Reconsidering *Bob Jones*:
The Problem with Public Policy, The Challenge Finding A Better Solution

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I - INTRODUCTION

In *Bob Jones University v. United States* (*Bob Jones*),[1] the US Supreme Court considered a deceptively difficult topic. Does an objectionable method of furthering a charitable purpose nullify charitable status at common law? The case dealt with two private schools – Bob Jones University and Goldsboro Christian Schools. The schools pursued a charitable purpose – the advancement of education. But they pursued this purpose discriminatorily. Specifically, both schools followed racially discriminatory admissions policies. In 1970, after a court issued an injunction prohibiting the Internal Revenue Service ("IRS") from awarding tax-exempt status to racially discriminatory schools,[2] the IRS released a revenue ruling indicating that such schools could no longer qualify as charities under U.S. tax law.[3] Further to this revenue ruling, the IRS concluded that the discriminatory admission practices of the schools disqualified them from tax-exempt status under §501(c)(3) and likewise disqualified contributions to the schools from the charitable contributions deduction under §170 of the Internal Revenue Code. A majority of the Supreme Court agreed.

Importantly, the majority judgment written Chief Justice Burger expressly purported to be upholding the common law understanding of charity. Having first found that the tax benefits set out in §501(c)(3) and §170 were contingent upon conformity with the common law standard of charity,[4] Chief Justice Burger went on to consider whether the racially discriminatory practices of the schools precluded them from meeting this standard. Reasoning that

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[1] *Bob Jones University v. United States*, 461 U.S. 574 (1983).

[2] See *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.).

[3] Rev. rul. 71-447, 1971-2 CB 230.

[4] Supra note 1 at 585-590.

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*.[5]

A lot has changed in the decades since the *Bob Jones* decision was released. Equality, diversity and inclusion are ideals increasingly shaping conceptions of what it means to "do good". These ideals are increasingly invoked in political, legal and social discourse as normative reference points from which to form moral judgments about law and society. Discrimination is by no means dead but it is increasingly socially unacceptable. One might think that this would diminish the imperative to develop principles for the regulation of discriminatory charity. But there is a sense in which just the opposite holds true.

Shifting attitudes against discrimination make it increasingly unlikely that discrimination will go unchallenged. Add to this that the legally recognized bases on which discrimination may occur continue to evolve and expand. In *Bob Jones*, discrimination entailed racial discrimination. There are now expanded bases on which discrimination may be challenged, *e.g.,* sexual orientation, gender identity and intersectionality, to name a few. In addition, the traditional taxonomy of "public law" and "private law" (public and private more generally) is being questioned. With that have come calls for the transmission of public law equality norms into private law.[6] Charitable trusts, which have always uniquely combined elements of public and private,[7] are a natural target for this reasoning. All of this makes it desirable to revisit *Bob Jones* with a view to considering anew if, when and why discrimination is incompatible with the common law of charity.

My thesis is straightforward. If we want to truly understand the discordance between discrimination and charity, we need to squarely confront the difficult questions raised by the topic from a perspective internal to charity law rather than invoke public policy as a doctrine

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[5] Supra note 1 at 591-596.
[6] See, for example, D. Friedmann & D. Barak-Erez, eds., *Human Rights in Private Law* (Portland: Hart Publishing, 2001) 50.
[7] See, for example, E. Brody & J. Tyler, "How Public is Private Philanthropy? Separating Reality from Myth" (June 2009) The Philanthropy Roundtable and K. Chan, *The Public Private Nature of Charity Law* (Portland, Hart Publishing, 2016).

of convenience through which these questions are avoided. If at the end of the day, we *must* address discriminatory charity as a matter of public policy, we should at least first understand precisely why the traditional modes of analysis in charity law are deficient. Implicit in this thesis is the value judgment that public policy should be a doctrine of last resort. The reliance on public policy in *Bob Jones* (and subsequent cases from abroad) reveals that public policy is an undisciplined and unconstrained basis for judicial decision through which external values are imported into charity law. Far better to first exhaust the possibility of developing a response to discriminatory charity using the values, doctrines and traditional modes of analysis endemic to charity law.[8] As we shall see, while it is surprisingly and tediously difficult to rationalize the non-charitableness of discrimination using the frames of reference endemic to charity law, *i.e.,* public benefit, charitable activities and charitable purposes, it is not impossible. The public component of the public benefit test arguably manifests an inclusive ethic useful to regulating discrimination by charities (though it is not traditionally understood as such).

The analysis unfolds as follows. Part II considers the holding in *Bob Jones*, identifying concerns with its resort to public policy. Part III considers cases from the UK and Canada, arguing that they attract many of the same criticisms as *Bob Jones*. Parts IV – VII mine the internal doctrines and values of the common law of charity for a better approach. Part IV considers discrimination in light of the charity law distinction between activities and purposes. While discriminatory *purposes* – such as were present in the leading Canadian decision, *Canada Trust Co v. Ontario Human Rights Commission*[9] – clearly vitiate charitableness at common law, the impact of discriminatory *activities* is less certain. Part V considers discrimination in light of the charity law requirement for public benefit (specifically the benefit component of public benefit). Since the benefit component of public benefit is assessed against purposes rather than activities, this takes us back to the distinction between activities and purposes. While discriminatory *purposes* can be said to be non-charitable on the basis

[8] For a philosophical account along these lines, see M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014). Harding argues that autonomy is an ideal native to charity law such that the state through charity law can be understood to be promoting the conditions of autonomy. Discrimination, he argues, is at cross purposes with this project. See p. 225-240.
[9] (1990) 69 D.L.R. (4th) 321 (Ont. C.A.).

that they lack benefit, the same reasoning cannot very easily be applied to discriminatory *activities*. Part VI considers the public component of public benefit, arguing that it is not immediately concerned with discriminatory exclusions from charitable trusts, at least not as formally applied in charity cases. Part VII takes the public component of public benefit beyond its traditional formal understanding, arguing that it manifests in charity law a belief in the equal worth, value and dignity of persons. As such, it is potentially useful to developing a principled approach to regulating discrimination by charities.

II - *BOB JONES*, PUBLIC POLICY AND THE MEANING OF CHARITY

(A) General

In Parts II and III, I develop the argument (with reference to, respectively, *Bob Jones* and the leading decisions from other jurisdictions following the English common law of charity) that public policy is a problematic basis on which to rationalize the non-charitableness of discrimination. It 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 risks moulding charities into the image of the ideal liberal state. Worse yet, the tendency to defer to "public policy" – a doctrine of last resort properly reserved to those instances where all else has failed – carries with it the surprising implication that charity law – a body of law concerned with doing good for others – lacks the normative resources internal to itself to develop a workable solution to the problem of discriminatory charity.

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

on public policy and tax expenditure considerations, both of which will be considered here in turn. As social policy, *Bob Jones* strikes a chord. But as a technical charity law precedent from a final court of appeal it leaves something to be desired.

(B) Tax Expenditure Considerations

The court's analysis of "charity" in *Bob Jones* seems to have been significantly influenced by the fact that charitable status carries with it tax benefits under §501(c)(3) and §170. Channeling a tax expenditure conception of charitable status, Chief Justice Burger tellingly observed that "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors'."[10] Likewise, Chief Justice Burger observed "it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination…should be encouraged by having all taxpayers share in their support by way of special tax status."[11] The implication is that discrimination is non-charitable at common law *because it is ill-suited for a tax subsidy*. This reasoning is highly infrequent in the common law of charity. And justifiably so.

On the one hand, it is understandable why the court in *Bob Jones* took into account the tax benefits accompanying charitable status. The dispute before the court in *Bob Jones* was centred on income tax, specifically whether the IRS had a basis in law to deny the tax benefits under §501(c)(3) and §170 to the schools under review. Add to this that the legal significance of charitable status is entirely due to the tax (and other) advantages exclusive to charities. The policy function served by the common law meaning of charity is to ration those benefits. To altogether ignore the privileged nature of charitable status at the stage of defining charity would be to consider charity in isolation of what gives it social and legal significance.

[10] *Supra* note 1 at 591.
[11] *Supra* note 1 at 595.

On the other hand, the tax (and other) benefits of charitable status are not an especially helpful referent for the common law meaning of charity. To contemplate that an institution must be worthy of a tax subsidy in order to be charitable puts the cart before the horse. Worthiness of a tax subsidy is not the standard by which an institution's charitableness at common law is determined. In fact, it works in the reverse. Charitableness at common law is the standard by which worthiness for a charitable tax subsidy is determined, or at least it is for tax subsidies specific to institutions qualifying as charitable at common law (which according to the court in *Bob Jones* includes §501(c)(3) and §170). Institutions qualifying as charitable *at common law* are deserving. Institutions not qualifying as charitable *at common law* are not. The foremost question to ask of any given applicant for charitable status is therefore not whether it should be subsidized but rather whether it has the character of a charitable institution *at common law*. Worthiness of a tax subsidy does not factor into this analysis as a discrete consideration.

The formal irrelevance of subsidy considerations is likely consistent with legislative intent. It is one thing to defer to courts the interpretation of an intelligible concept – charity – carrying with it tax subsidy implications. It is something else entirely to specifically intend for courts to interpret a concept like charity with a view to subsidy considerations. The difference (which is critical) is one of deferring decisions with spending implications (*e.g.,* what are the precise boundaries of "charity"?) versus actually deferring the spending decisions (*e.g.,* which institutions are worthy candidates for state subsidies?). Spending decisions are not for courts to make. It is respectful of the proper judicial function to confine the analysis of charity to its traditional common law meaning, *i.e.,* to interpret charity without treating (formally or informally) deservingness for a tax subsidy as a separate and discrete criterion.

Importantly, this is generally how courts – at least outside of the US – have approached the meaning of charity. Courts have not, at least not openly, embraced the idea that subsidy considerations have (or should have) anything to do with the definition of charity. Indeed, the leading charity decision, *Commissioners for Special Purposes of the Income Tax v. Pem-*

sel,[12] resolved that the income tax concept of charity should follow the trust law understanding of the term. This was effectively a denial that income tax considerations should in any way function as a determinant for the legal meaning of charity. The reasoning of *Pemsel* was questioned by Lord Cross in *Dingle v Turner*.[13] Lord Cross reasoned that courts "cannot avoid" taking subsidy considerations into account when defining charity.[14] However, all other members of the Court in *Dingle v Turner* (except for Lord Simon) expressly rejected this proposition. No court has subsequently established that subsidy considerations are formally relevant. Indeed, in *Independent Schools Council v. Charity Commission for England and Wales*, there were "doubts expressed" over Lord Cross's observation in *Dingle v. Turner.*[15]

The Supreme Court of Canada specifically mentioned fiscal considerations in both *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue*[16] and *Amateur Youth Soccer Association v Canada Revenue Agency*.[17] However, the contexts are distinguishable and stop well short of establishing the relevance of subsidy considerations to the common law meaning of charity.[18]

It may well be the case that institutions with discriminatory practices are poor candidates for tax subsidies. But this is not a basis on which to conclude that they are non-charitable at common law.

(C) Public Policy

Relying on precedents establishing that charitable status can be denied on the basis of public policy, Chief Justice Burger reasoned that, since there is a discernable public policy against

[12] [1891] AC 531.
[13] [1972] AC 601.
[14] *Ibid*. at 624.
[15] [2011] UKUT 421 (UKUT) at para 176.
[16] [1999] 1 S.C.R. 10.
[17] [2007] 3 SCR 217 ("AYSA).
[18] A. Parachin, "The Role of Fiscal Considerations in the Judicial Interpretation of Charity", in A. O'Connell, M. Harding and M. Stewart, eds., *Not-for-Profit Law: Theoretical and Comparative Perspectives* (New York, Cambridge University Press, 2014) 113.

racial segregation in education, the racially discriminatory practices of the private schools rendered the schools non-charitable at common law and disqualified them from the tax benefits for charitable institutions under §501(c)(3) and §170.[19] Public policy has long since been widely criticized as a poor basis for judgment. It has been variously described 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".[20] It is 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".[21] The public policy analysis in *Bob Jones* lends credence to these concerns.

Chief Justice Burger glosses over an important issue. What exactly was against public policy? As we shall see, the common law of charity distinguishes between activities and purposes. Which were against public policy in *Bob Jones* – the activities, the purposes or both? This is key to understanding the doctrine of public policy. Does it disqualify institutions from charitable status based on their purposes or based on the activities through which they pursue their purposes?[22]

Also, consider the sources relied upon by Chief Justice Burger as evidence of a public policy against racial discrimination in education. Ironically, Chief Justice Burger all but ignored the most directly relevant authority. In *Runyon v McCrary*, the Supreme Court concluded that it was a violation of Section 1981 of the *Civil Rights Act* of 1866 for private schools to engage in racially discriminatory admissions practices.[23] Based on this authority, it would seem that the admissions policies of the schools before the court in *Bob Jones* were contrary

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[19] Supra note 1 at 591-596.
[20] *Church Property Trustees, Diocese of Newcastle v Ebbeck* (1960), 104 C.L.R. 394 at 415 (H.C.A.), Windeyer J. (footnotes omitted).
[21] *Fender v St John-Mildmay* (1938) A.C. at 12 (per Lord Aitkin).
[22] See Part IV(C) below. M. Harding suggests that public policy may have been used inappropriately in *Bob Jones* as a way to regulate the activities of charities. As we shall see, the common law of charity generally does not regulate activities other than via the requirement that charities have exclusively charitable purposes. M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at 208.
[23] 427 U.S. 160 (1976).

to federal law.[24] This is important due to common law authorities establishing that illegality can result in charitable trusts either altogether failing or being modified via the doctrine of cy-pres to remove the illegality.[25] Leaving aside whether *every* instance of unlawful conduct by a charity should *necessarily* attract the doctrine of public policy, illegality is at least a plausible basis in law for judicial intervention where a charity is operating in direct violation of positive law. But *Runyon v McCrary* only received a few passing references in Chief Justice Burger's public policy analysis. At no point in the majority judgment was it specifically contemplated that the schools racially discriminatory practices were contrary to public policy because they were unlawful.

Instead, Chief Justice Burger based the public policy analysis on sources of law not directly applicable to the context under review (discrimination by a *private* school). In so doing he indulged a line of reasoning fraught with difficulty. 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. This contemplates that legal rules lack the boundaries to which they are expressly subject, that context specific legal rules manifest ideals that can be extended under the guise of public policy to contexts in which they do not apply.

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[24] This is most clear in relation to Goldsboro Christian School. From the description of the facts in Bob Jones, Goldsboro Christian School admitted Caucasian students and occasionally children from racially mixed marriages provided one of the parents was Caucasian. The implication is that it categorically refused to admit African American children.

The position is less clear in relation to Bob Jones University. Initially, Bob Jones University refused to admit any African American students. From 1971 to 1975, it admitted African American students provided they were married within their own race. Following the holding in *McCrary v Runyon*, the admission policy was revised to admit African American students. However, all students were subject to expulsion for interracial marriage, interracial dating or promoting either of these. The revised policy meant all students were subject to the same formal rules. However, it also meant that racial segregation was deliberately sustained within the school. No view is offered here as to whether this went far enough to comply with the holding in *McCrary v Runyon*.

[25] A trust to provide porter to inmates of a workhouse was modified via the *cy-pres* doctrine in *Att-Gen v Vint* (1850) 3 De G. & Sm. 704 because it ran contrary to statutory law. Likewise, a trust to provide seats for poor people to beg in by the highway was held invalid due to the criminality of begging. See *Anon* Duke 133 (as cited by H. Picarda, *The Law and Practice Relating to Charities* 4th ed (West Sussex, Bloomsbury Professional, 2010 at p. 451). Likewise, in *Thrupp v Collett* (1858) 26 Beav 125, a bequest to pay the fines of persons convicted under games laws failed because its tendency would be to induce further offences. See H. Picarda, *The Law and Practice Relating to Charities* 4th ed (West Sussex, Bloomsbury Professional, 2010 at p. 450-1, M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at pp. 31-33 and J. Warburton, *Tudor on Charities* 9th ed (London, Sweet & Maxwell, 2003) at p. 439.

For example, constitutional law principles were among the things on which Chief Justice Burger based the conclusion that charities are subject to a public policy against racial discrimination in education. His references to the Supreme Court's earlier decisions in *Brown v Board of Education*[26] and *Norwood v Harrison*[27] carried with them the implication that the Fourteenth Amendment's guarantee of equal protection was a determinant of public policy.[28] Constitutional law places limits on state action and is thus directly relevant to determining whether the state is acting unconstitutionally if it confers charitable status (and the associated benefits) on discriminatory institutions. But that specific question was not squarely entertained in *Bob Jones*. The issue before the court in *Bob Jones* was not whether the state was constitutionally forbidden from extending the tax benefits under §501(c)(3) and §170 to schools with racially discriminatory admissions policies but rather whether such schools were charitable at common law and thus eligible for tax benefits exclusive to charities. By reasoning that constitutional values inform public policy, Chief Justice Burger countenanced charities being subjected to a form of indirect constitutional scrutiny via the doctrine of public policy. There are several problems with this.

A resort to constitutional law principles is bound to be inconclusive. Equality is a constitutional value (evidenced by, for example, the guarantee of equal protection) but so too is the free exercise of religion. Why did the former but not the latter factor into the Court's public policy analysis even though it was acknowledged in the judgment that the racially discriminatory practices of the Schools were based on sincerely held religious beliefs? Though Chief Justice Burger acknowledged that denying the tax benefits under §501(c)(3) and §170 to the schools engaged free exercise rights,[29] he did not address how, if at all, free exercise rights (and other constitutional guarantees) are themselves a feature of public policy. So we are left with the genuine problem of having to resolve why some constitutional protections but not others inform the public policy to which charities are subject.

[26] 347 U.S. 483 (1954).
[27] 413 U.S. 455 (1973).
[28] Supra note 1 592-596.
[29] Supra note 1 at 602-605.

Also, defining charity with reference to constitutional limits on state action essentially extends constitutional restrictions to charities. In so doing, it risks moulding charity into the image of the ideal constitutionally compliant state. But presumably not everything the state is constitutionally forbidden from doing is for that reason alone against public policy and thus impermissible for non-state charitable actors.[30] It is one thing to ask whether it is unconstitutional for the state to extend tax benefits under §501(c)(3) and §170 to institutions with practices the state is constitutionally forbidden from directly funding or directly carrying out. It is quite another to import constitutional restrictions on state action into the common law of charity via the doctrine of public policy. Doing so begs the question in its assumption that restrictions on state action have a role to play in this context. If the state is not for constitutional law purposes implicated in the actions of charities – and no finding to that effect was made in *Bob Jones* – what decisive role is there for constitutional principles?

Also, once we are outside of the context of enforcing limits on state action in concrete disputes between citizen and state, it can be difficult to conceive of constitutional values except in the most abstract of terms. Absent the disciplined structure that ordinarily guides constitutional rights interpretation in fact specific disputes between citizen and state, constitutional values reduce to vague abstractions that can mean practically anything. How, for example, is a court, outside of a specific dispute between citizen and state, to give meaning to the constitutional value of equality and balance it against other equally abstract constitutional values? Resorting to the constitution as a repository of abstract values to inform the doctrine of public policy risks constitutional values being used as rhetorical devices through which courts (consciously or otherwise) lend disguised moral judgments the formal status of public policy.

Chief Justice Burger also resorted to federal civil rights legislation and Executive Orders dealing with racial discrimination in various contexts other than private schooling.[31] Again,

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[30] See, for example, M. Moran, "Rethinking Public Benefit: The Definition of Charity in the Era of the Charter" in J. Phillips, B. Chapman and D. Stevens, eds., *Between State and Market*: *Essays on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) at 258-259 and D. Brennen, "Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities" (2002) 5:9 Fla. Tax Rev. 779 at 844-5.

[31] Supra note 1 at 592-596.

it is not immediately clear what any of these establish of direct relevance to the common law meaning of charity. The choice to prohibit racial segregation via legislation or executive order in specific contexts – *e.g.,* public school – entails the choice to not extend that rule to other contexts – charitable private schools. Transporting the values implicit in legal rules developed for and exclusive to specifically defined contexts to other contexts via the doctrine of public policy is deeply troubling in that it has the effect of universalizing context specific rules.

Another problem with the court's public policy analysis in *Bob Jones* – and this point applies more generally to public policy as a basis for judgment in charity law decisions – is that it masks the true calculus behind the court's decision. At the end of the day, the problem confronted by the Supreme Court in *Bob Jones* was a charity law problem. The schools in question advanced a charitable purpose – education – but did so in ways exacerbating long-standing racial divisions in the United States. The essential question raised by this is whether the common law requirements for charitable status are met where a charity pursues a charitable end but is complicit in social harm by discriminatorily targeting its goods and services.

Public policy enables an answer – "no" – but conveniently avoids the need to squarely explain the precise discordance with charitable status. What *specifically* was the problem? Was there a total lack of public benefit? Was there a lack of net benefit?[32] How should charity law balance benefit against harm? What criteria can charities use to target their goods and services at specific target populations without vitiating charitable status? What matters more to charitable status at common law – the ends being pursued or the means used to pursue the ends? While public policy relieved the court in *Bob Jones* from having to explain its answers to these questions, it did not relieve the court from having to consider them. These questions are unavoidable. Since these questions have to be confronted, better that they get confronted transparently than masked behind the cover of public policy.

[32] M. Harding suggests this as a plausible interpretation of *Bob Jones*, that via public policy the court was concluding there was a lack of net benefit. See M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at 32.

A related problem with the public policy analysis in *Bob Jones* is that the doctrine of public policy is not exclusive to charitable trusts. For that reason alone it is a poor vehicle through which to establish a point of principle exclusive to charitable trusts. Both charitable and non-charitable dispositions are subject to the restraint of public policy. For example, settlors of personal trusts cannot condition beneficial interests in trusts on terms offensive to public policy, *e.g.,* requiring beneficiaries to divorce, abandon their minor children or perform illegal acts.[33] A recent Canadian decision went as far as to conclude that public policy furnishes a basis for courts to reject a testator's chosen beneficiary as unworthy.[34] So if the true basis for judgment in *Bob Jones* is that racial discrimination is against public policy, this potentially bodes implications not only for the charitableness of racially discriminatory institutions but also more generally for the validity of racially discriminatory exercises of property rights.

But the court in *Bob Jones* seems to have intended only to restrict the terms and conditions of charitable status and not property rights and trusts more generally. To be sure, it was specifically contemplated in the judgment that, although the racially discriminatory practices of the schools were incompatible with charitable status, the schools could continue to operate discriminatorily as non-charities, in other words that the racially discriminatory practices were not contrary to public policy for all purposes of law.[35]

We could make sense of this by concluding that charitable trusts are subject to a more rigorous form of public policy analysis than non-charitable manifestations of property rights. But it is problematic to conceptualize public policy as something that can vary from context to context. The nature of public policy is such that its content cannot vary from context to context. The very notion that public policy does not "depend on the idiosyncratic inferences

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[33] See, for example, A. Oosterhoff, D. Freedman, M. McInnes and A. Parachin, *Oosterhoff on Wills* 8th ed (Toronto, Thomson Reuters, 2016) 713-739.

[34] *McCorkill v McCorkill Estate* 2014 NBQB 148, affirmed 2015 NBCA 50. The case dealt with an unconditional bequest from a Canadian testator to the National Alliance, a white supremacist Virginia corporation. The bequest was struck on the ground that it would likely be used for racist purposes.

[35] *Supra* note 1 at 603-604: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets." Per Chief Justice Burger.

of a few judicial minds"[36] but is instead based on values commonly agreed upon in society seems to frustrate the possibility of public policy varying from one context to another. Perhaps we could avoid this problem by agreeing that there is only one public policy applied in trust law but that charitable trusts are held to a higher standard of conformity compared to non-charitable trusts. But, again, its not helpful to contemplate degrees of conformity with public policy. There is one public policy and a trust – charitable or otherwise – either violates it or it does not.

(D) Religion: Only a Constitutional Right, Not Also a Charitable Purpose?

In *Bob Jones*, religion was treated solely as a constitutional law issue. The schools before the court in *Bob Jones* argued that, since their educational practices relating to race were grounded in sincerely held religious beliefs, removing charitable status from the schools on the basis of those beliefs amounted to an unconstitutional interference with their free exercise of religion. The majority rejected this argument, reasoning that restrictions on religiously based conduct are constitutional where (as here) they serve compelling governmental interests.[37] Treating religion as solely a constitutional law free exercise issue left unaddressed an important question: What, if anything, does the charitableness of religion at common law establish about the charitableness of providing education consistently with sincerely religiously beliefs?

Chief Justice Burger countenanced the transmission of values from public law (federal civil rights legislation, executive orders and constitutional law) into charity law via the doctrine of public policy but ironically not the transmission of values within charity law from one charitable purpose (religion) to another (education). There is something missing in this reasoning. Even if the charitableness of religion is not determinative of the charitableness

[36] *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in *Fender v. Mildmay*, [1937] 3 All E.R. 402, at p. 13 S.C.R.].

[37] *Supra* note 1 at 602-605.

of religiously inspired education, an explanation is at least warranted as to why religious beliefs should attract such disparate treatment within charity law.

The common law of charity risks internal contradiction if a given religious belief is treated as charitable in one context – the advancement of religion – but not in another – the advancement of education. But this is precisely what the holding in *Bob Jones* appears to countenance. The very religious beliefs that vitiated charitable status in *Bob Jones* in the context of education could presumably be advanced with the benefit of charitable status in the context of religion, *e.g.,* a church teaching the identical beliefs. This leaves charity law celebrating religious beliefs in one context while decrying those very same beliefs in another on the basis that they contradict fundamental public policy. Implicit in this reasoning is a conception of charity in which the *Pemsel* categories of charitable purposes are assumed to be discrete silos standing in isolation of another such that that which is charitable in one silo (religion) can simultaneously be against public policy is another (education).

(E) Summation

In short, the resort to public policy in *Bob Jones* enabled the court 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. Practically every source of public policy identified by the court in *Bob Jones* – constitutional principles, executive orders and legislative enactments – lacked formal relevance to charities. So in a sense the court downplayed directly relevant considerations – the criteria for charitable status at common law – but highlighted considerations lacking relevance. This is why the public policy analysis in *Bob Jones* is wanting – it obfuscated rather than illuminated the incompatibility of discrimination with the common law meaning of charity.

III – LEADING CASES OUTSIDE THE US

(A) United Kingdom

While English authorities are normally a rich terrain to mine for all matters pertaining to the common law meaning of charity, they establish relatively little of direct relevance to the charitableness of discrimination. The early UK decisions confronting discriminatory charitable trusts - *Re Lysaght*[38] and *Re Dominion Students Trust*[39] - studiously avoided explicitly commenting on whether discrimination vitiates charitable status at common law. The approach of these cases was instead to reason that the discriminatory clauses under review were problematic only inasmuch as they were impracticable or impossible to administer. This conclusion allowed courts to excise the discriminatory provisions from the trusts using the doctrine of *cy-prés* without having to squarely confront when or even if discrimination precludes charitable status.

In *Re Lysaght*, a testatrix established a testamentary scholarship fund that restricted eligible scholarship candidates to male medical students "not of Jewish or Roman Catholic faith". The Royal College of Surgeons, the named trustee of the fund, refused to administer the fund due to the religious restriction. No objection was made over the gender restriction. Notwithstanding the well-established principle that no trust can fail for want of a trustee, the court characterized the College's refusal to act as trustee as an "impossibility" triggering the court's *cy-prés* jurisdiction. The court then used its *cy-prés* jurisdiction to remove the religious condition.[40]

In *Re Dominion Students Trust*, the court considered a charitable trust to provide a student hostel for male students "of European origin". The trustees sought a *cy-prés* order to remove the ethnic restriction (though, again, not the gender restriction). The court concluded

[38] [1966] Ch. 191.
[39] [1947] 1 Ch. 183.
[40] The Court expressly rejected the argument that the impugned provisions of the trust were contrary to public policy. Buckley J. acknowledged that the exclusion of Jews and Roman Catholics was "undesirable" and "unamiable" but not against public policy. *Re Lysaght* [1966] Ch. 191 at 206.

that the ethnic restriction made the purpose of the fund, promoting community of citizenship, impracticable and thus used its *cy-prés* jurisdiction to remove the ethnic requirement.

The reasoning of *Re Lysaght* and *Re Dominion Students Trust* seems strained.[41] The use of the *cy-prés* jurisdiction in these cases arguably contradicts the general principle that *cy-prés* is not to be used merely to enhance the public benefit of a charitable trust.[42] Also, it is arguable that the discriminatory provisions under review did not render either trust impossible or impracticable to carry out, at least not in the strict sense that those terms are normally understood in the *cy-prés* jurisprudence. The doctrine of *cy-prés* is usually restricted to events that outright halt the administration of the trust (*e.g.,* the inability to find persons within the described class of beneficiaries) or pose serious difficulties to the administration of the trust (*e.g.,* funds grossly inadequate to achieve the charitable purpose).[43] In neither *Re Lysaght* nor *Re Dominion Students Trust* was this kind of difficulty present. An alternative trustee could have been appointed in *Re Lysaght*. Also, since the gender restriction was left in *Re Dominion Students Trust*, presumably so could have the ethnic restriction without insurmountable difficulty. It seems that unspoken equality concerns may have played a role in both cases.[44] But taken at face value they do not establish any principles directly relevant to the charitableness of discrimination.

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[41] Jim Phillips describes the reasoning of *Re Lysaght* as "fiction" and concludes that the outcome in *Re Dominion Students Trust* reflected the judge's "dislike of the condition". See J. 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 at 19-20. Bruce Ziff concludes that the "court employed this reasoning to as a convenient means to eliminate the discriminatory provisions without departing radically from the basic law governing charitable trusts." See B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000) at 117. For a similar criticism of the U.S. cases using the doctrine of *cy-prés* to remedy discriminatory charitable trusts, see J. Colliton, "Race and Sex Discrimination in Charitable Trusts" (2002-2003) 12 Cornell J.L. & Pub. Pol. 275 at 284. Colliton observes that racially discriminatory provisions would be "embarrassing and inconvenient" but "would not be impossible or impractical".

[42] See D. Waters, M. Gillen and L. Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto, Thomson Carswell, 2005), p. 777.

[43] Ibid at pp. 773-780.

[44] For comments on these cases, see J. 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, F.H. Newark, "Trustee Who Dislike the Terms of the Trust" (1966) 17 Northern Ireland Legal Quarterly 123 and P.S.A. Lamek, Case Comment 4 Osgoode Hall L.J. 113 (1966) at 119.

Recent statutory reforms to UK anti-discrimination law impact upon the scope of permissible discrimination by English charities. Under s. 193 the *Equality Act, 2010*, charities are prohibited from restricting benefits on the basis of a "protected characteristic"[45] except where (1) they are acting in pursuance of a charitable instrument and (2) they are either redressing historical disadvantage or using proportionate means to achieve a legitimate end.[46] Importantly, this statutory rule does not on its face restrain the legal meaning of charity.[47] To the contrary, it speaks to the circumstances in which charities may lawfully discriminate, which is not the same as determining whether it is charitable to discriminate in the first place. As a practical matter it probably makes little difference whether discrimination is prohibited at the stage of defining charity or at the stage of applying statutory law to charities, since either way discrimination is restrained. However, the distinction matters greatly to those studying discriminatory charity from the standpoint of the definition of charity.[48] In that regard, note that the *Equality Act, 2010* presupposes that a trust may be discriminatory but nevertheless charitable at law. This is the implication of permitting discrimination only where it is authorized by a "*charitable* instrument". If a charitable instrument could not as a matter of law authorize discrimination, the provision would not and could not every apply.[49]

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[45] Defined in s. 4 to mean age, disability, gender reassignment, marriage, civil partnership, pregnancy, maternity, race, religion, belief, sex and sexual orientation

[46] S. 193. References to colour are nevertheless ignored (subs. 193(4)). S. 4 defines what constitutes a protected characteristic.

[47] Note, though, that the UK Charity Commission has interpreted the public benefit requirement in light of s. 193. Conflating the public benefit test with the statutory circumstances in which discrimination is lawful, the Charity Commission has specified that public benefit can co-exist with discrimination *only* when it can be justified as either an attempt to redress historical disadvantage or as a proportionate means to achieve a legitimate end. See Charity Commission, *Equality Act Guidance for Charities*, August 2011, p. 10.

[48] The distinction is particularly noteworthy in Canada where English authorities regarding the meaning of charity are liberally drawn upon. If English authorities will on a going forward basis define charity with a view to English statutory law, it will be necessary for Canadian authorities to reconsider the authoritative weight of English precedents.

[49] Interestingly, the public benefit requirement has been interpreted by the Charity Commission in light of s. 193. Conflating the public benefit test with the statutory circumstances in which discrimination is lawful, the Charity Commission has specified that public benefit can co-exist with discrimination *only* when it can be justified as either an attempt to redress historical disadvantage or as a proportionate means to achieve a legitimate end. See Charity Commission, *Equality Act Guidance for Charities*, August 2011, p. 10.

One consequence of this statutory intervention is that discrimination by charities in the UK is as much (if not more) a statutory matter than it is a common law matter. For example, in *Catholic Care and Charity Commission for England and Wales*,[50] the Court concluded that a charitable Roman Catholic adoption agency could not amend its governing document to expressly provide that adoption services would only be provided to heterosexual couples. But since counsel for both sides agreed that the case should not be decided independently of whether the charity's practices amounted to lawful discrimination under s. 193 of the Equality Act 2010,[51] the case focused not on whether targeting adoption services at heterosexual couples was charitable at common law but rather with whether doing so met the statutory standard – objectively justifiable as a proportionate means of achieving a legitimate aim – under s. 193 of the Equality Act. The court concluded that it did not. If this trend continues in future decisions, the statutory standards under the *Equality Act 2010* will become the *de facto* standards for permissible discrimination by charities, thereby displacing the practical need for English authorities to squarely confront the charitableness of discrimination at common law.

(B) Canada

(i) *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. v. Ontario Human Rights Commission* ("*Canada Trust Co*).[52] *Canada Trust Co* 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

[50] [2012] UKUT 395.
[51] [2012] UKUT 395 at [7].
[52] (1990) 69 D.L.R. (4th) 321 (Ont. C.A.). For very helpful analyses, see B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000), J. 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 E. & T.J. 117.

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".[53] 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".[54] No more than one quarter of the scholarship moneys awarded in any given year could be given to women.[55] The racial and religious restrictions also limited who could participate in the management and administration of the fund.[56]

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*.[57] The trustee of the Leonard Fund sought advice and direction of the court "as to the essential validity" of the trust.[58] 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, Robins J.A. 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".[59] 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".[60] Robins J.A. referred (without explanation) to the following indicia of this public policy: democratic principles, constitutionally protected equality rights,

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[53] *Canada Trust Co.*, *ibid.* at para. 12.
[54] *Ibid.* at para. 16.
[55] *Ibid.* at para. 16.
[56] *Ibid.* at para. 14.
[57] S.O. 1981, c. 53.
[58] *Canada Trust Co.*, *supra* note 52 at para. 28.
[59] *Ibid.* at para. 34.
[60] *Ibid.* at para 37.

the multicultural heritage of Canada and the public criticism of the Leonard Fund.[61] The doctrine of *cy-prés* was then applied to remove the eligibility criteria based on race, gender, religion and nationality.

The concurring judgment of Tarnopolsky J.A. said more about the determinants of the public policy against discrimination. Justice Tarnopolsky identified the following sources as relevant to the conclusion that the Leonard Fund was contrary to public policy: human rights codes, the Canadian Charter of Rights and Freedoms (specifically, s. 15, s. 28 and s. 27), Charter jurisprudence and international human rights conventions ratified by Canada.[62] He emphasized that scholarships exclusively for historically disadvantaged groups are not contrary to public policy because they are consistent with affirmative action programs constitutionally authorized by subs. 15(2) of the Charter.[63] 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".[64]

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".[65] What, for example, does the *Charter of Rights and Freedoms*, 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

[61] *Ibid.* at para. 37.
[62] *Ibid.* at paras 92-97.
[63] *Ibid.* at paras. 97-8.
[64] *Ibid.* at para. 100.
[65] Ziff, *supra* note 52 at 161-2.

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 of directly relevant considerations – *e.g.*, purposes and public benefit.

And what of Justice Tarnopolsky's express statement in *Canada Trust Co* that the decision's public policy finding does not extend to private 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"[66] 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 Justice Tarnopolsky'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".

Ironically, a comparatively simple path forward was available to the court in *Canada Trust Co*. The most straightforward explanation for the case is that the Leonard Fund had an

[66] *Fender v St John-Mildmay* (1938) A.C. at 12 (per Lord Aitkin).

express discriminatory purpose and therefore failed the common law requirement for exclusively charitable purposes. The recitals to the trust made clear that scholarships were not the means for the charitable end of advancing education but rather the means for the attainment of the non-charitable end of perpetuating racial and religious hierarchy. Writing for the majority, Robins J.A. alluded to this as follows:[67]

> According 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, 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.

It was 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 based on the well-established proposition that charitable trusts must have exclusively charitable purposes. The court instead indulged a line of reasoning – public policy – that raises more questions than it answers.

(ii) *Re Ramsden Estate and University of Victoria v. British Columbia (A.G.)*

Some of the language used in *Canada Trust Co* implied that it is necessarily non-charitable to restrict benefaction on the basis of religious adherence.[68] But two later decisions, *Re*

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[67] *Canada Trust Co supra* note 52 at para 36.

[68] The religious affiliation requirement was, after all, struck in *Canada Trust Co*. In addition, Robins J.A. observed that (*Canada Trust Co supra* note 52 at para 37):

> To 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 reli-

Ramsden Estate and *University of Victoria v. British Columbia (A.G.)*, reveal a more accommodating stance.

In *Re Ramsden Estate*[69] 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".[70] The court distinguished *Canada Trust Co* on the basis that that case dealt with a trust "based on blatant religious supremacy and racism".[71] Similarly, the court in *University of Victoria v. British Columbia (A.G.)*[72] 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."[73] The court explicitly rejected the idea that only ameliorative trusts can prefer one segment of society.[74] 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.[75] The importance of protecting testamentary freedom from erosion was also identified as a relevant consideration.[76] Similar to *Ramsden Estate*, *Canada Trust Co* was distinguished without elaboration on the basis that it dealt with a trust whose provisions were "clearly offensive".[77]

These cases lend credence to my suggestion above that the best explanation for the outcome in *Canada Trust Co* is that the Leonard Fund had an overtly non-charitable purpose. The discriminatory purposes of the Leonard Fund are presumably what the courts in *Ramsden Estate* and *University of Victoria v. British Columbia (A.G.)* were referring to when they

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> gion 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.

[69] [1996] P.E.I.J. No. 96
[70] *Ibid.* at para 13, per MacDonald C.J.T.D.
[71] *Ibid* at para 13, per MacDonald C.J.T.D.
[72] [2000] B.C.J. No. 520
[73] *Ibid* at para 25 per Maczko J.
[74] *Ibid* at para 17.
[75] *Ibid* at para 17.
[76] *Ibid* at para 17.
[77] *Ibid* at para 25.

distinguished the Leonard Fund on the basis of its "blatant supremacy and racism"[78] and "clearly offensive" terms.[79] This reveals the importance of context. Eligibility criteria problematic in one context – *e.g.,* when linked with a non-charitable discriminatory purpose as it was in *Canada Trust Co* – might be passable in another – *e.g.,* when linked with a charitable purpose as in *Ramsden Estate* and *University of Victoria v. British Columbia (A.G.)*.

(iii) *Re Esther G. Castanera Scholarship Fund*

In *Re Esther G. Castanera Scholarship Fund* (*Re Castanera*)[80] 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",[81] Justice Dewar concluded that the scholarship criteria did not attract the doctrine of public policy.

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 or ethnic criteria for benefaction under charitable trusts are necessarily contrary to public policy.[82] Second, the settlor's self-avowed discriminatory aims in *Canada Trust Co*

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[78] *Ibid* at para 13, per MacDonald C.J.T.D.
[79] *Ibid* at para 25.
[80] [2015] M.J. No. 65.
[81] *Ibid.* at para 42.
[82] *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.*

are fundamental to understanding the holding in that decision.[83] Third, courts remain predisposed to uncritically accept the charitableness of 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 Justice Dewar 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:

> Current 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.[84]
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> * * *
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> 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.[85]

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[83] See *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:

> *Put 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.*

[84] *Ibid.* at para 39.

[85] *Ibid.* at para 40.

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> 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.[86]

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.

(iv) *Royal Trust Corp. of Canada v. University of Western Ontario*

In *Royal Trust Corp. of Canada v. University of Western Ontario*,[87] 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.[88] Female candidates had to be single, Caucasian, "not a feminist or lesbian" and enrolled in a science program (other than medicine).[89] Special consideration was to be given to any female candidate who "is an immigrant, but not necessarily a recent one."[90] The settlor also specified other idiosyncratic criteria.[91]

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[86] *Ibid.* at para 44.
[87] [2016] O.J. No. 791 (Ont. Sup. Crt).
[88] *Ibid.* at para 8.
[89] *Ibid.* at para 8.
[90] *Ibid.* at para 8.
[91] *Ibid.* at para 8. 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"
- "Extracurricular activities (*i.e.,* non-academic)…shall not be taken into consideration…"
- "No awards to be given to anyone who plays intercollegiate sports."

Justice Mitchell concluded that the terms of the scholarship were contrary to public policy:[92]

> 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.

Little to nothing was offered by way of explanation. After identifying *Canada Trust Co* as the binding authority, Justice Mitchell acknowledge 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-a-vis the doctrine of public policy:[93]

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

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

[92] *Ibid.* at para 14.
[93] *Ibid.* at para 14.

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 authorities from outside of the US attract many of the same criticisms as the reasoning in *Bob Jones*. Since they 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.

IV – FROM PUBLIC POLICY TO WHAT? REVISITING THE RELATIONSHIP BETWEEN ACTIVITIES AND PURPOSES IN CHARITY LAW

(A) General

Having criticized public policy as a poor basis on which to regulate discrimination by charities, it behooves me to consider whether there is a better way forward. So in Parts IV-VII I consider whether the traditional doctrines and modes of analysis employed in the common law of charity enable any useful insights. The analysis is tedious but worth undertaking to deepen our understanding of the challenges posed by discriminatory charity.

We begin by considering discrimination from the vantage of the charity law distinction between activities and purposes. The following point will be developed: While discriminatory purposes are clearly non-charitable, the status of discriminatory activities (charitable versus non-charitable) is less clear. Since activities derive their character based on the purposes

they further, it is not obvious that a discriminatory method of furthering a charitable purpose is necessarily non-charitable.

The blunt statement "discrimination is non-charitable" glosses over an important detail. Are we talking about discriminatory means (activities) or ends (purposes)? That is, are we talking about the pursuit of charitable purposes through discriminatory means or the pursuit of discriminatory purposes? Here is why the distinction matters from the vantage of the common law.

As a purpose-focussed body of law, the common law regulates the purposes of charities though not their activities, at least not directly. Purposes are the ends being pursued. Purposes address "the why question", as in why (to what end) does the institution carry on activities. Activities are the means through which an institution furthers its purposes. Activities address "the how question", as in how (through what means) does the institution further its purposes. Whereas purposes are abstract (depicting institutions at a macro level), activities are specific (depicting institutions at a granular level).

At common law, charitable institutions must be established and operated for exclusively charitable *purposes.*[94] This means the purposes of a charity must fall within (and only within) the *Pemsel* categories (the "four heads") of charitable purposes: (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion and (4) other purposes of public benefit.[95] Notably, there is no analogous requirement for the *activities* of charities. Specifically, while there is a common law requirement for exclusively charitable purposes, there is no parallel requirement for exclusively charitable activities, at least not an activities requirement separate and distinct from the requirement for exclusively charitable purposes.

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[94] See, for example, *Vancouver Society of Immigrant and Visible Minority Women* [1999] 1 S.C.R. 10 (*Vancouver Society*) at paras. 38-40 and 154-155.

[95] In recent years, the legislatures in some jurisdictions (not Canada) have codified the meaning of charity through statutory lists of charitable purposes. The statutory lists include but also expand on the *Pemsel* categories of charitable purposes. See, for example, *Charities Act 2013* (Australia), *Charities Act 2011* (England and Wales), *Charities Act 2009* (Ireland), *Charities Act (Northern Ireland) 2008* (Northern Ireland) and *Charities and Trustee Investment (Scotland) Act 2005* (Scotland).

The common law does not simply ignore the activities of charities. Far from it. But the common law, to the extent that it regulates the activities of charities, does so indirectly (and arguably somewhat imprecisely) via the requirement for exclusively charitable purposes. To be sure, the requirement for exclusively charitable purposes carries with it by necessary implication a restriction on activities. Since charities must have exclusively charitable purposes, the activities of charities must further charitable rather than non-charitable purposes. In other words, it is through the enforcement of the requirement for exclusively charitable purposes that the common law of charity indirectly regulates the activities of charities.

The primacy of purposes over activities is evident in the common law's methodology for characterizing the activities of charities as charitable or non-charitable.[96] To say that a particular activity is a charitable (or non-charitable) activity is not necessarily to form a judgment about the intrinsic character of that activity – that it is intrinsically charitable (or non-charitable) – but rather to make an observation about its relationship to charitable (or non-charitable) purposes – that it contributes to the attainment of charitable (or non-charitable) purposes. That is, the common law uses an instrumental methodology for characterizing activities. This means activities are classified not with reference to their intrinsic character but rather with reference to the purposes they further. So the feature qualifying an activity as a charitable activity at common law is not that on its merits it is an inherently good or praiseworthy activity *per se* but rather that it is carried on to achieve a good or praiseworthy purpose – a charitable purpose. Likewise, the feature qualifying an activity as a non-charitable activity is not that it is a blameworthy activity *per se* but rather that it is carried on to achieve a non-charitable purpose.[97]

The principle is illustrated by one of the leading decisions dealing with the activities – purposes distinction – *Incorporated Council of Law Reporting v. Attorney General*.[98] In this

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[96] See, for example, *Vancouver Society supra* note 94 at paragraphs 53, 54, 56, 58, 152, and 154. See also Maurice C. Cullity, "The Myth of Charitable Activities" (1990) 10:1 *Estates and Trusts Journal* 7-29.
[97] In *Toronto Volgograd Committee v Minister of National Revenue* [1988] 1 C.T.C. 365, Stone J. reasoned (see paragraph 8) that the measures in federal income tax law in Canada dealing with charities would be "difficult if not impossible to administer" if the expenditures of charities (and by implication the activities of charities more generally) had to be characterized as charitable and non-charitable without regard for the purposes for which they were incurred (or carried out).
[98] [1971] 3 All ER 1029.

judgment, Lord Russell makes the point (citing the activity of publishing the Bible) that the very same activity can be charitable in one context but non-charitable in another depending upon the purpose for which it is carried on to achieve.[99] Lord Russell's example is meaningful because it exposes the derivative status of activities in the common law of charity. While charitable purposes are affirmed by the law of charity in their own right, the charitableness of activities derives from and is entirely contingent upon whether they are carried on in furtherance of charitable purposes.

So while the common law of charity makes unambiguous moral judgments about the universal worth of charitable purposes, its claims about charitable activities are comparatively modest. While the statement "purpose X is a charitable purpose" says something about the worth of purpose X, the statement "activity Y is a charitable activity" merely denotes a cause and effect – that activity Y will cause (or contribute to) the attainment of a charitable purpose.

There is more that could be said about the activities – purposes distinction but this will suffice to enable some observations germane to the premonition that discrimination is non-charitable.

(B) Non-Charitableness of Discriminatory Purposes

If what is meant by "discrimination is non-charitable" is that an institution with discriminatory *purposes* is non-charitable, then the statement is undoubtedly correct. As explained above, the non-charitableness of discriminatory purposes is the best explanation (in my view) for the holding in *Canada Trust Co.*

[99] Ibid at 1034.

(C) What about Discriminatory Activities?

Very often (most often, I suspect) fact patterns involving discrimination will not entail overtly discriminatory purposes (those are the easy cases) so much as discriminatory methods of pursuing charitable purposes (the more difficult cases). In other words, the more commonly encountered problem is likely to be discriminatory *activities* as opposed to discriminatory *purposes*. By this I mean discriminatory exclusions ("caucasions only") from charitable goods and services. Does discrimination remain non-charitable – a non-charitable *activity* – at common law when we are not talking about a purpose but rather a discriminatory activity directed toward a charitable end? Consistent with the methodology of this paper, we will address this question using the logic and conventions of the common law of charity. Bringing this perspective to the topic reveals that the non-charitableness of discriminatory *activities* lacks the obviousness of the non-charitableness of discriminatory *purposes*.

(i) Is a discriminatory activity *necessarily* indicative of a discriminatory purpose?

Activities and purposes do not exist in isolation of each other. As we have seen, the character of an activity (charitable or non-charitable) is determined by the character of the purpose for which it is carried on. We now need to consider whether the reasoning also works in the reverse – whether the character of an institution's purposes (charitable or non-charitable) is determined by its activities.

Consider the discriminatory activities of the universities under review in *Bob Jones*. What, if anything, do those activities reveal about the ultimate purposes that were being pursued? On one view, the discriminatory admissions practices do not ultimately change the fact that the purpose engaged was the advancement of education. From this perspective, a discriminatory activity in furtherance of education does not a discriminatory purpose make.[100] Another view might be that the discriminatory admissions practices revealed a more nuanced

[100] See M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at pp. 206-208.

purpose, *e.g.,* to advance and sustain *racially segregated education*. From this perspective, the educational purposes are not so easily sanitized of the discriminatory admissions practices.

(ii) Activities Do Not Traditionally Determine Charitableness at Common Law

The orthodox position of charity law is that activities are generally irrelevant to determining whether the purposes of an institution are charitable at law, at least where those purposes are clearly recorded in a written constitution.[101] Using the example of education, Vaisey J in *Re Shaw's Will Trusts* observed that "once it is found that there is a trust of an educational character [education being an unquestionably charitable purpose]…the matter speaks for itself."[102] The formal irrelevance of activities was recently affirmed in *Independent Schools Council*.[103]

In rare circumstance, courts will consider activities at the stage of identifying and characterizing an institution's purposes. Where, for example, there is no written constitution, the purposes of the institution have to be inferred from its activities.[104] Alternatively, there might be a written constitution with clearly identified purposes but the purposes are novel, raising questions as to whether they are charitable at law. Here activities might be considered to enrich understanding of the novel purposes.[105] But these are the exceptions rather than the rule.

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[101] See. J. Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013) at 81, citing *Hunter v. Attorney General* [1899] AC 309 (HL), *Bowman v Secular Society* [1917] AC 4016 (HL), *Incorporated Council of Law Reporting for England and Wales v. Attorney-General* [1972] Ch 73 (CA) and *Independent Schools Council* [2011] UKUT 421.
[102] [1952] Ch 163 (Ch) 169. Quoted in J. Garton *ibid* at 3.42.
[103] [2011] UKUT 421 (TCC) at 188.
[104] See J. Garton *supra* note 101 at 3.39.
[105] See J. Garton *supra* note 101 at 3.40.

(iii) Isolated / Discrete Activities

If charity law had a tradition of considering activities when characterizing purposes, we would still have the problem that activities, at least when they are isolated or discrete, will not significantly flavour purposes. In the same way that a journeyman's day-to-day steps are revealing of his or her ultimate destination, the activities of a putative charity are revealing of its purposes. But individual steps do not establish very much about the destination. Even isolated missteps do not somehow alter the destination. We need a sustained number of steps, a critical mass of steps, before being able to draw conclusions about the destination, *e.g.,* that there is an altered destination or new material waypoints. The same point applies to the discriminatory activities (or any other activities) of a charity. If the activities are discrete, it will very often be difficult to sustain the argument that they taint the institution's purposes. If they are sustained, or a fundamental feature of the institution's programming, they start to shed light on the end purposes being pursued.[106]

(iv) Charitable Purposes as Abstractions

How, in any event, could activities alter our conception of an institution's purposes? Activities are specific. Purposes are abstractions from the specific. The process of abstracting from the specific (the activities) to the general (the purposes) necessarily results in some of the particulars being left out of our description of the general. It is therefore possible that a specific discriminatory activity – take the racially discriminatory admissions practices in *Bob Jones* – would not oblige the conclusion that there is a discriminatory gloss to the institution's purposes – that the purpose in *Bob Jones* was not to advance education *per se* but rather to advance *racially segregated* education.

[106] In *Re Public Trustee and Toronto Humane Society* [1987] O.J. No. 534, Anderson J. reasoned that limited political activities do not disclose political purposes but that the opposite might hold true for sustained and significant political activities.

The common law of charity does not have a tradition of insisting upon highly particularized formulations of purposes at the stage of vetting institutions for charitableness. If anything, the tendency is the exact opposite, to assess charitableness by abstracting the specific purposes of specific institutions to the level of generality reflected in the *Pemsel* categories. It is understood (whether or not expressly stated in the authorities) that, whereas the *Pemsel* categories of charitable purposes are generic, individual charities are established for highly specific instantiations of those generic purposes.[107]

This exposes a shortcoming with the oft-cited proposition that charities need to be established *for* one or more of the *Pemsel* categories of charitable purposes. This proposition is misleading in the sense that it implies charities must be established for purposes synonymous with the *Pemsel* categories. It is more literally the case that charities have to be established for one or more purposes *falling within* the *Pemsel* categories. In other words, the specific purposes of a specific institution – to advance the Christian religion in the Baptist tradition – need merely be capable of being abstracted to the level of generality reflected in the *Pemsel* categories – to advance religion.

Recognizing that the purposes of putative charities will frequently (if not inevitably) entail specific representations of the generic *Pemsel* categories, the common law has evidently adopted a strategy for reconciling the specificity of the purposes for which individual charitable institutions are established with the generality of the *Pemsel* categories. That strategy is against assessing charitableness based on the most particularized formulation possible of an institution's purposes but to instead consider whether the particular purposes under review – say, "to advance the Christian religion in its Baptist form" – can be abstracted to the generality of the *Pemsel* categories – "to advance religion".

Embedded in this strategy is the principle that it matters more *what* is ultimately trying to be achieved than *how* it is trying to be achieved. In other words:[108]

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[107] As J. Garton notes, purposes are sometimes described in written constitutions so specifically that it becomes difficult to disentangle purposes from activities, *e.g.,* to advance education by _____. See J. Garton *supra* note 101 at 3.38.

[108] M. Cullity *supra* note 96 at 10.

> It is the ends, or purposes, not the means by which they are to be achieved, which determine whether a trust or corporation is charitable at law.

The natural tendency of this strategy is against allowing discrete activities to flavour how an institution's purposes are framed at the stage of assessing the charitableness of those purposes. Even formally targeted charitable programming has attracted this strategy. For example, academic scholarships exclusive to adherents of particular religions have been upheld as charitable as being for the advancement of education.[109] There was no suggestion in these cases that the proper construction of the purposes of these trusts was to advance of education *for Catholics only* (or *for Protestants only*) or to deny benefaction to non-Catholics (or to non-Protestants). So in a case like *Bob Jones* the tendency will be to frame the purposes as being the advancement of education as opposed to something more particularized, *e.g.*, the advancement education *through segregation*.

(v) Discriminatory Activities and the Charity Law Methodology for Characterizing Activities as Charitable and Non-Charitable

A discriminatory activity does not necessarily reveal a non-charitable discriminatory purpose. However, it still has to be considered whether a *discriminatory activity* can qualify as a *charitable activity*. Doing so will help us determine whether discriminatory activities can somehow be regulated by the common law of charity on the basis that they are non-charitable activities.

To address this topic we need to revisit the feature qualifying an activity as a charitable activity. The first step is to acknowledge (again) the centrality of purposes to the common law of charity. As we have seen, charity law does not characterize activities as charitable or non-charitable in the abstract. That approach to characterizing activities has been described

[109] See *Re Ramsden Estate supra* note 69 and *University of Victoria supra* note 72.

as "highly misleading"[110] and "a conceptual impossibility".[111] Instead, the character of activities is determined with reference to the purposes they are carried on to achieve.[112] 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.[113] One commentator sums it up as follows:[114]

> As 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.

Perhaps surprisingly, courts have 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 of Immigrant and Visible Minority Women v M.N.R.*, Justice Gonthier seemed to dismiss the need for specific judicial guidance, observing as follows:[115]

> There is no magic to this process: it is simply a matter of logical reasoning combined with an appreciation of context."

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[110] M. Cullity *supra* note 96 at 7.
[111] M. Cullity *supra* note 96 at 7.
[112] See paras 52, 53, 54, 56, 58, 59, 101, 152, 153, 154 and 205 of *Vancouver Society supra* note 94.
[113] *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1972] Ch. 73 (C.A.) at 86 (per Russell L.J.)

> Suppose 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.

[114] M. Cullity *supra* note 96 at 12.
[115] *Vancouver Society supra* note 94 at para 98.

In the same decision, Justice Gonthier loosely described the nature of the requisite link, saying that charitable activities must have a "coherent relationship" to charitable purposes,[116] have "the effect of furthering the purpose",[117] be "sufficiently related to those purposes"[118] enjoy a "sufficient degree of connection" to charitable purposes,[119] be "sufficiently related" to charitable purposes,[120] be "substantially connected to and in furtherance of" charitable purposes and be "instrumental in achieving the organization's goals.".[121] 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."[122] 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.[123]

All of this exposes the remarkably enabling posture of the common law of charity. The common law requirements for charitable status tend to be rather general in nature, leaving it to charities to determine for themselves most (practically all?) of the particulars. As we saw above, even charity law's strictest requirement – the requirement for exclusively charitable purposes – affords charities considerable autonomy to personalize and particularize their unique charitable missions. The common law is even more enabling with activities. Activities are regulated by the common law indirectly (and rather loosely) through the requirement for exclusively charitable purposes. The system by design gives charities tremendous latitude to determine how to further their charitable missions. If an activity furthers a charitable purpose, it is by definition a charitable activity. It need not be the *best way* to

[116] *Vancouver Society supra* note 94 at para 52.
[117] *Vancouver Society supra* note 94 at para 53.
[118] *Vancouver Society supra* note 94 at para 53.
[119] *Vancouver Society supra* note 94 at para 54.
[120] *Vancouver Society supra* note 94 at paras 56 and 63.
[121] *Vancouver Society supra* note 94 at para 54.
[122] *Vancouver Society supra* note 94 at para 62.
[123] *Vancouver Society supra* note 94 at para 154.

further a charitable purpose. It need merely be *a way* to further a charitable purpose. As Justice Gonthier observed in *Vancouver Society*, there is "no magic" to the test.[124]

The purpose-focussed methodology of the common law shines a spotlight on what charity law does and does not condone through grants of charitable status. Charity law is all about purposes. A grant of charitable status is an affirmation and celebration of the worthiness of an institution's purposes. It is the purposes, not the activities, of charities that are tested for public benefit.[125] While charity law also makes normative claims about the worthiness of charitable activities, those claims are comparatively modest. Charitable activities are not said to be worthy in and of themselves *per se*. To the contrary, the worthiness of charitable activities is derivative in the sense that it is contingent upon (derives from) the capacity of activities to further worthy [read charitable] purposes. So, yes, charity law condones both charitable purposes and charitable activities, but its condonation of charitable activities is all but restricted to one characteristic of charitable activities, their capacity to further charitable purposes.

Standing back we now have a context for understanding what it means to say that activity X is non-charitable. Construed from the vantage of the common law, that statement signals that activity X does not further charitable purposes. Therein lies the proper basis for testing – again from the vantage of the common law – the judgment that discrimination is non-charitable. That judgment follows if discriminatory activities do not and cannot further charitable purposes. But is that *really* the case?

In most instances the objection to discriminatory activities is bound to be centred on how a charity is furthering its charitable purpose rather than whether it is furthering a charitable

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[124] *Vancouver Society supra* note 94 at para 98.

[125] See *Independent Schools Council supra* note 15 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 P. Luxton, "Making Law? Parliament v The Charity Commission" *Politeia*, 2009, at 19. Likewise, J. Garton *supra* note 101 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. M. 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. See M. Synge, *The 'New' Public Benefit Requirement. Make Sense of Charity Law?* (Portland, Hart Publishing, 2015) at 36 (emphasis in original).

purpose.[126] The universities before the court in *Bob Jones* were advancing education. But they were doing so in a way that perpetuated a longstanding social harm. It is not obvious that this severs the link between means and charitable ends. Charitable programming is often targeted at very specific populations, as in populations much narrower in scope than those who in the ordinary course would qualify as eligible recipients for the charitable goods or services being provided. We do not normally conclude that targeting charitable goods and services severs the link between activities and charitable purposes, at least not where the goods and services are targeted other than on the basis of "private selection criteria".[127] It would be difficult to sustain the proposition that discriminatorily targeted programming is incapable of advancing charitable purposes (understood as the abstract ends encapsulated in the *Pemsel* formulation). Again, the problem with discriminatory activities is less that they are incapable of furthering charitable purposes but rather that they do so in a divisive and objectionable way.

(D) Summation

In sum, activities are characterized by the common law of charity with reference to the purposes they serve. Charitable activities further charitable purposes. Non-charitable activities further non-charitable purposes. The common law condones and celebrates charitable purposes. To the extent that activities are condoned, it is because – and only because – they further charitable purposes. The challenged posed by discriminatory activities is that a given activity can simultaneously discriminate and yet further one or more of the *Pemsel* categories. This confronts us with the paradox that common law logic appears to permit a

[126] The discriminatorily targeted scholarships in *Canada Trust Co* are an exception. But the difference there is that the settlor specifically said that the purpose of the fund was to perpetuate the privilege of British, white, Christian, Protestant men with a view to ensuring the ``progress of the World.` This was not the pursuit of charitable means through discriminatory activities but rather the pursuit of discriminatory purposes through discriminatory activities.

[127] See Part VI(C) below.

discriminatory activity to qualify as a charitable activity, at least in the limited sense of an activity furthering a charitable purpose.

V PUBLIC BENEFIT – THE BENEFIT COMPONENT OF PUBLIC BENEFIT

(A) General

The analysis so far has focussed on the common law distinction between activities and purposes. The status of discrimination (charitable or non-charitable) is inconclusive when viewed from the vantage of this distinction. While institutions with discriminatory purposes are non-charitable, not all episodes of discrimination (discriminatory activities) disclose discriminatory purposes. As we have seen, charitableness is assessed by abstracting specific and nuanced institutional purposes – and literally all charities are established for specific and nuanced purposes – to the level of generality reflected in the *Pemsel* categories of charitable purposes. Since this methodology assesses charitableness by filtering out nuance, it can mean that discriminatory nuance on a charitable purpose is not factored into the characterization of an institution's purposes. Likewise, given the common law's method of characterizing activities as charitable or non-charitable with reference to the purposes they further, it is not obvious that discriminatory methods of achieving charitable purposes are necessarily incapable of qualifying as charitable. A discriminatory way of furthering a charitable purpose presumably meets the minimal standard of furthering a charitable purpose.

There remains, however, the problem of reconciling discrimination with the public benefit standard of charity law, which is what we turn to now. No purpose can qualify as charitable without conforming to the public benefit standard. Public benefit seems to be a fruitful basis on which to conclude that discrimination is non-charitable. Indeed, the phrase "public benefit" conjures ideals that seem to all but ensure the non-charitableness of discrimination. It is one thing to tolerate discrimination in purely private realms but quite another to conclude

that it brings, of all things, public benefit. Charitable status is not a neutral status but rather a celebrated status. Charity law broadcasts the conclusion that certain pursuits – those qualifying as charitable – are worthy pursuits, *i.e.,* to signal that these pursuits are aligned with not just a plausible but indeed a laudable conception of "the good". As Matthew Harding notes, "a central feature of charity law is that the state uses it to promote charitable purposes."[128] It seems counterintuitive that this celebrated status could be conferred on discriminatory institutions under the guise of public benefit. The words themselves – "public benefit" – enjoy an aspirational quality, conjuring a resort to such vague abstractions as community ethics, community conscience and doing good for others.

The seeming incompatibility of discrimination with public benefit has been noted in the scholarship. So while Lorraine Weinrib and Earnest Weinrib have concluded that constitutional equality values have no role to play in the regulation of personal trusts generally, they have drawn just the opposite conclusion in relation to charitable trusts.[129] Specifically, they have concluded that "[b]ecause public benefit constitutes the entire range of application for testamentary freedom in charitable trusts, that freedom has no application inconsistent with Charter [meaning the Canadian *Charter of Rights and Freedoms*] values."[130] Likewise, Debra Morris observes that the charity law requirement "to provide public benefit clearly links very neatly with the duty to avoid discrimination"[131] and that "it could be argued that public benefit cannot be achieved through discrimination."[132]

All of this, of course, turns on what specifically public benefit requires. While the public benefit standard is admittedly open-textured, amenable to competing interpretations, it is not so flexible as to be measured by nothing more than the length of Chancellor's foot. It is not an empty vessel constrained, if at all, by the limits of what we can read into such

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[128] M. Harding *supra* note 32 at 44.
[129] L. Weinrib and E. Weinrib, "Constitutional Values in Private Law in Canada" in D. Friedman & D. Barak-Erez, eds., *Human Rights in Private Law* (Portland: Hart Publishing, 2001) 43 at 68: "[t]o invoke Charter values to upset what the testator has done strikes at the core of testamentary freedom in circumstances so personal that Charter values are peripheral."
[130] *Ibid.* at 68.
[131] D. Morris, "Charities and the Modern Equality Framework – Heading for a Collision?" (2012) 65 Current Legal Problems 295 at 299.
[132] *Ibid.* at 300.

abstract ideals as community conscience. To the contrary, it has discernable meaning and content. It behooves us to rigorously consider precisely how, if at all, discrimination is discordant with that meaning and content.

There are two components to the public benefit requirement – the public component and the benefit component.[133] Each of these will be considered in turn, beginning here with the benefit component. Perhaps surprisingly, it does not seem that the public benefit requirement, as traditionally applied, is immediately concerned with giving effect to a bright line rule against discrimination in charity law.

(B) Benefit Component of Public Benefit

The benefit component of public benefit entails a value judgment through which courts consider whether the trust under review somehow makes the world a better place. Through the benefit component courts do not merely tolerate but rather affirm charitable trusts as something worth affirming. Discrimination seems an unlikely candidate for this kind of endorsement. There are nonetheless two principles that need to be squarely confronted before reflexively concluding that discrimination can never pass the benefit test. The first principle is that the benefit component of public benefit is a requirement for net benefit rather than absolute benefit.[134] The second principle is that it is the purposes (not the activities) of charities that are subject to the benefit component of public benefit.[135]

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[133] J. Garton takes issue with whether the questions are so easily separable. See J. Garton *supra* note 101 at pp. 33-. It is nonetheless orthodox to dissect public benefit into these two components. See, for example, H. Picarda, *The Law and Practice Relating to Charities* 4th ed (West Sussex, Bloomsbury Professional, 2010 at p. 29 and J Warburton and D. Morris, *Tudor on Charities* (8th ed, Sweet & Maxwell 1995) at 5.

[134] In *National Anti-Vivisection Society v. IRC* [1947] 2 All ER 217, 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.

[135] See *Independent Schools Council supra* note 15 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 P. Luxton, "Making Law? Parliament v The Charity Commission" *Politeia*, 2009, at 19. Likewise, J. Garton *supra* note 101 at 3.36 observes "[t]he orthodox position is that it is the purposes of an organization, and not the activities undertaken in pursuit

The first principle means that the harm of discrimination will cause a trust to fail the benefit requirement only where it overwhelms the benefit otherwise conferred by the trust. Since it is a requirement for net benefit, the benefit component of public benefit requires a contextual assessment in which detriment (*e.g.,* discrimination) is considered in light of whatever offsetting benefits are present. This frustrates a universal rule against discrimination. Discrimination may or may not preclude net benefit depending upon whether offsetting benefits are present in the circumstances under review. Guiding criteria are necessary to assist courts balance the detriment of discrimination against benefits in individual circumstances.[136]

The second principle, since it poses a more difficult problem for regulating discrimination via the benefit component of public benefit, will be our focus here. The distinction in charity law between activities and purposes was already discussed above. The point was made that discrimination might not manifest in a charity's purposes but rather in its activities. In other words, a charity might employ discriminatory means to achieve charitable ends. Indeed, it may well be the case that discrimination is more commonly found in the activities than in the purposes of charities. This is relevant to the benefit component of public benefit because orthodox charity law vets ends (purposes) for benefit but not means (activities). Since it is only the purposes of a charity that are tested for benefit, activities do not need to be independently shown to bring benefit. They need merely be shown to further charitable purposes. Stated otherwise, the benefit of an activity is inferred solely from its furtherance of a beneficial charitable purpose.

Vetting purposes but not activities for benefit brings a significant advantage: it is tremendously enabling inasmuch as it leaves it to charities to determine for themselves how best to

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thereof, that are relevant to its charitable status. M. 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. See M. Synge, *The 'New' Public Benefit Requirement. Make Sense of Charity Law?* (Portland, Hart Publishing, 2015) at 36 (emphasis in original).

[136] This is discussed further in A. Parachin, "Public Benefit, Discrimination and the Definition of Charity", in K. Barker and D. Jensen, eds., *Private Law: Key Encounters with Public Law* (New York, Cambridge University Press, 2013) 171.

achieve their charitable missions.[137] Any activity furthering a charitable end is by definition a charitable activity and thus permissible. But this methodology also suffers from a potentially serious flaw in that it rests on a simplistic assumption. Orthodox charity law assumes that activities either further charitable purposes (and are thus beneficial in the charity law sense) or do not further charitable purposes (and are thus not beneficial, at least not in the charity law sense). If we accept this assumption, it would of course be redundant to vet activities for benefit. If the benefit (or lack thereof) of an activity derives solely from the benefit (or lack thereof) inhering in the purpose that the activity furthers, the only question we need to ask of an activity is whether it furthers a charitable purpose.

But this reductionist thinking overlooks the possibility that an activity can simultaneously further a charitable end (and be beneficial in that sense) but nonetheless be harmful in some other respect. This is in a nutshell the problem posed by discriminatory activities carried on in furtherance of charitable purposes. They are beneficial in the sense that they further charitable purposes but detrimental in the sense that they cause social harm along the way. By treating the end being furthered through an activity as determinative of the activity's benefit, charity law has frustrated its ability to intervene where charities further charitable purposes in harmful ways (including, for example, discriminatory ways).

(C) Is Public Policy a Disguised Way of Vetting Activities for Benefit?

From time to time it has proven desirable to disqualify an activity as a charitable activity notwithstanding that the activity furthers a charitable purpose. For the reasons noted (*i.e.*, charity law vets purposes but not activities for public benefit), this cannot be done on the express basis that the impugned activity lacks benefit. This is where the doctrine of public policy comes in. The doctrine of public policy has arguably evolved as a way for courts to selectively subject activities to a disguised form of benefit assessment.[138] Specifically, public

[137] It has been suggested that a different approach would stifle initiative and innovation. See *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Cabinet Office, September 2002) at 4.11.

[138] Note, for example, H. Picarda's reference to activities in his formulation of the doctrine of public policy:

policy is arguably a way for courts to intervene where questionable activities would otherwise go unregulated because they (the questionable activities) further charitable purposes and would thus in the ordinary course qualify as charitable activities cloaked with the public benefit of the charitable purposes they further. The resort to public policy is only necessary here because the benefit component of public benefit does not regulate activities but rather purposes. If both activities and purposes were subject to the benefit requirement, there would be no need to resort to public policy. In that event, courts could transparently reason that the impugned activities lack benefit.

On the one hand, we could consider this to be a comfortable status quo. The periodic resort to public policy leaves us with the benefit of charity law's enabling posture vis-à-vis "activities" while providing a safety valve to selectively intervene in those rare instances in which charity law's approach to activities is too enabling. On the other hand, public policy (as we have seen above) is an unsatisfactory basis for decision. As applied in such cases as *Bob Jones* and *Canada Trust Co*, public policy seems to entail (among other problems) charities being subjected to sources of law – *e.g.,* constitutional law – formally inapplicable to them. Is there a better way for charity law to respond?

An alternative solution would be for courts to dispense with the artifice of public policy and openly vet both activities and purposes for benefit. This would provide an unambiguous way for charity law to respond where charities use harmful means of achieving charitable ends. But doing so would contravene the principle that it is the purposes not the activities of charities that are subject to the benefit requirement. We need to respect that principle if we are going to remain faithful to our goal of finding a solution to the problem of discriminatory charity using the values and doctrines indigenous to charity law.

> A gift for an object which is charitable but illegal, or for an object which is chartab*le by means which are illegal or against public policy, is impossible*…If from the context of a gift the general charitable intention of the donor is plain, *but the prescribed manner of carrying out that intention is illegal, or against public policy*, the court will execute the gift cy-près.

H. Picarda, *The Law and Practice Relating to Charities* 4th ed (West Sussex, Bloomsbury Professional, 2010) at 450.

Once we accept as a given the principle that the benefit component of public benefit applies to the purposes not the activities of charities, it becomes apparent that "benefit" is only helpful for regulating discriminatory purposes but not discriminatory activities. The problem with this, as we have seen, is that discrimination will not always afflict an institution's purposes. We need to look elsewhere within charity law to see if there is a more suitable basis on which to regulate discrimination by charities.

VI – PUBLIC COMPONENT OF PUBLIC BENEFIT

(A) General

The public component of the public benefit test speaks to "the who" question, as in who is eligible to receive goods and services from a charitable trust.[139] More specifically, the public component of the public benefit requirement is concerned with the qualifications used to determine who is within the class of beneficiaries of a charitable trust. The rules and principles governing this aspect of charity law are "elusive".[140] As I cannot do justice here to every line of debate, the criticism that I oversimplify some aspect of the doctrine is unavoidable. That said, there are a number of reasons why the public component of the public benefit requirement – at least as traditionally applied and understood – is an unlikely doctrinal basis on which to ground a rule against discrimination in charity law.

(B) *Public* Benefit as a Sliding Scale Requirement

The public component of the public benefit standard does not impose a single standard to

[139] Different authors use different terminology to describe this feature of public benefit. J. Garton calls this "cross-sectional public benefit". See J. Garton *supra* note 101 at Chapter 5. The Upper Tribunal in *Independent Schools Council v Charity Commission for England and Wales supra* note 15 at para 45 called it "public benefit in the second sense".
[140] *IRC v Baddeley* [1955] AC 572 (HL) at 592 (per Viscount Simonds).

which all charitable trusts must conform. To the contrary, its specific requirements – leaving aside for the moment what those requirements entail – vary across the *Pemsel* categories of charitable purposes.[141] As a sliding scale requirement imposing non-uniform standards, the public component of the public benefit standard is an unlikely candidate to ground a uniform rule against discrimination across all categories of charitable purposes. If we are looking for a doctrinal tool on which to ground a uniform rule against discrimination by charities, the variability of the requirements imposed by the public component of public benefit suggest we should look elsewhere.

This is not to suggest that the public component of public benefit is entirely incapable of grounding an across-the-board standard of any sort. For example, the public component of public benefit carries with it an across-the-board prohibition against charities expressly excluding the poor from their goods and services.[142] But even this seemingly straightforward uniform standard is in practice a variable standard that adapts to context. This is evidenced by the recent controversy over fee-charging independent schools.[143] The contentious issue was how to reconcile the principle that charities cannot exclude the poor with the reality that the fees charged by charities (in this case independent schools) for their goods and services can have the effect of doing just that. The controversy culminated in a 116 page judgment that is notable for avoiding bright-line rules dictating precisely when the poor are being improperly excluded and/or precisely what charities must do to include the poor.[144] Consistent with the orientation of the public component of public benefit as a sliding standard, a variable facts and circumstances standard was instead preferred. So even the non-exclusion of the poor is an aspirational standard meaning different things in different contexts. If the public component of public benefit has not produced uniform guidelines in

[141] See, for example, J. Garton *supra* note 101 at pp. 114-5 and H. Picarda *supra* note 138 at p. 35-.
[142] For a discussion, see P. Luxton, "Making Law? Parliament v The Charity Commission" *Politeia*, 2009 and M. Synge, "Independent Schools Council v Charity Commission for England and Wales [2011] UKUT 421 (TCC)" Modern Law Review (2012) 75(4) 624-639.
[143] *Independent Schools Council supra* note 15. See also Luxton, *ibid*, Synge *ibid* and M. Synge, *The 'New' Public Benefit Requirement. Make Sense of Charity Law?* (Portland, Hart Publishing, 2015).
[144] *Ibid*.

connection with the seemingly benign principle that the poor cannot be excluded from charitable programming, it is doubtful that it could fair any better in connection with an across-the-board anti-discrimination standard.

(C) *Public* Benefit and Personal Nexus

The public component of public benefit functions primarily as a "personal nexus test". Subject to an exception for relief of poverty trusts (note again the variability of the test), a would-be charitable trust will fail the public component and thus be disqualified as a charity if the qualification determining who is within the trust's class of potential beneficiaries is a personal (or private) nexus – *e.g.,* relationship (friendship, familial relationship, employment, etc) with a specific person(s). This is not to say that friends, family and employees of, say, the settlor of a charitable trust cannot be within the class of persons receiving goods and services from the trust. But that cannot be the basis on which they qualify for membership in the class. Note that the personal nexus test is less concerned with our problem – persons being improperly *excluded* (or disqualified) from charitable trusts for discriminatory reasons – than it is with the exact opposite problem – persons being improperly *included*.[145]

As traditionally described, the public component of public benefit is said to mean that a charitable trust must be for the "benefit of the community or of an appreciably important class of the community".[146] This way of phrasing the requirement seems to invite avoidable confusing. It inspires unhelpful discussion as to what precisely qualifies a class of the community as "appreciably important". The implication is that communities not satisfying this standard are somehow not appreciable and/or not important (or important enough).[147] Predictably, this has resulted in commentary to the effect that a numerically small class is not

[145] More specifically, the personal nexus test is less concerned with who benefits than with how it is determined who benefits. The personal nexus test, as we shall see, people being included in the class of beneficiaries *for the wrong reasons*.
[146] *Verge v Somerville* [1924] All ER Rep 121 at 123 (per Lord Wrenbury).
[147] Or not identifiable. The trusts in *Keren Kayemeth Le Jisroel Ltd v IRC* [1932] AC 650 HL and *Williams' Trustees v IRC* [1947] AC 447 failed to qualify as charitable because, *inter alia*, it was not clear what community, if any, the trusts would benefit.

appreciably important, as if the exercise reduces to a head count.[148] Rather than get mired in these debates, it might be more helpful to briefly return to first principles.

The legal meaning of charity is ultimately concerned with but two questions: (1) What kinds of goods and services must charities provide? (2) Who is eligible to receive those goods and services and on what basis(es)? In other words, "who benefits" and "how they benefit". The first question is addressed by the *Pemsel* categories of charitable purposes. Since charities must have exclusively charitable purposes, they must confine their goods and services to those that further charitable purposes. The second question is addressed by the public component of the public benefit requirement. The public component of the public benefit requirement regulates the bases on which eligibility for charitable goods and services may be determined.

In *IRC v Baddeley* Viscount Simonds summarized two circumstances that help frame discussion of the public component of public benefit. He noted a distinction:[149]

> *between a form of relief extended to the whole community, yet, by its very nature, advantageous only to the few, and a form of relief accorded to a selected few out of a larger number equally willing and able to take advantage of it.*

The public test is clearly satisfied in the first instance because the goods and services of the trust are formally open to everyone falling within the trust's charitable purposes. It matters not that the relevance and appeal of the goods and services supplied by charities will unavoidably vary across different sections of the community. A trust for the relief of poverty is by its very nature not directly advantageous to the wealthy. Likewise, a trust for the advancement of religion is by its very nature not directly advantageous to atheists. It inheres in the nature of the goods and services typically supplied by charities that, even if those goods and services are available to everyone, they will for all practical purposes only be

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[148] See, for example, *Oppenheim v. Tobacco Securities Trust Co Ltd* [1951] AC 297 at 306. For a criticism of this position, see *Ontario Law Reform Commission Report on the Law of Charities* (Toronto: Ontario Law Reform Commission, 1997) ("OLRC") at pp. 179-182 and M. Synge, *The 'New' Public Benefit Requirement. Make Sense of Charity Law?* (Portland, Hart Publishing, 2015) at 47. Peter Luxton notes – citing *Cross v. Lloyd-Greame* (1909) 102 LT 163 – that a disaster relief fund for only six victims was recognized as charitable. See P. Luxton, *The Law of Charities* (Oxford, Oxford University Press, 2001) at p. 172.
[149] [1955] AC 572 at 592.

directly advantageous to those in need of or pursuit of them. Charity as we know it would be impossible if this frustrated a trust's ability to meet the public component of public benefit.

The analysis grows more complex where the goods and services of a charitable trust are not extended to the whole community. This happens where the terms of a charitable trust formally spell out eligibility criteria that must be met in order for any given person to come within the class of persons eligible for the trust's goods and services. As we have seen, a scholarship trust might restrict the class of eligible recipients to adherents of a specified religion. In these situations, a person's need for or pursuit of the kinds of goods and services being supplied by the trust is not what determines, or at least not all that determines, who is within the class of potential persons to directly benefit. It becomes necessary here to consider whether the eligibility criteria formally drafted into the trust runs contrary to the public component of the public benefit test.

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. Religious affiliation,[150] parental occupation[151] and nationality[152] 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. A similar point may be made of a home for old Christian Scientists,[153] a home of rest exclusive to seamen,[154] a trust exclusive to poor lawyers and

[150] *Income Tax Special Purpose Commissioners v. Pemsel* [1891] A.C. 531, *Re Ramsden Estate* [1996] P.E.I.J. No. 96 and *University of Victoria v. British Columbia (A.G.)* [2000] B.C.J. No. 520.
[151] *Canada Trust Co. supra* note 9, *German v. Chapman* (1877) 7 Ch D 271 (restricted to daughters of missionaries) and *Hall v Derby Sanitary Authority* (1885) 16 QBD 163 (restricted to children of railway workers).
[152] *A-G for (New South Wales) v. Perpetual Trustee Co Ltd* (1940) 63 CLR 209 (restricted to Australians) and *Re Koettgen's Will Trusts, Westerminster Bank Ltd v. Family Welfare Association Trustees Ltd* [1954] Ch 252 (restricted to British subjects).
[153] *City of Hawthorn v Victoria Welfare Assoc* [1970] V.R. 205 and *Re Hilditch* (1985) 39 S.A.S.R. 469.
[154] *Finch v. Poplar Corp.* (1967) 66 L.G.R. 324.

their families,[155] a fund to promote marriage among persons of a specified religion,[156] a fund to benefit wounded foreign soldiers of a particular nationality[157] and a fund restricting access to an oyster fishery to freeholders in a particular locality.[158] 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 charty law incentivizes charitable trusts is to respect the freedom of settlors to choose their target population.

A bright line line is drawn, however, at the use of private qualifications to determine who is eligible for goods and services from the trust (subject, as we shall see, to an exception for trusts established for the relief of poverty). In practice, this means that 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.[159] 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). This is sometimes described as the

[155] *Re Denison* (1974) 42 D.L.R. (3d) 652.
[156] *Re Cohen* (1919) 36 T.L.R. 16.
[157] *Re Robinson* [1931] 2 Ch. 122.
[158] *Goodman v. Saltash Corp* (1882) 7 App. Cas. 633.
[159] See paras 8 and 53 of Lord MacKay, *Halsbury's Laws of England* 4th ed. 2001 Reissue (London: Butterworths, 2001). For example, in *Re Compton* [1945] 1 Ch 123 Lord Greene MR observed at 137 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 *Re Scarisbrick* [1951] Ch 622 (CA) at 651 per Jenkins LJ. But see *Re Segelman* [1996] Ch 171 for a more accommodating stance (and p. 175 of P. Luxton *supra* note 148 for criticisms of *Re Segelman*).

"personal nexus test".[160] It would seem from this that the word "public" in the phrase public benefit is understood negatively as meaning "not private".[161]

The Ontario Law Reform Commission captured this idea by casting the public component as a kind of stranger requirement requiring "emotional and obligational distance" between settlors of charitable trusts and the end beneficiaries of charitable programming:[162]

> *[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.*

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".[163]

Oppenheim v. *Tobacco Securities Trust Co*. is one of the leading decisions.[164] At issue was the charitableness of a scholarship exclusive to the children of employees and former employees of specified companies. The class of persons who could benefit was numerically significant (over 100,000). Nonetheless, the fund was held not to be charitable because the class was defined using private selection criteria (employment and familial relationship).[165]

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[160] See, for example, P. Luxton *supra* note 148 at chapter 5.
[161] If it is unclear who benefits from a putative charitable trust, then charitable status will be withheld. For example, the trusts in *Keren Kayemeth Le Jisroel Ltd v IRC* [1932] AC 650 HL and *Williams' Trustees v IRC* [1947] AC 447 failed to qualify as charitable because, *inter alia*, it was not clear what community, if any, the trusts would benefit.
[162] OLRC *supra* note 148 at 150.
[163] *Verge v Somerville* [1924] All ER Rep 121 at 123.
[164] [1951] A.C. 297 (H.L.). See also *Re Compton* [1945] 1 Ch 123 (CA) and *Inland Revenue Commissioners v. Educational Grants Association Ltd.* [1967] 1 Ch 993.
[165] The personal nexus test was applied to the fourth head in *Re Hobourn Aero Components Ltd's Air Raid Distress Fund* [1946] Ch 194 (CA). See pp. 179-180 of P. Luxton *supra* note 148. Luxton moots at pp. 178-9 the possibility of the personal nexus test not applying strictly to the advancement of religion.

There is, though, an exception to the principle that trusts using private criteria to restrict or define the class of beneficiaries fail the public requirement. It is well established that private criteria may be used to delimit the class of beneficiaries for trusts established for the relief of poverty.[166] 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 familial,[167] employment[168] or other private relationships.[169] Nor has the lenient treatment been exclusive to poverty trusts. An orphanage restricted to children of deceased railway employees and fund for the benefit of widows and children of seamen in Liverpool have been held to be charitable.[170] Similarly, scholarship funds with a direction to prefer descendants of the settlor[171] or employees (or family members of employees) of a particular employer[172] have been upheld as charitable. So too have funds designed to benefit the residents of a particular locality *and their descendants*[173] and trusts for

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[166] The unique treatment of poverty relief trusts has attracted criticism. See, for example, *IRC v Educational Grants Assoc Ltd* [1967] Ch 993 at 1011 (per Harman LJ) and *Re Scarisbrick* [1951] Ch 622 at 639 (per Evershed MR). The accommodation of private class qualifications for poverty relief trusts has made it difficult to distinguish charitable trusts for the purpose of relieving poverty from personal trusts for the benefit of poor beneficiaries. See P. Luxton *supra* note 148 at 174-5.

[167] See, for example, *Re Segalman* [1996] Ch 171, *Re Scarisbrick* [1951] Ch. 622 and *Re Cohn* [1952] 3 D.L.R. 833 (NSSC).

[168] See, for example, *Dingle v. Turner* [1972] A.C. 601 (HL), *Re Gosling* (1900) 48 WR 300, *Gibson v. South American Stores Ltd* [1950] Ch 177 and *Jones T. Eaton Co.*¸ [1973 S.C.R. 635 (SCC).

[169] 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), association (see *Re Lacy* [1899] 2 Ch 149) or society (see *Pease v. Pattinson* (1886) 32 Ch D 154). For a discussion of these cases, see H. Picarda, *The Law and Practice Relating to Charities* 3rd ed. (London, Butterworths, 1999) at pp. 40-46.

[170] *Hall v Derby Borough Urban Sanitary Authority* (1885) 16 Q.B.D. 163 and *Powell v Attorney General* (1817) 3 Mer 48. Charity law apparently distinguishes common employment from a common employer. See, though, *Oppenheim v. Tobacco Securities Trusts Co Ltd* [1951] AC 297 at 307.

[171] *Caffoor v Income Tax Commissioner* [1961] A.C. 584, *Permanent Trustee Co (NSW)* v. *Presbyterian Church (NSW) Property Trust* (1946) 64 WN (NSW) and *Herbert v Cyr and Lynch* [1944] 2 DLR 374.

[172] *Re Koettgen's Will Trusts* [1954] Ch 252, *Public Trustee v. Young* (1980) 24 SASR 407.

[173] *Re Tree* [1948] Ch 325. Evershed J. denied that this decision represents an exception to the anti-private objective of the public requirement. He reasoned that, even though the fund employed private criteria in the form of a descendancy test, "the essential element remains impersonal, namely, the connexion with some locality" (p. 332). The implication is that a trust remains public even where private criteria (*e.g.,* ancestry) is grafted onto a class otherwise defined using public criteria (*e.g.,* residence in a particular locality, which is "public" on the authority of *Goodman v Mayor of Saltash* (1882) 7 App Cas 633). This reasoning does not obviously follow. It is not the broadest formulation of the trust`s class of beneficiaries that qualifies it as public but rather the narrowest targeting of its benefits that threatens to vitiate its publicness. That is, private selection criteria can render a trust private even if the trust is otherwise public. A scholarship for high academic achievers meets the public test but this does not mean the same can be said of a scholarship for high academic achievers *and their descendants*. The use of public criteria to initially identify the class of beneficiaries does not conclusively qualify the trust as public because the additional use of private criteria can

the resettlement of soldiers.[174] So the public requirement does not mean that private selection is categorically inconsistent with charitable status.

On balance, what has emerged from the jurisprudence is an approach that generally tests for publicness by ruling out privateness.[175] 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 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).

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

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undermine its public character. Similar concerns over the reasoning of *Re Tree* are evident in *Davies v. Perpetual Trustee Co. (Ltd.)* [1959] A.C. 439 at 456-57.

[174] *Verge v Somerville* [1924] AC 496. This arguably represents an exception to the public criterion inasmuch as the class of beneficiaries – soldiers – is defined on the basis of common employment, something that would normally privatize the trust and disqualify it as charitable. Alert to this issue, Lord Simonds asked rhetorically in *Oppenheim v. Tobacco Securities Trusts Co Ltd* [1951] AC 297 at 307 "Is there a difference between soldiers and soldiers of the King?" However, rather than conclude that a trust for soldiers is private due to the common employer, he observed at p. 307 that he would "consider on its merits" the charitableness of any such fund. Perhaps the more lenient treatment is because, though service as a soldier represents common employment, the connecting factor is nevertheless public due to both the nature of the employment, *i.e.,* public service, and the nature of the employer, *i.e.,* government.

[175] Note how Lord Simonds equates public with not private in the following quote from *Williams' Trustees v I.R.C.* [1947] AC 447 at 457:

> [T]he 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."

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

(D) *Public* Benefit and Rationally Related Class Qualifications

The preceding may be objected to on the basis that it frames the public component of the public benefit test as something solely concerned with prohibiting private class qualifications. This ignores, so the anticipated objection would go, the suggestion in certain authorities that the public test plays a further role, specifically that it vets the class qualifications for charitable trusts to ensure that they relate to a charitable trust's charitable purposes.[176] This objection matters for present purposes because discriminatory class qualifications will very often fail this standard. It seems doubtful, for example, that a "caucasians only" stipulation for a scholarship could be defended on the basis that it directly relates to a credible educational objective.

But what is the better view? Do class qualifications *have* to relate to a charitable trust's purposes?

We can think of class qualifications as falling into three camps: (1) Normative class qualifications directly relevant to a charitable trust's charitable purposes, *e.g.,* a requirement that the direct beneficiaries of a relief of poverty trust be "poor", (2) Self-defeating class qualifications running contrary to – in contradiction of – a charitable trust's charitable purposes, *e.g.,* a requirement that the direct beneficiaries of a relief of poverty trust *not* be "poor" and (3) Neutral class qualifications neither directly relevant to, nor in direct contradiction of, a

[176] H. Picarda *supra* note 140 at 33. M. Synge contends that a trust for a class lacking any rational link with its charitable purpose should be struck on the basis of public policy rather than public benefit. See M. Synge *The "New" Public Benefit Requirement* at p. 43.

charitable trust's charitable purposes, *e.g.,* a scholarship exclusive to adherents of a particular religion. Category 3 is likely to be the single largest category.

It is inconceivable that the first category, normative class qualifications directly relevant to the charitable purposes for which a trust is established, could vitiate charitable status. For example, a poverty relief trust can (indeed must) target its goods and services at the poor. Likewise, an educational trust can screen potential beneficiaries for academic aptitude without thereby jeopardizing its charitable status. We can distill from this the principle that it is *sufficient* if class qualifications directly relate to the charitable purposes engaged by a trust. Where this standard is met, class qualifications will not result in a charitable trust failing the public component of public benefit.

The more difficult issue is whether we can take the next step and conclude that it is indeed *necessary* (not merely *sufficient*) for class qualifications to directly relate to the charitable purposes. The idea that class qualifications should relate to the charitable purpose being pursued appears to come from the dictum of Viscount Simonds in *I.R.C. v. Baddeley*. Viscount Simonds mooted the example of a trust providing a bridge for impecunious Methodists.[177] He reasoned that such a trust is "clearly not a charity" because it fails the public requirement.[178] According to Viscount Simonds, "[i]t is not of general public utility: for it does not serve the public purpose which its nature qualifies it to serve."[179] This reasoning contemplates that class qualifications can be problematic where they are discordant with the charitable purpose being furthered. It therefore provides a toehold to contend that the qualifications used to determine membership in a charitable trust's class of objects must correspond with the trust's purposes.

The U.K. Charity Commission has interpreted this liberally as a prohibition against a charitable trust defining its class of direct beneficiaries using criteria unrelated to its charitable

[177] [1955] A.C. 572 at 592.
[178] *Ibid.* at 592.
[179] *Ibid.* at 592. In the same case, Lord Somervell of Harrow observed in *obiter* that "what constitutes a section of the community depends on the nature of the purpose." Various other cases of high authority contain statements to the effect that the specific requirements of the public criterion vary among the four heads of charity. See, for example, *Dingle v. Turner* [1972] A.C. 601 at 624 (per Lord Cross) and *Gilmour v Coats* [1949] A.C. 426 at 449 (per Lord Simonds).

purpose.[180] In the view of the Commission, a link must exist between the class of direct beneficiaries and the purposes of the fund.[181] Strictly speaking, this would mean that eligibility criteria for participation in, say, an educational trust would have to relate somehow to education. Similarly, the Canada Revenue Agency has taken the position that '[w]hen a charity proposes to restrict the beneficiaries of the undertaking in any way, the nature of the restriction must be clearly linked to the proposed benefit'.[182]

With respect, I question whether the dictum of Viscount Simonds in *Baddeley* goes that far.[183] The better view is that Viscount Simonds was contemplating the invalidity of class qualifications contradicting or working at cross purposes with a charitable trust's purposes. If so, this establishes nothing about the validity of neutral qualifications – those neither directly relevant to, nor in contradiction of, a charitable trust's purposes. Viscount Simonds' point does not appear to have been that targeting criteria must *always* relate to the charitable purpose being pursued. The example of a bridge for impecunious Methodists is revealing of the intended meaning. The relevant feature of a bridge is that it is a good of general public utility. Goods of general public utility need to be open to the general public in order to qualify as such. A good of general public utility exclusive to a narrowly defined community – impecunious Methodists (or something else) – carved out from the general community at large is by definition not a good of general public utility. It is like a poverty relief fund targeted at the wealthy in the limited sense that the qualifications for the class of potential beneficiaries are discordant with the underlying charitable purpose. We can distill from this the transferable principle that the qualifications used to delimit a charitable trust's class of beneficiaries cannot contradict, undermine or work at cross purposes with the charitable purpose being pursued.

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[180] Charity Commission (2008), *Analysis of the Law Underpinning Charities and Public Benefit*, London, Charity Commission at p. 10. See also Charity Commission (2008), *Charities and Public Benefit, The Charity Commission's General Guidance on Public Benefit*, London, Charity Commission, p. 18.
[181] *Ibid*.
[182] Canada Revenue Agency, *Guidelines for Registering a Charity: Meeting the Public Benefit Test*, CPS-024 (10 March 2006), s. 3.2.2. Available at **www.cra-arc.gc.calchrts-gvng/chrts/plcylcps/cps-024-eng.html (last accessed 24 June 2013).**
[183] See M. Synge *supra* note 148 at p. 70-1.

In most cases targeting a charitable good or service at a particular sub-population carved out from the population at large will not be at cross purposes with the *Pemsel* category engaged by the good or service but will instead be neutral, neither directly relevant to nor in contradiction of the charitable purposes being furthered. So while a good or service of general public utility exclusive to impecunious Methodists may be a *non-sequitur*, it does not necessarily follow that every charitable trust targeted at that demographic is necessarily void.

Consider how Viscount Simonds' hypothetical trust for impecunious Methodists might play out in other contexts. For example, it seems doubtful from the reported authorities that a relief of poverty trust for impecunious Methodists or a scholarship trust for impecunious Methodists would be void on the basis that the target population was somehow discordant with the charitable goods or services being supplied. This is why the dictum of Lord Simonds arguably does not ground a rule of general application requiring that targeting criteria must always correspond with the nature of the good or service being provided. His point instead seems to have been – although it is admittedly not altogether clear – that class qualifications cannot undermine or contradict the charitable purposes being pursued. So a class unworkable for a good or service of general public utility might prove okay for another category of charitable purpose.

If this is right, then class qualifications can be plotted along a continuum. At one end of the continuum are class membership qualifications directly relevant to the charitable purpose engaged by a trust, *e.g.,* a requirement for a poverty relief fund that the direct beneficiaries be poor. These are consistent with charitable status. At the other end are class membership qualifications contradicting or undermining the charitable purpose engaged by a trust, *e.g.,* Viscount Simonds' example of a good of general public utility targeted away from almost the entire general public. These are inconsistent with charitable status. In between are class membership qualifications that are neither directly relevant to, nor in direct contradiction of, the charitable purposes of the fund. These are presumably consistent with charitable status.

This way of plotting the three categories of class qualifications helps us reconcile Lord Simonds' dictum in *Baddeley* with the authorities in which class qualifications lacking obvious

relevance to charitable purposes have been upheld. We can expect Lord Simonds would have been a lot more specific if his intention was to contradict the line of cases supporting a broad freedom to target benefaction. Likewise, in order for the dictum of Lord Simonds to chart a departure from charity law's usual accommodation of targeted charitable benefaction, we might fairly expect it to have been adopted by other members of the panel in *Baddeley* or approved in subsequent cases. Neither has happened.[184]

So where do discriminatory class qualifications lie on this continuum? Since discriminatory class qualifications lack direct relevance to charitable purposes, they do not plot at the clearly charitable end of the continuum. But neither do they directly contradict charitable purposes in an analogous way to a bridge for impecunious Methodists or a relief of poverty fund for the wealthy.[185] A discriminatorily targeted relief of poverty trust or educational trust relieves poverty and advances education notwithstanding its discriminatory class qualifications. If that is right, we cannot reflexively plot discriminatory class qualifications at the clearly non-charitable end of the continuum.

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[184] See, though, *Davies v. Perpetual Trustee Co (Ltd) and Others* [1959] 2 All ER 128 where Lord Morton concluded against the charitableness of a trust to establish a college for "the Presbyterians the descendants of those settled in the colony hailing from or born in the north of Ireland". The principal ground of the decision (see p. 133) was that the nexus between the intended beneficiaries was private (the descendants of specific persons). The trust was therefore not a trust for the benefit of *a public* but rather a "fluctuating body of private individuals" (see p. 133). But Lord Morton also noted (see p. 133) that the "qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator has in mind". Again, the implication is that the qualifications defining the class of eligible beneficiaries must somehow relate to the charitable purpose being pursued.

Like the *dictum* in *Baddeley*, this does not go very far to establish an independent bright line rule whereby a trust will fail the public requirement unless the class defining qualifications are demonstrably relevant to the charitable purpose. No supporting authorities were cited. No reference was made to cases revealing a more accommodating approach. And no explanation was offered. We know for certain that the settlor's use of private criteria to delimit the class of beneficiaries was in and of itself sufficient to render the trust non-charitable. Beyond that we can only speculate as to why Lord Morton also commented that the class defining criteria bore no relation to its educational purposes. Having commented elsewhere in the judgment that the trust seemed "capricious" and would prove difficult to administer and apply, Lord Morton's comments on the idiosyncratic nature of the class defining criteria may simply have been a way of emphasizing its impracticability.

Likewise, see *Commissioner of Taxation v Triton* [2005] FCA 1319 where the targeting criteria for a charity under the fourth head of charity were upheld with Kenny J. expressly noting at para 35 that the targeting criteria were "rational" and "in keep with Triton's main object".

[185] Discriminatory class membership qualifications work at cross purposes with goods of general public utility. But this is not because they are discriminatory *per se* but rather because, as Lord Simonds reasoned in *Baddeley*, goods of general public utility need to be open to the general public.

It seems then that discriminatory qualifications are apt to plot on the continuum together with those other class qualifications neither directly relevant to, nor in direct contradiction of, the charitable purpose engaged by the trust's goods and services. Class qualifications landing at this point along the continuum are not normally considered contrary to the public component of the public benefit requirement. We must keep looking then if we are going to discover a clear basis in charity law to strike discriminatory class qualifications.

(E) *Public* Benefit and the "Class Within a Class"

There has been some suggestion in the authorities that a charitable trust organized for a purpose falling under the fourth head of charity will fail the public component of the public benefit test if it targets its services at a "class within a class".[186] This emerges from the dictum of (again) Viscount Simonds in *IRC v Baddeley*. *Baddeley* dealt with a trust promoting the religious, social and physical well-being of residents of named localities who were (or were likely to become) members of the Methodist church. The majority ruled against the charitableness of the fund on the ground that its purposes were not charitable.[187] Viscount Simonds and Lord Somervell also reasoned that the trust's narrowly defined class of beneficiaries meant that it failed the public requirement.

Describing the intended beneficiaries as a "class within a class",[188] Viscount Simonds reasoned that:[189]

> *a trust cannot qualify as a charity within the fourth class…if the beneficiaries are a class of persons not only confined to a particular area but selected from within it by reference to a particular creed.*

The intention was presumably not for this to be taken literally as meaning that targeting criteria under the fourth head cannot combine geographical and religious restrictions but

[186] For a discussion, see P. Luxton, *supra* note 148 at 180.
[187] Lord Reid dissenting.
[188] *Baddeley supra* note 149 at p. 591.
[189] *Ibid* at p. 592.

rather a caution against combining any two restrictions (a "class within a class").[190] The comment is probably explicable with reference to the principle identified above – that goods of general public utility cannot be so specifically targeted that they cease to be goods of general public utility.

Strictly speaking, Viscount Simonds' reasoning does little to prevent discrimination by charities. Having expressly linked his reasoning with the fourth head of charity, it imposes no restrictions on the first three heads of charity. Also, a rule preventing a "class within a class" does not prevent discrimination *per se* but rather leaves it to settlors to discriminatorily target charitable trusts through a single discriminatory class qualification ("caucasians only").[191] In any event, Viscount Simonds did not have the support of the panel on this point, nor has his commentary since been adopted.[192] We will therefore not discuss it further here.

(F) Summation

So far the prospects of regulating discrimination by charities through the public component of the public benefit standard do not look promising. Viewed formally, the public component of public benefit establishes a formal "stranger requirement" not a formal anti-discrimination requirement. Viewed functionally, the public component of public benefit functions as an anti-privateness requirement not an anti-discrimination requirement. But it is worth mining the stranger requirement further to see if it somehow manifests value judgments that might prove relevant to discriminatory charitable programming.

[190] P. Luxton *supra* note 148 at p. 180.
[191] "Caucasians only" is not a class within a class in the sense described by Viscount Simonds because there is lacking two or more class qualifications.
[192] The Charity Commission rejected the class within a class concept as "unhelpful". See M. Synge *supra* note 148 at p. 71.

VII – MOVING BEYOND A FORMAL UNDERSTANDING OF PUBLIC BENEFIT

(A) General

The analysis of the public component of public benefit thus far as been purely formal. As a formal rule, the public component of public benefit is not directly concerned with discrimination. But it remains to be considered whether the value judgments implicit in the public component of public benefit establish anything of relevance to the topic of discriminatory charity. 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.

(B) Inclusive Ethic Behind the Public Component of Public Benefit

The orthodox position is that a settlor's motives are irrelevant to whether a given trust is charitable at law.[193] But I think the true position is more nuanced. *All else being equal*, a charitable motive cannot cure a trust's failure to meet the legal test for charitable status.[194] *All else being equal*, a non-charitable motive cannot overcome a trust's compliance with the legal test for charitable status.[195] There is, though, a sense in which motive is arguably 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*

[193] See, for example, J. Garton *supra* note 101 at 77 and Lord MacKay, *Halsbury's Laws of England* 4th ed. 2001 Reissue (London: Butterworths, 2001) at para 7.
[194] See, for example, *Re Pinion* [1965] Ch. 85.
[195] See, for example, *Hoare v Osborne* (1866) LR 1 EQ 585 and Kerr v Bradley [1923] 1 Ch 243.

not otherwise obligated".[196] The Ontario Law Reform Commission connected this requirement with motive as follows:[197]

> *[I]t 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 effects, the doing of good for strangers.*

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 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.[198] 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

[196] OLRC *supra* note 148 at 150.
[197] OLRC *supra* note 148 at 150.
[198] M. Harding refutes that motive is useful to regulating discriminatory charity. See M. Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) at 209.

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 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 factors to weigh when considering whether this line is crossed.

(C) Guiding Considerations

(i) 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* and *Canada Trust Co* 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.

As ever, we have to accept the good with the bad. The enabling posture of charity law carries with it both positive and negative consequences. On the upside, it (among other things) encourages innovative responses to complex problems and countenances pluralistic manifestations of "doing good by others". On the downside, its resistance of "one size fits all" regulatory modelling means best practices are sometimes honoured in the breach. An enabling posture means there will be both big hits and big misses in the charitable sector. Courts, lawmakers and regulators should strive to remain consciously aware that, since the big hits are never contentious (and thus never wind up before them), their time is disproportionately consumed by the big misses. While it may be tempting to conclude that charity law's enabling posture is itself the problem to be solved, regulatory and judicial responses to those instances in which charity law's facilitative orientation is abused should be proportionate, minimally impairing of this posture and consciously aware that charity law's enabling posture does not function singularly to incentivize mischief.

(ii) Expression Matters (Exclusionary Criteria 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 – "no Protestants" – or as inclusionary criteria – "only Protestants". Since both expressions have the practical effect of 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). In any event, it would accomplish nothing to fixate on the method of expression. 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 seems 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.

(iii) 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.

(iv) 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.[199] The distinction between advantaged and disadvantaged can be a problematic distinction to draw. In a simple world, we would have the luxury of conceiving 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

[199] For a discussion, see M.P. Fleischer, "Equality of Opportunity and the Charitable Tax Subsidies" (2011) 91 Boston University Law Review 601 at 636-643.

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, socio-economic 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?

These problems are not insoluble. Other areas of law – *e.g.,* constitutional law and human rights law – face similar problems contending with proxies for disadvantage and intersectionality. But 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 – *e.g.,* female, racialized, of limited means and disabled. 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.[200] There is a general principle against excluding the poor. 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 privileged communities. The holding in *Re Independent Schools* provides but the vaguest of guidance as to when fee-charging improperly excludes the poor. 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).

[200] Even in the context of the relief of poverty, charities are not restricted to only serving populations that are destitute. See, for example, *Independent Schools Council supra* note 15 at paras 173 and 179.

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.

(v) *Pemsel* Categories are Not Silos

Courts should resist the temptation to view the *Pemsel* categories 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. For example, religious beliefs will often be 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. In other instances, heterosexual theologies of marriage might impact significant features of charitable programming. A church may, for example, decline to solemnize same-sex marriages and/or teach heterosexual theologies of marriage.[201] Moving outside of the church context, a religious school might require its students to agree to abide by a sexual code of

[201] Subs. 149.1(6.21) of the *Income Tax Act (Canada)* expressly provides that charities organized for the advancement of religion will not jeopardize their charitable registration.

ethics confining sexual expression to heterosexual marriage.[202] Charity law should be reluctant to discover non-charitable motives where charitable programming manifests sincerely held religious beliefs.

When confronted with religiously inspired charitable programming, 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".[203] In *Neville Estates Ltd v Madden*, Cross J. 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."[204] Likewise, in *United Grand Lodge of Ancient Free & Accepted Masons of England* v. *Holborn Borough Council*, Donovan J. reasoned that advancing religion entails giving it robust expression:[205]

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

By extending charitable status to religious institutions, charity law affirms religion as something worthy of the promotion, subsidy and expressive aims of charity law. While charity law stops short of 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.[206]

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

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[202] See *Law Society of British Columbia v. Trinity Western University* 2018 SCC 32 and *Trinity Western University v. Law Society of Upper Canada* 2018 SCC 33.
[203] *Gilmour v Coats* [1949[1 All ER 848 at 862.
[204] [1962] 1 Ch 832 at 853.
[205] [1957] 3 All ER 281 at 285.
[206] Citing the philosopher John Finnis, the Ontario Law Reform Commission 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." See OLRC *supra* note 148 at 148.

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. 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.

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. To go down this path would entail charity law simultaneously endorsing and refuting religious belief.

(vi) Application to Specific Targeting Criteria

We will consider the eligibility criteria that came before the Ontario Superior Court of Justice in *Royal Trust Corp. of Canada v University of Western Ontario* 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. Which of these on their face betray a non-charitable motive?

(a) Sexual Orientation

In the current milieu, sexual orientation is the most challenging identity marker 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. But there will also be circumstances in which a different conclusion can and should follow.

A pluralistic society includes not only diverse sexual expressions and identities but also diverse beliefs about those diverse sexual expressions and identities. Sexual ethics and the nature of human sexuality are contested matters of conscience 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 should 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 to go down that path is to make conformity to a given sexual ethic a precondition to charitable status. Far 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 on the basis of sexual orientation: 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, that since stigmatizing non-acceptance on the basis of sexual orientation originates in (and is enabled by) objections 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 some beliefs welcomed to the table will prove controversial. 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 worst way to balance charity law's inclusive ethic with diversity of belief.

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 LGTBQ persons is likely anything but discriminatory rejection. Add to this that prohibiting settlors of scholarship trusts from excluding LGTBQ 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 declining to solemnize same-sex 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 forcing agreement will militate in favour of allowing differential treatment on the basis of sexual orientation.[207]

In between these are instances in which religious belief is brought to bear in circumstances outside the formal advancement of religion but still within circumstances in which sincerely

[207] Subs. 149.1(6.21) of the *Income Tax Act (Canada)* expressly provides that charities organized for the advancement of religion will not jeopardize their charitable registration.

held beliefs about sexuality could be engaged. In *Catholic Care*,[208] this meant the provision of adoption services by a Roman Catholic organization to heterosexual couples only. As we have seen, this case was resolved on the basis that restricting access to adoption services on the basis of sexual orientation was not lawful discrimination under s. 193 of the Equality Act 2010.[209] How would the analysis differ if we were to instead assess this from a charity law perspective using "acceptance" versus "agreement" as our touchstones?

In that event, we could conclude that requiring the organization to provide adoption services contrary to religious belief would require not merely acceptance but also agreement. The difference between *Catholic Care* and *Royal Trust Corp* is that a normative conception of "the family" (and by extension beliefs about family and sexuality) is directly engaged by the nature of the service being provided. Whereas sexual ethics were at most peripheral to the academic scholarship in *Royal Trust Corp*, placing children for adoption to same-sex couples could be experienced by the service provider as a condonation and/or facilitation of that family structure. This case could be seen as leaning in favour of permitting differential treatment in order to leave space for principled disagreement.

Consider also the legal battle in Canada over the accreditation of a religious law school. Trinity Western University is a Christian university that recently sought accreditation from provincial law societies for its law school. The law societies in British Columbia and Ontario declined accreditation (meaning graduates of the law schools would not be eligible to practice law school 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

[208] *Supra* note 50.
[209] [2012] UKUT 395 at [7].

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.

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?[210]

A charity law argument (although not a strong one) could be made against the covenant using the touchstones of "acceptance" and "agreement". The facts of *Trinity Western* are in an important sense distinguishable from *Catholic Care*. Whereas the provision of adoption services to same-sex couples in *Catholic Care* could be experienced as a condonation or facilitation of their family structure, the same reasoning does not apply in the context of a law school. 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 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 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 covenant) without prohibiting disagreement (to allow the value ethic implicit in the covenant).

But there is an argument in favour the position that the covenant should not vitiate charitable status. The touchstones "acceptance" and "agreement" suggest 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 LGTBQ 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 excluded from the law school

[210] For an argument that charitable status should be withdrawn from Trinity Western University see https://ablawg.ca/2015/03/09/trinity-western-university-your-tax-dollars-at-work/.

community all unmarried sexually active persons, all users of pornography and all married persons engaging in extramarital sex. Its differential treatment was 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 LGTBQ persons but rather to a sincerely held sexual ethic forbidding 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 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, 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? The objection to the covenant is ultimately an objection 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, charity law risks 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, then we must be prepared to live with the fact that some views represented in the charitable sector will prove controversial.

(b) Single – 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 of Rights and Freedoms*.[211] Likewise, it is prohibited for private actors in contexts in which human rights codes apply.[212] 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

[211] Subs. 15(1) of Canadian *Charter of Rights and Freedoms*.
[212] *Human Rights Code*, R.S.O. 1990, c. H. 10, s. 1.

a distinction that might be considered discriminatory in the context of either constitutional law or human rights codes.

(c) 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 say the least, to identify situations in which a "Caucasians only" stipulation is not stigmatizing.

(d) Not a Feminist:

The Ontario Superior Court of Justice in *Royal Trust Corp. of Canada v University of Western Ontario* concluded that the "no feminist" stipulation was misogynistic and discriminatory on the ground of ideology. I think this goes too far. While I agree that the stipulation "no feminists" was properly struck, I take issue with 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.[213]

(D) 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).

VIII – 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

[213] This is one of the bases on which the religiously conditioned scholarships were upheld in *Re Ramsden Estate supra* note 69 and *University of Victoria supra* note 72.

charity we need to be able 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 if 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 in *Bob Jones*.