

Charitable Trusts and Discrimination: Two Themes

Matthew Harding*

In this article, I consider two doctrinal themes available to judges in equity who must deal with what I call “discriminatory charitable trusts”. In Part II, I concentrate on the theme of public policy. I review how this theme has been deployed in cases about discriminatory trusts, charitable and “private”, before turning to some theoretical considerations that bear on the proper application of the public policy doctrine. In Part III, I turn to the theme of public benefit. I argue that, although the public benefit test applied in equity when working out whether a trust is for a charitable purpose is scarcely used in responding to discriminatory charitable trusts, it has considerable potential as a tool for judges seeking to respond in nuanced ways to such trusts. In Part IV, I conclude by offering some thoughts as to whether judges should opt for the theme of public policy or the theme of public benefit when deliberating about discriminatory charitable trusts.

* Professor of Law, University of Melbourne. Versions of this paper were presented at the Conference on Succession and Trusts Law at the University of the Western Cape on 17 April 2015 and at the Law of Charitable Trusts Colloquium at Université de Montréal on 8 May 2015. I learned a great deal from each of these events, and my sincere thanks are due to all those who participated in them. Very special thanks are due to François du Toit and Matthew Harrington for truly exceptional hospitality during my visits to Cape Town and Montreal.

-
- I. INTRODUCTION
 - II. PUBLIC POLICY
 - III. PUBLIC BENEFIT
 - IV. CONCLUSION
-

I. Introduction

The problems associated with what, in this article, I will call “discriminatory charitable trusts” are not new to equity. However, in the twenty-first century they have assumed, and may be expected to continue to assume, greater importance than ever before. In various jurisdictions in which the political community has organised along broadly liberal lines, equitable responses to discriminatory charitable trusts now play out against a backdrop of human rights law, the constitutional expression of anti-discrimination norms, and a public culture in which tolerance of discrimination on grounds like race, sex, and religion is at its lowest point in human history. Such responses also take their place within legal and intellectual frameworks in which there is growing scepticism about the plausibility of distinctions between “public” and “private” spheres and “public” and “private” law. In utilising extant doctrinal themes to fashion just solutions to old problems, judges exercising equitable jurisdiction who must deal with discriminatory charitable trusts are presented with challenges that they have not traditionally faced.

With such challenges in view, this article will focus on the two main doctrinal themes available to judges in equity who are asked to determine whether discriminatory charitable trusts should be interfered with on account of their discriminatory character. The two themes are public policy and public benefit. In Part II of the article, I consider the theme of public policy. I review how this theme has been deployed in cases about discriminatory trusts, charitable and “private”, before turning to some theoretical considerations that bear on the proper application of the public policy doctrine in such cases. I conclude that more work must be done if the theme of public policy is to be rendered appropriately sensitive to normative considerations underpinning it in cases about

discriminatory charitable trusts. In Part III, I turn to the theme of public benefit. I argue that, although the public benefit test applied in equity when working out whether a trust is for a charitable purpose is, perhaps surprisingly, scarcely used in responding to discriminatory charitable trusts, it has considerable potential as a tool for judges seeking to respond in nuanced ways to such trusts. In Part IV, I conclude by offering some thoughts as to whether judges should opt for the theme of public policy or the theme of public benefit when deliberating about discriminatory charitable trusts.

At the outset, two points of clarification are in order. First, when I refer to “discriminatory” trusts, I have in mind trusts the terms of which explicitly mete out unfavourable treatment to some class of persons based on the fact that the class shares an element or elements of human identity. However, I make no attempt to describe or explain the circumstances in which such discrimination ought to be of moral or legal concern.¹ Instead, I rely on what I take to be the intuitive proposition that at least some instances of such discrimination ought to be of both moral and legal concern, and I assume that this proposition is sufficient to animate my arguments in this paper. Secondly, when I refer to discriminatory “charitable” trusts, I describe such trusts as charitable in a provisional sense only; I mean to refer to the fact that those trusts are for purposes that are charitable purposes except for the fact that they entail discrimination. Thus, I leave open the possibility that such trusts, once the discriminatory character of their purposes is brought into view, might turn out not to be charitable all things considered. Moreover, I do not enter into debates about whether the appropriate response to discriminatory charitable trusts is to declare them invalid or to vary their terms *cy-près*: instead, I pose questions at a higher level of generality about whether such trusts ought to be “interfered” with in one or another way.

1. I do attempt such arguments elsewhere: see Matthew Harding, *Charity Law and the Liberal State* (Cambridge: Cambridge University Press, 2014) ch 7 [Harding, *Charity Law*].

II. Public Policy

The most prominent theme in equitable responses to discriminatory charitable trusts is the theme of public policy. In cases about discriminatory charitable trusts where judges deploy this theme in their reasoning, they typically seek to ascertain whether or not the trust in question offends the doctrine according to which dispositions may be interfered with, including struck down altogether, on grounds of public policy. An investigation into public policy in relation to a discriminatory charitable trust usually entails some assessment of the extent to which equality norms inform public policy, along with an effort to balance such norms against the freedom of disposition of the settlor of the trust. In this part, I consider what the case law reveals about how judges work with the theme of public policy when dealing with discriminatory charitable trusts, before undertaking a critical analysis of that case law.

Cases in which judges have been asked to interfere with discriminatory charitable trusts on public policy grounds are not numerous. Nonetheless, such cases tend to support the proposition that, traditionally at least, judges have been reluctant to invoke the public policy doctrine against discriminatory charitable trusts. In England, although judges have shown themselves willing to order *cy-près* variation of discriminatory charitable trusts,² they have never made such orders explicitly on public policy grounds. For example, in *Re Lysaght*, a testamentary gift was made to the Royal College of Surgeons for the purpose of providing scholarships to medical students; its terms discriminated against Roman Catholic and Jewish students.³ Justice Buckley said that it would be “going much too far” to say that the trust was contrary to public policy,⁴ but he nonetheless approved a *cy-près* scheme excising the discriminatory terms because the testatrix’s intention was that the trust be administered by the College, and the College would not accept the gift unless the trust was rendered non-

2. See also *In Re Harding*, [2007] EWHC 3 (Ch)(where a discriminatory charitable trust was varied on statutory grounds).

3. [1966] Ch 191 (Eng) [*Re Lysaght*].

4. *Ibid* at 206.

discriminatory in relation to religion.⁵ In Australia too, a recent decision of the Supreme Court of New South Wales also reveals judicial reluctance to deploy the public policy tool against a discriminatory charitable trust. In *Kay v South Eastern Sydney Area Health Service*⁶ (“*Kay*”), a testamentary gift for the treatment of “White babies” was upheld,⁷ Chief Justice Young in equity saying only that “generally speaking testators can be as capricious as they like and ... if they wish to benefit a charity in respect of, or [sic] even of, a discriminatory group, they are at liberty to do so”.⁸ These cases reveal judges balancing freedom of disposition and equality in the setting of the public policy doctrine by assuming that freedom of disposition outweighs equality.

The traditional reluctance of judges to interfere with discriminatory charitable trusts on public policy grounds has been accompanied by an even more pronounced judicial reluctance to invoke the public policy doctrine against discriminatory “private” trusts. There is, as is well known, a long tradition of judges interfering with dispositions for reasons of public policy.⁹ At the same time, there is a long, if poorly understood, tradition of judges recognising equality norms within the public policy doctrine.¹⁰ Nonetheless, in cases of “private” trusts, viz., trusts whose objects are persons identified by name or ascertainable by reference to a described class, courts have traditionally refused to invoke public policy to respond

-
5. *Ibid* at 209. See also *Re Dominion Students' Hall Trust*, [1947] 1 Ch 183 (Eng); *Re Meres' Will Trusts* (1957)(Ch (Eng)), cited in “Law Report, May 3”, *The Times* (3 May 1957) 10.
 6. [2003] NSWSC 292 (Austl).
 7. *Ibid* at para 2 (in the will, the testatrix had underlined the word “White” twice).
 8. *Ibid* at para 18. Compare *Home for Incurables of Baltimore City v University of Maryland Medical System Corporation*, 797 A (2d) 746 (Md Ct App 2002 (US))(and thanks to Evelyn Brody for bringing that case to my attention).
 9. I note relevant cases in Matthew Harding, “Some Arguments against Discriminatory Gifts and Trusts” (2011) 31:2 *Oxford Journal of Legal Studies* 303 at 310-11 [Harding, “Some Arguments”].
 10. See Peter Benson, “Equality of Opportunity and Private Law” in Daniel Friedman & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Portland: Hart Publishing, 2001) 201 at 209.

to any discrimination entailed in the terms of the trusts in question.¹¹ In withholding the public policy tool in such cases, courts have resolved a perceived competition between freedom of disposition and equality by finding that freedom of disposition prevails. A good illustration of this is *Blathwayt v Baron Cawley*.¹² There, a testamentary disposition in terms that discriminated against Roman Catholics was upheld notwithstanding its discriminatory character. In upholding the disposition, members of the House of Lords noted the equality interest of the class affected by the discrimination, and acknowledged that equality norms informed public policy in England. However, their Lordships thought that, on the facts of the case, any such equality norms were clearly outweighed by the testator's freedom of disposition.¹³ For Lord Wilberforce, "neither by express provision nor by implication has private selection yet become a matter of public policy".¹⁴

The traditional judicial tolerance towards discriminatory charitable and "private" trusts has been unsettled in recent decades in two jurisdictions: Canada and South Africa. In Canada, the key case, decided in 1990, is *Canada Trust Co v Ontario (Human Rights Commission)*¹⁵ ("*Canada Trust*"). The trust in question, the Leonard Foundation, was settled by a prominent Canadian in the 1920s to fund educational scholarships; the recitals and provisions of the trust deed made clear, in unmistakably bigoted terms, that the scholarships were not to be awarded except to white Protestants of British nationality or "parentage". The trust deed also stipulated that no more than a quarter of available funds should be paid each year to female candidates, and it contained terms that discriminated against other candidates on grounds of parental

-
11. Judges have been more willing to interfere with such trusts where their discriminatory terms take the form of uncertain conditions: see Harding, "Some Arguments", *supra* note 9 at 307-10 for a discussion of relevant cases.
 12. [1976] AC 397 (HL) [*Blathwayt*]. I discuss other illustrative cases in Harding, "Some Arguments", *supra* note 9 at 304-305.
 13. *Blathwayt*, *supra* note 11 at 425-26, per Lord Wilberforce; 429, per Lord Cross; 441, per Lord Edmund-Davies.
 14. *Ibid* at 426.
 15. (1990), 69 DLR (4th) 321 (Ont CA) [*Canada Trust*].

occupation.¹⁶ In response to public pressure, the trustee of the Leonard Foundation applied for judicial directions as to the validity of the trust. At first instance, the trust was found not to offend public policy,¹⁷ but the Ontario Court of Appeal ordered a *cy-près* scheme excising the terms of the trust deed that discriminated on grounds of race, sex, nationality, and religion.¹⁸ In that decision, all the members of the Court thought that the terms of the trust offended public policy and should be varied on that basis.

A majority of the Court framed the relevant question for decision as one that demanded a balancing of freedom of disposition and equality via the public policy doctrine. Justice Robins noted the significance of freedom of disposition in Canadian law,¹⁹ but he went on to state that equality norms inform Canadian public policy in important ways, in light of the diverse character of Canadian society and the nation's constitutional commitments.²⁰ For Robins JA:

[t]he settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.²¹

In this and other passages²² Robins JA seemed to say that equality may outweigh freedom of disposition not only in the case of a discriminatory charitable trust, such as the Leonard Foundation, but also in the case

-
16. The relevant provisions of the trust deed are set out *ibid* at 326-29. Eligibility to participate in the management of the trust was also restricted based on race, nationality and religion.
 17. *Canada Trust Co v Ontario (Human Rights Commission)*(1987), 61 OR (2d) 75 (H Ct J).
 18. The provisions that discriminated on grounds of parental occupation were left undisturbed.
 19. *Canada Trust*, *supra* note 15 at 334.
 20. *Ibid* at 334-35.
 21. *Ibid* at 335.
 22. See also *ibid* (“[t]he freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognised in our society and is firmly rooted in our law ... That interest must, however, be limited in the case of this trust by public policy considerations” at 334).

of a discriminatory “private” trust. The majority judgment in *Canada Trust* may thus be read as a radical departure from the traditional judicial reluctance to invoke public policy against discriminatory “private” trusts, and there is evidence that Canadian courts have read the judgment in this way since *Canada Trust* was decided.²³

In his concurring judgment in *Canada Trust*, Justice Tarnopolsky joined with the majority in conceiving of the question for decision as one that required a balancing of freedom of disposition and equality via the public policy doctrine. Like the majority, Tarnopolsky JA ruled that Canadian public policy entailed equality norms;²⁴ like the majority, he also acknowledged the importance of freedom of disposition to the law:²⁵

[i]n this case the court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition.²⁶

However, while Tarnopolsky JA agreed with the majority that a balancing exercise was necessary, he seems to have disagreed with the majority on the right way to balance freedom of disposition and equality in cases of discriminatory “private” trusts. He stated that:

[t]his decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection ... This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community ... It is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.²⁷

23. See *McCorkill v Streed*, 2014 NBQB 148; *Spence v BMO Trust Company*, 2015 ONSC 615. Perhaps ironically, Canadian courts have proven less willing to interfere with discriminatory *charitable* trusts on public policy grounds in the years since *Canada Trust* was decided: see *Re Ramsden Estate* (1996), 139 DLR (4th) 746 (PESC (TD)) [*Re Ramsden Estate*]; *University of Victoria v British Columbia (AG)*, 2000 BCSC 445 [*University of Victoria*]; *Re The Esther G Castanera Scholarship Fund*, 2015 MBQB 28 [*Castanera*]. I discuss the latter three cases below.

24. *Canada Trust*, *supra* note 15 at 348-52.

25. *Ibid* at 353.

26. *Ibid*.

27. *Ibid*.

For Tarnopolsky JA, it was because charitable trusts are in some relevant sense “public” trusts that freedom of disposition and equality in cases of discriminatory charitable trusts are to be balanced in favour of equality.²⁸

Also at odds with the traditional judicial reluctance to invoke public policy against discriminatory trusts is recent South African jurisprudence. While these South African developments are not, strictly speaking, developments in equity — South Africa has no tradition of equity — they are of obvious relevance for those jurisdictions where discriminatory trusts fall to be considered by judges exercising equitable jurisdiction. Prior to South Africa’s current constitutional settlement, South African courts were loath to interfere with such trusts on public policy, or “*boni mores*”, grounds;²⁹ as François du Toit points out in his important work on the subject, there are reasons to think that historically freedom of disposition has been prized in South Africa even more than in the common law world.³⁰ However, all that changed with the coming into effect of the *Constitution of the Republic of South Africa, 1996*.³¹ According to section 9(4) of the Constitution of South Africa, constitutionally protected equality rights may be enforced by citizens against each other

28. See further Harding, *Charity Law*, *supra* note 1 at 215-16.

29. Although see *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust*, [1993] 2 SA 697 (Cape Prov Div)(decided under s 13 of the *Trust Property Control Act, 1988* (SA) No 57 of 1988 [*Trust Property Control Act*]). The section “empowers a court to vary any trust provision where such provision occasions consequences which, in the opinion of the court, the trust founder failed to contemplate or foresee ... and such provision is, *inter alia*, in conflict with the public interest”: François du Toit, “Constitutionalism, Public Policy and Discriminatory Testamentary Bequests; A Good Fit between Common Law and Civil Law in South Africa’s Mixed Jurisdiction” (2012) 27 *Tulane European and Civil Law Forum* 97 at 111 [du Toit, “A Good Fit”]. The inquiry into “public interest” for the purposes of s 13 is similar to the inquiry under the public policy doctrine.

30. du Toit, “A Good Fit”, *ibid* at 114-16.

31. No 108 of 1996 [*Constitution of South Africa*].

as well as against the state;³² this provision led commentators, including du Toit, to argue in the years following the new constitutional settlement that some previously uncontroversial discriminatory dispositions would no longer survive the scrutiny of South African courts.³³ And those predictions have indeed been borne out in the post-1996 jurisprudence; South African courts are now willing to interfere with discriminatory trusts on public policy grounds.³⁴ At the same time though, freedom of disposition, at least in a testamentary setting, has been placed on a constitutional footing as well, a matter to which I return below.

In South Africa, the first post-1996 case to deal with a discriminatory trust was *Minister for Education v Syfrets Trust Ltd NO*³⁵ (“*Minister for Education*”). There, the terms of a testamentary trust for the purpose of funding educational scholarships discriminated against non-Europeans, Jews and women. Justice Griesel of the High Court of South Africa was asked to order that the offending provisions of the will be deleted, so that the trust could be administered in a non-discriminatory fashion. Justice Griesel granted the order. Rather than dealing with the case as one requiring an enforcement of the equality rights set out in section 9(4) of the Constitution,³⁶ Griesel J applied the public policy doctrine.³⁷ He spelled out the ways in which the equality norms enshrined in the Constitution now informed and gave content to public policy in South

32. See also *Promotion of Equality and Prevention of Unfair Discrimination Act* (SA), Act 4 of 2000.

33. See François du Toit, “The Constitutionally Bound Dead Hand? The Impact of Constitutional Rights and Principles on Freedom of Testation in South African Law” (2001) 12:2 Stellenbosch Law Review 222, and the sources cited therein.

34. And recently, it seems, via direct application of the equality provisions of the Constitution: see Fatima Schroeder, “Whites-only Bursaries to be Scrapped”, *Iol News* (25 April 2015), online: iol news <www.iol.co.za/news/south-africa>. I am grateful to Marius de Waal for alerting me to this case; written reasons for the decision had not been published when this article went to press.

35. *Minister for Education v Syfrets Trust Ltd NO*, [2006] ZAWCHC 65 (SA) [*Minister for Education*].

36. As he had been invited to do: *ibid* at para 9.

37. *Ibid* at para 16.

Africa.³⁸ Justice Griesel was of the view that those public policy-informing equality norms outweighed the freedom of disposition of the testator, in light of the fundamental nature of the commitment of the South African polity to equality in the Constitution.³⁹ This approach was also taken in *Curators Ad Litem to Certain Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal*,⁴⁰ in which the Supreme Court of Appeal appealed to “the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past” in upholding an order varying the terms of another discriminatory trust for funding educational scholarships.⁴¹

Another recent South African case to deal with a discriminatory trust is *BoE Trust Limited NO*⁴² (“*BoE Trust*”). The terms of a testamentary trust, once again for the purpose of funding educational scholarships, discriminated against students who were not “White”. The testatrix had also made provision in the will that, “[i]n the event that it should become impossible for my trustee[s] to carry out the terms of the trust”, the income of the trust should be paid to certain named charities.⁴³ The terms of the educational trust required that professors from four named universities participate in its management; the universities in question refused to participate as long as the trust contained a racially discriminatory provision.⁴⁴ The trustees therefore sought an order deleting the provision in question. The Supreme Court of Appeal refused to grant the order. In doing so, the Court ruled that freedom of testation is the subject of a right protected by section 25(1) of the South African Constitution,⁴⁵ a proposition that Griesel J had assumed to be correct in

38. *Ibid* at paras 23-32.

39. *Ibid* at paras 39-46. Also relevant was that the trust was to be administered by a public body, viz., a university, *ibid* at para 45.

40. [2010] ZASCA 136 (SA).

41. *Ibid* at para 42. The order had been made under section 13 of the *Trust Property Control Act*, *supra* note 29.

42. [2012] ZASCA 147 (SA) [*BoE Trust*].

43. *Ibid* at para 3.

44. *Ibid* at paras 3, 7-9.

45. *Ibid* at paras 26-27.

Minister for Education but had not ruled on.⁴⁶ Significantly, the Court also linked freedom of testation to “... the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away”.⁴⁷

Immediately prior to affirming that the right to freedom of testation is protected by the Constitution, the Court issued this statement:

[t]he giving of the bursaries as [the testatrix] had intended had become impossible as a result of the universities’ stance. Must the alternative provided in the will be given effect to? Does [the testatrix’s] right to dispose of her assets as she saw fit, whether we agree with her exercise of that right or not, require a court to see at least whether there is a way in which to interpret her will so as that it does not offend public policy?⁴⁸

Having posed those questions, the Court answered them by giving effect to the provision of the will that was conditional on the educational trust being impossible to carry out.⁴⁹ Rather than resolving the competition between freedom of disposition and equality that was raised by the educational trust, the Court, thanks to the provisions of the will, was able to sidestep that competition altogether. In one sense, for the Court to have given effect to the terms of the will in that way seems unremarkable; at the same time though, there are reasons to worry about the Court’s emphasis on freedom of testation, and I return to these shortly.

As the case law shows, the public policy doctrine is a useful tool for judges who seek to balance the demands of freedom of disposition and equality in responding to discriminatory trusts. The doctrine is an especially useful tool for judges in jurisdictions where equality norms figure in the Constitution, as the South African jurisprudence amply demonstrates; through the doctrine, judges may draw on constitutional equality norms in giving content to equity according to orthodox methods of judicial reasoning.⁵⁰ That said, invocation of the theme of public

46. *Minister for Education*, *supra* note 35 at para 18.

47. *BoE Trust*, *supra* note 42 at para 27.

48. *Ibid* at para 25.

49. *Ibid* at paras 30-31.

50. For fuller discussion, see Harding, “Some Arguments”, *supra* note 9 at 310-16.

policy in cases of discriminatory trusts raises questions that demand careful scrutiny, and these questions have not, to date, received sufficient answers in the case law. Perhaps the most pressing of these questions might be stated as follows: does public policy demand that freedom of disposition and equality be balanced in respect of discriminatory charitable trusts differently than in respect of discriminatory “private” trusts? According to the traditional view, the answer is no: public policy demands that freedom of disposition should prevail in respect of both types of trust. According to the majority in *Canada Trust* and, it would seem, recent South African jurisprudence, the answer is also no, but in a different way: public policy demands that equality norms prevail over freedom of disposition in respect of both charitable and “private” trusts that discriminate.⁵¹ According to Tarnopolsky JA in *Canada Trust*, on the other hand, the answer is yes: charitable trusts, because they are in some relevant sense “public” trusts, are susceptible to equality norms in ways that “private” trusts are not. Which view is to be preferred?

One theoretical effort to address this question is to be found in the work of Lorraine Weinrib and Ernest Weinrib.⁵² The Weinribs begin with the proposition that certain values underpin and animate the entire legal order, including private law, of which the law of trusts and equity more generally are a part.⁵³ The Weinribs, writing in a Canadian setting, locate these values in the written constitution,⁵⁴ but nothing in the Weinribs’ analysis precludes the possibility that the values might emerge from judge-made law. The important point is that the values are foundational and affect private law. In the Weinribs’ view, in a jurisdiction where

51. The South African cases discussed above were about discriminatory charitable trusts. However, their reasoning seems clearly applicable to discriminatory “private” trusts as well.

52. Lorraine E Weinrib & Ernest J Weinrib, “Constitutional Values and Private Law in Canada” in Daniel Friedman & Daphne Barak-Erez, eds, *Human Rights and Private Law* (Portland: Hart Publishing, 2001) 43 [Weinrib & Weinrib, “Constitutional Values”].

53. *Ibid* at 50-51.

54. This is in keeping with Canadian jurisprudence: see *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573; *Hill v Church of Scientology*, [1995] 2 SCR 1130.

such foundational values include equality norms, those equality norms affect private law, and private law must be appropriately sensitive to them. At the same time though, the Weinribs point out that private law must be sensitive to freedom of disposition, and it may be assumed that they regard this freedom also as a fundamental value underpinning the legal system.⁵⁵ Again, this value might have recognition in a written constitution — as is the case in South Africa with regard to freedom of testation, as we saw earlier — or it might emerge from judge-made law; again, the important point is that the value of freedom of disposition is fundamental and affects private law. In a jurisdiction where equality norms and freedom of disposition constitute fundamental values of the legal system, the Weinribs appear to think that the appropriate legal response to discriminatory trusts demands that the right balance be struck between those values.⁵⁶

The Weinribs argue that such a balancing exercise must be carried out according to what they call a “proportionality” principle;⁵⁷ they describe the principle in the following passage:

[a] central aspect of one normative principle is granted priority over a comparatively more marginal aspect of another. Relevant to this exercise would be a comparison of the principles that favour the two parties, in which one asks whether the triumph of the plaintiff’s principle would impact more heavily on the defendant’s than the triumph of the defendant’s principle would impact on the plaintiffs.⁵⁸

According to the Weinribs, when applied to discriminatory “private” trusts, this principle demands that freedom of disposition prevail. The Weinribs argue that for such a trust to be interfered with owing to its discriminatory character would be to disturb freedom of disposition in a disproportionate way; after all, they say, freedom of disposition in a “private” trust is precisely the freedom to choose between different possible beneficiaries in ways that discriminate between them.⁵⁹ For the Weinribs, matters are otherwise in the case of a discriminatory charitable

55. Weinrib & Weinrib, “Constitutional Values”, *supra* note 52 at 68.

56. *Ibid* at 57-59.

57. *Ibid* at 57.

58. *Ibid* at 58.

59. *Ibid* at 68.

trust. In such a case, freedom of disposition is exercised to give effect to a public benefit purpose, and, to that extent, to subject that exercise of dispositive freedom to equality norms that operate in the public sphere is consistent with the choices entailed in it.⁶⁰

If the Weinribs' view of how freedom of disposition and equality should be balanced in cases of discriminatory trusts is sound, then Tarnopolsky JA seems to have been on the right track when, in *Canada Trust*, he drew a distinction between charitable and "private" trusts that discriminate and found that only trusts of the former type should be interfered with on public policy grounds. But embedded in the Weinribs' view is a contestable understanding of the value of freedom of disposition that should be exposed and scrutinised before the view is accepted as sound. The Weinribs seem to assume that freedom of disposition is valuable because and to the extent that the disponor chooses the objects of her disposition, whether those objects be persons or purposes. On this view, the meanings and consequences of the disponor's choice, along with the identity and character of objects of that choice — what may compendiously, if somewhat tendentiously, be called the expressive and teleological aspects of the choice — are of no relevance to understanding the sense in which the freedom to make the choice is valuable. It follows that such expressive and teleological aspects of disponors' choices are irrelevant to understanding the value of freedom of disposition in cases of discriminatory trusts. Among the irrelevant considerations might be that the expression of a disponor's choice demeans some identity-based group, or that a historically disadvantaged class is placed at a relative disadvantage by the choice in question.

The Weinribs' assumption that the value of freedom of disposition inheres in choice itself is consistent with a particular view of the moral practice of private law, a view that Ernest Weinrib has explored more fully in his other work.⁶¹ According to that view, expressive and teleological considerations ought to play no role in private law. Rather, private law should be confined to the public enforcement of the demands of right

60. *Ibid.*

61. Ernest J Weinrib, *The Idea of Private Law*, 2d (Oxford: Oxford University Press, 2012) [Weinrib, *Private Law*].

understood according to the moral theory of Immanuel Kant;⁶² from a Kantian perspective, the demands of right are demands that a legal framework enable each person to act freely and purposively in the world consistent with the free and purposive action of each other person.⁶³ The demands of right are therefore agnostic as to expressive and teleological dimensions of free and purposive choice; it is free and purposive choice itself that matters. And it follows that, within the moral practice of private law, choice may be treated as valuable in itself, irrespective of its expressive or teleological dimensions, so long as it is consistent with the demands of Kantian right.⁶⁴ Thus the legal system may, indeed should, constrain choices that dominate or coerce others, but there is no moral requirement that the legal system constrain choices that discriminate against others on grounds relating to their identity.

The Weinribs' assumption that the value of freedom of disposition inheres in choice itself is not self-evident; neither is the Kantian account of the moral practice of private law, which animates that assumption. Thus, the Weinribs should provide some argument to support the proposition that private law is a moral practice confined to giving effect to Kantian right; and in the absence of such an argument, the Weinribs' contestable assumption about the value of freedom of disposition should not be accepted. It has been well explained elsewhere why the arguments that Ernest Weinrib provides for his interpretation of private law are

62. In their jointly authored piece, the Weinribs talk about the principle of "transactional equality"; this principle appears to refer to the demands of Kantian right: Weinrib & Weinrib, "Constitutional Values", *supra* note 52 at 58 and *passim*.

63. On the demands of Kantian right, see also Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009).

64. I say "treated as valuable" because, in a sense, from the perspective of Kantian right questions of value are altogether irrelevant to the question whether the law should facilitate or constrain freedom of disposition: Weinrib, *Private Law*, *supra* note 61 at 109-13. From this perspective, to ask about the "value" of freedom of disposition is to ask the wrong question. Nonetheless, for ease of expression I refer in the text to freedom of disposition as a "value" even when referring to the Weinribs' ideas.

unconvincing.⁶⁵ Moreover, there are plausible alternative accounts of private law according to which private law should take an interest in the expressive and teleological dimensions of choices, even though those choices are consistent with the demands of Kantian right.⁶⁶ I therefore want to proceed by insisting that the value of freedom of disposition may depend in important ways on just the sorts of considerations — relating to the expressive and teleological dimensions of the choices entailed in exercises of that freedom — that the Weinribs rule out of play in their treatment of that value. In particular, some exercises of freedom of disposition might turn out to lack value in certain ways where they entail choices to settle trusts on discriminatory terms. And in extreme cases of such value-lacking exercises of dispositive freedom, a balancing of the values of freedom of disposition and equality might turn out to be inappropriate, because there might be nothing of value to place on the scales on the “freedom of disposition” side. In those extreme cases, it might be misleading to say that discriminatory trusts offend public policy in spite of the value of freedom of disposition; it might be more accurate to say that discriminatory trusts both offend public policy and are products of valueless exercises of dispositive freedom.

To illustrate these points about extreme cases, consider an example of a discriminatory disposition from beyond the law of trusts: the discriminatory restrictive covenant in the Canadian case of *Re Noble and Wolf*.⁶⁷ The covenant in question purported to prohibit the sale of land to “any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood”.⁶⁸ Was the exercise of freedom of disposition entailed in binding a purchaser of land to this covenant a valuable one? The Weinribs seem

65. See e.g. Hanoch Dagan, “The Limited Autonomy of Private Law” (2008) 56:3 *American Journal of Comparative Law* 809.

66. For example, accounts informed by higher order teleological accounts of political morality: for two such higher order accounts see John Finnis, *Natural Law and Natural Rights*, 2d (Oxford: Oxford University Press, 2011); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

67. [1949] OR 503 (CA) [*Re Noble and Wolf*].

68. *Ibid* at 513.

to suggest not in their discussion of the case.⁶⁹ And yet according to the Weinribs' own understanding of the value of freedom of disposition, it seems that a choice to dispose of land on the terms of the covenant in *Re Noble and Wolf* may be treated in law as valuable because it is consistent with the demands of Kantian right; to that extent, the choice may be weighed in the balance against equality norms in working out whether or not to enforce the covenant. Moreover, according to the Weinribs' understanding of the value of dispositive freedom, it seems that the balancing exercise should be determined by giving effect to the disponent's choice because any other result would interfere disproportionately with the value of freedom of disposition. This reflects in substance the position taken by the Ontario Court of Appeal, members of which appealed to the "sanctity" or "liberty" of contract in upholding the covenant in question.⁷⁰ But the Weinribs' reaction to the case seems the right one notwithstanding their theoretical commitments, once it is accepted that the expressive and teleological dimensions of choices may be taken into account in assessing their value. On this view, that the covenant expressed a bigoted contempt for certain religious and racial groups, and that it was directed at excluding members of those groups from living in a particular residential community, combine to suggest that the covenant was the product of a valueless exercise of dispositive freedom and one that merited no legal protection or concern.⁷¹

Extreme cases like *Re Noble and Wolf* show that where judges share the Weinribs' contestable assumption about the value of freedom of

69. Weinrib & Weinrib, "Constitutional Values", *supra* note 52 at 63.

70. *Re Noble and Wolf*, *supra* note 67 at 524 per Justice Henderson, 530 per Justice Hogg. The case went on appeal to the Supreme Court of Canada, where the covenant was struck down, but not on public policy grounds: *Noble v Alley*, [1951] SCR 64.

71. From this perspective, it is a matter for regret that in *Re Noble and Wolf* the Court departed from the earlier decision of Justice Mackay of the Ontario High Court in *Re Drummond Wren*, [1945] OR 778 (HC), striking down a similar discriminatory restrictive covenant on public policy grounds. In the law of Ontario today, discriminatory restrictive covenants are void under section 22 of the *Conveyancing and Law of Property Act*, RSO 1990, c C-34.

disposition, they may attribute weight to the value of freedom of disposition in the setting of the public policy doctrine even though that value should be given no weight in the circumstances. And, of particular relevance to this paper, the possibility of such extreme cases calls into question the willingness of courts to attribute weight to freedom of disposition as well as equality when applying the public policy doctrine in cases about discriminatory trusts. Courts have shown this willingness not only in jurisdictions like England and Australia where such trusts have been upheld, but also in jurisdictions like Canada and South Africa where such trusts have been interfered with on public policy grounds. For example, recall the emphasis on freedom of testation in the South African case of *BoE Trust* and the unquestioning association of that value with the fundamental constitutional value of human dignity. This emphasis seems at odds with the proposition that, in some cases, a bigoted and offensive exercise of freedom of testation might be utterly without value and deserving of no legal protection or concern. In such cases, a South African court might do better to assert that the exercise of testamentary freedom is valueless and invoke the public policy rule against it on that basis.

At this point, it must be noticed that extreme cases like *Re Noble and Wolf* are rare. To begin with, it is unusual for a discriminatory disposition to be discriminatory in a way that ought to be of concern to the law. As the Weinribs point out, freedom of disposition just is the freedom to discriminate in choosing objects of the disposition, and most of the time such discrimination — for example, the choice of one child over another as heir, or the choice of a “relief of poverty” purpose over an “advancement of education” one — is and ought to be unremarkable from a legal point of view.⁷² Moreover, even in cases where dispositions do entail the sort of discrimination in which the law should take an interest, that discrimination is often plausibly construed as a means to bringing

72. Although, in the case of the choice of one child over another as heir, see *Spence*, *supra* note 23.

about a valuable state of affairs.⁷³ And nowhere is this clearer than in the case of discriminatory charitable trusts. Such trusts are usually oriented to a purpose of a type recognised as *prima facie* charitable in law, but the class of persons who stand to benefit directly from that purpose being carried out is restricted in some way. That discriminatory charitable trusts typically have this profile may be illustrated even by cases of such trusts that discriminate in an egregious way, such as the trusts in *Canada Trust* and *Kay*. The most plausible construction of the terms of those trusts is that they were for “advancement of education” and “advancement of health” purposes respectively, rather than for the purpose of discriminating against the classes affected by their discriminatory terms.⁷⁴

Where discriminatory trusts are the products of exercises of dispositive freedom that are valuable to some degree even though they entail discrimination, there is something to weigh on the scales on the “freedom of disposition” side when assessing whether such trusts offend public policy. This leads us back to a principle approximating the Weinrib’s principle of “proportionality”, according to which freedom of disposition and equality are to be balanced against each other. But if we reject the Weinrib’s contestable assumption about the value of freedom of disposition, the application of the principle of “proportionality”

73. Thus, the testamentary disposition in *Blathwayt* may – and I stress, *may* – have had more to do with the testator’s loyal pride in the Protestantism of his aristocratic family than with bigoted prejudice against Roman Catholics: *Blathwayt*, *supra* note 12 at 426 per Lord Wilberforce, 429 per Lord Chelsea.

74. For a different view, see Adam Parachin, “Public Benefit, Discrimination and the Definition of Charity” in Kit Barker & Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) 171 at 199-200 [Parachin, “Public Benefit”]. Of course, a trust might be created for the purpose of discriminating against some group; a trust for the purpose of “promoting the subordination of women” might be offered as an example. Such a trust could not be called “charitable” even in a provisional sense; it would clearly fail the public benefit test on any reasonable view of that test. But attempts to create trusts for the purpose of discrimination, as opposed to trusts for purposes that entail discrimination, are not known to the case law and may be assumed to be exceedingly rare.

must be sensitive to the fact that, in cases of discriminatory trusts, the proper balance between freedom of disposition and equality cannot be determined except with reference to the expressive and teleological dimensions of choices entailed in exercises of dispositive freedom. And this sensitivity is called for whether the balancing exercise is required in the setting of a charitable or a “private” trust. In a legal landscape in which the “proportionality” principle was applied in this way, a discriminatory charitable trust would not be susceptible to interference on public policy grounds solely because it was in some sense “public”; it would be susceptible to such interference to the extent that the exercise of dispositive freedom that brought it into existence lacked value. And a discriminatory “private” trust would be susceptible to interference for the same reason.

If the value of freedom of disposition is a function of expressive and teleological dimensions of the choices entailed in it, then there is work to be done developing the public policy doctrine so that it is more sensitive to that value. In *Canada Trust*, the majority barely engaged with normative considerations bearing on the value of dispositive freedom, simply stating that freedom of disposition was a value, that it must “give way” to equality norms on the facts of the case, and that to assert this was to “expatiate the obvious”.⁷⁵ In particular, no real effort was made to explain why equality norms should prevail in *Canada Trust* despite the fact that the Leonard Foundation was a trust for the advancement of education and, to that extent, the product of a valuable exercise of dispositive freedom.⁷⁶ And judges in subsequent Canadian cases about discriminatory trusts for the advancement of education have also shown little appetite to engage with the value of freedom of disposition.⁷⁷ In *Re Ramsden Estate*, a case about a trust to provide scholarships to Protestant students, *Canada Trust*

75. *Canada Trust*, *supra* note 15 at 321, 334.

76. See *ibid* at 333, per Robins JA (for the view that the trust was for the advancement of education). The criticism in the text may also be made of the decision of the US Supreme Court in *Bob Jones University v US*, 461 US 574 (1983) [*Bob Jones*], and indeed was made by Chief Justice Rehnquist in his dissenting judgment in that case.

77. See the discussion in Parachin, “Public Benefit”, *supra* note 74 at 178-79.

was distinguished on the basis that the discrimination in *Canada Trust* was “blatant”.⁷⁸ There was no attempt to investigate whether the value of freedom of disposition was to be understood differently in the two cases because of the character of the discrimination in each. Similarly, in *University of Victoria v British Columbia (AG)*⁷⁹ (“*University of Victoria*”), a case about a trust for funding scholarships for Roman Catholic students, *Canada Trust* was distinguished because the discrimination in *Canada Trust* was thought to be “offensive” whereas the discrimination in the case at hand was not;⁸⁰ but again the court declined to consider whether and why the value of freedom of disposition might be affected in some way by the fact that such freedom is exercised in an “offensive” fashion.

*Re The Esther G Castanera Scholarship Fund*⁸¹ (“*Castanera*”) is the most recent Canadian case raising a discriminatory charitable trust. In that case, a testamentary trust to provide financial support to women graduates of a particular high school undertaking tertiary studies in the sciences was in view.⁸² Unlike the judges in *Re Ramsden Estate* and *University of Victoria*, in *Castanera*, Justice Dewar of the Court of Queen’s Bench of Manitoba undertook a careful analysis of normative considerations bearing on the public policy doctrine as it applies to discriminatory charitable trusts. In this regard, *Castanera* represents an improvement on the earlier cases. That said, Dewar J seems to have thought that the motivations underpinning a discriminatory charitable trust are of normative significance in applying the public policy doctrine; thus, he drew attention to the bigoted motivations underpinning the discriminatory trust in *Canada Trust*, and he contrasted the benign motivations of the testatrix in the case at hand.⁸³ But Dewar J seems to have been searching in the wrong place for normative considerations bearing on freedom of disposition in cases of discriminatory charitable trusts; after all, as a general rule motivations are irrelevant to questions

78. *Re Ramsden Estate, supra* note 23 at para 13.

79. *University of Victoria, supra* note 23.

80. *Ibid* at para 25.

81. *Castanera, supra* note 23.

82. *Ibid*.

83. *Ibid* at para 37.

relating to the construction and validity of trusts. Arguably, Canadian courts have some way to go before they identify those expressive and teleological considerations that truly bear on discriminatory charitable trusts.

III. Public Benefit

I ended Part II by suggesting that judges may need to develop the public policy doctrine in cases of discriminatory trusts so as to respond better to normative considerations that bear on the value of freedom of disposition. However, in cases of discriminatory *charitable* trusts, this need may not be an urgent one. In such cases, judges have at hand another theme — arising from equity’s historical jurisdiction over charity — that might prove capable of delivering nuanced responses without at the same time demanding that judges reflect on the value of freedom of disposition. This is the theme of public benefit. It is, of course, well established in equity that a charitable trust must have a dominant or primary purpose that is, in some sense, a public benefit purpose. The jurisprudence on this public benefit requirement is large and complex, and in contemporary equity it may fairly be said that public benefit is the central organising idea in cases about charity.⁸⁴ Thus, it is strange that the theme of public benefit is hardly ever deployed in judicial responses to discriminatory charitable trusts; as I discussed above, in the relatively few cases about such trusts, invocation of the theme of public policy is the norm. Equally, the theme of public benefit seems not to be prominent, even if it is present, in cases about charities that engage in discrimination in the provision of services.⁸⁵ In this part, I will not speculate as to why the public benefit

84. The most comprehensive contemporary treatment of the public benefit test is Jonathan Garton, *Public Benefit in Charity Law* (Oxford: Oxford University Press, 2013) [Garton, *Public Benefit*].

85. Thus, there are references to public benefit in *Bob Jones, supra* note 76; *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*, [2010] EWHC 520 (Ch); and *St Margaret’s Children and Family Care Society v Office of the Scottish Charity Regulator* (2014), App 02/13 (Scottish Charity Appeals Panel) [*St Margaret’s*] (but ultimately each of these cases can be understood as having been decided on grounds other than the public benefit test).

test has not been utilised by judges dealing with discriminatory charitable trusts. Rather, my aim is to offer some thoughts as to how the theme of public benefit might be developed by judges so as to respond to such trusts. I argue that the public benefit test contains resources on which judges may build in reasoning about public benefits and detriments associated with discriminatory charitable trusts. In particular, I suggest that public benefit jurisprudence might be developed to enable judges, in appropriate cases, to find that discriminatory charitable trusts are not of public benefit and should be interfered with on that basis.

The public benefit test has two components.⁸⁶ First, in order to satisfy the test, a purpose must stand to benefit a class of persons that is sufficiently “public” in character. This component of the test is directed against trusts that stand to benefit classes of persons whose relations to each other take the form of family, employment or associational ties and are accordingly viewed in charity law as “private”;⁸⁷ latterly, in some jurisdictions, it has also come to be directed against trusts that exclude the poor.⁸⁸ Secondly, if a purpose is to satisfy the public benefit test, it must, if carried out, stand to benefit people, as opposed to causing detriment to people or having no discernible welfare implications one way or the other. In thinking about how a discriminatory charitable trust might be dealt with under the public benefit test, the first point to note is that, except in unusual cases, such a trust is likely to satisfy the “public” component of the test. As Adam Parachin has insightfully pointed out, trusts that stand to benefit only persons who share — or lack — some common element of human identity are not typically impugned by the “public” component of the public benefit test.⁸⁹ And if they are so impugned, it is likely to be because the identity-based class that they stand to benefit is also restricted

86. For fuller discussion of the two components of the public benefit test, see Harding, *Charity Law*, *supra* note 1 at 13-30.

87. See *e.g.* *In Re Compton*, [1945] Ch 123 (CA (Eng)); *Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297 (HL).

88. *R (Independent Schools Council) v Charity Commission for England and Wales*, [2011] UKUT 421 (Upper Tribunal Tax and Chancery Chamber) [*Independent Schools*]; *Charities and Trustee Investment (Scotland) Act*, ASP 2005, c 10, s 8(2)(b).

89. Parachin, “Public Benefit”, *supra* note 74 at 182-94.

based on family, employment or associational ties. Moreover, according to Parachin, judicial dicta to the effect that a purpose is “public” only where the class that stands to benefit from the purpose somehow reflects the character of the purpose should be read as applying only to purposes that meet the description “general public utility”; those dicta play no role in helping to explain why discriminatory charitable trusts might fail the public benefit test in cases about purposes that are not of “general public utility”.⁹⁰

Parachin convincingly argues that if discriminatory charitable trusts are to fall foul of the public benefit test on account of their discriminatory character, it is in most cases likely to be because in some sense their purposes fail the “benefit” component of the public benefit test.⁹¹ However, the application of the “benefit” component in cases about discriminatory charitable trusts is complicated by the fact that such trusts are typically for purposes of types recognised as *prima facie* charitable in law. In the decided cases, discriminatory charitable trusts have usually been for the advancement of education, a type of purpose recognised as *prima facie* charitable since the time of the *Statute of Elizabeth*⁹² and one of the four heads of charity articulated by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*.⁹³ It is not unreasonable to assert that the legal expression of a type of purpose as *prima facie* charitable indicates that there are strong reasons for thinking that the type of purpose in question stands to benefit people in well recognised and accepted ways.⁹⁴ This thought would seem to underpin the longstanding judicial practice of assuming or even presuming the benefit of purposes within certain heads of charity, a practice that continues in some jurisdictions even if it

90. *Ibid* at 186-93, discussing dicta of Lord Simonds in *Inland Revenue Commissioners v Baddeley*, [1955] AC 572 (HL) at 592.

91. Parachin, “Public Benefit”, *supra* note 74 at 194-204.

92. *Statute of Charitable Uses*, 1601 (UK), 43 Eliz I, c 4.

93. [1891] AC 531 (HL) at 583 [*Pemsel*].

94. See Mary Syngé’s description of judicial practice as informed by this proposition: Mary Syngé, *The ‘New’ Public Benefit Requirement: Making Sense of Charity Law?* (Portland: Hart Publishing, 2015) at 22-23.

is prohibited by statute in others.⁹⁵ Thus, where a trust is for a purpose of a type recognised as *prima facie* charitable in law — for example, the advancement of education — there are strong reasons to think that the trust satisfies the “benefit” component of the public benefit test, even if it entails discrimination. How, then, might a judge make a finding that a discriminatory charitable trust lacks benefit in these circumstances?

Public benefit jurisprudence points to the answer to this question. That jurisprudence shows that, where appropriate, judges working with the “benefit” component of the public benefit test are prepared to shift their attention away from the general character of a purpose under scrutiny and towards the likely social effects of carrying out that particular purpose.⁹⁶ Often this emphasis on likely social effects will entail some engagement with evidence of such effects that the parties have put before the court. A preparedness to look to likely social effects may be discerned in some cases about purposes of types recognised as *prima facie* charitable in law, most obviously, purposes within the first three heads of charity articulated by Lord Macnaghten in *Pemsel*, viz., “relief of poverty”, “advancement of education”, and “advancement of religion”.⁹⁷ For example, in *In Re Macduff*,⁹⁸ Lord Rigby recognised that the purpose of teaching the art of theft, although in a general sense within the description of “advancement of education” and to that extent *prima facie* charitable, would nonetheless have undesirable social effects and therefore fail the “benefit” component of the public benefit test.⁹⁹ Moreover, in cases arising under the fourth head of charity set out by Lord Macnaghten in *Pemsel*, “other purposes

95. Judges are prohibited from presuming the benefit of purposes of certain types in England and Wales: *Charities Act 2011* (UK), c 25, s 4(2); Scotland: *Charities and Trustee Investment (Scotland) Act* ASP 2005; and Northern Ireland: *Charities Act (Northern Ireland) 2008* (NI), c 12, s 3, as amended by *Charities Act (Northern Ireland) 2013* (NI), c 3, s 1.

96. Drawing on the language of Jonathan Garton’s taxonomy of public benefit, this shift might be described as one away from questions of “conceptual” benefit and towards questions of “demonstrable” benefit: Garton, *Public Benefit*, *supra* note 84 at paras 2.16-2.17.

97. *Pemsel*, *supra* note 93 at 583.

98. [1896] 2 Ch 451 (CA (Eng))

99. *Ibid* at 474.

beneficial to the community”,¹⁰⁰ judges have had no choice but to look to likely social effects when applying the public benefit test, because the fourth head does not refer to a type of purpose regarded as *prima facie* charitable in law beyond pointing judges in the direction of the public benefit test. The best illustration of judges grappling with likely social effects in a case arising under the fourth head is *National Anti-Vivisection Society v Inland Revenue Commissioners*.¹⁰¹ There, the House of Lords was asked to determine whether the purposes of a society that campaigned for laws to prohibit scientists from performing experiments on live animals satisfied the public benefit test. Among the reasons for decision was that the “benefit” component of the public benefit test was not satisfied. In reaching this finding, the Law Lords considered evidence of likely social effects in the form of the frustration of advances in medical research on the one hand, and the cultivation of humane sentiments on the other, and they concluded that evidence of the former effects was more compelling than evidence of the latter.¹⁰²

Thus, public benefit jurisprudence shows that judges may look to the likely social effects of carrying out the purposes of discriminatory charitable trusts when applying the “benefit” component of the public benefit test to such trusts. And they may do this even in cases where the purposes of the trusts in question are of types that are recognised as *prima facie* charitable in law. But now another question presents itself. This question may be better grasped in light of a crude taxonomy of the social effects that might be generated by carrying out a purpose. This taxonomy is made up of two categories. The first contains what might be called “direct” social effects. So, for example, a trust for the purpose of providing educational scholarships to “white Protestant boys” might, when carried out, give educational opportunities to children within that class and at the same time deny other children outside the class similar educational opportunities. Carrying out the purpose of the trust is, in a sense, an immediate cause of these outcomes: to this extent, the outcomes fall within the category of direct social effects. In the second

100. *Pemsel*, *supra* note 93 at 583.

101. [1948] AC 31 (HL) [*Anti-Vivisection*].

102. *Ibid* at 48-49, per Lord Wright.

category are what might be called “indirect” social effects. So, to return to the example, the purpose of providing educational scholarships to “white Protestant boys” might, depending on the circumstances in which it is carried out, express attitudes and beliefs about certain identity-based groups that demean members of those groups, and those expressive effects might be felt in public culture irrespective of the impact of carrying out the purpose on children whose educational opportunities are directly affected, for good or ill, by the discrimination entailed in the purpose.

The question that is illuminated by this crude taxonomy of social effects is this: to what extent should indirect social effects be taken into account, along with direct social effects, in the setting of an inquiry into whether some discriminatory charitable trust satisfies the “benefit” component of the public benefit test? This question about indirect social effects is of general importance in public benefit jurisprudence, but it is of particular importance in cases about discriminatory charitable trusts because, according to many philosophers, discrimination has considerable indirect social effects that help to explain why it ought to be of moral and legal concern.¹⁰³ Indeed, in certain cases, whether a discriminatory charitable trust satisfies or fails the public benefit test might turn on the extent to which the indirect social effects of discrimination are taken into account. For example, return once more to the example of a trust for providing educational scholarships to “white Protestant boys”, and imagine that the evidence shows clearly that students excluded from this class suffer no loss of educational opportunity as a result of that exclusion, perhaps because they remain eligible for a range of other scholarships that are not discriminatory in the same way. In these circumstances, the “benefit” component of the public benefit test seems clearly satisfied if only direct social effects are taken into account, but the position seems far

103. For detailed discussion, see Harding, *Charity Law*, *supra* note 1 at 226-33.

more complex once indirect social effects are brought into view.¹⁰⁴

There are indications in the public benefit jurisprudence that judges are sometimes reluctant to take into account indirect social effects when working with the “benefit” component of the public benefit test. For example, in *R (Independent Schools Council) v Charity Commission for England and Wales*¹⁰⁵ (“*Independent Schools*”), the Upper Tribunal (Tax and Chancery) was invited to find that the purposes of independent fee-charging schools were not of public benefit because they contributed to inequality and social division in British society.¹⁰⁶ The Tribunal noted the force in such arguments but declined to take such claimed indirect social effects into account in applying the public benefit test. For the Tribunal, the evidence presented on the question of indirect social effects was not substantial enough to influence inquiries into public benefit; moreover, to make findings on the basis of evidence of the indirect social effects of private schools would be to venture onto political territory that was properly the province of the legislature.¹⁰⁷ But if *Independent Schools* reveals judicial wariness about indirect social effects, there are also cases on public benefit that indicate a different judicial attitude. In *Re Resch*,¹⁰⁸ for example, the Privy Council accepted the proposition that a private hospital stood to benefit the public because the private hospital relieved

104. See *St Margaret's*, *supra* note 85 at 12, 22-29 (where the Panel was asked, *inter alia*, whether the purposes of an adoption agency that excluded same sex couples from its services satisfied the public benefit test. In finding that the public benefit test was satisfied, the Panel made no reference to the indirect social effects of discrimination. Instead, the Panel focused on direct social effects, noting that no same sex couples had ever sought the services offered by the agency in question and that same sex couples seeking adoption services had a range of other agencies to choose from). In contrast, see *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales*, [2011] UKFTT B1 (First Tier Tribunal General Regulatory Chamber) at para 59 (where the Tribunal acknowledged the indirect social effects of discrimination against same sex couples in the provision of adoption services).

105. *Independent Schools*, *supra* note 88.

106. *Ibid* at para 29.

107. *Ibid* at paras 96-109.

108. [1969] 1 AC 514 (PC (Austl)).

public hospitals and therefore the state of the burden of health care.¹⁰⁹ And in *Neville Estates Ltd v Madden*¹¹⁰ (“*Neville Estates*”), Justice Cross considered that the purposes of a synagogue closed to the public satisfied the public benefit test because worshippers would leave the synagogue and go out into the community, thereby generating benefit to the public (albeit in ways that were not well explained in the judgment).¹¹¹

Of course, in *Re Resch* and *Neville Estates*, purposes that ostensibly failed the public benefit test were ultimately found to satisfy the test once indirect social effects were taken into account. In contrast, if indirect social effects are to be taken into account when applying the “benefit” component of the public benefit test to discriminatory charitable trusts, then a purpose that ostensibly satisfies the public benefit test may ultimately be found to fail the test after those indirect social effects are taken into account. But it is not the outcomes in *Re Resch* and *Neville Estates* that are of present interest: it is the method adopted in those cases. The cases show that public benefit jurisprudence contains resources for judges who are minded to take into account indirect social effects in working out whether discriminatory charitable trusts satisfy the “benefit” component of the public benefit test. In light of these resources, judges may apply the “benefit” component of the public benefit test in a way that is sensitive to benefits associated with a discriminatory charitable purpose (including, importantly, benefits indicated by the fact that the purpose is of a type recognised as *prima facie* charitable in law), but at the same time takes into account both direct and indirect adverse social effects associated with the discrimination entailed in the purpose. These latter effects may be described, using the language of public benefit jurisprudence, as detriments to be taken into account in working out whether the “benefit” component of the public benefit test is met.

Earlier, I argued that, in cases of discriminatory charitable trusts, judges applying the public policy doctrine must balance the value of freedom of disposition, which is properly viewed as a function of the expressive and teleological aspects of choices entailed in the exercise of

109. *Ibid.*

110. [1962] Ch 832 (Eng) [*Neville Estates*].

111. *Ibid.*

that freedom, against the value of equality. Now we are in a position to see that judges who sought to apply the public benefit test in such cases would also be required to undertake a balancing exercise. In the setting of the public benefit test, the balancing exercise would be one according to which benefits associated with the purpose of a discriminatory charitable trust must be weighed against the detriments associated with the discrimination entailed in carrying out that purpose. As with the treatment of indirect social effects, public benefit jurisprudence offers judges some guidance in undertaking such a balancing exercise. In *Anti-Vivisection*, for example, the House of Lords placed emphasis on tangible and material social effects in finding that detriments associated with the frustration of advances in medical research outweighed benefits associated with the cultivation of humane sentiments.¹¹² But such guidance can only take judges so far; after a point, public benefit jurisprudence is vague as to how benefits and detriments ought to be weighed. Indeed, as I have argued elsewhere, the most plausible reading of *Anti-Vivisection* is one according to which the Law Lords experienced the balancing exercise as demanding a political choice between incommensurable considerations of value.¹¹³

That an application of the public benefit test in cases of discriminatory charitable trusts may lead to judges having to make choices between incommensurables should not be counted as a shortcoming in the public benefit jurisprudence; rather, it should be seen as a necessary consequence of the nature of what judges are asked to balance when working with

112. *Anti-Vivisection*, *supra* note 101 at 48-49, per Lord Wright.

113. See Harding, *Charity Law*, *supra* note 1 at 25.

that jurisprudence.¹¹⁴ A robust public benefit jurisprudence dealing with discriminatory charitable trusts would recognise this fact. However, at the same time such jurisprudence would seek to provide reasoned accounts of the various benefits and detriments associated with such trusts. And in light of these reasoned accounts, judges might be able to identify circumstances in which discriminatory charitable trusts either clearly fail or clearly satisfy the “benefit” component of the public benefit test notwithstanding the incommensurable character of the benefits and detriments associated with them.¹¹⁵ For example, the benefits associated with the purpose of such a trust might be relatively modest but significant detriments might be associated with its discriminatory terms; equally, there might be evidence of substantial benefits associated with the purpose of a trust but only negligible evidence of detriments associated with the discrimination entailed in that purpose. Moreover, even in cases where it is unclear how to balance incommensurable benefits and detriments associated with a discriminatory charitable trust, reasoned accounts of those benefits and detriments may be expected at least to give judges a clearer sense of what is at stake in their choices.

114. See also Parachin, “Public Benefit”, *supra* note 74 at 204-205 (Parachin suggests that the balancing of incommensurables that is required if the public benefit test is to be applied to discriminatory charitable trusts takes judges beyond “the traditionally conceived boundaries of the judicial realm”. This may be true, but as cases like *Anti-Vivisection* show, it is in the very nature of the public benefit test that it requires judges to make political choices among incommensurables; for as long as judges must apply that test when working out whether purposes are charitable in law, they must venture beyond the “traditionally conceived boundaries” to which Parachin refers).

115. This may be possible where the incommensurability of such benefits and detriments is, in Timothy Endicott’s language, “vague” rather than “radical”. Vague incommensurables may be compared with each other; sometimes the outcome of this comparison will be clear, but in a range of cases it will not. Radical incommensurables cannot be compared with each other. See Timothy Endicott, “Proportionality and Incommensurability” (2012) Oxford Legal Studies Research Paper No 40.

IV. Conclusion

A public benefit jurisprudence that took into account both direct and indirect social effects, and that demanded a balancing exercise in cases where such social effects took the form of both benefits and detriments, would be a useful instrument for judges seeking to respond in nuanced ways to discriminatory charitable trusts. That said, as I argued earlier, the public policy doctrine, at least where it rests on a sound understanding of the value of freedom of disposition, is also a useful instrument for such judges. At the same time, both the public policy doctrine and the public benefit test demand that competing considerations be weighed against each other, and a balance struck between them, in the setting of discriminatory charitable trusts: in the case of the public policy doctrine, it is the values of freedom of disposition and equality; in the case of the public benefit test it is the various benefits and detriments associated with the purpose of a discriminatory charitable trust. Given that both the public policy doctrine and the public benefit test seem fit, or at least might be rendered fit, for dealing with discriminatory charitable trusts, and given that neither tool is able to avoid the difficulties associated with balancing competing considerations, it is worth asking whether anything would be gained if judges ceased reaching for the theme of public policy when deciding cases about discriminatory charitable trusts, and started reaching for the theme of public benefit in its place.

One possible advantage is that, by reaching for the theme of public benefit, judges might be able to respond to, and in appropriate cases interfere with, discriminatory charitable trusts without at the same time engaging with the value of freedom of disposition. Earlier, I argued that this value might be misunderstood as having nothing to do with the expressive or teleological aspects of choices that are entailed in the exercise of dispositive freedom. To the extent that judges misunderstand the value of freedom of disposition in this way, there is a risk that they will attribute weight to that value in circumstances where no or less weight ought to be attributed to it. Consequently, discriminatory trusts might be upheld in circumstances where they should rather be interfered with. But if judges turn to the theme of public benefit when dealing with discriminatory charitable trusts, then at least in cases about discriminatory

charitable trusts judges will not have to consider the value of freedom of disposition; after all, the public benefit test is uninterested in that value. To that extent, the risk will be minimised that a misunderstanding of the value of dispositive freedom might affect the treatment of discriminatory charitable trusts.

However, at the same time a different risk might be realised. If judges come to think that discriminatory charitable trusts are a matter for public benefit jurisprudence, and that discriminatory “private” trusts are a matter for the public policy doctrine, then they may assume, as Tarnopolsky JA did in *Canada Trust*, that the reason why discriminatory charitable trusts are subject to equality norms is that they are in some sense “public” trusts, and on the basis of this assumption they may conclude that discriminatory “private” trusts are not subject to equality norms because of their “private” character. Earlier I argued that there is no reason to think that dispositions of a “private” character are necessarily exempt from equality norms that operate in the public sphere: such norms are relevant to understanding and evaluating the expressive and teleological dimensions of the choices entailed in “private” dispositions just as they are relevant to understanding those dimensions of the choices entailed in “public” dispositions. In truth, both charitable *and* “private” trusts that discriminate are subject to equality norms because the value of exercises of freedom of disposition that underpin them is, in part, to be understood in light of such norms. In addition, discriminatory charitable trusts are subject to equality norms via the public benefit test. So judges exercising equity’s jurisdiction over charity are spoilt for choice in deciding how to give legal expression to the equality norms that apply to discriminatory charitable trusts. Judges exercising equity’s jurisdiction over “private” trusts do not enjoy this luxury. In these circumstances, far from eschewing the public policy doctrine in favour of the public benefit test, there may be a case for judges exercising equity’s jurisdiction over charity to eschew the public benefit test and continue, as they have done to date, to invoke the theme of public policy when interfering with discriminatory charitable trusts. In this way, such judges may ensure that a legal basis is maintained for interfering with discriminatory trusts of all types, whether charitable or “private” in character.