

## PHILANTHROPY, JUSTICE AND LAW

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*It is sometimes said that philanthropy and justice are in tension with each other. In this article, I explore several settings in which this tension might be observed: (a) philanthropy, because it lacks coordination, might generate distributive outcomes that seem undesirable from a justice standpoint; (b) philanthropy might entail discrimination that offends norms of equality grounded in justice; (c) philanthropy might enable the rich to enjoy a disproportionate share of political power; and (d) philanthropy might express relational inequality between citizens that offends justice irrespective of distributive outcomes. I aim to show that, in each of these settings, philanthropy might frustrate the attainment of justice notwithstanding its propensity to generate public benefit. However, I also emphasise that justice problems are problems for philanthropy for as long as we inhabit a non-ideal world in which the state fails to discharge its responsibilities in justice.*

### I INTRODUCTION

It is sometimes said that philanthropy and justice are in tension with each other. In this article, I explore several ways in which this tension might be observed in contemporary settings: (a) philanthropy, because it lacks coordination, might generate distributive outcomes that seem undesirable from the perspective of justice; (b) philanthropy might entail discrimination that offends norms of equality grounded in the demands of justice; (c) philanthropy might enable the rich to enjoy a disproportionate share of political power; and (d) philanthropy might express relational inequality between citizens that offends justice irrespective of distributive outcomes. I aim to demonstrate that in each of these settings, depending on the conception of justice in view, it seems plausible to think that philanthropy might frustrate the attainment of justice notwithstanding its propensity to generate public benefit. Throughout, I consider the role law might play in bringing philanthropy

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into alignment with what justice requires, acknowledging as I go the limitations of law in reconciling philanthropy and justice. I conclude with some brief general reflections on philanthropy, justice and the role of the state: these reflections emphasise the importance of state provision as well as philanthropy in solving justice problems, but they also highlight that justice problems are problems for philanthropy for as long as we inhabit a non-ideal world in which the state fails to discharge its responsibilities in justice.

Justice figures in philosophical thinking in a variety of ways, and of course there are many competing visions of its content and scope. The states of affairs presented in this article as potentially problematic in view of applicable conceptions of justice would not be viewed as such within every philosophical tradition with a preoccupation or concern with justice. Nonetheless, each of the matters discussed here would be viewed by at least some philosophers as potentially problematic from a justice standpoint.<sup>1</sup> And, more fundamentally, I think there is a good argument that the different topics discussed in this article raise questions of justice, even if those questions might be answered quite differently by those with different philosophical commitments. There is a venerable tradition of thinking of questions of justice as arising when questions of allocation are in view: that is, questions about who is owed how much of what, and from whom.<sup>2</sup> It seems plausible to argue that each of the matters traversed here raises such questions.

## II PHILANTHROPY AND THE PROBLEM OF UNCOORDINATED DISTRIBUTIVE OUTCOMES

On some accounts of distributive justice in society, justice is not a matter of distributive outcomes having a desired profile but is rather a product of distributive outcomes being generated by transactions with a desired character.<sup>3</sup> That said,

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- 1 Philosophers in the egalitarian tradition might take issue with the distributive inequalities that philanthropy might cause, as well as the discrimination and relational inequality philanthropy might entail: see generally Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109(2) *Ethics* 287 <<https://doi.org/10.1086/233897>>; GA Cohen, 'On the Currency of Egalitarian Justice' (1989) 99(4) *Ethics* 906 <<https://doi.org/10.1086/293126>>; GA Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Harvard University Press, 2001) ch 10 <<https://doi.org/10.4159/9780674029668>>; Amartya Sen, 'Equality of What?' (Tanner Lecture on Human Values, Stanford University, 22 May 1979) 217–20. Distributive inequalities generated by the uncoordinated nature of philanthropy might provoke concern from philosophers who prioritise distributive justice: see, eg, John Rawls, *A Theory of Justice* (Oxford University Press, rev ed, 1999). For utilitarians, philanthropy may be in tension with marginal and overall social utility: see generally John Stuart Mill, *Utilitarianism* (Cambridge University Press, 2014); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1907) 125–6. For a general overview of considerations relating to charitable giving from a justice perspective, see Paul Woodruff, 'Afterword: Justice and Charitable Giving' in Paul Woodruff (ed), *The Ethics of Giving: Philosophers' Perspectives on Philanthropy* (Oxford University Press, 2018) 204 <<https://doi.org/10.1093/oso/9780190648879.001.0001>>.
  - 2 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 242 ('*Law as a Leap of Faith*'), citing Aristotle, *Nicomachean Ethics*, tr WD Ross 1131<sup>a</sup>29, 1134<sup>a</sup>2 <<https://doi.org/10.1093/acprof:oso/9780199695553.001.0001>>.
  - 3 See, eg, Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 150–74.

other accounts of distributive justice – including leading accounts in the liberal philosophical tradition – are concerned primarily with ensuring that desired distributive outcomes are achieved across society.<sup>4</sup> On these accounts, distributive outcomes might be viewed as desired or not depending on their conformity to principles of distributive justice, principles that might, for example, lay emphasis on how the worst off in society fare in the distributive picture.<sup>5</sup> From a justice informed perspective that is interested in achieving desired distributive outcomes, lack of coordination in the mechanisms by which resources or other goods are distributed may well be cause for concern. This is because lack of coordination might make it relatively difficult to secure distributive outcomes that are characterised in the right sort of way. A centralised and planned approach to distribution can keep in view principles of distributive justice – or at least policies that are defensible in light of such principles – and aim at outcomes that conform to the principles or policies in question. A diffuse and unplanned approach cannot readily do this.

From a justice standpoint, then, philanthropy seems susceptible to criticism because, as the product of individual motivations and actions, it typically has an uncoordinated character. Indeed, such criticism is expressed in different ways in philosophical work. John Stuart Mill, for example, in the course of arguing that poor relief should be the responsibility of the state, famously claims that ‘charity almost always does too much or too little: it lavishes its bounty in one place, and leaves people to starve in another’.<sup>6</sup> GA Cohen worries over the distributive implications of uncoordinated philanthropy for philanthropists themselves; for Cohen, in the absence of coordination and coercion, philanthropists might carry a share of the burden of redistribution while those of similar means who decline to make charitable gifts might enjoy an unjust relief from that burden.<sup>7</sup> And leading thinkers with interests in a range of outcomes and values other than justice have also expressed concern about the propensity of philanthropy to miss the distributive mark because philanthropists do not typically coordinate their giving.<sup>8</sup>

The problem of philanthropy generating undesired distributive outcomes because of its uncoordinated character is far from academic. A striking example of the problem in practice emerged in early 2020 in Australia. The summer of 2019–20 will long be remembered in Australia because of the catastrophic bushfires that ravaged much of the eastern side of the continent. At the height of the bushfire season, an Australian comedian and actor called Celeste Barber launched a fundraising appeal on Facebook, displaying a photograph of a bushfire consuming a house, and making the following statements:

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4 See, eg, Rawls (n 1) ch 5; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) ch 2.

5 Consider, for example, Rawls’ famous ‘difference principle’: Rawls (n 1) 13 and passim.

6 John Stuart Mill, *Principles of Political Economy and Chapters on Socialism*, ed Jonathan Riley (Oxford University Press, 1994) 356.

7 Cohen, *If You’re an Egalitarian, How Come You’re So Rich?* (n 1) ch 10.

8 See, eg, CR Attlee, *The Social Worker* (G Bell and Sons, 1920) 55, and the discussion of ‘philanthropic particularism’ in Lester M Salamon, ‘Of Market Failure, Voluntary Failure, and Third-Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State’ (1987) 16(1–2) *Nonprofit and Voluntary Sector Quarterly* 29, 40–1 <<https://doi.org/10.1177/089976408701600104>>.

Please help anyway you can. This is terrifying.

Want to join me in supporting a good cause? I'm raising money for The Trustee for NSW Rural Fire Service & Brigades Donations Fund and your contribution will make an impact, whether you donate a lot or a little. Anything helps. Thank you for your support.<sup>9</sup>

Ms Barber's appeal had an initial fundraising goal of \$30,000, but by 11 January 2020 \$50 million had been donated. The appeal was closed on 17 January 2020, by which time Ms Barber had raised \$51,299,348 from some 1.3 million donors. Donations were received by the trustee of a charitable trust called the PayPal Giving Fund (pursuant to an arrangement between Facebook and PayPal) and that trustee then paid the donations in full to the trustees of the NSW Rural Fire Service ('RFS') and Brigades Donations Fund.<sup>10</sup>

Ms Barber did not consult with the trustees of the RFS before launching her fundraising appeal; that appeal might be fairly characterised as a spontaneous act of altruism.<sup>11</sup> Similarly, the donors who responded to the appeal acted individually, each one expressing their own sentiments and motivations on the Facebook platform at the time of making their donation. This lack of coordination in the way the \$51 million was raised presented a problem for the trustees of the RFS once the donations were paid over to it.

The RFS is a charitable trust. Its trustees are bound, by the terms of its trust deed, to apply its assets to its articulated charitable purposes. The purposes of the RFS focus on enabling or assisting fire brigades in New South Wales with purchasing and maintaining equipment and facilities, providing training and resources, and meeting administrative expenses associated with volunteer fire and emergency service activities.<sup>12</sup> The \$51 million raised by Ms Barber's appeal and paid, via the trustee of the PayPal Giving Fund, to the trustees of the RFS was clearly appropriately expended on those purposes. However, Ms Barber, at least some of the donors to her appeal,<sup>13</sup> and sections of the Australian media and public, indicated a desire that some of the \$51 million be expended on other purposes as well, for example, assisting other charities, helping fire services in states of Australia other than New South Wales, and assisting people and animals affected by bushfires. After all, in early 2020 there was great need in all these areas across the whole east coast of Australia. And \$51 million is an enormous sum of money to be expended on the purposes of a single charity with a relatively confined mandate.

9 Celeste Barber, 'Fundraiser for the Trustee for NSW Rural Fire Service & Brigades Donations Fund' (Facebook, 3 January 2020) <<https://www.facebook.com/donate/1010958179269977>>. For more information on Celeste Barber, see 'Celeste Barber', *Wikipedia* (Web Page) <[https://en.wikipedia.org/wiki/Celeste\\_Barber](https://en.wikipedia.org/wiki/Celeste_Barber)>.

10 For a full description of the legal arrangements surrounding Ms Barber's appeal, see *Re New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604, [14]–[41] (Slattery J) ('*NSWRFS Case*').

11 *Ibid* [14].

12 *Ibid* [38].

13 This fact raises the prospect that at least some donors may have made gifts to the PayPal Giving Fund trustee impressed with trusts for purposes other than the purposes of the RFS. This prospect was alluded to but not dealt with by Slattery J in the *NSWRFS Case*: *ibid* [55].

The trustees of the RFS sought judicial advice on what they could expend the \$51 million on, consistent with the charitable purposes of the RFS.

The response of Slattery J of the New South Wales Supreme Court is instructive when thinking about the resources available within law to address the problem of philanthropy and uncoordinated distributive outcomes.<sup>14</sup> One mechanism in charity law that might be thought pertinent in this sort of case is a cy pres scheme, enabling trust assets to be applied to purposes analogous but not identical to those for which they were settled.<sup>15</sup> However, Slattery J thought that a cy pres scheme was not available on the facts of the case before him, as all of the \$51 million could be appropriately applied in furtherance of the purposes of the RFS.<sup>16</sup> Cy pres variation is apposite in circumstances where there is some impediment to applying assets to purposes, not when the distributive implications of doing so are suboptimal or unwelcome.<sup>17</sup> Moreover, while Slattery J arguably interpreted the RFS trust deed expansively in giving meaning to the RFS's articulated purposes,<sup>18</sup> he was compelled to conclude – with minor exceptions<sup>19</sup> – that the RFS trustees could not expend any part of the \$51 million on fire services outside New South Wales, or on helping people or animals affected by bushfires.<sup>20</sup>

One matter on which Slattery J was not asked for advice, but which seems relevant to the overall assessment that Ms Barber's appeal lacked coordination, relates to the position of the PayPal Giving Fund. As I mentioned earlier, the trustee of the PayPal Giving Fund received donations made pursuant to the appeal. Those donations were received and held subject to terms set out in a 'Donation Delivery Policy', 'Terms of Service' and the PayPal Giving Fund trust deed.<sup>21</sup> Those terms appeared to give the PayPal Giving Fund trustee a discretion whether to pay donations to the beneficiary nominated by donors at the point of making their donations (in this case, the RFS). Thus it seems arguable that the PayPal Giving Fund trustee could have exercised its discretion to impose some coordination and planning on the question of how to distribute the \$51 million, and might have discharged its duties as trustee of the funds other than by paying the entire amount to the trustees of the RFS. However, the plausibility of such an argument turns on the precise meaning of the terms of the 'Donation Delivery Policy', 'Terms

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14 Ibid.

15 In New South Wales, cy pres schemes may be ordered where 'the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust': *Charitable Trusts Act 1993* (NSW) s 9(1).

16 *NSWRFS Case* (n 10) [54] (Slattery J). In any event the RFS trustees did not seek a cy pres scheme.

17 This is true whether one locates the normative foundations of cy pres in respect for donor intention or in considerations of public policy: see also John Picton, 'Donor Intention and Dialectic Legal Policy Frames' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar Publishing, 2018) 189 <<https://doi.org/10.4337/9781785369995.00016>>.

18 See, eg, the interpretation of the word 'resources' in the RFS trust deed: *NSWRFS Case* (n 10) [73]–[79] (Slattery J).

19 Ibid [69].

20 Ibid [64]–[68].

21 Ibid [27]–[28].

of Service' and PayPal Giving Fund trust deed, and their interaction with donor preferences and intentions.<sup>22</sup>

As a result of Slattery J's advice in the *NSWRFS Case*, the \$51 million raised for bushfire disaster relief may now be expended only on the purposes of the RFS, however generously those purposes might have been interpreted. In the absence of further study, it cannot be said to what extent the distributive implications of this might be of concern in light of applicable principles of justice. Nonetheless, some questions might be raised. To the extent that disaster relief for people affected by the 2019–20 bushfires has been insufficient to meet needs, has the law failed to match the \$51 million philanthropically raised with distributive outcomes that are desired, or even mandated, in light of principles of justice? The New South Wales government and local councils in that State are required under statute to fund rural fire services on a quarterly basis.<sup>23</sup> If this funding is in the future reduced because of the philanthropic endowment enjoyed by the RFS, do distributive concerns arise to the extent that the tax and rate payers of New South Wales are subsidised by charitable donors from other states and countries? When viewed from a justice standpoint, how does the uncoordinated philanthropy on display in Ms Barber's appeal compare with more coordinated, state-sponsored initiatives such as direct government assistance to disaster-affected citizens,<sup>24</sup> or philanthropic intermediaries that are subject to a higher degree of government regulation and oversight?<sup>25</sup>

The postlude to Celeste Barber's spectacularly successful fundraising appeal reinforces the sense that the distributive outcomes generated by that appeal may be less than ideal with justice goals in view. Soon after Slattery J gave his judgment in the *NSWRFS Case*, a bill was introduced into the New South Wales Parliament to give legislative permission to the RFS trustees to apply the \$51 million to a range of purposes beyond those articulated in the RFS trust deed.<sup>26</sup> The bill was referred to a parliamentary committee.<sup>27</sup> The committee noted concerns about the

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22 Note also that this might have generated legitimate concerns on the part of donors who thought their gifts would end up in the hands of the RFS. Indeed, PayPal recently settled a lawsuit with the Attorney-General of New York, undertaking to be more transparent with donors where it does not pass on gifts to nominated beneficiaries: see Letitia James, New York State Attorney-General, 'Attorney General James Announces Settlement with PayPal Charitable Giving Fund, Inc to Ensure Transparency in Charitable Donations' (Press Release, 14 January 2020) <<https://ag.ny.gov/press-release/2020/attorney-general-james-announces-settlement-paypal-charitable-giving-fund-inc>>.

23 *Rural Fires Act 1997* (NSW) ss 107, 110A.

24 In Australia, see the 'Disaster Assist' payment scheme administered by the Commonwealth Department of Home Affairs: 'Disaster Assist', *Department of Home Affairs* (Web Page, 2 February 2022) <<https://www.disasterassist.gov.au/>>.

25 In Australia, see the 'Australian Disaster Relief Fund' sub-type of charity administered by the Australian Charities and Not-for-Profits Commission and the Australian Taxation Office: 'Running Australian Disaster Relief Funds', *Australian Taxation Office* (Web Page, 29 July 2020) <<https://www.ato.gov.au/non-profit/gifts-and-fundraising/in-detail/disasters/running-australian-disaster-relief-funds/>>.

26 Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020 (NSW).

27 Portfolio Committee No 5: Legal Affairs, New South Wales Legislative Council, 'Inquiry into the Rural Fires Amendment (NSW RFS and Brigades Donation Fund) Bill 2020' (Terms of Reference, 16 June 2020) <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2600/Terms%20of%20Reference.pdf>>.



bill and recommended that it be returned to Parliament for debate and discussion.<sup>28</sup> At the time of writing, this has not happened. Nonetheless, the fact that the bill was introduced at all indicates that there was some parliamentary interest in achieving distributive outcomes different from those enabled by the philanthropic means adopted in Ms Barber's appeal. As for Ms Barber herself, her last word on the matter bears repeating:

It was decided today in the Supreme Court that the money we raised will stay with the NSW RFS. I had hoped, because it was such a big and 'unprecedented' amount, that it could have been distributed to other states and charities, turns out that studying acting at university does not make me a lawmaker.<sup>29</sup>

### III PHILANTHROPY AND THE PROBLEM OF DISCRIMINATION

One of the great justice projects of the 20<sup>th</sup> and now 21<sup>st</sup> centuries has been the imposition of norms of equality in the public life of political communities. Such norms prohibit discrimination against members of groups defined with reference to articulated elements of human identity, ranging from religious belief, to sex, to sexual orientation, to disability. In countries where liberal political commitments inform law and policy, equality norms enjoining discrimination usually figure in public law, constraining action on the part of the state and, to some extent, other actors where they perform state functions. Much less clear has been the question of the application of equality norms to private action.<sup>30</sup>

How equality norms at large in public life should affect philanthropy is a difficult question. Philanthropy is in one sense private action, in that it entails the owners of private property exercising their use freedoms to dispose of that property as they see fit. However, in another sense philanthropy has a public character as it is usually (although not always) directed to the furtherance of public benefit purposes and is not infrequently administered by intermediary institutions – universities might be offered as an example – that perform public functions or enjoy some degree of state support. At the same time, philanthropists may be driven by a sense

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28 Portfolio Committee No 5: Legal Affairs, New South Wales Legislative Council, *Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020* (Report No 54, July 2020) <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2600/Report%20No%2054%20-%20PC%205%20-%20Rural%20Fires%20Amendment%20Bill%202020.pdf>>. The Government responded to the report on 28 January 2021, but in that response did not address the recommendation that the bill be returned to the Parliament. See Letter from David Elliott, Minister for Police and Emergency Services, to David Blunt, 28 January 2021 <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2600/Government%20response%20-%20Rural%20Fires%20Amendment%20Bill%202020.pdf>>.

29 @celestebarber\_, 'An Update' (Twitter, 25 May 2020, 6:12pm AEST) <[https://twitter.com/celestebarber\\_/status/1264831815782563840](https://twitter.com/celestebarber_/status/1264831815782563840)>.

30 Although note the position in South Africa, where the *Constitution of the Republic of South Africa Act 1996* clearly imposes equality norms on private actors, and courts have recognised this fact in, for example, testamentary settings: *King NO v De Jager* [2021] ZACC 4, [221]–[224], and the discussion in François du Toit, Matthew Harding and Andreas Humm, 'King NNO v De Jager 2021 4 SA 1 (CC): Three Perspectives' (2022) 33(3) *Stellenbosch Law Review* 501 <<https://doi.org/10.47348/SLR/2022/i3a8>>.

of interest in or even loyalty to a particular community or class of people. To the extent that philanthropists are driven in this way, their gifts are likely to be framed in discriminatory terms, including those who belong to the community or class in question and, whether explicitly or by implication, excluding everyone else.<sup>31</sup> Where philanthropy does entail discrimination of this sort, how should law respond given philanthropy's 'hybrid' character as both private and public?<sup>32</sup>

In several leading cases, law has sought to respond *ex post facto*, using the general law tool of public policy. Perhaps the best known example is in *Re Canada Trust Co v Ontario Human Rights Commission* ('*Canada Trust*').<sup>33</sup> Colonel Reuben Wells Leonard was a prominent Canadian who had made a fortune in mining. He had a strong philanthropic drive, leading him to make substantial gifts for a variety of public purposes. Among these was the Leonard Foundation, a trust established to fund educational scholarships.<sup>34</sup> It was, and remains, one of the largest providers of such scholarships in Canada.<sup>35</sup> The recitals and provisions of the trust deed reflected Colonel Leonard's worldview: among other things, the scholarships were to be restricted to white Protestants of British nationality or 'parentage'. The quantum of scholarship funds to be paid to women was restricted, and the trust terms also discriminated against other candidates on grounds of parental occupation.<sup>36</sup>

When the Leonard Foundation was first established early in the 20<sup>th</sup> century, the discriminatory trust terms were arguably in alignment with prevailing elite beliefs and practices in Canada. However, by the late 20<sup>th</sup> century, the trustees of the Leonard Foundation were under intense public scrutiny and pressure because of their continued adherence to those trust terms. The trustees applied to the court for judicial advice. At first instance, they were advised that the Leonard Foundation did not violate public policy.<sup>37</sup> However, on appeal the Ontario Court of Appeal ordered a *cy pres* scheme to remove from the trust deed the terms that discriminated on

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- 31 Whether such discriminatory terms are of moral concern might depend on a range of factors, as the example of 'affirmative action' discrimination shows: see Adam Parachin, 'Why and When Discrimination Is Discordant with Charitable Status: The Problem with "Public Policy", the Possibility of a Better Solution' (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 305, 343–5 ('Why and When Discrimination Is Discordant with Charitable Status'); *Re The Esther G Castenera Scholarship Fund* [2015] MBQB 28, [44], where Dewar J noted: 'Where the gift can be articulated as promoting a cause or a belief with specific reference to a past inequality, there is nothing discriminatory about such a gift'. See also *Regents of the University of California v Bakke* 438 US 265, 407 (Blackmun J) (1978). For general philosophical discussion of affirmative action, see Thomas Nagel, 'Equal Treatment and Compensatory Discrimination' (1973) 2(4) *Philosophy & Public Affairs* 348; Judith Jarvis Thomson, 'Preferential Hiring' (1973) 2(4) *Philosophy & Public Affairs* 364.
- 32 For the characterisation of charity as a 'hybrid' of public and private action, and a full exploration of that proposition with reference to charity law: see Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016).
- 33 (1990) 69 DLR (4<sup>th</sup>) 321 ('*Canada Trust*').
- 34 For the background to the case, see Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (University of Toronto Press, 2000).
- 35 See 'Home: The Leonard Foundation', *The Leonard Foundation* (Web Page) <<http://www.leonardfind.org/>>.
- 36 See *Canada Trust* (n 33) 326–9 (Robins JA) for the relevant provisions of the trust deed. Eligibility to participate in the management of the Leonard Foundation was also restricted.
- 37 *Re Canada Trust Co v Ontario Human Rights Commission* (1987) 42 DLR (4<sup>th</sup>) 263.



grounds of race, sex, nationality and religion.<sup>38</sup> For the Court, Canadian public policy clearly enshrined equality norms, and such norms were applicable in the law of trusts as well as in public law. A majority of the Court reasoned in terms suggesting that equality norms apply to trusts generally in Canadian law,<sup>39</sup> while Tarnopolsky JA in a separate, concurring, judgment was careful to limit his reasoning to charitable trusts because of their distinctive public character.<sup>40</sup>

*Canada Trust* may be contrasted with other recent Canadian cases in which an ex post approach was taken to a discriminatory charitable trust but with different results.<sup>41</sup> *Re Ramsden Estate* involved a trust to provide educational scholarships to Protestant students.<sup>42</sup> The trust was found not to offend public policy because the discrimination entailed was not ‘blatant’ and thus the case was not thought to be analogous to *Canada Trust*.<sup>43</sup> In *University of Victoria Foundation v British Columbia (Attorney-General)*, an educational scholarship trust, this time for Roman Catholic students, was found to be consistent with Canadian public policy for similar reasons.<sup>44</sup> And in *Re The Esther G Castenera Scholarship Fund*, a trust to provide educational scholarships to women who had graduated from a certain high school and sought to study science at the tertiary level was again upheld, the discrimination in the trust being found unproblematic.<sup>45</sup> These cases show that courts are reluctant to interfere with discriminatory charitable trusts where the discrimination expresses benign loyalty to or affection for a class of persons rather than a bigoted desire to favour one group over another, or where the discrimination is perceived to address historical disadvantage and exclusion.<sup>46</sup> Such distinctions seem broadly acceptable in light of mainstream liberal accounts of what justice demands in the application of equality norms, although there is much debate

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38 Nothing was said about the provisions discriminating on grounds of parental occupation. Note also that the cy pres order was made even though there was no practical impediment to applying the assets of the Leonard Foundation to Colonel Leonard’s stated purposes. Indeed, the trustees had been doing precisely this for decades.

39 *Canada Trust* (n 33) 334–5 (Robins JA, Ostler JA agreeing). This suggestion has since been firmly rejected: see especially *Spence v BMO Trust Co* [2016] ONCA 196, [75] (Cronk JA).

40 *Canada Trust* (n 33) 348–53 (Tarnopolsky JA).

41 It may also be contrasted with the Australian case of *Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292, in which Young CJ in Eq of the New South Wales Supreme Court refused to interfere with a racially discriminatory charitable trust on grounds of public policy.

42 (1996) 139 DLR (4<sup>th</sup>) 746.

43 Ibid 751 (MacDonald CJTD).

44 [2000] BCJ No 520, [25].

45 [2015] MBQB 28.

46 For commentary on these Canadian cases, see François du Toit, ‘*Re The Esther G Castanera Scholarship Fund* and Recent South African Judgments on Discriminatory Bursary Trusts’ (2017) 40(1) *Manitoba Law Journal* 141; Matthew Harding, ‘Charitable Trusts and Discrimination: Two Themes’ (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 227; Adam Parachin, ‘Public Benefit, Discrimination and the Definition of Charity’ in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, 2013) 171 <<https://doi.org/10.1017/CBO9781139856478.010>>; Parachin, ‘Why and When Discrimination Is Discordant with Charitable Status’ (n 31) 314–22; Ian Murray, ‘Charities and Discrimination: Is Charity Law Always a Better Solution than Public Policy?’ (2022) 13(2) *Nonprofit Policy Forum* 141 <<https://doi.org/10.1515/npf-2021-0066>>.

among theorists of discrimination about what, exactly, equality norms should be directed against.<sup>47</sup>

Ex post responses to philanthropy and the problem of discrimination are not limited to cases in which courts are asked to work out the demands of general law public policy. They may also arise in public law, where the question for determination might be the demands of statutory anti-discrimination law in philanthropic settings. Consider the recent case of *R (Z) v Hackney London Borough Council* ('*Z v Hackney Council*').<sup>48</sup> A charitable housing association, Agudas Israel Housing Association ('AIHA'), owned some 470 properties in Hackney, London.<sup>49</sup> The purpose of AIHA was to provide housing to those in need, with a primary focus on the Orthodox Jewish community.<sup>50</sup> Under an arrangement with the Council, AIHA made housing available to Council approved social housing applicants, and the Council placed Orthodox Jewish applicants with AIHA in accordance with AIHA's charitable purpose. A single mother with four small children, two of whom had autism, had applied to the Council for social housing and discovered that Orthodox Jewish families were placed in AIHA housing ahead of her, even though she had been identified by the Council as a priority case and as requiring the sort of housing that AIHA provided.<sup>51</sup> This applicant then went to court asserting that AIHA had discriminated against her on grounds of religion and that this was unlawful under provisions of the *Equality Act 2010* (UK) ('*Equality Act*').<sup>52</sup>

In the United Kingdom Supreme Court, AIHA's discrimination on grounds of religion was found to be lawful. The Court first considered section 158 of the *Equality Act*, which permits discrimination on grounds of religious belief in circumstances where that discrimination satisfies a proportionality test.<sup>53</sup> The Court found that AIHA's aim, when allocating its housing, of alleviating disadvantage suffered by London's Orthodox Jewish community was a legitimate aim. Moreover, its policy of allocating all available housing to members of the Orthodox Jewish community, to the exclusion of other applicants, was a proportionate means of achieving that legitimate aim, once the benefits to the Orthodox Jewish community were weighed against the disadvantages experienced by other groups as a result, and once the limited resources available to AIHA in working out how best to achieve its legitimate aim were properly taken into account.<sup>54</sup> The Court then considered section 193(2) of the *Equality Act*, which permits a charity to discriminate on grounds of religion in order to prevent or compensate for disadvantage linked to being a member of a certain religion. The Court found that, in order to avail itself of the protections of this provision, a charity is not required to satisfy a

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47 For a fuller discussion, see Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) ch 7 <<https://doi.org/10.1017/CBO9781139136358>>.

48 [2020] UKSC 40 ('*Z v Hackney Council*').

49 Ibid [29] (Lord Sales, Lords Reed, Kerr and Kitchin agreeing).

50 The objects of AIHA are set out in *ibid* [27].

51 *Ibid* [3].

52 *Ibid* [6].

53 *Ibid*.

54 *Ibid* [79]–[88].

proportionality test. It is sufficient that the discrimination in view addresses historic disadvantage.<sup>55</sup>

An interesting understanding of philanthropy and its relation to the demands of justice emerges from a close reading of the Court's judgment in *Z v Hackney Council*. In finding that charities tackling historic disadvantage by targeting benefits at particular groups need not justify their actions by showing proportionality, the Court emphasised that charities must demonstrate public benefit in order to achieve registration,<sup>56</sup> and that it is the role of the state, not charities, to ensure sufficient social welfare provision to members of the community.<sup>57</sup> Putting this differently, the Court seemed to suggest that it is not for the philanthropists whose generosity means that AIHA is able to provide 470 homes to needy families to solve the problem of social housing in London or indeed to justify their failure to do so. It is for the state to do this. The philanthropists behind AIHA should be free to target their gifts to Orthodox Jewish people in need, and if at the same time housing is unavailable to other needy people, it is for the state to explain this injustice. In *Z v Hackney Council*, then, reflection on the problem of discrimination leads to a set of further questions about the division of labour between the state and the charity sector in the achievement of distributive justice generally.<sup>58</sup>

This vision of the state bearing the burden of distributive justice through the provision of social welfare, and philanthropy supplementing state provision according to the convictions and preferences of philanthropists, is an attractive one.<sup>59</sup> Nonetheless, in a society where the state fails to discharge its responsibility to make adequate provision for the worst off, is it appropriate that this vision inform legal responses to injustice in philanthropic settings? A fortiori when the state not only shirks its responsibility to provide social welfare, but then expects and funds the charity sector to take up this burden instead, a situation that has come to pass in many liberal democracies over the past 40 or so years. The single mother in *Z v Hackney Council* had been placed by the Council into suitable housing by the time the case got to the United Kingdom Supreme Court.<sup>60</sup> But what if this had not happened, and she had ended up homeless? If the state fails to ensure the minimum of social welfare for all, then perhaps the law should refuse to allow philanthropists to make their contributions according to their own lights. Instead, perhaps the law should attempt to generate, from the patchwork of philanthropic

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55 Ibid [95]–[108].

56 Ibid [98]–[105].

57 Ibid [106]–[110].

58 Contrast the approach in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2012] UKUT 395, where the Upper Tribunal found that an adoption agency could not withhold its services from same sex couples consistent with the requirements of the *Equality Act 2010* (UK). There was no discussion in the Upper Tribunal's reasoning of the state's responsibilities in respect of adoption services.

59 For reasons to subscribe to this vision, see Daniel Halliday and Matthew Harding, 'Keeping Justice (Largely) Out of Charity: Pluralism and the Division of Labor between Charitable Organizations and the State' (2020) 26(4) *Legal Theory* 281 <<https://doi.org/10.1017/S1352325220000233>> ('Keeping Justice (Largely) Out of Charity').

60 *Z v Hackney Council* (n 48) [34].

provision on offer, a simulacrum of what the state ought to, but does not, provide. I return to these thoughts in Part VI below.

Ex post strategies are called for where philanthropists act on their altruistic motives, and the arrangements they set in motion then collide with equality norms that give expression to justice goals. Before moving on, it is worth considering *ex ante* strategies that might be deployed to ensure that philanthropists make choices that are likely to coincide, rather than collide, with what justice requires. One such strategy is clearly set out in section 193(4) of the English *Equality Act*. According to that provision:

If a charitable instrument enables the provision of benefits to persons of a class defined by reference to colour, it has effect for all purposes as if it enabled the provision of such benefits –

- (a) to persons of the class which results if the reference to colour is ignored, or
- (b) if the original class is defined by reference only to colour, to persons generally.

Thus, philanthropists are simply not permitted to embed certain forms of racial discrimination in the terms of their gifts even where such discrimination might support or advance a historically disadvantaged group.<sup>61</sup>

Another, arguably subtler, *ex ante* strategy to ensure philanthropic alignment with norms of equality may be observed in the law of Singapore. In Singapore, as in many other jurisdictions, philanthropists enjoy tax preferments in respect of their gifts to charity. However, in Singapore, such tax preferments – which take the form of deductions from assessable income – are not available in the case of gifts to charity as such. Rather, they are available only to philanthropists who make gifts to a subset of charities called Institutions of a Public Character.<sup>62</sup> Institutions of a Public Character are charities that work for the benefit of the whole Singaporean community as opposed to subcommunities defined by ‘race, belief or religion’.<sup>63</sup> The deduction is currently 250%,<sup>64</sup> indicating that the Singaporean State prizes philanthropy that is aligned with equality norms and that does not seek to discriminate on certain articulated grounds, even in benign ways.<sup>65</sup>

61 See, eg, *Gibbs v Harding* [2008] Ch 235, [23]–[27], decided under the predecessor provision: *Race Relations Act 1976* (UK) s 34.

62 *Income Tax Act* (Singapore, cap 134, 2014 rev ed) ss 37(1), (3)(c)(ii) (‘*Singapore Income Tax Act*’).

63 *Charities (Institutions of a Public Character) Regulations* (Singapore, cap 37, rg 5, 2008) reg 3(1)(c).

64 *Singapore Income Tax Act* (n 62) s 37(3A)(a).

65 Whether this approach is best understood as directed at justice goals or at communitarian goals is an interesting question. For the policy settings that inform it, see the account of post-independence Singaporean politics in CM Turnbull, *A History of Modern Singapore: 1819–2005* (National University of Singapore Press, rev ed, 2009) chs 9–10.

#### IV PHILANTHROPY AND THE DISTRIBUTION OF POLITICAL POWER

The idea that the rich should enjoy disproportionate political power compared with other members of the political community is repugnant to most prevailing conceptions of justice. To the extent that philanthropy enables this, then, it ought to be a matter of great concern. In recent years, much has been written about the political influence exercised by extremely wealthy philanthropists, such as Bill and Melinda Gates, George Soros, and Mark Zuckerberg, to name just a few.<sup>66</sup> In order to assess the extent to which such claims of plutocracy have merit, it is worth pausing to dwell on the precise mechanisms by which philanthropists might come to enjoy political power, to see whether those mechanisms create or exacerbate a disproportionate political influence on the part of the rich.

An inquiry into such mechanisms rightly begins with tax preferments. Philanthropists – at least where their gifts are directed to state-approved purposes – typically enjoy tax preferments in respect of those gifts. For example, a donor might be able to deduct, from her assessable income in the relevant period, the amount of the gift, potentially reducing her assessable income to \$0 depending on the quantum of the gift.<sup>67</sup> Such a deduction might be conceptualised in different ways, but in substance it amounts to a contribution, by the state, of revenue that would have been collected but for the deduction, to further the purposes for which the donor made her gift.<sup>68</sup> The philanthropist is thus able to effectively direct the expenditure of revenue to her chosen purposes, and thereby exercises political power separate from the democratic and representative institutions of government through which the whole political community collectively decides how to spend revenue in the ordinary course of events. And while it is true that, beyond threshold minimums,<sup>69</sup> any donor is able to enjoy this sort of power over expenditure of the revenue, rich donors possess more of this power as they tend to direct larger expenditures. Moreover, and this is a critical point, in jurisdictions with a progressive income tax, rich donors possess a disproportionate amount of political

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66 See Mairi Mclean et al, 'Elite Philanthropy in the United States and United Kingdom in the New Age of Inequalities' (2021) 23(3) *International Journal of Management Reviews* 330 <<https://doi.org/10.1111/ijmr.12247>>; Darrell M West, *Billionaires: Reflections on the Upper Crust* (Brookings Institution Press, 2014) ch 4. See also Rob Reich, *Just Giving: Why Philanthropy Is Failing Democracy and How It Can Do Better* (Princeton University Press, 2018) ch 4 <<https://doi.org/10.1515/9780691184395>>; Andrew Sayer, *Why We Can't Afford the Rich* (Policy Press, 2014) 291–2 <<https://doi.org/10.2307/j.ctt1t89fd6>>.

67 See, eg, IRC § 170 (2020); *Income Tax Assessment Act 1997* (Cth) s 30-15 ('*Income Tax Assessment Act*'), and above nn 62–4.

68 See David G Duff, 'The Tax Treatment of Charitable Contributions in a Personal Income Tax: Lessons from Theory and the Canadian Experience' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 199, 210–11 ('The Tax Treatment of Charitable Contributions in a Personal Income Tax').

69 In Australia, for example, the value of the gift must be at least \$2: *Income Tax Assessment Act* (n 67) s 30-15.

power when they claim deductions, because deductions have a perverse regressive effect that mirrors the progressive character of the income tax.<sup>70</sup>

So the inquiry into tax preferences quickly leads, at least in the case of deductions, to real concerns about philanthropy and the distribution of political power. The regressive effects of the deduction might be dealt with by the state adopting other mechanisms to encourage philanthropy. The tax credit, which does not have a regressive effect, is an available alternative and indeed is used (at least for taxpayers who are natural persons) in Canada and New Zealand.<sup>71</sup> Other, more complex, schemes might also be deployed, such as the Gift Aid scheme in use in the United Kingdom.<sup>72</sup> Nonetheless, the underlying concern remains: where rich philanthropists make large gifts, they direct the expenditure of revenue in ways that afford them a substantial – even if not disproportionate – degree of political power. At this point in the analysis, bigger questions come into view. How did rich philanthropists become so rich in the first place? Have they carried a just share of the tax burden apart from their philanthropic activities? While the question of what distributive justice demands of a tax system is notoriously difficult,<sup>73</sup> it seems hard to believe that current settings in most of the tax systems of the world today meet even a minimal set of demands. Indeed, Bill Gates himself has said publicly that extremely rich people should pay more tax.<sup>74</sup> In short, to the extent that wealthy philanthropists enjoy substantial political power because of their philanthropic activities, it might have more to do with the fact that they are wealthy and less to do with the fact that they are philanthropists.<sup>75</sup>

At the same time as concerns about philanthropy and plutocracy might turn out to be less about philanthropy and more about underlying concentrations of wealth, it is possible to construct a narrative in which the value of philanthropy is located, at least in part, in its very potential as a means for exercising political

70 On the regressive effect of deductions, see generally David G Duff, 'Charitable Contributions and the Personal Income Tax: Evaluating the Canadian Credit' in Jim Phillips, Bruce Chapman and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press, 2001) 407; Neil Brooks, 'The Tax Credit for Charitable Contributions: Giving Credit Where None Is Due' in Jim Phillips, Bruce Chapman and David Stevens (eds), *Between State and Market: Essays on Charities Law and Policy in Canada* (McGill-Queen's University Press, 2001) 457; Miranda Perry Fleischer, 'Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice' (2010) 87(3) *Washington University Law Review* 505; Miranda Perry Fleischer, 'Equality of Opportunity and the Charitable Tax Subsidies' (2011) 91(2) *Boston University Law Review* 601; Duff, 'The Tax Treatment of Charitable Contributions in a Personal Income Tax' (n 68); Miranda Perry Fleischer, 'Subsidizing Charity Liberally' in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar Publishing, 2018) 418, 441–3 <<https://doi.org/10.4337/9781785369995.00029>>.

71 *Income Tax Act*, RSC 1985, c 1, ss 110.1, 118.1; *Income Tax Act 2007* (NZ) s LD1.

72 *Income Tax Act 2007* (UK) ss 413–30.

73 See Linda Sugin, 'Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems' (2004) 72 *Fordham Law Review* 1991, 2004; Harding, *Charity Law and the Liberal State* (n 47) ch 4.

74 See Sergei Klebnikov, 'Bill Gates Urges Lawmakers to Raise Taxes on America's Billionaires', *Forbes* (online, 3 January 2020) <<https://www.forbes.com/sites/sergeiklebnikov/2020/01/03/bill-gates-urges-lawmakers-to-raise-taxes-on-americas-ultra-rich/?sh=4f167623f3f5>>. See also the recent letter from a consortium of millionaires to the World Economic Forum demanding to be taxed more: 'Attn Davos Attendees: In Tax We Trust', *In Tax We Trust* (Web Page) <<https://www.intaxwetrust.org>>.

75 For further elaboration of this thought, see 'Keeping Justice (Largely) Out of Charity' (n 59) 301–3.



power. Elements of such a narrative are spelled out in the work of Robert Reich, who argues that philanthropy is a vehicle for political contributions from a diverse and decentralised range of voices and associations in society, and a site for experimentation that is untethered by the usual accountabilities attached to state action.<sup>76</sup> In this view, Reich continues a tradition dating back at least to John Stuart Mill.<sup>77</sup> In other work, I have also emphasised this aspect of philanthropy, arguing that it is a means by which individuals may express and cultivate a range of altruistic virtues and that this diversity in ways of bringing about public benefit outcomes is desirable in a society committed to enabling a range of options for living self-directed and meaningful lives.<sup>78</sup> On these accounts, philanthropy enables pluralism and innovation in political engagement and is to be celebrated to that extent.

Such philosophical reflections find their counterpart in jurisprudential developments. Since the early part of the 20<sup>th</sup> century, charity law has raised obstacles in the path of the philanthropist who seeks to make gifts to further political purposes. While the furtherance of charitable purposes by ancillary political means has always been considered permissible within orthodox charity law, the pursuit of non-ancillary political purposes has not. Thus, a trust to promote law reform, or changes to government policy, or advocacy for a particular point of view on a contested social issue, has been refused charity status.<sup>79</sup> Recently, however, the idea that philanthropy might unlock political potential of public benefit has found expression in jurisprudential developments in at least one jurisdiction. In Australia, in the case of *Aid/Watch Inc v Commissioner of Taxation*, a majority of the High Court found that an entity formed for the purpose of generating public debate about foreign aid delivery was a charity pursuing a public benefit purpose.<sup>80</sup> In doing so, the majority reasoned that the furtherance of political purposes by not-for-profit associations might contribute to a culture of free political expression on which representative and responsible government under the *Australian Constitution* depends.<sup>81</sup> These developments in Australian law underscore the proposition that philanthropy might have value insofar as it enables diverse and experimental contributions to be made to the political life of a community.

An account that celebrates the contributions that philanthropy can make to politics assumes a certain sort of charity sector, and this brings us back to underpinning questions of wealth inequality. The Millian vision of philanthropy

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76 Reich (n 66) ch 4.

77 John Stuart Mill, 'On Liberty' in Tom Griffith (ed), *On Liberty and The Subjection of Women* (Wordsworth Editions, 1996) 73–4, 105–10; John Stuart Mill, 'Endowments (1869)' in John M Robson (ed), *The Collected Works of John Stuart Mill, Volume V: Essays on Economics and Society Part II* (University of Toronto Press, 1967) 613, 617.

78 'Keeping Justice (Largely) Out of Charity' (n 59) 289–97; Matthew Harding, 'Independence and Accountability in the Charity Sector' in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart Publishing, 2020) 13 ('Independence and Accountability') <<https://doi.org/10.5040/9781509926862.ch-002>>.

79 See *Bowman v Secular Society Ltd* [1917] AC 406, 442 (Lord Parker); *McGovern v Attorney-General* [1982] 1 Ch 321, 334 (Slade J); and now, it would seem, *Attorney-General v Family First New Zealand* [2022] NZSC 80, [153] (O'Regan J for Winkelmann CJ, William Young, Glazebrook and O'Regan JJ).

80 (2010) 241 CLR 539, 557 [47]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

81 *Ibid* 554–6 [39]–[45].

generating a diversity of innovative and independent viewpoints on questions of government and policy is one that seems most easily realised by a multitude of relatively modest associations and entities operating in accordance with their own preferences, convictions and beliefs. Such a scene may be contrasted with a civil society dominated by the interests and agendas of a few rich philanthropists. In the latter picture, diversity is likely to be hampered as the voices of smaller, more modestly resourced organisations are drowned out. Innovation might also suffer, as organisations funded by the rich achieve scale and consequently grow bureaucratic and inflexible. Even independence might be compromised as wealthy donors shy away from projects and purposes that might complicate their political aspirations or connections. Once again, the point that emerges is that, in the world where plutocrats enjoy political power through their philanthropic activities, the problem to be addressed is not so much the practice of philanthropy itself as the concentrations of wealth that plutocrats enjoy in the first place.

## V PHILANTHROPY AND RELATIONSHIPS OF INEQUALITY

Since Aristotle, justice has been thought to be a matter of equality, even if the sense in which justice demands equality has been much debated by philosophers.<sup>82</sup> On many mainstream accounts of distributive justice, for example, justice is a matter of distributive outcomes that can be justified according to a decision procedure in which individual persons figure as equals in some morally significant way.<sup>83</sup> Similarly, leading accounts of corrective justice locate its distinctive moral concern in a principle of equality applied to impugned interpersonal transactions.<sup>84</sup> Within one tradition of thinking about justice, equality is central in a different way again. In this tradition, the equality with which justice is rightly concerned is a characteristic of the affective and cognitive dimensions of social relationships. More specifically, this view of justice asks questions about the emotions, motivations, virtues, attitudes and beliefs held and expressed when people interact in the social sphere. Thus, in one influential treatment of egalitarian justice, Elizabeth Anderson argues for a conception of equality as:

a relationship among people rather than merely as a pattern in the distribution of divisible goods. This helps us see how egalitarians can take other features of society besides the distribution of goods, such as social norms, as subject to critical scrutiny. It lets us see how injustices may be better remedied by changing social norms and the structure of public goods than by redistributing resources.<sup>85</sup>

82 Aristotle, *Nicomachean Ethics*, tr CDC Reeve (Hackett Publishing, 2014) bk 5 <<https://doi.org/10.1093/acprof:oso/9780199695553.001.0001>>.

83 Two examples are Rawls (n 1); Dworkin (n 4).

84 See, eg, Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, rev ed, 2012) <<https://doi.org/10.1093/acprof:oso/9780199665815.001.0001>>; John Gardner, 'What Is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1 <<https://doi.org/10.1007/s10982-010-9086-6>>.

85 Anderson (n 1) 336.

From a justice perspective that is centrally interested in relationships of equality, philanthropy may be viewed as problematic. For example, take Clement Attlee's well-known critique of philanthropy, arguing that the beneficiaries of charity are demeaned by their passive role in the transaction from which they benefit. For Attlee, people who seek to help others without demeaning them ought to pay taxes that may then be redistributed to those in need.<sup>86</sup> Turning to case law, consider the statement of Lord Wright in *National Anti-Vivisection Society v Inland Revenue Commissioners*, made at a time when the British welfare state was taking shape: 'Again eleemosynary trusts may as economic ideas and conditions and ideas of social service change cease to be regarded as being for the benefit of the community.'<sup>87</sup> On one reading, this intriguing statement suggests that trusts for the relief of poverty, the heartland of philanthropic endeavour since Elizabethan times, might be thought to lack public benefit where the prevailing public culture doubts that such trusts are consistent with relationships of equality. Returning to academic work, there are even arguments to the effect that relationships of equality are compromised by philanthropy insofar as philanthropists themselves are emotionally manipulated into making gifts to good causes.<sup>88</sup>

When assessing arguments that philanthropy situates people in unequal relationships of concern from the perspective of justice, several considerations seem relevant. One is the extent to which a philanthropist deals directly with those who benefit from their philanthropy. Where relationships between philanthropists and their beneficiaries are mediated by third parties or interposed structures, the presence of those mediating factors might diffuse concerns about the relationships in question being unequal. Consider the example of a wealthy philanthropist who funds a bursary to support a student from a poor family. Where this philanthropist has direct dealings with the student to whom the bursary is awarded, there is certainly scope for the operation of social norms that might express inequality in the relationship between the two. Imagine that a lunch is organised to celebrate this philanthropist for their generosity, and the recipient of the bursary attends, feels obliged to show gratitude to the philanthropist at the lunch table, and is proudly displayed to all the philanthropist's rich friends. It is not hard to imagine the student in question being demeaned in this setting. Now imagine that the philanthropist chooses not to engage directly with the recipient of their bursary, but instead leaves it to an intermediary organisation – perhaps a university – to handle the bursary and the recipient according to its usual administrative processes. Now the opportunity for the recipient to be demeaned by the act of philanthropy seems diminished. After all, giving a benefit to a recipient through administrative processes does not

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86 Attlee (n 8) 8–9, 29–30, 75–8. Note that on Anderson's account, state-sponsored solutions to distributive problems might also offend relational equality where they express a lack of respect for those who benefit from the solutions in question: see Anderson (n 1) 305–7.

87 [1948] AC 31, 42 [48] (Lord Wright).

88 Véronique Munoz-Dardé and MGF Martin, 'Beggars Your Neighbour: (Or Why You Do Want to Pay Your Taxes)' in Martin O'Neill and Shepley Orr (eds), *Taxation: Philosophical Perspectives* (Oxford University Press, 2018) 124, 134–5 <<https://doi.org/10.1093/oso/9780199609222.003.0008>>.

tend to engage either donor or recipient affectively or cognitively in the way that a direct act of charity tends to do.

This point about mediated philanthropy seems generalisable. Much philanthropy does not look like an analogue of a rich pedestrian handing money to a beggar in a demeaning transaction on the street. Rather, it entails foundations or trusts (themselves separate from, if controlled by, the philanthropists that set them up), or even individual people, making grants to operational charities and other not-for-profit organisations, which in turn provide services to beneficiaries, often in exchange for a fee. Again, an example will help to illustrate. In Australia, a range of charities provide disability support services. Some of these charities are supported by philanthropists. At the same time, however, under Australia's National Disability Insurance Scheme ('NDIS'), people with disabilities receive government funding that they may then spend purchasing support services from the range of available providers.<sup>89</sup> Such people are thus enabled to interact with service providers not as supplicants seeking the philanthropic largesse of donors who support those service providers, but rather as consumers with purchasing power in a structure that, in some ways, resembles a market. The NDIS has many flaws, and I certainly do not intend to suggest that there are compelling reasons for the state to manufacture quasi-markets for social welfare in the way it has done in this instance.<sup>90</sup> Instead, I raise the example of the NDIS to make just one pertinent point: it seems far from clear that philanthropists who support the disability services sector in Australia and disabled people supported by that sector, stand in unequal relationships of concern from the perspective of justice. And this is because of mediating factors interposed between those two groups.

Another consideration that seems relevant to the argument that philanthropy expresses relationships of inequality is the destination of philanthropic largesse. Philanthropy by which advantaged people extend benefits to disadvantaged people seems susceptible to the charge of relational inequality. This is because, thanks to prevailing social and cultural conditions, it seems plausible that such philanthropy might express the sorts of motivations, attitudes and beliefs that help to constitute unequal relationships. Philanthropy motivated by pity and its entailed sense that its object is deficient in some way,<sup>91</sup> or borne of the arrogant view that the poor cannot help themselves, or even accompanied by a sense of resentment at having to care for the worst off, might be offered as examples. However, much philanthropy does not follow this pattern of advantaged people benefiting the disadvantaged. Indeed, recent data suggest that the causes favoured by wealthy philanthropists tend not to focus on benefiting the disadvantaged and instead concentrate on education, health

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89 See *National Disability Insurance Scheme Act 2013* (Cth) ss 3–5.

90 For a recent critical examination of the NDIS quasi-market, see David J Gilchrist, Satish Chand and Thomas Emery, 'Demand, Supply and the NDIS: A Matter of Words?' (NDIS Green Paper 4, Not-for-Profits University of Western Australia, 11 March 2021) <<https://www.uwa.edu.au/schools/-/media/Not-for-profits-UWA/NDIS-and-Disability-Services/Green-Paper-4-NDIS-Economic-Model-11-March-2021.pdf>>. See also the discussion in this Part V below.

91 See Anderson (n 1) 306–7.

care, arts, culture and sports.<sup>92</sup> These are all purpose types from which the wealthy themselves stand to benefit. Where a rich person donates money to an opera company because they value the opportunity that opening night affords to network with their preferred social circle, it is not obvious how their philanthropy expresses any inequality in relationships as opposed to their own selfish preferences. Similar points may be made about the wealthy donor who supports an elite university in the hope that their child will one day gain admission there,<sup>93</sup> or who funds research into a rare cancer because they suffer from it themselves.

It might be objected that self-interest is an unpalatable motivation for philanthropy. I certainly do not dissent from that view.<sup>94</sup> Nonetheless, the objection does not establish that in cases where philanthropy is self-interested it situates people in relationships of inequality. Indeed, if self-interest were inconsistent with social interaction on a footing of equality, then contracts would be morally suspect and everyone would be impelled by the demands of justice to act as a sort of fiduciary vis-a-vis everyone else. The affective and cognitive aspects of philanthropy that render it suspect in light of the demands of relational equality arise when philanthropists engage with beneficiaries in a morally problematic way, causing beneficiaries to conceive of their own position in the relationship in a way that demeans them. None of this necessarily occurs where philanthropists act from self-interest; indeed, the self-interested philanthropist may not think about the beneficiaries of their bounty at all.

What, then, does relational equality demand of the ethical philanthropist? We should take care here not to unthinkingly adopt an excessively rigorous view of what relational equality requires. For while it seems plausible that philanthropy by which advantaged people benefit disadvantaged people is susceptible to the charge of relational inequality, this need not inevitably be the case. Anderson herself recognises this fact when she discusses the virtue of compassion and how it might animate concern for, and action to benefit, the disadvantaged that does not offend the demands of relational equality.<sup>95</sup> Another way of putting this point is that relational equality does not require that all philanthropy be motivated by and express one set of attitudes, beliefs or virtues. A diversity of approaches is consistent with treating others on a footing of equality. John Gardner writes persuasively about the distinctive characters of virtues such as justice, charity (understood now in the non-legal sense to mean the disposition to care for those who are suffering

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92 Camden Wealth and Rockefeller Philanthropy Advisers, *Global Trends and Strategic Time Horizons in Family Philanthropy 2020* (Report, 2020) 13–15 <[https://www.rockpa.org/wp-content/uploads/2020/01/Global-Trends-and-Strategic-Time-Horizons-in-Family-Philanthropy\\_FINAL.pdf](https://www.rockpa.org/wp-content/uploads/2020/01/Global-Trends-and-Strategic-Time-Horizons-in-Family-Philanthropy_FINAL.pdf)>.

93 Note that philanthropic support for elite educational institutions might sometimes be understood as driven by class loyalty or solidarity as opposed to self-interest. See Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicholson, 1979) 348.

94 Economic analysis of philanthropy sometimes proceeds from the methodological assumption that all human behaviour is self-interested: see James Andreoni, 'Giving with Impure Altruism: Applications to Charity and Ricardian Equivalence' (1989) 97(6) *Journal of Political Economy* 1447 <<https://doi.org/10.1086/261662>>. I do not consider that assumption here except to register that I am not writing within the methodological tradition in question.

95 Anderson (n 1) 306–7.

irrespective of their situation relative to others), and public-spiritedness (being a disposition to do good for everyone in an indiscriminating way).<sup>96</sup> On a view inspired by Gardner's work on the virtues, philanthropy might be understood as a site for the expression of a range of incommensurable virtues that, while different, nonetheless express the sort of respect for others that is consistent with relational equality.<sup>97</sup> This last thought echoes a line of argument that I introduced earlier when discussing philanthropy that supports political engagement: a large part of the value of philanthropy might lie in precisely its capacity to enable the expression of a range of altruistic virtues and foster plurality and innovation in social life.

Reflection on philanthropy and the demands of relational equality does not obviously generate specific insights about how law might best be designed to ensure that philanthropy and justice goals are aligned. That said, in my view the argument that relational equality may be expressed in philanthropic settings sheds some light on a recent court decision in England and Wales raising questions about charity governance. In *Re Keeping Kids Co*, the question was whether the directors of a well-known charitable company supporting disadvantaged children should be disqualified from holding office under the *Company Directors Disqualification Act 1986* (UK) on the basis that they were 'unfit to be concerned in the management of a company'.<sup>98</sup> The key allegation made against the directors was that they allowed the company 'to operate an unsustainable business model'.<sup>99</sup> The incidents of this business model were various, but critically for present purposes included a policy of 'never turning a child in need away'.<sup>100</sup> On one view, then, the business model of the company was founded on a principle of compassion, committed to assisting needy children without regard to their relative positions or resource implications. After an exhaustive examination of the facts, Falk J rejected the allegation of unfitness.<sup>101</sup> In doing so, Falk J acknowledged that charity governors might, consistent with their legal duties, operate a business model based at its core on compassion for those in need.<sup>102</sup> To the extent that the demands of relational equality are consistent with the expression of compassion in philanthropy, Falk J's decision in *Re Keeping Kids Co* seems appropriately sensitive to relevant moral considerations. The case serves as a reminder of the importance of legal and regulatory frameworks that enable and do not inhibit philanthropy that expresses relational equality in a variety of self-chosen ways.

96 John Gardner, 'The Virtue of Charity and Its Foils' in Charles Mitchell and Susan R Moody (eds), *Foundations of Charity* (Hart Publishing, 2000) 1. See also Gardner, *Law as a Leap of Faith* (n 2) ch 10.

97 See 'Keeping Justice (Largely) Out of Charity' (n 59) and 'Independence and Accountability' (n 78), for further elaboration.

98 [2021] EWHC 175 (Ch), [1] (Falk J) ('*Re Keeping Kids Co*'); *Company Directors Disqualification Act 1986* (UK) s 6(1)(b).

99 *Re Keeping Kids Co* (n 98) [52] (Falk J).

100 *Ibid* [55].

101 *Ibid* [876].

102 See, eg, *ibid* [173]: 'The operation of a demand led model is far from unusual and should not itself be criticised. Many charities, and particularly those devoted to the relief of people in need, are pretty much by definition demand led.'



## VI CONCLUSION: PHILANTHROPY, JUSTICE AND THE ROLE OF THE STATE

One theme that emerges quickly in any investigation of philanthropy, justice and law is the role of the state in addressing problems of injustice in society. In this article, we have seen that the uncoordinated distributive outcomes produced by mass fundraising appeals might be less likely to arise where state agencies adopt a planned approach at scale. We have also seen that our thinking about the extent to which philanthropists should be permitted to discriminate in supporting their favoured causes might be influenced by the state's commitment to social welfare provision, for example, as a housing provider of last resort. We have reflected on the fact that the rich enjoy a large, and sometimes disproportionate, share of political power when making philanthropic gifts, but that the root cause of concern about that situation may lie in the legal and policy settings that permit the rich to enjoy such extreme concentrations of wealth in the first place. And finally we have looked at the demands of relational equality, noting that they are consistent with philanthropy that expresses respect for its beneficiaries, and also noting that mediating institutions can help to ensure that such respect is in fact expressed. This once again brings us back to the state, as the repository of just such mediating institutions, and Attlee's demand that citizens pay taxes to enable the state to assist the disadvantaged rather than attempting to provide such assistance through philanthropy.

All of this suggests that, in order to arrive at a sense of how philanthropy might support, rather than frustrate, justice goals, it might be necessary to have an accompanying sense of the state's proper responsibilities in pursuing such goals. As Dan Halliday and I have argued elsewhere, such an account of the state's responsibilities should be sensitive not only to the ways in which the state is well-placed to pursue justice (say, because of its monopoly on legitimate coercion and its scale) but also to the distinctive value of the charity sector as a site for the expression of a multiplicity of virtues and modes of interaction. The general picture we argue for is one in which the state provides a baseline of social welfare and public goods that accords with the demands of justice, freeing up philanthropists to pursue their own conceptions of the good relatively unencumbered by what justice requires. Where the division of labour between the state and philanthropy is structured in this way, the charity sector may flourish as the site for diversity and innovation celebrated by philosophers such as Mill.<sup>103</sup>

Different political communities conceive of this division of labour between state and philanthropy according to their own traditions. In some communities the state plays a dominant role; in others it is philanthropy that occupies that position.<sup>104</sup> Thus, an inquiry into how philanthropy might best accord with the

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103 'Keeping Justice (Largely) Out of Charity' (n 59). See also William Beveridge, *Social Insurance and Allied Services* (Cmd 6404, 1942); William Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (Allen & Unwin, 1948).

104 See Helmut K Anheier, 'Dimensions of the Nonprofit Sector: Comparative Perspectives on Structure and Change' in Helmut Anheier and Avner Ben-Ner (eds), *The Study of the Nonprofit Enterprise: Theories and Approaches* (Springer, 2003) 247 <<https://doi.org/10.1007/978-1-4615-0131-2>>; Helmut K Anheier,

demands of justice must be sensitive not only to theoretical questions but also to the history, institutions and orientation of the political community in view. I will not take up such matters here, except to note one general trend in a number of Western countries with liberal democratic traditions: the trend away from direct state provision of social welfare, and towards indirect provision involving the state funding charitable and other organisations to deliver social welfare in accordance with state objectives.<sup>105</sup> This trend has had profound implications for the political communities in which it has played out. Among them are surely implications for the practice of philanthropy against the backdrop of the demands of justice.

As Halliday and I suggest, the ideal world might be one in which the state carries its share of the justice burden, leaving philanthropy to pursue a range of conceptions of the good in a plurality of ways. However, our argument acknowledges the possibility that the ideal world might not be achievable given current political and institutional settings. In particular Halliday and I leave open the question of what should happen where – as appears increasingly to be the case – the state eschews its justice burden. In these circumstances, it might be appropriate to hold philanthropists to account from a justice standpoint, especially where they control vast concentrations of wealth, even though doing so might undermine diversity and innovation in the charity sector. Moreover, in a world where the state falls short of discharging its responsibilities in justice, ethical philanthropists might respond appropriately to that challenge by choosing to pursue justice as opposed to other worthy goals.<sup>106</sup>

In the non-ideal world in which we live, then, part of the everyday work of reconciling philanthropy and justice lies in orienting philanthropy to achieving justice goals precisely because the state will not do so. At the same time, though, citizens who care about justice and also about the creative potential of the charity sector should never stop seeking to achieve justice goals through state institutions. It is against the backdrop of those imperatives that the four tensions explored in this article are best understood. The problem of uncoordinated philanthropy might find its solution in coordinated state action but where it does not, there might be a role for law to play in helping to generate a higher degree of philanthropic coordination than has historically been present. Where the state does not guarantee a non-discriminatory provision of social welfare to all who need it, it might be necessary for law to demand of philanthropists that they look beyond their desire to assist historically disadvantaged groups with whom they have personal connections. In a world of gross, unjust inequality of wealth, legal settings that

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Stefan Toepler and S Wojciech Sokolowski, 'The Implications of Government Funding for Non-Profit Organizations: Three Propositions' (1997) 10(3) *International Journal of Public Sector Management* 190 <<https://doi.org/10.1108/09513559710166057>>.

105 For one recent study, see Kathryn Chan, 'The Co-optation of Charities by Threatened Welfare States' (2015) 40(2) *Queen's Law Journal* 561.

106 It might be thought that this is a good thing, either because justice is, to adopt Rawlsian language, the 'first virtue' of philanthropy, or because, all else being equal, it is desirable that philanthropists cultivate and act from a sense of justice as opposed to other virtues or goals: see further Rawls (n 1) 3–4 (on justice as a 'first virtue') and 409–29 (on the sense of justice in associational life). If we value philanthropy as a site for diversity and innovation, it is difficult to accept either of these claims.

encourage philanthropists to engage in political advocacy might need to be more closely monitored than would be necessary in a society where wealth is more equally distributed. And where underlying social conditions give rise to a real risk of relational inequality, law should seek to support philanthropy that expresses equality in relationships but in a diversity of self-chosen ways.