Why and When Discrimination is Discordant with Charitable Status: The Problem with "Public Policy", The Possibility of a Better Solution

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When courts have considered when and why discrimination renders an institution ineligible for charitable status, they have resorted to the doctrine of public policy to explain the non-charitableness of discrimination. Public policy is not, though, up to the task. It is undisciplined, inspires courts to consider irrelevant factors and offers no principled explanation as to when and why discrimination should and should not vitiate charitable status. A better approach would be to address this issue using the traditional analytical tools of charity law — charitable purposes, charitable activities and public benefit. But this is a deceptively difficult task, which perhaps accounts for the appeal of public policy to courts. Nonetheless, this paper looks inward to the law of charity, developing an "in-house" rule against discrimination grounded in the internal logic and values of charity law. Specifically, this paper discovers in the public benefit requirement an inclusive ethic through which charity law affirms the equal worth, value and dignity of others. Discrimination is non-charitable when it fails this standard through stigmatizing rejection. But not all differential treatment under charitable trusts contradicts the inclusive ethic of charity law.

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I. Introduction

When charity lacks its characteristic warm glow, courts sometimes turn to public policy to conclude that the prerequisites for charitable status are unmet. This happened in, for example, *Bob Jones v United States*,[1] where private schools engaging in racial discrimination were found to be non-charitable, *Canada Trust Co v Ontario Human Rights Commission*,[2] where a discriminatory scholarship fund was found to be non-charitable, and *Royal Trust Corp v University of Western Ontario*,[3] where another discriminatory scholarship fund was found to be non-charitable. The problem with these decisions is not the conclusions reached but rather the basis — public policy — for decision-making. As has been widely observed, public policy is a poor basis for judicial decision-making.[4] So how do we account for the appeal of public policy to courts in these kinds of cases? When courts invoke public policy in these fact patterns, it is (I think) because they instinctively perceive a discordance with charitable status at law but struggle to articulate that intuition using the usual frames of reference employed in charity law. The above authorities had very little to say about the traditional charity law touchstones of charitable purposes, charitable activities and public benefit. It is almost as though public policy was relied upon in these decisions as shorthand for 'noncharitable for inarticulable reasons'.

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1. 461 US 574 (1983) [*Bob Jones*].
2. (1990) 69 DLR (4th) 321 (ONCA) [*Canada Trust Co*].
3. 2016 ONSC 1143 [*Royal Trust Corp*].
4. *Church Property Trustees, Diocese of Newcastle v Ebbeck*, [1960] HCA 88. Windeyer J noted that public policy has been variously described (citations omitted here) as: "a very unruly horse", "a treacherous ground for legal decision", "a very unstable and dangerous foundation on which to build", a "slippery ground", "a vague and unsatisfactory term" and "calculated to lead to uncertainty and error when applied to the decision of legal rights" at 416. See also *Fender v St John-Mildmay* (1937), [1938] AC 1 (HL (Eng)) [*Fender*]. Per Lord Atkin, the doctrine of public policy was described as a doctrine of last resort that "should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds" at 12.

This is neither sustainable nor desirable. As a doctrine of absolute last resort, public policy provides a fail-safe for extreme circumstances escaping the reach of charity law's traditional doctrinal tools. While the above noted cases fit the mould of unusual circumstances, charity law needs a better answer than 'public policy' to explain when and why discrimination is discordant with charitable status. As we shall see, public policy is undisciplined, establishes little to no transferable principles to guide future decisions, inspires courts to consider irrelevant factors in place of relevant ones, masks the true calculus going on behind the scenes and, inasmuch as it channels into charity law constitutional law principles intended to restrain governmental action, risks moulding charities into the image of the ideal liberal state.

For example, in *Bob Jones* and *Canada Trust Co* virtually none of the sources of law relied upon by the courts as determinants of public policy — *e.g.* civil/human rights legislation, constitutional law principles, international human rights treaties and presidential executive orders — were applicable under the circumstances. Deferring to these sources of law carried with it the disturbing implication that the doctrine of public policy permits courts to universalize context specific rules. Worse yet, deferring to 'public policy' — a doctrine of last resort properly reserved to those instances where all else has failed — implies that charity law — a body of law concerned with "doing good for others"[5] — lacks the normative resources internal to itself to develop a workable solution to the issue of discriminatory charity. If we cannot do a better job of explaining when and why discrimination is discordant with doing good for others, perhaps we are not trying hard enough.

Shifting social attitudes against discrimination, one might say, suggest that these objections to public policy are a tempest in a teapot. As the public's tolerance of discrimination wanes, presumably so too does the prospect of discriminatory charitable trusts being settled, much less funded through voluntary charitable subscriptions. So why not leave 'well enough' alone and allow public policy to resolve questions about

5. Ontario Law Reform Commission, *Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997) at 146 [*OLRC*].

discriminatory charity if and when they rarely arise? But I see the logic working in reverse. The ascendancy of human rights amplifies rather than mutes the need to better understand the discordance between charity and discrimination. Shifting attitudes against discrimination may well render discriminatory charity less marketable to donors but they also mean that it is increasingly unlikely that discrimination will go unchallenged. Future legal challenges are coming. Answers are needed. Public policy is not up to the task.

Add to this that the legally recognized bases on which discrimination may occur continue to evolve and expand. As the grounds of discrimination have expanded, so too have the prospects of equality conflicting with other values. The thing about diversity is that it is diverse — it wears many hats. Consider, for example, the recognition of sexual orientation and gender identity as prohibited grounds of discrimination.[6] One of the issues here, sharpened by charitableness of religion, is that it is not only experiences of sexuality and gender that are diverse, but also beliefs about the nature of sexuality and gender. With the benefit of charitable status, religions espouse a wide range of beliefs about sexuality and gender. Not all beliefs within this range mesh seamlessly with ascendant human rights perspectives on the matter.

A question will inevitably need to be squarely confronted: what scope for principled disagreement about sexuality and gender (among many other things) is possible within the charitable sector? Buried in this question is a deeper question about the value commitments of diversity. When it comes to respect for difference, what manifestations of difference are deserving of respect? Is diversity of belief a feature of diversity or an anathema to it? At stake here is not just charitable status, but also whether the end game of diversity is to expand the seats at the table (expand the roster of differences seen as enriching the mosaic) or merely to substitute who is invited to the table and by extension who is not (swapping outcasts). If charity law were to marginalize traditional belief systems, what would that reveal about our tolerance for principled dissent within the charitable sector? Far better to squarely confront these

6. See *e.g.*, *Human Rights Code*, RSO 1990, c H.19, s 1 [*HRC*].

issues than to bury them behind the veneer of public policy.

My thesis is that there is a better way to address the topic of discriminatory charity than via public policy. Moving forward, there is no need for courts to refer to the kinds of outside values and considerations — *e.g.* equality norms reflected in constitutional law, human rights law, international human rights treaties and executive orders — that were identified in *Bob Jones* and *Canada Trust Co*. Doing so risks distorting both those values and the legal meaning of charity along with them. Native to charity law are values relevant to solving this problem. As we shall see, as traditionally understood, the charity law touchstones of charitable purposes, charitable activities and public benefit can make it difficult to respond when charities discriminate. But it is nonetheless possible to locate in the public component of the public benefit requirement a principle of inclusion. The truly charitable trust affirms the equal worth, value and dignity of all persons. Trusts manifesting stigmatizing rejection fail this standard.

The difficulty is that not all differential treatment or all exclusions from charitable trusts amount to non-charitable stigmatizing rejection. There will be circumstances in which these will be attributable to benign goals. Charity law affords settlors of charitable trusts a broad discretion to target benefaction at specific sub-populations. When this freedom is exercised to, for example, further affirmative action goals, there are no concerns that settlors are acting non-charitably. Likewise, when differential treatment is the outworking of principled disagreement on matters of conscience, charity law should not intervene. While charity law is concerned with fostering acceptance, it is not concerned with using charitable status to compel agreement. Given the charitableness of religion, it would literally be impossible for charity law to require that all charities share a common set of values. Differential treatment attributable to principled disagreement can be a reflection of, rather than deviation from, the values and doctrines of charity law. Inclusion and diversity of belief co-exist within charity law.

II. Leading Authorities

One might have assumed that the 'problem' of discriminatory charity would be easy to solve. Charitable status is a legally privileged status.[7] It is conferred to enable and endorse charitable purposes, meaning purposes that are of public benefit and within one or more of the 'Pemsel' categories of charitable purposes: the relief of poverty, the advancement of religion, the advancement of education and other purposes of public benefit.[8] The law distinguishes charitable from non-charitable purposes with the singular aim of promoting, enabling and endorsing charitable purposes. The deal is that charities are supposed to go out and make the world a better place. Discrimination seems like a particularly unlikely candidate for the ringing endorsement that is charitable status. Nonetheless, there are doctrinal hurdles to concluding that charitable status is vitiated by literally every manifestation of discrimination.[9] Before elaborating on these, we will briefly consider a few of the leading and recent cases on point.

A. United States

The leading US decision dealing with the public policy against discrimination is *Bob Jones*.[10] In 1970, after a court issued an injunction

7. See *e.g.*, Adam Parachin, "The Role of Fiscal Considerations in the Judicial Interpretation of Charity" in Ann O'Connell, Matthew Harding & Miranda Stewart, eds, *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York: Cambridge University Press, 2014) 113; Adam Parachin, "Legal Privilege as a Defining Characteristic of Charity" (2009) 48:1 Canada Business Law Journal 36.
8. *Income Tax Special Purpose Commissioners v Pemsel*, [1891] 3 TC 53 (HL (Eng)) at 97, Lord Macnaghten [*Pemsel*].
9. Assume that a large institutional charity, *e.g.*, a hospital or university, found itself on the wrong end of, say, a pay equity dispute. Would we conclude that the charity needs to make appropriate reparations or that it should also be deregistered as a charity and thereby become exposed to a 100% revocation tax under subsection 188(1.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*], as amended? The extreme response of deregistration is not always the appropriate answer.
10. *Bob Jones*, *supra* note 1.

prohibiting the Internal Revenue Service ("IRS") from awarding tax-exempt status to racially discriminatory schools,[11] the IRS released a revenue ruling indicating that such schools could no longer qualify as charities under US tax law.[12] Further to this revenue ruling, the IRS concluded that two religious schools (Bob Jones University and Goldsboro Christian Schools) could not qualify as educational charities under federal income tax law on the ground that they were discriminatory. These schools engaged in racially discriminatory practices further to religious beliefs against interracial dating and marriage.[13] The matter wound up before the US Supreme Court, a majority of which concluded that neither of these educational institutions could qualify as charities for tax purposes.

Writing for the majority, Chief Justice Burger concluded that the tax benefits set out in paragraph 501(c)(3) and section 170 of the Internal Revenue Code of 1954 ("*IRC*") were contingent upon conformity with the common law standard of charity.[14] Reasoning that racial discrimination in education is contrary to public policy, he found that the discriminatory practices of the schools were likewise against public policy and that the schools were therefore non-charitable at common law.[15] The consequence of this is that the schools were likewise disqualified from the tax benefits for charitable institutions under paragraph 501(c)(3) and section 170 of the *IRC*.[16]

For a judgment that purported to be applying the common law of charity, the majority judgment of Burger CJ in *Bob Jones* had remarkably

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11. See *Green v Kennedy*, 309 F Supp 1127 (DDC 1970).
12. Rev Rul 71-447, 1971-2 CB 230, online (pdf): <www.irs.gov/pub/irs-tege/rr71-447.pdf>.
13. The Goldsboro Christian Schools enforced a racially discriminatory admissions policy. Bob Jones University initially declined to admit any African American students. This policy was changed in the 1970s, when the university began to admit African Americans, but it nonetheless maintained a disciplinary rule that made interracial dating and marriage grounds for expulsion.
14. *Bob Jones*, *supra* note 1 at 585-90.
15. *Ibid* at 591-96.
16. *Ibid*.

little to say about the topic. There was no sustained analysis of charitable purposes, the relationship between charitable activities and charitable purposes or public benefit. To the extent that any of these core pillars of charity law were mentioned, it was only in passing. The judgment instead focussed almost entirely on public policy.

While emphasizing that the public policy doctrine should be applied "only where there can be no doubt that the activity involved is contrary to a fundamental public policy",[17] Burger CJ concluded that this test was met, since there was "no doubt" that a public policy against racial discrimination existed.[18] There are, he observed, "few social or political issues" that have "been more vigorously debated and more extensively ventilated than the issue of racial discrimination".[19] He cited as evidence of this public policy, constitutional equal protection jurisprudence, civil rights legislation and Executive Orders. The problem, of course, is that none of these sources of law were applicable to the context under review.

This is why the public policy analysis in *Bob Jones* is wanting. The judgment implies that legal rules and principles formally inapplicable to charitable private schools can be indirectly applied to them under the guise of public policy. Public policy enabled the majority to conclude against the charitableness of the schools under review without having to explain that conclusion with specific reference to the unique juridical features of charitable trusts or the doctrinal tests for charitable status. The judgment does little to assist understanding as to when and why discrimination is incompatible with charitable status.

17. *Ibid* at 592.
18. *Ibid* at 598.
19. *Ibid* at 595.

B. Canada

1. *Canada Trust Co v Ontario Human Rights Commission*

The leading authority in the Commonwealth on discriminatory charitable trusts is a decision from the Ontario Court of Appeal, *Canada Trust Co*,[20] which dealt with a scholarship fund (the "Leonard Fund") established in 1923 by the late Colonel Reuben Wells Leonard. The recitals in the trust deed shed light on Colonel Leonard's intended purpose for the fund. They state his belief that "the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World", that the "progress of the World depends in the future, as in the past, on the maintenance of the Christian religion" and that "the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire".[21] The terms of the fund provided that a student could qualify for a scholarship only if he or she was a "British subject of the White Race and of the Christian Religion in its Protestant form" and only if "without financial assistance" he or she "would be unable to pursue a course of study".[22] No more than one quarter of the scholarship moneys awarded in any given year could be given to women.[23] The racial and religious restrictions also limited who could participate in the management and administration of the fund.[24]

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20. *Canada Trust Co*, *supra* note 2. For very helpful analyses, see Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (University of Toronto Press, 2000); Jim Phillips, "Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*" (1990) 9:3 Philanthropist 3; and J.C. Shepherd, "When the Common Law Fails" (1988-1989) 9 Estates and Trusts Journal 117.
21. *Canada Trust Co*, *supra* note 2 at para 14.
22. *Ibid* at para 18.
23. *Ibid*.
24. *Ibid* at para 16.

The charitableness of the Leonard Fund eventually came before the courts in 1986 when the Ontario Human Rights Commission filed a formal complaint alleging that the terms of the fund violated the *Human Rights Code*.[25] The trustee of the Leonard Fund sought advice and direction of the Court "as to the essential validity" of the trust.[26] The Court of first instance upheld the validity of the trust, but that decision was overturned by the Ontario Court of Appeal, which unanimously found that the discriminatory provisions of the Leonard Fund were void.

Writing for the majority, Justice of Appeal Robins emphasized that a trust should be found to violate public policy "'only in clear cases, in which the harm to the public is substantially incontestable'".[27] He had no difficulty concluding that this standard was met, reasoning it is "obvious" that "a trust premised on these notions of racism and religious superiority contravenes contemporary public policy".[28] Justice of Appeal Robins referred (without explanation) to the following indicia of this public policy: democratic principles, constitutionally protected equality rights, the multicultural heritage of Canada and the public criticism of the Leonard Fund.[29] The doctrine of *cy-prés* was then applied to remove the eligibility criteria based on race, gender, religion and nationality.

The concurring judgment of Justice of Appeal Tarnopolsky said more about the determinants of the public policy against discrimination. Justice of Appeal Tarnopolsky identified the following sources as relevant to the conclusion that the Leonard Fund was contrary to public policy: (1) human rights codes; (2) the *Canadian Charter of Rights and Freedoms*[30] (specifically, sections 15, 28 and 27); and (3) *Charter* jurisprudence and international human rights conventions ratified by Canada.[31] He emphasized that scholarships exclusively for historically disadvantaged

25. SO 1981, c 53.
26. *Canada Trust Co*, *supra* note 2 at para 30.
27. *Ibid* at para 36.
28. *Ibid* at para 39.
29. *Canada Trust Co*, *supra* note 2 at para 39.
30. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
31. *Canada Trust Co*, *supra* note 2 at paras 92-97.

groups are not contrary to public policy because they are consistent with affirmative action programs constitutionally authorized by subsection 15(2) of the *Charter*.[32] He also made a point of noting that "[o]nly where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void" and by extension that "this decision does not affect private, family trusts".[33]

The conclusion reached in *Canada Trust Co* is eminently supportable, but the public policy analysis in the decision attracts similar criticisms and questions to those raised above in connection with the majority judgment in *Bob Jones*. As one analyst notes, it is "not the light that it [*Canada Trust Co*] shines, that makes the case worthy of study, but rather the complexity that it exposes".[34] What, for example, does the *Charter*, which places constitutional limits on state action, have to do with what charities — non-state actors — can and cannot do? And what of the *Charter's* conflicting values? Equality is a value reflected in the *Charter* but so too is freedom of conscience. According to what norm does the former necessarily trump the latter — which was taken for granted in *Canada Trust Co* — for purposes of charity law? Likewise, what do international human rights conventions have to do with the meaning of charity? And legislated human rights codes? There was no finding in *Canada Trust Co* that the scholarships were prohibited by provincial or federal human rights legislation. So, how are legislated human rights codes at all relevant? As with *Bob Jones*, there is a genuine concern here over public policy being used as a vehicle through which to subject charities to sources of law formally inapplicable to them. Just like the US Supreme Court in *Bob Jones*, the Ontario Court of Appeal in *Canada Trust Co* emphasized formally irrelevant considerations — *e.g.* constitutional restrictions on state action — and deemphasized directly relevant considerations — *e.g.*, purposes and public benefit.

And what of Tarnopolsky JA's express statement in *Canada Trust Co* that the decision's public policy finding does not extend to private

32. *Ibid* at para 104.
33. *Ibid* at para 107.
34. Ziff, *supra* note 20 at 161-62.

family trusts? Both charitable and non-charitable trusts are subject to the doctrine of public policy. So why would the decision's public policy analysis not bode implications for both charitable and non-charitable trusts? Are there two public policies — one applicable to charitable trusts and one applicable to non-charitable trusts? Lest public policy become captive to "the idiosyncratic inferences of a few judicial minds"[35] it is better conceived of as singular — it exists or it does not — rather than as something that varies from context to context (and thus with the length of the Chancellor's foot). But this is ultimately why Tarnopolsky JA's statement that *Canada Trust Co* is confined to charitable trusts is so telling: it suggests that public policy was not the true basis for judgment.

The reason *Canada Trust Co* is inapplicable to private family trusts is not because there are separate public policies for family trusts and charitable trusts, but rather because the judgment was ultimately less concerned with public policy than with the legal meaning of charity. Similar to *Bob Jones*, public policy was resorted to in *Canada Trust Co* as a doctrine of convenience. It conveniently enabled the Ontario Court of Appeal to conclude against the charitableness of the discriminatory trust under review without having to explain precisely how, when and why discrimination is discordant with legal 'charity'.

2. *Re Ramsden Estate* and *University of Victoria v British Columbia (AG)*

Some of the language used in *Canada Trust Co* implied that it is necessarily non-charitable to restrict benefaction on the basis of religious

35. *Fender*, *supra* note 4 at 12.

adherence.[36] But two later decisions, *Re Ramsden Estate*[37] and *University of Victoria v British Columbia (AG)*,[38] reveal a more accommodating stance.

In *Re Ramsden*, the Court considered a scholarship exclusive to Protestants and concluded that there was "no ground of public policy which would serve as an impediment to the trust proceeding".[39] The Court distinguished *Canada Trust Co* on the basis that that case dealt with a trust "based on blatant religious supremacy and racism".[40] Similarly, the Court in *University of Victoria v British Columbia (AG)* upheld a scholarship for practicing Roman Catholics. The Court reasoned that a "scholarship or bursary that simply restricts the class of recipients to members of a particular religious faith does not offend public policy".[41] The Court explicitly rejected the idea that only ameliorative trusts can prefer one segment of society.[42] In addition, the Court emphasized that even scholarship funds restricted to persons of particular faiths have social utility inasmuch as they provide educational opportunities to a segment of society.[43] The importance of protecting testamentary freedom from erosion was also identified as a relevant consideration.[44] Similar to *Re Ramsden*, *Canada Trust Co* was distinguished without elaboration on the basis that it dealt with a trust whose provisions were "clearly offensive".[45]

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36. *Canada Trust Co*, *supra* note 2. The religious affiliation requirement was, after all, struck in *Canada Trust Co*. In addition, Robins JA observed that (at para 39):

    > [t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced.

37. [1996] 139 DLR (4th) 746 (PESC) [*Re Ramsden*].
38. 2000 BCSC 445 [*University of Victoria*].
39. *Re Ramsden*, *supra* note 37 at para 13, MacDonald CJ.
40. *Ibid*.
41. *University of Victoria*, *supra* note 38 at para 25, Maczko J.
42. *Ibid* at para 17.
43. *University of Victoria*, *supra* note 38 at para 17.
44. *Ibid*.
45. *Ibid* at para 25.

3. *Re Esther G Castanera Scholarship Fund*

In *Re Esther G Castanera Scholarship Fund*,[46] the Court considered whether a scholarship for "needy and qualified women graduates of the Steinbach Collegiate Institute [the donor's high school]" majoring in one of several specified science disciplines at the University of Manitoba was contrary to public policy. Concern had been expressed by the University of Manitoba that, since women were no longer underrepresented in the specified fields of study, targeting the scholarship at women might violate public policy. Justice Dewar disagreed. Emphasizing that "[e]very gift requires a contextual assessment" and cautioning against a "one-size-fits-all",[47] Dewar J concluded that the scholarship criteria did not attract the doctrine of public policy.[48]

Three important points emerge from the decision.

First, *Canada Trust Co* does not establish, at least not as a bright-line rule, that racial, religious, gender or ethnic criteria for benefaction under charitable trusts are necessarily contrary to public policy.[49] Second, the settlor's self-avowed discriminatory aims in *Canada Trust Co* are fundamental to understanding the holding in that decision.[50] Third, courts remain predisposed to uncritically accept the charitableness of

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46. 2015 MBQB 28 [*Re Castanera*].
47. *Ibid* at para 42.
48. *Ibid* at para 46.
49. *Ibid* at para 35:

    > I do not interpret their decision [in *Canada Trust Co*] on the characteristic of sex as a conclusion that every gift that discriminates between the sexes will necessarily be contrary to public policy. The cautions expressed by both the majority and minority judges are as applicable to cases where discrimination is based upon sex or gender as it is where the discriminatory characteristic is race, religion, creed, colour or ethnic origin.

50. See *Re Castanera*, *ibid* at para 37 where Justice Dewar implies that *Canada Trust Co*, notwithstanding the decision's outward public policy reasoning, is in reality attributable to the settlor's openly declared non-charitable purpose of perpetuating a racial, ethnic, religious and gender hierarchy:

    > [p]ut very simply, the restrictions which drove the decision in the Leonard Trust case were motivated by a belief that white Anglo Protestant people were superior to all other people of different races and different creeds. It is this notion that a select group of people are superior to others simply because of who they are that makes the restrictions in the Leonard Scholarships so offensive.

programming premised on traditional affirmative action considerations — *e.g.* the desirability of incentivizing women to attain credentials in fields historically dominated by men.

The only hard evidence before the Court in *Re Castanera* suggested that women were no longer systemically underrepresented in the relevant programs of study. But Dewar J nonetheless had little difficulty concluding — unassisted by any further evidence before the Court — that the traditional explanation for gender based affirmative action remained as cogent as ever:

> [c]urrent enrollment numbers do not always tell the whole story. They certainly do not give consideration to what has happened in the past, or recognize a testator's experience which motivates her desire to make a gift. Additionally, enrollment numbers in undergraduate programs may give a false impression of equality within the discipline if there is a large exodus of women from the discipline after graduation or an underrepresentation in leadership positions within the discipline … [E]very situation needs individual assessment, and factors such as the history or motivation of the giftor are factors which merit some examination.[51] …
>
> And if any male graduate feels deprived, so be it. That graduate is not being kept out of the sciences just because he is not receiving this particular scholarship.[52] …
>
> Where the gift can be articulated as promoting a cause or a belief with the specific reference to a past inequality, there is nothing discriminatory about such a gift.[53]

Achievements towards equality notwithstanding, charitable programming exclusive to historically disadvantaged groups is not in any imminent danger of being struck. Current judicial attitudes remain as conducive as ever to such programming being received as quintessentially charitable efforts to help the less fortunate.

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51. *Re Castanera*, *supra* note 46 at para 39.
52. *Ibid* at para 40.
53. *Ibid* at para 44.

4. *Royal Trust Corp of Canada v University of Western Ontario*

In *Royal Trust Corp*,[54] the Ontario Superior Court of Justice considered whether a scholarship trust was contrary to public policy. The terms of the trust specified that male candidates had to be Caucasian, single, heterosexual and enrolled in a science program.[55] Female candidates had to be single, Caucasian, "not a feminist or lesbian" and enrolled in a science program (other than medicine).[56] Special consideration was to be given to any female candidate who "is an immigrant, but not necessarily a recent one".[57] The settlor also specified other idiosyncratic criteria.[58]

Justice Mitchell concluded that the terms of the scholarship were contrary to public policy: "I have no hesitation in declaring that the qualifications relating to race, marital status, and sexual orientation and, in the case of female candidates, philosophical ideology…void as being contrary to public policy".[59]

Little to nothing was offered by way of explanation. After identifying *Canada Trust Co* as the binding authority, Mitchell J acknowledged a crucial difference: the trust under consideration here lacked the discriminatory recitals — and by extension the overtly declared discriminatory purposes — that were present in *Canada Trust Co*. Nonetheless, she had little difficulty concluding that this made no difference *vis-à-vis* the doctrine of public policy:

> [a]lthough it is not expressly stated by [the testator] that he subscribed to white supremacist, homophobic and misogynistic views as was the case in the indenture under consideration in *Canada Trust Co*, the stated qualifications

54. *Royal Trust Corp*, *supra* note 3.
55. *Ibid* at para 8.
56. *Ibid*.
57. *Ibid*.
58. *Ibid*. The additional criteria included the following:
"academic achievement, but not necessarily the highest marks… honest desire to work and achieve… good character… not afraid of hard manual work [as demonstrated] in their selection of summer employment… [e]xtracurricular activities (i.e., non-academic)… shall not be taken into consideration… [and] [n]o awards to be given to anyone who plays intercollegiate sports" (at para 8).
59. *Royal Trust Corp*, *supra* note 3 at para 14.

> in [the will] leave no doubt as to [the testator's] views and his intention to discriminate on these grounds.[60]

The holding in *Royal Trust Corp* contemplates that charitable programming cannot be targeted on the basis of identity markers — *e.g.* Caucasian and heterosexual — associated with historic social and/or economic advantage. But the decision does not even attempt an explanation as to why this is so. Is it because a non-charitable purpose — perpetuating advantage — is inferred from this kind of eligibility criteria? Is it because courts take judicial notice in such circumstances that the harm introduced outweighs the benefits? Is it due to concerns over whether charitable purposes can be meaningfully furthered through discriminatory activities, that discrimination somehow severs the link between means and charitable ends in charity law? Is it because governments are constitutionally forbidden from targeting government programming to white, heterosexual, non-feminists? That public policy avoids the necessity to squarely answer, or even acknowledge, these questions may well account for its appeal to courts. But, again, if we want to truly understand the discordance between discrimination and charity, we need to squarely confront the difficult questions raised by the topic rather than systematically avoid them by resorting to public policy as a doctrine of convenience through which judicial value judgments are masked.

C. Summation

In short, the leading and recent authorities do not precisely explain when and why discrimination fails the common law test for charitableness; they do not establish transferable principles. To the extent that they rely upon public policy, they tend to draw on external sources of law lacking formal relevance to charities. They raise more questions than they answer.

III. The Search For Better Solutions

Given the problems with public policy, a natural question to ask is whether there is a better approach, defined as an approach better

60. *Ibid.*

calibrated to explaining why and when discrimination is discordant with charitable status using the values and doctrines of charity law. I will consider here three alternative lines of reasoning that would naturally occur to charity lawyers: (1) discrimination evidences non-charitable purposes; (2) discrimination evidences non-charitable activities; and (3) discrimination is contrary to the charity law requirement for public benefit. As we shall see, these lines of reasoning engage some significant fault lines in the law of charity, making them more doctrinally difficult to sustain than one might anticipate.

A. Discrimination and Non-Charitable *Purposes*

To be charitable at law, an institution must have exclusively charitable purposes. If an institution has a discriminatory purpose, it is non-charitable notwithstanding that it may also have one or more charitable purposes. Indeed, the most straightforward explanation for the holding in *Canada Trust Co* is that the trust under review had an express discriminatory purpose and therefore failed the common law requirement for exclusively charitable purposes. The recitals to the trust made clear that the scholarships in question were not the means for the charitable end of advancing education but rather the means for the non-charitable end of perpetuating racial and religious hierarchy.[61] There was no guesswork in this regard. The settlor so much as explicitly said that this was the purpose of the fund.

Writing for the majority, Robins JA alluded to this as follows:

> [a]ccording to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation,

61. *Royal Trust Corp*, *supra* note 3. The recitals in the trust deed shed light on the trust's purposes. They stated that "the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World", that the "progress of the World depends in the future, as in the past, on the maintenance of the Christian religion" and that "the advancement of civilization depends very greatly upon the independence, the stability and prosperity of the British Empire" (at para 12).

> development and progress of civilization along the best lines, and, second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.[62]

It was therefore open to the Court to conclude that the trust's overtly racist recitals were revealing of a non-charitable purpose, to maintain a society in which white, British Christians remained in positions of social, economic and political leadership. Doing so would have furnished the Court with an uncontroversial basis on which to strike the trust using the logic and conventions of charity law. Since perpetuating racial, ethnic and religious hierarchy is not a charitable end, the trust under review in *Canada Trust Co* was non-charitable.

But very few instances will as readily avail the conclusion that a non-charitable discriminatory purpose is present. The more common problem will be that discrimination manifests not in the ends being pursued but rather in the means (or activities) through which charitable purposes are being pursued. In other words, the more common problem is apt to be that an institution pursues a charitable end but in a discriminatory way. This was essentially the issue raised by the facts and circumstances of *Bob Jones*. The schools in question advanced education but in a racially discriminatory way.

Regulating *activities* through a common law requirement for exclusively charitable *purposes* is a chronic square peg, round hole problem experienced in charity law.[63] Concerns over activities can only take expression as concerns over purposes if activities are understood to evidence purposes, *e.g.* activity X evidences non-charitable purpose Y. But charity law does not typically infer purposes from activities except in such rare instances as where there are no recorded purposes.[64] If we keep faith with this principle, it is difficult to conclude from a discrete

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62. *Canada Trust Co*, *supra* note 2 at para 38.
63. See Adam Parachin "Regulating Charitable *Activities* Through the Requirement for Charitable *Purposes*: Square Peg Meets Round Hole" in Jennifer Sigafoos & John Picton, eds, *Debates in Charity Law* (Oxford, Hart Publishing, 2020) ch 7.
64. See *ibid.*

discriminatory activity (or any other kind of activity) that a non-charitable (discriminatory) purpose is present.

But even if charity law was inclined to construct purposes out of activities, there is a further problem to grapple with. Doing so would involve a process of abstracting something general (the purposes) from something specific (the activities). The analytical process of abstracting the general from specifics necessarily results in some of the specifics being left out of the description of the general.[65]

To be sure, individual charities are necessarily established for specific and particularized manifestations of the general *Pemsel* categories of charitable purposes. A medical school is unlikely to be formally established for the generic *Pemsel* category of advancing education but rather for the more particularized purpose of providing *medical* education. Likewise, a church is unlikely to be formally established for the generic *Pemsel* category of advancing religion but rather for the more particularized purpose of advancing a *particular denomination* of a *particular religion*. But when we assess the charitableness of these institutions, we will abstract their particularized purposes to the level of generality reflected in the *Pemsel* categories of charitable purposes. The medical school will be considered to be advancing education. The church will be considered to be advancing religion. When assessing charitableness, the aim of the exercise is to determine whether the particularized purposes under review can be abstracted to the level of generality reflected in the *Pemsel* categories.

This is among the reasons why the racially discriminatory practices in *Bob Jones* did not oblige the conclusion that there was a non-charitable gloss to the institution's purposes — that the true purpose in *Bob Jones* was not to advance education *per se* but rather to advance *racially segregated* education. Again, the established convention of charity law is to assess charitableness based on an abstract (rather than particularized)

65. As Jonathan Garton notes, purposes are sometimes described in written constitutions so specifically that it becomes difficult to disentangle purposes from activities. See Jonathan Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013) at 82-83.

casting of purposes. This is among the reasons why it can be difficult to frame concerns over a charity's activities as concerns over that charity's purposes.

B. Discrimination and Non-Charitable *Activities*

Even if not all manifestations of discrimination in charitable programming taint an institution's purposes, we are still left with the conundrum of how a discriminatory activity could possibly qualify as a charitable activity. Is it all that difficult for charity law to intervene on the basis that, even if a charity's purposes are charitable, its activities are non-charitable?

The challenge here is that charity law has an established convention of characterizing activities based on the purposes they are carried on to further.[66] This is why courts have recognized that the same activity can be charitable in one context — where it is carried on to achieve a charitable purpose — and non-charitable in another — where it is carried on to achieve a non-charitable purpose.[67] One commentator sums it up as follows: "[a]s the concept of charity is concerned with purposes, or ends and not means, any attempt to characterize the means as charitable or non-charitable without reference to the ends or objects to be achieved is necessarily doomed to failure".[68]

In brief, the principle is this: if an activity is carried on to further a charitable purpose, it is a charitable activity. If an activity is carried on to further a non-charitable purpose, it is a non-charitable activity.

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66. See *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10 at paras 52-54, 56, 58-59, 101, 152-54 and 205 [*Vancouver Society*].

67. *Incorporated Council of Law Reporting for England and Wales v Attorney General*, [1972] Ch 73 (CA (Eng)) at 86, per Russell LJ:

> [s]uppose on the one hand a company which publishes the Bible for the profit of its directors and shareholders: plainly the company would not be established for charitable purposes. But suppose an association or company which is non-profit making, whose members or directors are forbidden to benefit from its activities, and whose object is to publish the Bible; equally plainly it would seem to me that the main object of the association or company would be charitable — the advance or promotion of religion.

68. Maurice C Cullity, "The Myth of Charitable Activities" (1990) 10:1 Estates and Trusts Journal 7 at 12.

This principle reveals that charity law is more concerned with whether charitable purposes are being furthered than with how they are being furthered. The advantage of this approach is that it is enabling. Charities enjoy tremendous latitude to determine for themselves how best to further their charitable missions. The disadvantage is that it is at times too enabling and too imprecise. From time to time certain methods of furthering charitable ends are bound to attract legitimate regulatory concerns. But charity law's conventional approach to characterizing activities makes regulatory interventions in relation to activities difficult. If an activity furthers a charitable purpose, it is by definition a charitable activity. It need not be the *best way* to further a charitable purpose. It need merely be *a way* to further a charitable purpose.

Obviously, this paradigm significantly reduces the bases on which the law may intervene in relation to activities. The primary door it leaves open is the possibility for regulatory interventions on the basis that a given activity does not (or does not do enough to) further charitable purposes. But even here courts have surprisingly not described in great detail the nature of the link that must exist between an activity and a charitable purpose in order for that activity to qualify as a charitable activity. In one of the leading cases, *Vancouver Society*, Justice Gonthier seemed to dismiss the need for specific judicial guidance, observing "[t]here is no magic to this process: it is simply a matter of logical reasoning combined with an appreciation of context".[69]

In the same decision, Gonthier J loosely described the nature of the requisite link, saying that charitable activities must have a "coherent relationship" to charitable purposes,[70] have "the effect of furthering the purpose",[71] be "sufficiently related to those purposes",[72] enjoy a "sufficient degree of connection" to charitable purposes,[73] be "sufficiently related" to charitable purposes,[74] be "substantially connected to and in furtherance of"

69. *Vancouver Society*, *supra* note 66 at para 98.
70. *Ibid* at para 52.
71. *Ibid* at para 53.
72. *Ibid*.
73. *Ibid* at para 54.
74. *Ibid* at paras 56 and 63.

charitable purposes and be "instrumental in achieving the organization's goals".[75] Observing that there must be a "direct, rather than an indirect, relationship between the activity and the purpose it serves", he indicated that he was "reluctant to interpret 'direct' as 'immediate'", specifying that "[a]ll that is required is that there be a coherent relationship between the activity and the purpose, such that the activity can be said to be furthering the purpose".[76] In the same case, Justice Iacobucci agreed that charitable activities must "directly further" charitable purposes but likewise did not elaborate on what specifically this entails.[77]

Perhaps predictably, charity law's treatment of activities is a source of sustained conflict in the law of charity. The common law's approach to activities manifests a reductionist assumption: activities either do or do not further charitable purposes, either are or are not charitable. This leaves little to work with in terms of, say, dual character activities that further both charitable and non-charitable ends. Likewise, it supplies few solutions for activities that arguably should be restrained notwithstanding that they further charitable purposes. This is among the reasons why debates over such issues as political activities,[78] business activities[79] and

75. *Ibid* at para 54.
76. *Ibid* at para 62.
77. *Ibid* at para 154.
78. See *e.g.*, Joyce Chia, Matthew Harding & Ann O'Connell, "Navigating the Politics of Charity: Reflections on Aid/Watch Inc v Federal Commissioner of Taxation" (2011) 35 Melbourne University Law Review 353; Matthew Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) [Harding, *Charity Law*], ch 6; Adam Parachin, "Charity, Politics and Neutrality" (2015-16) 18 Charity Law & Practice Review 23; and Adam Parachin, "Shifting Legal Terrain: Legal and Regulatory Restrictions on Political Advocacy by Charities" in Nick Mulé & Gloria DeSantis, eds, *The Shifting Terrain: Nonprofit Policy Advocacy in Canada* (Montreal: McGill University Press, 2017) 33.
79. See *e.g.*, Canada Revenue Agency, *What is a Related Business?* (Policy Statement) CPS-019 (31 March 2003); *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd*, [2008] HCA 55.

tuition fees[80] at independent schools have proven so contentious. Each of these activities can be justified as a method of furthering charitable purposes and yet each of them also raises legitimate policy concerns as to whether they should be restrained in some way.

Discriminatory means of furthering charitable purposes straddle the same fault line in the common law of charity. Inasmuch as they might further charitable purposes, the logic of the common law of charity suggests that they should be labelled charitable activities. My goal at the moment is not to defend this position as the best possible answer so much as to highlight that the common law's stance *vis-à-vis* activities makes it difficult to dogmatically conclude that an activity (including a discriminatory activity), carried on in furtherance of a charitable end, is automatically non-charitable at common law. This is not to deny that there are principled objections to discriminatory ways of furthering charitable ends but rather to recognize that the common law (for better or for worse) is concerned less with how charitable ends are being furthered than with whether they are being furthered. Regulating activities through a body of law focussed on purposes is difficult.[81]

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80. See *e.g.*, *Independent Schools Council v The Charity Commission*, [2011] UKUT 421 (TCC) [*Independent Schools*]; Peter Luxton, "Making Law? Parliament v The Charity Commission" (2009), online (pdf); *Politeia* <www.politeia.co.uk/wp-content/Politeia%20Documents/2009/June%20-%20Making%20Law%3F/'Making%20Law'%20June%202009.pdf >; Mary Synge, *The 'New' Public Benefit Requirement. Making Sense of Charity Law?* (Oxford: Hart Publishing, 2015).

81. Buried in this observation is also a clue as to how best to supplement the common law of charity through legislative interventions. It seems to be a received wisdom that legislated definitions of charitable purposes are the way to go. But legislating a list of charitable purposes is not somehow going to somehow make debates over activities go away. Charities need to know two things: (1) what ends can we pursue? (2) how can we pursue those ends? Addressing the former but not the latter is not going to be particularly helpful.

C. Discrimination and Public Benefit

There remains the fundamental charity law concept of public benefit. It is trite law that all charitable purposes must conform to the public benefit standard. How could an institution with discriminatory practices possibly be said to bring public benefit? Once again, the answers are not as obvious as may be anticipated. As I have dealt with this topic elsewhere in detail, the discussion here will take summary form.[82]

1. Public Benefit and Activities

The charity law concept of public benefit is attendant to the activities versus purposes distinction discussed above. To be sure, it is the purposes, not the activities, of charities that are tested for public benefit.[83] As a result, activities do not need to be independently shown to bring benefit. The benefit of activities is derivative in the sense that it stems from their furtherance of beneficial charitable purposes. Stated otherwise, charity law infers the benefit of activities from their furtherance of charitable purposes.

This approach to public benefit again illustrates why it is difficult for charity law to intervene when charities further their missions in questionable ways. Charity law is a purposes-oriented body of law. As

82. See Adam Parachin, "Public Benefit, Discrimination and the Definition of Charity" in Kit Barker & Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (New York: Cambridge University Press, 2013) 171 [Parachin, *Public Benefit*].

83. See *e.g.*, *Independent Schools*, *supra* note 80 at para 188 where it was concluded that "public benefit as it was understood prior to the 2006 Act [at common law] was also directed to what the relevant trust or institution was set up to do, not on how it operated". See also Luxton, *supra* note 80 at 19; and Garton, *supra* note 65 at 80 observes "[t]he orthodox position is that it is the purposes of an organization, and not the activities undertaken in pursuit thereof, that are relevant to its charitable status". See Synge, *supra* note 80 where Synge similarly observes that "[t]he principle that the charitable status of a trust or organisation depends on its *purposes* (rather than its activities…) is so clearly established, and judicial authority so abundant, that it hardly needs to be cited" [emphasis in original] (at 36).

long as an institution's purposes are charitable and thus of public benefit in the charity law sense, it will enjoy tremendous latitude to determine for itself how best to further those purposes. If we confine ourselves to the norms of charity law, it is no objection to an activity that the activity lacks public benefit. The standard is not that activities must have public benefit but rather that they must further purposes that have public benefit.

In fairness, the position is more nuanced in circumstances where the formal objects of a charity blur the boundary between purposes and activities, *e.g.* 'to advance education by [insert planned activities]'. While still analytically possible, it is more difficult here to insist on a rigid bifurcation between activities and purposes. Short of this kind of circumstance, objections over activities are difficult to ground in the public benefit standard because activities are not directly subject to this standard.

The risk inherent in the common law framework is that charities will abuse the freedom afforded to them by charity law to self-determine how best to further their charitable missions. By vetting purposes but not activities for public benefit, the common law of charity leaves itself with remarkably few doctrinal tools to respond when charities cross the line *vis-à-vis* their activities. Arguably, this is the very mischief to which the doctrine of public policy is the response. Although it is not typically understood as such, the doctrine of public policy is arguably a disguised way for courts to selectively do what they normally do not do — vet activities for public benefit.[84]

If the only concerns that arose in charity law were concerns over purposes, there would be no need for the doctrine of public policy. If a purpose lacks public benefit, courts can transparently say that it is non-charitable using the usual frames of reference employed in charity law. The problem that public policy takes up is that the charity law toolbox is comparatively lean when it comes to activities. Vetting activities for public benefit is not an option. Severing the link between activities and charitable purposes — *e.g.* sustaining the position that activity X is an

84. Parachin, *Regulating Charitable Activities*, *supra* note 63.

implausible way of furthering charitable purpose Y — is easier said than done. Public policy allows courts to circumvent these concerns.

As we have seen, though, public policy is a poor basis for judicial decision-making. The cases dealing with public policy evidence courts grasping at straws, citing inapplicable sources of law — *e.g.* abstract constitutional law principles — as though they are somehow obviously relevant to the legal meaning of charity.

2. Two Components of Public Benefit

In any event, public benefit is not specifically calibrated to address instances of discrimination. Orthodox charity law analyses treat the public benefit standard as consisting of two components: (1) the public component and (2) the benefit component.

The benefit component of public benefit entails a value judgment through which courts consider whether the trust under review makes the world a better place in a way the law regards as charitable. While discrimination sounds like an unlikely candidate for this standard, the benefit component of public benefit is not a requirement for absolute benefit but rather a requirement for net benefit. In other words, charitable status does not require the total absence of potential harm but rather that the good outweigh the harm.[85] It is not obvious as a matter of law that literally every incidence of discrimination will necessarily mean there is

85. In *National Anti-Vivisection Society v IRC*, [1947] 2 All ER 217 (HL), Lord Wright observed at 223 that courts should "weigh against each other" detriment and benefit and that the impact of a trust "must be judged as a whole". In the context of the decision, this meant weighing the material benefits of vivisection against the moral benefits of anti-vivisection. The implication is that benefits can offset detriments (and vice versa) even if they are not of the same nature.

no net benefit.[86] Indeed, anti-discrimination laws themselves recognize that charities may engage in practices that ordinarily would amount to unlawful discrimination.[87] This is not to deny that discrimination in some instances could handily outweigh any offsetting benefit.[88] The point is that it reduces to a contextual assessment rather than a bright line answer.

The public component of public benefit is ultimately concerned with who benefits from a charitable trust. It is not specifically calibrated to police discriminatory exclusions from charitable programming.[89] To be sure, the primary, though not the sole,[90] function of the public component of public benefit is to prohibit persons from being *included* in charitable programming on improper bases (*i.e.* bestowed charitable

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86. In Canada, the *ITA*, *supra* note 9, subsection 149.1(6.21), as amended provides:

    (6.21) Marriage for civil purposes -- For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*.

    The import of the subsection is that a church only solemnizing heterosexual marriages does not thereby jeopardize its charitable registration.

87. See *e.g.*, *HRC*, *supra* note 6, ss 18, 18.1 and 24. These legislative measures allow for differential treatment by charities in relation to membership, marriage ceremonies and employment.

88. See *e.g.*, Matthew Harding, "Charitable Trusts and Discrimination: Two Themes" (2016) 2:1 Canadian Journal of Comparative and Contemporary Law 227; Harding, *Charity Law*, *supra* note 78, ch 7; and Debra Morris, "Charities and the Modern Equality Framework – Heading for a Collision?" (2012) 65:1 Current Legal Problems 295.

89. See Parachin, *Public Benefit*, *supra* note 82.

90. The public component of public benefit also helps to ensure it is clear as to who is intended to benefit from the trust. If it is unclear who benefits from a putative charitable trust, then charitable status will be withheld. See *e.g.*, the trusts in *Keren Kayemeth Le Jisroel Ltd v IRC*, [1932] AC 650 (HL (Eng)) and *Williams' Trustees v IRC*, [1947] AC 447 (HL (Eng)) [*Williams' Trustees*] which failed to qualify as charitable because, *inter alia*, it was not clear what community, if any, the trusts would benefit.

benefaction on the basis of some personal nexus) rather than *excluded* on improper bases. In practice, the public component of public benefit functions as an 'anti-private' standard. Subject to an exception for trusts established for the relief of poverty,[91] the public component of public benefit prohibits private qualifications from being used to determine who is eligible for goods and services from a charitable trust. Persons cannot qualify for membership in the class of potential beneficiaries on the basis that they are known to the settlor and thus specifically named as a potential beneficiary in the trust instrument.[92] Neither can a charitable trust specify that the basis on which persons are included in the trust's class of potential beneficiaries is that they stand in a particular private relationship (*e.g.* familial, employment, associational or friendship).

In *Report on the Law of Charities*, the Ontario Law Reform Commission framed the public component of public benefit as a "stranger" standard

91. For reasons courts have never clearly elucidated, funds established for the relief of poverty have been upheld as charitable even where the class of beneficiaries has been defined on the basis of: (1) familial (see *e.g.*, *Re Segelman*, [1996] Ch 171 (ChD (Eng)) [*Segelman*], *Re Scarisbrick*, [1951] Ch 622 (CA (Eng)) [*Scarisbrick*] and *Re Cohn*, [1952] 3 DLR 833 (NSSC)); (2) employment (see *e.g.*, *Dingle v Turner*, [1972] AC 601 (HL (Eng)), *Re Gosling*, (1900) 48 WR 300 (Ch (Eng)), *Gibson v South American Stores Ltd*, [1950] Ch 177 (CA (Eng)) and *Jones v T Eaton Co*¸ [1973] SCR 635); (3) other private relationships (a trust for the relief of poverty may be limited on the basis of membership in a club) (see *Re Young's Will Trusts*, [1955] 1 WLR 1269 (Ch (Eng)); (4) association (see *Re Lacy*, [1899] 2 Ch 149 (ChD (Eng)); or (5) society (see *Pease v Pattinson*, (1886) 32 Ch D 154 (Eng)). For a discussion of these cases, see Hubert Picarda, *The Law and Practice Relating to Charitie*s, 3d (London: Butterworths, 1999) at 40.

92. See Lord MacKay, Halsbury's Laws of England, 4d, vol 5(2) (London: Butterworths, 2001 Reissue) at paras 8 and 53. For example, in *Re Compton*, [1945] 1 Ch 123 (CA (Eng)) at 137, Lord Greene MR observed that a trust to educate named nephews and nieces of the testator was not charitable. Even trusts for the relief of poverty (which we will see receive relaxed treatment under the public component of the public benefit test) cannot specifically name the end beneficiaries. See *Scarisbrick*, *ibid* at 651 per Jenkins LJ. Also see *Segelman*, *ibid* for a more accommodating stance (and Luxton, *supra* note 80 at 175 for criticisms of *Segelman*).

requiring "emotional and obligational distance" between settlors of charitable trusts and the end beneficiaries of charitable programming:

> [charity] connotes dispositions towards individuals that are more remote in our affection or to whom we are not otherwise obligated. "Strangers" is perhaps too strong a word to express the distance required, but it is helpful because it does emphasize that some such distance is mandatory.[93]

This is not to say that charitable trusts can only benefit persons who are virtual strangers to the settlor, contributors to the trust and to all other potential beneficiaries. It is just that non-strangers have to be on equal footing with strangers. In other words, a person's status as a non-stranger cannot be the qualification bringing him or her within the class of potential beneficiaries. In *Verge v Somerville*, Lord Wrenbury put it this way: a charitable trust cannot be settled for "private individuals, or a fluctuating body of private individuals".[94]

The public component of public benefit is sometimes described as the "personal nexus test",[95] implying that personal nexus cannot be the basis on which anyone qualifies for benefaction under the trust. On balance, what has emerged from the jurisprudence is an approach that generally tests for publicness by ruling out 'privateness'.[96] That is, the public component of the public benefit test functions as less a positive requirement for publicness than as a negative prohibition against 'privateness'. The evident ambition is to differentiate legal charity from private benevolence. In the case of non-charitable private benevolence, a benefactor can target his or her benefaction through trusts and gifts on practically any basis. Most often this entails restricting benefaction to persons connected to the benefactor through family, relationship or

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93. *OLRC*, *supra* note 5 at 150.
94. *Verge v Somerville*, [1924] All ER Rep 121 (PC) at 123.
95. See *e.g.*, Luxton, *supra* note 80, ch 5.
96. Note how Lord Simonds equates public with not private in the following quote from *Williams' Trustees*, *supra* note 90 at 457:

> the principle has been consistently maintained, that a trust in order to be charitable must be of a public character. It must not be merely for the benefit of private individuals: if it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble.

any other bond of significance to the benefactor. The truly charitable act, on the other hand, is restricted to the provision of services or benefits to unascertained persons remote to the benefactor. We can summarize this by saying that charities must be established to provide goods and services to either *the public* (the whole community) or to *a public* (a section of the community delimited other than on the basis of private qualifications).

Where goods and services are being offered to 'the public' at large, there is no concern that charities are somehow being improperly targeted at a sub-population. If anything, our concern here may be that goods and services are being extended too broadly.[97] The questions about improper targeting arise when goods and services are aimed at specific sub-populations carved out from the population at large. This is a difficult topic because the public component of public benefit accommodates some but not all bases on which charitable goods and services may be formally targeted at specific sub-populations.

We have seen that private qualifications cannot be used to determine who is eligible for goods and services from a charitable trust. However, religious affiliation,[98] parental occupation[99] and nationality[100] are among the diverse criteria courts have upheld for educational trusts. Perhaps in some cases these criteria might be positively correlated with a barrier to education and thus related in at least some way to education but by and large they seem to have no inherent or logical connection with education.

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97. For example, a relief of poverty organization should not be extending its poverty relief goods and services to the wealthy.
98. *Pemsel*, *supra* note 8; *Re Ramsden*, *supra* note 37; *University of Victoria*, *supra* note 38.
99. *Canada Trust Co*, *supra* note 2; *German v Chapman*, (1877) 7 Ch D 271 (CA (Eng)) (restricted to daughters of missionaries); *Hall v Derby Sanitary Authority*, (1885) 16 QBD 163 (Eng) (restricted to children of railway workers).
100. *A-G for (New South Wales) v Perpetual Trustee Co Ltd*, (1940) 63 CLR 209 (HCA) (restricted to Australians); *Re Koettgen's Will Trusts, Westminster Bank Ltd v Family Welfare Association Trustees Ltd*, [1954] Ch 252 (ChD (Eng)) (restricted to British subjects).

A similar point may be made of a home for old Christian Scientists,[101] a home of rest exclusive to seamen,[102] a trust exclusive to poor lawyers and their families,[103] a fund to promote marriage among persons of a specified religion,[104] a fund to benefit wounded foreign soldiers of a particular nationality[105] and a fund restricting access to an oyster fishery to freeholders in a particular locality.[106] Whatever else may be said about why courts have upheld these funds (and others like them), it seems apparent that courts are willing to protect the freedom of settlors to target the delivery of charitable goods and services using a wide range of eligibility criteria. While this accommodating stance could be defended on the basis of traditional property rights (settlors of express trusts generally enjoy a very broad freedom to determine the recipients of benefaction), it can also be thought of as a deliberate incentive strategy for encouraging the settlement of charitable trusts. That is, one of the ways charity law incentivizes charitable trusts is to respect the freedom of settlors to choose their target population.

If we stop there, we reach a surprising conclusion about discriminatorily targeted charitable trusts and the public component of the public benefit requirement. A charitable trust can *exclude* persons on discriminatory bases without thereby *including* persons on private bases. That is, charitable programming can be both discriminatory and compliant with the personal nexus rule. It is ultimately for this reason that charitable trusts with discriminatorily defined beneficiary classes do not obviously fall offside the public component of the public benefit standard. Discriminatory eligibility criteria do not result in persons qualifying for participation in charitable trusts on the basis of private relationships (familial, employment or other). A charitable trust can still be a trust

101. *City of Hawthorn v Victoria Welfare Assoc*, [1970] VR 205 (VSC (Austl)); *Re Hilditch*, (1985) 39 SASR 469 (SASC (Austl)).
102. *Finch v Poplar Bourough Council*, (1967) 66 LGR 324 (Ch (Eng)).
103. *Re Denison*, [1974] 2 OR (2d) 308 (ONSC).
104. *Re Cohen, National Provincial and Union Bank of England Ltd v Cohen*, (1919) 36 TLR 16 (Eng).
105. *Re Robinson*, [1931] 2 Ch 122 (ChD (Eng)).
106. *Goodman v Saltash Corp*, (1882) 7 App Cas 633 (HL (Eng)).

for strangers (persons remote to the settlor in affection and obligation) notwithstanding that its goods and services are discriminatorily targeted.

IV. Moving Beyond A Formal Understanding Of Public Benefit

A. General

We have seen thus far that the usual resources in the charity law toolbox — charitable activities, charitable purposes and public benefit — are not ideal contenders for crafting a principled approach to regulating discriminatory charity, at least not as traditionally understood. But the analysis thus far has been purely formal. It is now time to vet these formal charity law concepts — focussing specifically on the public component of public benefit — to discover in them principles that might be relevant to rationalizing the non-charitableness of discrimination. The goal here is to explain when and why discrimination is non-charitable from a perspective internal to charity law so that in future cases it is unnecessary to repeat the misguided practice of grasping at straws — drawing on external sources of law, *e.g.* constitutional law — that are strictly speaking irrelevant to the legal meaning of charity. As we shall see, the stranger requirement reflected in the public component of public benefit arguably manifests a concern over settlor motives that is potentially useful to developing a principled response to discriminatory charitable programming.

I will leave to a future discussion precisely how a motives threshold might be mapped onto the doctrinal test for charitable status. Would it factor into an evolved public policy test, an evolved public benefit test, a separate motive test (doubtful) or something else? To be clear, my goal is not to assist courts in their application of the doctrine of public policy so much as to wean them off of it. And so ideally the ideas developed below would not merely influence how courts approach public policy but rather provide them with an alternative point of reference. Nonetheless, even if all that changes moving forward is that courts 'do public policy' better by substituting tokenistic and superficial references to constitutional values (or any irrelevant sources of law) in their public policy analyses with references to values endemic to the law of charity, the status quo would

be improved.

B. Inclusive Ethic Within Public Component of Public Benefit

The orthodox position of charity law is that a settlor's motives are irrelevant to whether a given trust is charitable at law.[107] But I wonder whether the true position is more nuanced. *All else being equal*, a charitable motive cannot otherwise cure a trust's failure to meet the legal test for charitable status.[108] *All else being equal*, a trust that is charitable on its face is not rendered non-charitable on the basis of motive.[109] There is, though, a sense in which motive might be relevant to whether a given trust meets the legal test for charitable status in the first place.

To be sure, the stranger requirement reflected in the public component of public benefit is in substance a kind of motive requirement. Recall from above that the stranger requirement means charities must benefit persons who are "*remote in our affection or to whom we are not otherwise obligated*".[110] The Ontario Law Reform Commission connected this requirement with motive as follows:

> it is the motives of the donor that we are focusing on in requiring an emotional and obligational distance [through the stranger requirement]. To be purely altruistic, we seem to be saying, an act has to have as its motive, as well as its form and actual effect, the doing of good for strangers.[111]

In other words, through its prohibition against 'privateness', the stranger requirement filters out of the charity camp private benefaction motivated by personal affection or duty. It does this by testing whether the settlor of a would-be charitable trust is truly motivated to benefit strangers in the sense of persons lacking emotional and obligational proximity to him or her. Manifestations of personal affection and discharges of personal

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107. See *e.g.*, Garton, *supra* note 65 at 77; Lord MacKay, *supra* note 92 at para 7.
108. See *e.g.*, *Re Pinion*, [1965] 1 Ch 85 (CA (Eng)).
109. See *e.g.*, *Hoare v Osborne*, (1866) LR 1 Eq 585 (Ch (Eng)); *Kerr v Bradley*, [1923] 1 Ch 243 (ChD (Eng)).
110. *OLRC*, *supra* note 5 at 150 [emphasis added].
111. *Ibid.*

duty — *e.g.* provision for one's children — are non-charitable because they fail this standard. If we stop here, we do not have much to work with to develop a restraint against discriminatory charity. Whatever else might be said of discriminatory charitable trusts, they do not appear to be motivated by personal affection or duty.

But the analysis need not stop here. Rather than express the motive test implicit in the stranger requirement *negatively* — legal charity *cannot* be motivated by personal affection or personal duty — lets instead express it *positively* — legal charity *must* be motivated by a demonstrated willingness to benefit strangers.[112] In its positive formulation, the principle could be understood as going further than merely denying charitable status to trusts conferring benefaction on friends and family and thus motivated by personal affection and/or duty. Requiring a willingness to benefit strangers amounts to a requirement to accept a value judgment about strangers — that strangers are worthy of benefaction notwithstanding their emotional and obligational distance. Implicit in this is an equality ideal of sorts. To be sure, in the stranger requirement we arguably discover two core principles of charity law: (1) strangers are fellow persons with equal dignity, worth and value (this is at least one reason why they are worth benefiting notwithstanding their emotional and obligational distance) and (2) the voluntary choice to benefit strangers through charitable benefaction is something worth celebrating, promoting and incentivizing (this is at least one reason why the law bestows legal and social advantages on charitable trusts). In other words, native to charity law is a human rights project concerned with cultivating and promoting the belief that 'others' are equal and worthy. Through the stranger requirement, charity law advances an inclusive principle of acceptance.

So, what kind of an anti-discrimination doctrine might this support? As we have seen, the stranger requirement allows settlors of charitable trusts to target charitable benefaction more narrowly than at all strangers (the public at large). So, while settlors of charitable trusts must be willing

112. Matthew Harding refutes that motive is useful to regulating discriminatory charity. See Harding, *Charity Law supra* note 78 at 209.

to benefit strangers, they can choose (within limitations) which strangers they wish to benefit. The law needs a reference point for determining when settlors cross the line in a way that contradicts the inclusive ethic implicit in the stranger requirement. The principle could be this: the line is crossed when targeted benefaction discernably manifests stigmatizing rejection working at cross purposes with the 'equal worth' ethic implicit in the stranger requirement. Without expressing a concluded view on the matter, I think there are a number of contextual factors to weigh when considering whether this line is crossed.

C. Guiding Considerations

1. Courts Should Be Hesitant to Intervene

Courts should only intervene where there is a clear case for doing so. This is not only consistent with what courts have said in such leading decisions as *Bob Jones*[113] and *Canada Trust Co*[114] but also with the enabling, indeed remarkably enabling, posture of charity law. As we have seen, while charity law insists upon exclusively charitable purposes, it generally leaves it to charities to determine for themselves how best to advance such purposes. The broad freedom of settlors to advance their charitable missions as they determine — including the freedom to choose a target population — is arguably one of the intentional strategies through which charity law incentivizes the settlement of such trusts. We are not 'doing charity law' unless we are keeping with the enabling posture traditionally followed by this area of law.

2. Expression Can Matter (Exclusionary Versus Inclusionary Criteria)

It makes little difference to the practical operation of a charitable trust whether the eligibility criteria for its goods and services are expressed as exclusionary criteria — *e.g.* no Protestants — or as inclusionary criteria — *e.g.* only Protestants. Since both expressions have the practical effect of

113. See *Bob Jones*, *supra* note 1.
114. See *Canada Trust Co*, *supra* note 2.

including one group(s) to the exclusion of another/others, the validity of eligibility criteria should not be determined solely by whether they take expression as exclusionary criteria (antirequisites) versus inclusionary criteria (prerequisites). A rule specifying that, say, inclusionary criteria are necessarily valid but exclusionary criteria are necessarily void (or *vice versa*) could be gamed. Practically any exclusionary criteria could easily take expression as inclusionary criteria (and *vice versa*) without changing practical results.

That said, it does not follow that expression is altogether irrelevant. Though inclusionary and exclusionary criteria bode identical practical consequences, their communicative differences might matter *vis-à-vis* motive. While both inclusionary and exclusionary criteria can expose a settlor's rejection of the value judgment implicit in the stranger requirement — that strangers are worth benefiting by virtue of nothing more than their status as fellow persons with equal dignity, worth and value — exclusionary criteria are unique in their communication of a possibly suspect motive. Inclusionary criteria communicate the sub-population of strangers the settlor of the trust expressly wishes to benefit. Generally speaking, there is nothing facially suspect about this because settlors of charitable trusts are permitted to target their benefaction at sub-populations. Exclusionary criteria communicate the sub-population of strangers the settlor of the trust expressly wishes *not* to benefit. That is, exclusionary criteria expressly communicate a settled conviction — some strangers should not benefit — that on its face seems discordant with the value judgment implicit in the stranger requirement — strangers are worthy of benefaction. There may very well be benign reasons for an express exclusion, *e.g.* because other charitable trusts are already servicing the needs of that population. Or, there may not be. The problem is that exclusionary criteria directly confront us with something that on its face has the potential to run contrary to the inclusive ethic behind the stranger requirement and thus warrants investigation. Without denying that inclusionary criteria can raise identical concerns over motive, it is for this reason that exclusionary criteria are unique in their potential to raise suspicions of improper motives.

3. Ameliorative Charitable Trusts

Improper motive should not be inferred where charitable benefaction is targeted at populations facing unique barriers to full participation in social and economic life. There is nothing non-charitable about levelling the playing field through the provision of material assistance to the less fortunate. To the contrary, 'charity' is at heart an ameliorative institution. A green light should be given to charitable programming targeted on the basis of identity markers traditionally accepted as legitimate bases for affirmative action. And consistent with the Court's treatment of the 'women only' scholarship in *Re Castanera*, there should be a low hurdle to demonstrate that any given population falls within this category. This is not to deny that an ameliorative trust can be inspired by non-charitable motives. A 'women only' scholarship could very well be rooted in misandry. But charity law should be slow to infer such motives. Openly disclosed discriminatory motives, such as were present in *Canada Trust Co*, is the kind of thing that should properly suspend the benefit of the doubt normally extended to settlors.

4. Avoid a 'Race to the Bottom'

Eligibility criteria for charitable programming should be left to stand if they serve affirmative action goals. But this should not be the minimum standard to which all eligibility criteria should be required to conform. That is, we should not infer an improper non-charitable motive simply because the eligibility criteria employed by a charitable trust lack an affirmative action rationale. To do so would be to accept as a categorical rule that the motive test implicit in the stranger requirement is satisfied *only* where a charitable trust is open to the public at large or targeted at a disadvantaged population.

Going down this path would prove challenging.[115] The distinction between advantaged and disadvantaged can be a problematic distinction to draw. In a simple world, we would have the luxury of conceiving

115. For a discussion, see Miranda P Fleischer, "Equality of Opportunity and the Charitable Tax Subsidies" (2011) 91 Boston University Law Review 601 at 636-43.

of 'advantaged' and 'disadvantaged' as mutually exclusive and binary categories. Reality complicates this taxonomy. Populations can be advantaged and disadvantaged in incommensurable ways making it difficult to singularly categorize them as one or the other. How do we categorize a population that is economically advantaged but socially disadvantaged (or *vice versa*)? Would the social disadvantage outweigh the economic advantage such that this population is on balance 'disadvantaged' and thus a proper population to which charitable benefaction could be directed? Or would we draw the opposite conclusion?

Advantage is also relative. Population A might be advantaged relative to population B and population B might be advantaged relative to population C. Expressed in terms of disadvantage, this means population C is disadvantaged relative to both populations A and B and population B is disadvantaged relative to population A (but not C). So, what happens if a charitable trust is targeted at population B? If 'advantage' versus 'disadvantage' is going to be our frame of reference, how would we best conceive of this trust? Is it a trust that ameliorates the disadvantage of B relative to A or a trust that deepens C's relative disadvantage *vis-à-vis* B? There is no obvious answer. The fact that charity plays out on both a domestic and international scale only complicates things further. If a person who is poor by Western standards is comparatively better off than a person who is poor by a developing nation's standards, a fixation on 'disadvantage' would compel us to resolve whether it is proper for a charitable trust settled for the former to thereby exclude the latter.

And what of intersectionality? Whereas 'advantaged' versus 'disadvantaged' are singular blunt characterizations, identities are in reality intersectional, meaning they combine numerous identity markers, some of which might correspond with advantage and some of which might correspond with disadvantage. In other words, 'advantage' and 'disadvantage' play out not only across populations but also within them. This frustrates our ability to label individual persons as either advantaged or not.

For example, women as a group face social and economic disadvantages that men as a group do not face. We could on that basis conclude that, say, 'women only' scholarship trusts are properly charitable because they

are directed at a disadvantaged population but 'male only' scholarships are non-charitable because they are directed at an advantaged population. However, a person's status as a male or female is but one of that person's identity markers. Would our view of the 'male only' scholarship change if we accounted for socioeconomic status and targeted the scholarship at 'men of limited means'? Would we conclude that women *of any means* are disadvantaged and thus worthy of benefaction in ways that are not true of men *of limited means*? What if we instead accounted for sexual orientation and targeted the scholarship at 'gay men'? Or what if we combined sexual orientation, socioeconomic status and gender and targeted the scholarship at 'gay men of limited means'? Would we still conclude that 'maleness' is not a viable eligibility criterion on the basis that it is *always* a marker of advantage and thus *always* irrefutable evidence of an improper non-charitable motive?

It would be misguided for charity law to even bother taking on these challenges. Requiring that all eligibility criteria be markers of disadvantage would inspire a futile intersectional race to the bottom whereby charitable trusts using multiple targeting criteria — *e.g.* gender, race, class and ability — could only be targeted at populations disadvantaged on every single ground identified. Settlors should, of course, be free to settle charitable trusts for specific target populations disadvantaged in each and every one of these ways (and others). But it should not be the case that every single targeting criterion used by charitable trusts should necessarily have to correspond with some form of demonstrable disadvantage, at least not if our aim is to give expression to values indigenous to charity law.

Charity law has never developed a principle specifying that charities, *if* they target their goods and services, can only do so in favour of the worst off among us.[116] There is a general principle against excluding the poor.[117] However, the recent controversy over the charitableness of fee-charging independent schools exposes what could be described as a surprising tolerance for programming disproportionately benefiting

116. Even in the context of the relief of poverty, charities are not restricted to only serving populations that are destitute. See *e.g.*, *Independent Schools*, *supra* note 80 at paras 173, 179.

117. See *e.g.*, *Independent Schools*, *ibid*.

privileged communities. The holding in *Independent Schools* provides but the vaguest of guidance as to when fee-charging improperly excludes the poor.[118] There is no reason to think charity law is any better equipped to offer practicable guidance as to when charitable trusts improperly exclude populations on the basis of other identity markers (gender, race, sexual orientation, etc.).

Keep in mind that we are testing for motive, looking to see whether a charitable trust's targeting criteria expose the settlor's denial of the equal dignity, worth and value of disadvantaged populations not serviced by the trust. There is no basis to conclude, at least not as a bright line rule, that a charitable motive is absent every single time a trust is targeted other than on the basis of social and/or economic disadvantage. Charitable scholarships for Catholics and Protestants (which, as we have seen, Canadian courts have upheld) do not deny the equal dignity, worth and value of either atheists or adherents of other religions notwithstanding that being Catholic or Protestant is not typically thought to be a marker of disadvantage. An athletic scholarship does not manifest discriminatory ableism notwithstanding that it is targeted at those who are extraordinarily abled. To insist on an across-the-board standard whereby permissible targeting criteria are confined to markers of disadvantage would not be to vindicate values indigenous to charity law but rather to significantly curtail the broad freedom to choose a target population normally extended to settlors of charitable trusts.

5. *Pemsel* Categories of Charitable Purposes Are Not Silos

Courts should resist any approach that treats the *Pemsel* categories of charitable purposes as discrete silos. The common law recognizes four categories of charitable purposes but only one conception of charity. It would be odd if the values that attract charitable status under one category vitiated it in another. Religion provides a good example. While the advancement of religion is a discrete charitable purpose, the formal advancement of religion is not the only placeholder for religious beliefs

118. *Ibid.*

in the realm of charity. Religious values are also reflected in charitable programming outside of the formal advancement of religion. In *Bob Jones*, the positions of the schools relating to interracial dating/marriage were based on sincerely held religious beliefs.[119] Likewise, in *Law Society of British Columbia v Trinity Western University*[120] and *Trinity Western University v Law Society of Upper Canada*[121] (discussed below) a religiously infused law school required its students to abide by a community covenant that (among other things) confined sexual expression to heterosexual marriage.[122]

When confronted with religiously inspired charitable programming outside of the formal advancement of religion, charity law should remain mindful of the claims it makes about religion. In *Gilmour v Coats*, Lord Reid observed that charity law "assumes that it is good for man to have and to practice a religion".[123] In *Neville Estates Ltd v Madden*, Justice Cross observed that "[a]s between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none".[124] Likewise, in *United Grand Lodge of Ancient Free & Accepted Masons of England v Holborn Borough Council*, Justice Donovan reasoned that advancing religion entails giving it robust expression:

> [t]o advance religion means to promote it, to spread its message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary.[125]

By extending charitable status to religious institutions, charity law affirms religion as something worthy of what Matthew Harding describes as the "facilitative, incentive and expressive strategies" through which charity law promotes charitable purposes.[126] While charity law stops short of

119. *Bob Jones*, *supra* note 1.
120. 2018 SCC 32 [*LSBC v TWU*].
121. 2018 SCC 33 [*TWU v LSUC*].
122. See *LSBC v TWU*, *supra* note 120 and *ibid*.
123. [1949] 1 All ER 848 (HL) at 862.
124. [1962] 1 Ch 832 (ChD (Eng)) at 853.
125. [1957] 3 All ER 281 (CA) at 285.
126. Harding, *Charity Law*, *supra* note 78 at 44.

endorsing the correctness of individual religious beliefs or the truth of any single religion, it attaches value to the enterprise of religion, the important questions religion asks and the frame of reference religion provides.[127]

Charity law risks incoherence if it simultaneously lauds the advancement of religion as a charitable purpose without also recognizing religious belief as a possible motive for charitable benefaction and thus possible basis for targeting charitable programming. This is not to suggest that all manifestations of religious belief in charitable programming are properly beyond reproach. The point rather is to acknowledge that charity law could potentially find itself in contradiction if a given religious belief could be advanced by, say, a church without threatening its charitable status under the advancement of religion but the identical belief could not be reflected in the terms and conditions of a charitable trust settled by a church congregant under one of the other *Pemsel* categories of charitable purposes. The holding in *Bob Jones* squarely raised this problem. The decision left the religious beliefs of the schools with opposing characterizations. The beliefs were contrary to fundamental public policy in the context of education but presumably remained charitable (and thus of public benefit) in the context of the advancement of religion.

By way of reply, one could say that the advancement of religion is a distinct category of charity concerned not with individual religious beliefs but rather with entire belief systems (specifically those qualifying as 'religious'). It is the religious belief *system* and not the individual religious beliefs, so the argument would go, that is being endorsed through the charitableness of the advancement of religion. In contrast, religiously informed charitable programming under the other heads of charity (such as education in *Bob Jones*) will tend to confront courts not with a religious belief system *per se* but rather with a *specific* religious belief.

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127. Citing the philosopher John Finnis, the *OLRC*, *supra* note 5 at 148 observes that even "the sceptic must admit, at the very least, that whether in fact God exists or not, the question of God's existence is crucially important for everyone".

So if there is a meaningful distinction to be drawn between a religious belief system and the individual religious beliefs comprising that religious belief system, there is no contradiction, so the argument would go, in charity law's endorsement of a religious belief system in one context — the advancement of religion — but its refutation of a specific religious belief in another context — *Bob Jones*. Add to this that charity law has long since recognized a certain degree of differentiation across the *Pemsel* categories of charitable purposes such that what passes as charitable in one category may not in another.[128]

But it strains credulity to reason that charity law's endorsement of religion is solely an endorsement of systematized religious belief. Either the beliefs, practices and rituals cultivated by religion have value or they do not. It cannot be the case that they only have value when systematized unless we accept that systematization somehow sanitizes religious beliefs of the objections they attract as stand-alone beliefs. To go down this path would be to conceptualize religion as systematized mischief. That would be an odd basis on which to rationalize the charitableness of religion, not to mention the fact that such an uncongenial view of religion contradicts the claims charity law makes about religion.

As for differentiation across the *Pemsel* categories of charitable purposes, it is true that the pre-requisites for charitable status vary somewhat across the four "heads" of charity. It does not, though, follow that religion is properly confined to a silo quarantining it from the other heads of charity. And what would be the point of doing so? If religion has to be quarantined, then charity law will find itself in the strange position of promoting religion for the sake of promoting religion. Again, either the beliefs, practices and rituals cultivated by religion have value or they do not. Religious beliefs cannot have value for the sake of cultivating those beliefs through the advancement of religion but not for the sake of anyone actually acting on those beliefs in other contexts. Charity law should not simultaneously endorse and refute religious belief.

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128. The best example of this is that trusts for the relief of poverty are unlike other charitable trusts in that they are permitted to target their goods and services on the basis of private criteria. See *supra* note 98.

D. Application to Specific Targeting Criteria

We will consider the eligibility criteria that came before the Ontario Superior Court of Justice in *Royal Trust Corp*[129] to see which of them contradict the inclusive ethic implicit in the public component of public benefit. Eligible scholarship candidates had to be single, Caucasian, not a feminist (in the female candidates) and heterosexual.[130] Which of these on their face betray a non-charitable motive?

1. Sexual Orientation

In the current milieu, sexual orientation is one of the most challenging identity markers to contend with. There will clearly be circumstances in which differential treatment on the basis of sexual orientation will be attributable to non-charitable discriminatory motives. As we have seen, this was the finding in *Royal Trust Corp* where the Court concluded that expressly restricting a scholarship trust to heterosexuals broadcasted homophobic aspirations.[131] But there will also be circumstances in which the answer is less clear.

A pluralistic society includes not only diverse sexual expressions and identities but also diverse beliefs about the nature of sexuality. Sexual ethics and the nature of human sexuality are contested matters of conscience, experience and/or religious conviction. Not everyone agrees on sexual ideals or even on the ideal of a sexual ideal. In that sense, disagreements about sexuality are themselves an expression and feature of a diverse society. A society committed to diversity can see diverse beliefs about sexuality as more a strength (or at the minimum an inevitability) than a problem to be solved through charity law.

Some will object that certain views — *e.g.* traditional views of sexuality through which heterosexual marriage is cast as the singular manifestation of normative sexual expression — are hostile to sexual diversity and thus not properly welcomed to the table in a pluralistic society. But for

129. *Royal Trust Corp*, *supra* note 3.
130. *Ibid* at para 8.
131. *Ibid* at para 14.

present purposes where would we go with that perspective? Would we, for example, vet religions for their theologies of sexuality before granting charitable status? To go down that path would be to make conformity to a given sexual ethic a precondition to charitable status. The traditional practice of charity law is against assessing individual religious doctrines for benefit. In any event, it is perhaps better for a diverse society to foster acceptance of difference without in the process foreclosing the possibility of principled disagreement. Stated otherwise, *acceptance* (something implicit in the inclusive ethic of the stranger requirement) should not preclude *disagreement* (something that is inevitable with diverse beliefs).

Charity law can foster acceptance without precluding disagreement by asking the following question in instances where there is differential treatment: Is the differential treatment a manifestation of stigmatizing non-acceptance (discriminatory rejection) or a manifestation of principled disagreement (a sincerely held sexual ethic). A predictable objection is that this is a misguided question; since stigmatizing non-acceptance on the basis of sexual orientation originates in (and is enabled by) heterosexual sexual ethics, charity law cannot both live out its inclusive ethic and welcome into the charity realm traditional sexual ethics. But again if we acknowledge diversity of belief as a welcome feature of charity law, particularly diversity of religious belief, then we just have to live with the fact that the various beliefs welcomed to the table will be in tension with one another. Charity law cannot simultaneously foster diversity of belief and make conformity to a singular sexual ethic (or any other ethic) a precondition for charitable status. To go down that path risks charitable status becoming a tool through which to induce conformity with orthodoxy. Prohibiting stigmatizing non-acceptance while allowing for principled disagreement is possibly the least undesirable way to balance charity law's inclusive ethic with diversity of belief.

So, what might this look like in practice? The facts of *Royal Trust Corp* fit the category of stigmatizing rejection on the basis of sexual orientation. Sexual ethics are at best peripheral in the context of a scholarship trust. As such, there is nothing about the context of an academic scholarship to suggest that the blunt exclusion of LGBTQ persons is likely anything but discriminatory rejection. Add to this that prohibiting settlors

of scholarship trusts from excluding LGBTQ persons is in no way tantamount to forcing conformity with any given sexual ethic. Doing so does not compromise charity law's commitment to diversity of belief so much as it contemplates that an academic scholarship is an unlikely outlet for expressing a belief on sexuality. The transferable principle is that exclusions on the basis of sexual orientation in contexts in which beliefs about sexuality are peripheral (where requiring acceptance neither requires agreement nor frustrates disagreement) are prime candidates to be characterized as stigmatizing non-acceptance.

At the opposite end of the continuum is a church teaching a heterosexual theology of marriage and only solemnizing heterosexual marriages. These facts entail an exclusion of same-sex couples from a service — marriage — that is otherwise available to heterosexual couples. But the exclusion is directly and unmistakably attributable to a religious belief. The only way to require equal access to the service here is to require that the church as a condition for maintaining its charitable status perform marriage services in contravention of its beliefs. This is the kind of situation where a principle against using charitable status to compel agreement will militate in favour of allowing differential treatment on the basis of sexual orientation.[132] Even though there is differential treatment, there is not a targeted attempt to stigmatize and exclude. Sexual orientation is only one of many topics that a church's theology of sexuality would address. The trappings of principled disagreement are present and thus we have ample reason to not view the differential treatment as merely stigmatizing rejection.

In between these are instances in which religious belief will be brought to bear in circumstances outside the formal advancement of religion but still within circumstances in which sincerely held beliefs about sexuality could be engaged. Consider, for example, the facts and circumstances behind the recent litigation over the accreditation of a religious law school. Trinity Western University is a Christian university

132. *ITA*, *supra* note 9, s 149.1(6.21) expressly provides that charities organized for the advancement of religion will not jeopardize their charitable registration.

that recently sought accreditation from provincial law societies for its law school.[133] The law societies in British Columbia and Ontario declined accreditation (meaning graduates of the law schools would not be eligible to practice law in these provinces) due to the law school's religiously inspired 'community covenant'. The covenant was mandatory for staff, faculty and students. It covered a wide range of behaviour including but not restricted to sexuality (*e.g.* honesty, theft, plagiarism, entertainment, alcohol, drugs and tobacco, etc.). In relation to sexuality, the covenant required that staff, faculty and students agree not to use pornography, to observe modesty and to reserve sexual intimacy for heterosexual marriage. Relying upon their 'public interest' statutory mandate, the law societies denied accreditation due to concerns over the discriminatory character of the covenant (its differential treatment of heterosexual and same-sex married persons). In a 7-2 decision, the Supreme Court of Canada concluded that the law societies did not exceed their authority in declining accreditation.[134]

In the wake of the decision, Trinity Western University modified the community covenant so that it was no longer mandatory for students (though it remains mandatory for staff and faculty). But what if the covenant was still mandatory for students? Would this compromise the charitableness of Trinity Western University? Should it?[135]

A charity law argument (although not a strong one) could be made against the covenant using the touchstones of "acceptance" and "agreement". If a law school had to admit students without any regard to sexual orientation as a precondition to charitable status, the law school would not thereby in any meaningful way be made to facilitate or condone the sexual orientation of the law students. Indeed, we might say that disallowing the differential treatment implicit in the covenant without

133. *LSBC v TWU*, *supra* note 120; *TWU v LSUC*, *supra* note 121.

134. *Ibid*.

135. For an argument that charitable status should be withdrawn from Trinity Western University see Saul Templeton, "Trinity Western University: Your Tax Dollars at Work" Case Comment on *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, online (pdf): <ablawg.ca/wp-content/uploads/2015/03/Blog_ST_TWU_March2015.pdf>.

going as far as to prohibit the law school from imbuing its curriculum with the belief system reflected in the covenant is a balanced way for charity law to require acceptance (to disallow the exclusion occasioned by the covenant) without prohibiting disagreement (to allow the value ethic implicit in the covenant).

But there is a better argument in favour of the position that the covenant should not vitiate charitable status. The framework I have suggested here means that the covenant compromises charitable status only if it meets the standard of stigmatizing rejection (non-acceptance). It is not obvious that the covenant meets that standard. Even though the covenant achieved differential treatment on the basis of sexual orientation, it was not specifically targeted at LGBTQ persons, nor was its singular effect to exclude such persons. The covenant outlined a holistic sexual ethic proscribing a broad range of sexual expression (including many forms of heterosexual sexual expression). Its terms also excluded from the law school community all unmarried sexually active persons, all users of pornography and all married persons engaging in extramarital sex. Its differential treatment was ultimately only in relation to married persons. Whereas persons in heterosexual marriages were in compliance with the covenant, those in same-sex marriages were in contravention of it. Nonetheless, the sheer breadth of the covenant supports the conclusion that its differential treatment was not attributable to stigmatizing rejection of LGBTQ persons but rather to a sincerely held sexual ethic limiting a broad array of sexual expression. In other words, the covenant is amenable to the interpretation that it manifests principled disagreement rather than stigmatizing rejection of a targeted group.

A predictable objection to this is that it gives the greenlight to discrimination on the basis of sexual orientation provided the discrimination is packaged as part of a holistic sexual ethic. But this objection merely highlights the inevitable conflict between charity law's inclusive ethic and its commitment to diversity of belief. Charity law can be inclusive and also foster diversity of belief but it cannot always do both at the same time. The two come into conflict whenever a belief system (as in Trinity Western University relating to sexuality) leads to differential treatment. In theory, a rule could be adopted whereby inclusion takes

priority whenever the ideal of inclusion comes into conflict with belief systems countenancing differential treatment. In a context like Trinity Western University, such a rule would mean that the covenant jeopardizes charitable status because of its non-inclusive effects.

But if inclusion is the top priority why stop at merely prohibiting the covenant in Trinity Western University? At the end of the day, objections to the covenant are presumably objections to the value commitments — the view of sexuality — reflected in the covenant. So what, if anything, would be achieved if charity law merely prohibited the covenant — *i.e.* stopped the law school from making conformity with the covenant a condition of membership in the law school community — but did not prohibit the law school from imbuing its curriculum with the values reflected in the covenant? In that event (as has actually happened) the law school curriculum would continue to be informed by the very beliefs about sexuality that made the covenant controversial in the first place. If the covenant is problematic due to those beliefs, then perhaps it is not merely the covenant that should vitiate charitable status but also the perpetuation of the beliefs reflected in the covenant too, or so the argument would go.

But if we go down that path, we are back to the problem of charity law inducing conformity of belief (in this circumstance, conformity to a particular sexual ethic) in the name of inclusion. In that event, charity law's commitment to inclusion would crowd out the possibility of principled disagreement within the charitable sector. Either we accept that there is value in diverse beliefs being welcomed into the charitable sector or we do not. If we do (which we should), then we must be prepared to live with the fact that some views represented in the charitable sector will prove controversial.

2. Marital Status

Restricting eligibility to single persons discriminates on the basis of marital status. This kind of discrimination is constitutionally prohibited for state actors under the *Charter*.[136] Likewise, it is prohibited for private

136. *Charter*, *supra* note 30 s 15(1).

actors in contexts in which human rights codes apply.[137] Nonetheless, there was no finding in *Royal Trust Corp* that a person's marital status was an improper basis on which to determine eligibility for charitable benefaction. I agree with this. The exclusion of married persons from the trust did not stigmatize them. It did not on its face signal the settlor's denial of the equal worth, value and dignity of married persons. This is not at all the kind of eligibility criterion for which a benign explanation seems unlikely.

The fact that the exclusion of married persons in *Royal Trust Corp* did not even attract judicial comment, notwithstanding that marital status is a prohibited ground of discrimination under the *Charter* and human rights codes, alerts us to an important principle. The common law of charity is not captive to equality norms under constitutional law and human rights codes. A non-charitable motive need not be inferred simply because the settlor draws a distinction that might be considered discriminatory in the context of either constitutional law or human rights codes.

3. Caucasian

While a charitable scholarship trust for 'singles only' is facially similar to one for 'Caucasians only', courts need not and should not ignore that facially similar criteria can be differently stigmatizing. Given the history and present realities of race relations, 'Caucasians only' practically cannot avoid being interpreted as a denial of the equal worth, value and dignity of non-whites. This kind of criterion is a paradigmatic example of where a non-charitable motive may be inferred. It is difficult to identify situations in which a 'Caucasians only' stipulation is not stigmatizing.

4. Not a Feminist

The Ontario Superior Court of Justice in *Royal Trust Corp* concluded that the 'no feminist' stipulation was misogynistic and discriminatory on the ground of ideology.[138] I think this goes too far. While I agree that the stipulation 'no feminists' was properly struck, I take issue with

137. *HRC*, *supra* note 6.
138. *Supra*, note 3 at para 14.

it having been struck on the express ground that it was ideologically discriminatory. The stipulation 'no feminists' was instead arguably void for vagueness. By voiding the trust on the express basis that it was ideologically discriminatory, the Court opened the door to ideological conformity becoming a touchstone for charitable status.

As reasoned, the judgment takes for granted that feminism is the singular and incontestable ideological expression of the equal worth, value and dignity of women, that settlors of charitable trusts cannot manifest dissenting views on feminism without thereby unmistakably broadcasting that women are inferior. While no doubt well-intentioned, this aspect of the judgment sets a misguided precedent whereby non-charitable motives could in future cases be reflexively inferred from principled ideological dissent. Where a settlor uses a person's belief system as a qualifying or disqualifying criterion, we can interpret that as signalling more about the settlor's view of the belief system than about the settlor's view of the person espousing the belief system. That is, this kind of targeting criterion does not necessarily signal that the excluded persons are less worthy persons.[139]

E. Summation

It is possible to discover in the public component of public benefit an ideal useful to regulating discriminatory charity. Through the stranger requirement reflected in the public component of public benefit, charity law broadcasts the conviction that strangers are worth benefiting by virtue of their equal worth, value and dignity. While stigmatizing rejection contradicts the inclusive ethic implicit in this conviction, not all differential treatment amounts to stigmatizing rejection. I have offered some considerations as to when the line is and is not crossed. An important consideration will be for charity law to require acceptance (disallow stigmatizing rejection) without thereby requiring agreement (disallowing principled disagreement).

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139. This is one of the bases on which the religiously conditioned scholarships were upheld in *Re Ramsden*, *supra* note 37 and *University of Victoria*, *supra* note 38.

V. Conclusion

This paper has taken up the following question: Can we regulate discriminatory charity while 'doing charity law'? That is, can we regulate discrimination by charities while confining our frame of reference to the logic, values and doctrines of charity law and the unique juridical features of charitable trusts? The question is apt because the leading cases — *e.g.* *Bob Jones* and *Canada Trust Co* — have arguably looked outside of the law of charity for relevant values. These cases have, via the doctrine of public policy, imported into charity law values developed in and for other contexts, *e.g.* constitutional law principles. For a variety of reasons — *e.g.* it universalizes context specific rules — this is a problematic line of reasoning. If we want to truly understand when and why discrimination is discordant with legal charity we need to be able to explain the non-charitableness of discrimination from a perspective internal to the common law of charity.

As we have seen, though, this is a surprisingly difficult task. While discriminatory purposes are clearly non-charitable at common law, this does not help in contexts where charities pursue charitable purposes through discriminatory activities. Explaining why discriminatory methods of pursuing charitable purposes is non-charitable at law is challenging when we confine our frame of reference to the core pillars of charity law — *e.g.* the charity law distinction between activities and purposes and public benefit. In that sense, discriminatory activities expose a fault line in the common law of charity. Charity law's remarkably enabling posture means it is compromised in its ability to intervene (without invoking the problematic concept of public policy) when charities pursue their charitable missions in objectionable ways. To be sure, given that charity law (1) categorizes activities with reference to the purposes they advance and (2) vets purposes but not activities for benefit, it is possible (however counterintuitive it may seem) that an objectionable method of furthering a charitable purpose can qualify as a charitable activity. Likewise, the public component of public benefit is not formally applied as an anti-discrimination rule so much as a 'stranger requirement'.

It is nonetheless possible to discover in the stranger requirement an inclusive ethic useful to the regulation of discrimination. That is, native to charity law is an ideal that helps to explain and operationalize the non-charitableness of discrimination from a perspective internal to the common law of charity. The framework I have provided does not answer all questions nor eliminate the role for difficult value judgments. But it at least provides a frame of reference from within charity law for refining our understanding of the non-charitableness of discrimination. In that sense, it is an improvement on the resort to public policy.