 586–587 (*per* Lord Macnaghten).

79 *Ibid* at 542–544, 548–553 (*per* Lord Halsbury), 565, 566, 568 (*per* Lord Bramwell).

80 (1923) 32 CLR 362.

81 *Ibid* at 382–383 (*per* Isaacs J), 397, 398 (per Rich J), 399 (*per* Starke J). Knox CJ and Higgins J dissented at 376, 377 and 393, 394 respectively.

82 *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317 [*Chesterman*].

83 *Central Bayside*, *supra* note 45 at paras 91–119. Two years later, in *Word Investments*, *supra* note 49 at para 77, Kirby J, referring to his judgment in *Central Bayside*, mused: "[m]y own attempt to drag this body of law into the twenty-first century, in conformity with modernity and the applicable general principles, came to nothing".

Character'.[84] These are charities whose focus is on generating public benefit for the whole Singaporean community as opposed to sections of the community defined by race, belief or religion.[85] The deduction is currently 250%,[86] indicating a strong state objective of endorsing and promoting certain public benefit purposes. But in Singapore, legal charity is not considered a sufficiently finely-tuned category to serve that objective.

In recent years, an argument for constituting and maintaining legal charity has focused on the objectives of regulation. According to this argument, legal charity enables the identification of organisations managing assets for the public benefit, organisations that call for distinctive regulatory treatment because of their public benefit orientation. The argument is, then, that legal charity does useful work as a trigger for regulation. But remember: not all public benefit purposes are within legal charity, and therefore using legal charity as a trigger for regulation risks leaving unregulated some arrangements in which assets are managed for the public benefit.[87] Moreover, further thought is needed as to why public benefit arrangements call for distinctive regulatory treatment in the first place. On one view, regulatory goals and strategies should be the same in all cases where assets are managed for other-regarding purposes, irrespective of whether those purposes have a public benefit character. Fiduciary responsibility is fiduciary responsibility, after all.

With all of this in mind, let me pause to consider one possible future for charity and law. This is a future in which the problem of purpose trust enforcement is solved in a way that does not depend on the concept of legal charity, tax policy objectives are pursued via categories other than legal charity, and no distinction is drawn between the regulation of public benefit arrangements and the regulation of other arrangements entailing fiduciary responsibility for assets.[88] In this future, law would discontinue the doctrine that constitutes and maintains legal charity, preferring instead to develop doctrine around other organising ideas. The charity sector whose self-understanding currently refers to the mode of action that is legal charity would come to understand itself differently, with reference to other modes of action. Over time, legal charity would cease to have salience in public culture. It would instead come to be viewed as a historical phenomenon, perhaps associated with currents of thought originating in Tudor England and coming to fruition in the mid- to late twentieth century. Legal charity as a mode of action would wither and die.

In this future, would something of value have been lost? One way of addressing this question might be to consider the quantum of public benefit that is produced by people doing legal charity, and to ask whether more or less public benefit might be produced in the world in which legal charity did not exist as a mode of action. If it could be shown that more public benefit is produced where people choose legal charity than where people channel their energies into other modes of action, perhaps because the social and cultural meaning associated with legal charity acts

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84 *Income Tax Act* (Cap 134, 2014 Rev Ed Sing) [*ITA*], ss 37(1), 37(3).

85 *Charities (Institutions of a Public Character) Regulations* (Cap 37, Reg 5, 2008 Rev Ed Sing), r 3.

86 *ITA*, *supra* note 84, s 37(3A).

87 See further Jonathan Garton, *The Regulation of Organised Civil Society* (Oxford: Hart Publishing, 2009) at ch 6.

88 Gino Dal Pont imagines a world characterised by the first two of these three possibilities in his piece: "Why Define Charity? Is the Search for Meaning Worth the Effort?" (2002) 8 Third Sector R 5.

as a particularly effective incentive to those who desire to bring about public benefit outcomes, then this might support an argument for legal charity irrespective of the design of trusts law, tax law and regulation.

Formidable difficulties attend this line of inquiry. A large range of counterfactual scenarios must be grappled with. In the world without legal charity, to what extent would people turn to other extant modes of action such as government administration, political activism and market capitalism to achieve public benefit outcomes? To what extent might those other modes prove more effective and efficient in generating the outcomes concerned? To what extent might new, hitherto unknown, modes of action emerge, and how effective and efficient might these prove to be? Moreover, in asking counterfactual questions about public benefit, there seems no reason to confine inquiry to public benefit outcomes that people might intend to achieve through social action. In the overall analysis, further, unintended but foreseeable, public benefit outcomes ought to be taken into account. For example, if people lacked the option of legal charity as a way of benefitting others, would they choose instead to become more politically engaged with corresponding benefits to democratic institutions and culture? In a world where plutocrats increasingly opt for legal charity over political engagement as a way of generating public benefit, this last question is of more than academic interest.[89]

Another way of approaching the question of whether something of value would have been lost in a future without legal charity is to think more about legal charity's modal character. As we have seen, what makes legal charity distinctive is not the public benefit outcomes it generates but rather the special way in which it brings these outcomes about. Legal charity thus supplies an option on the menu, if you like, of modes of action that exist in the social sphere, an option that orients people around a particular conception of altruism. To the extent that legal charity contributes to diversity in modes of action, it is to be welcomed, because, all else being equal, such diversity is valuable.[90] For example, the world in which all social action takes place via government administration seems a deficient one, at least to liberal sensibilities. And political philosophers such as Michael Sandel have argued that the world in which market thinking dominates social life is morally diminished.[91] The existence of legal charity supports conditions under which this sort of modal uniformity cannot easily take root.

Once again, this line of inquiry is not without its difficulties. In the future without legal charity, it is possible that other modes of action might emerge, including modes that organise around a conception of altruism, and these might augment options notwithstanding that legal charity is not available. On the other hand, there is a path-dependency here, and it seems relevant. As a matter of history, law has constituted and maintained legal charity as a mode of action, and this has had implications for social action and public culture. For law to withdraw from its historical commitment

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89 I wrote this paragraph in January 2020. Reading it again while editing this paper in April 2020, it occurs to me that the extraordinary actions taken by many states in recent weeks in response to COVID-19 may inform answers to some of the questions I pose.

90 I argue more fully in support of these claims in Harding, *Charity Law and the Liberal State*, *supra* note 38 at ch 3, and Harding, "Independence and Accountability in the Charity Sector", *supra* note 44.

91 Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012).

to legal charity would disturb settled expectations and generate associated costs that ought to be factored into the overall assessment of the impact of such a move on people's options.

A compelling answer to the question, 'Why legal charity?', seems elusive, even though legal charity has been on the common law scene for over four hundred years. But precisely because legal charity has been on the scene for so long, it may be worth trying to imagine a future in which law continues to constitute and maintain legal charity as a mode of action, even if it is decoupled from trusts law, tax law and regulation. One aspect of charity law that I have not yet emphasised is that, by recognising purposes and organisations as charitable, the state expresses approval of them. Charity law might perform this expressive function even if charity status carried with it no implications in trusts law, tax law or regulation.[92] Organisations with charitable purposes might be registered to signal the requisite approval, but law's interest in the charitable character of such organisations might end there. In this future, charity law, as a body of doctrine supporting legal charity, might continue to have a point. But aspects of that doctrine that have been driven by imperatives of trusts law and tax policy might come to be viewed as inessential to legal charity. For example, a purely expressive charity law might not easily maintain a distinction between public benefit purposes within the equity of the Elizabethan preamble and those without. On the other hand, a purely expressive charity law might be vigilant to distinguish legal charity from non-altruistic modes of action such as market capitalism.

The possible futures for charity and law that I have sketched here may never come to pass. But reflection on those possible futures assists in working through key aspects of the question, 'Why legal charity?', even when that question is asked of legal charity as we find it now. In turn, seeking answers to the question 'Why legal charity?' informs thinking on the broader questions with which I have been concerned in this article. Legal charity in the common law world is the legacy of past doctrinal development, a legacy that is presently challenged on multiple fronts. Should law yield to that pressure and follow social trends, just as it did in Elizabethan England when legal charity first took shape? Or should law uphold the legacy of the past, continuing the work begun in *Morice*, and thereby aiming to shape social life? These are central questions for charity and law today and they will remain so for many years to come.

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[92] On legal expression, see Richard H McAdams, *The Expressive Powers of Law: Theories and Limits* (Massachusetts: Harvard University Press, 2015).