

Egoism and the Return of Charitable Gifts

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I. INTRODUCTION

THE LAW ASSUMES that all donors to charities are altruistic, when they are not. It assumes that all donors care about the charitable ends to which they give their money, when they do not. In consequence of the law's misconception, judges sometimes proceed to return gifts without a sound legal rationale for doing so. It is argued that where gifts fail, the legal basis of return is that, in analogy with frustrated consumers who have paid for unobtainable goods, donors should get their money back. With reference to altruism and egoism as the concepts are understood in economic donative theory,¹ it will be seen that this legal logic is only pertinent in relation to individuals who genuinely care about the delivery of charitable outcomes.

The law has a blind spot in relation to egoistic intent. Such individuals donate for a personal satisfaction which is entirely removed from the achievement of any other-regarding charitable outcome.² If they are purely egoistic, these donors cannot be frustrated where gifts fail. End goals are unimportant to them. They had their satisfaction at the point of donation when they consumed a joy-of-giving.³ They are not frustrated, so they are outside the rationale of return.

It is in difficult cases—failure cases—that judicial understandings of donor motivation come to the fore. In the normal course, when donors part with their money,

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¹ See generally J Elster, 'The Valmont Effect: The Warm-Glow Theory of Philanthropy' in P Illingworth et al (eds), *Giving Well: The Ethics of Philanthropy* (Oxford, Oxford University Press, 2011) 67; A Kotzebue, *On Collective Goods, Voluntary Contributions and Fundraising* (Karlsruher, Springer Gabler, 2013) 4–13; AK Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory' (1977) 6 *Philosophy and Public Affairs* 317.

² See J Andreoni, 'Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving' (1990) 100 *The Economic Journal* 464; W Harbaugh, 'The Prestige Motive for Making Charitable Transfers' (1998) 88 *The American Economic Review* 227; see generally A Rutherford, 'Get By with a Little Help from My Friends: A Recent History of Charitable Organisations in Economic Theory' (2010) 17 *European Journal of Economic Thought* 1031.

³ Joy-of-giving is itself understood a consumable good: D Ribar and M Wilhelm, 'Altruistic and Joy-of-Giving Motivations in Charitable Behavior' (2002) 110 *Journal of Political Economy* 424; Kotzebue (n 1) 10.

their gifts flow up a legal pipeline and into the lives of others without any cause for an analysis of the donor's wishes. In ordinary cases, the law channels, but does not query too deeply, the motivation behind the gift. But where the pipeline fractures because the donor's instructions prove impossible to effect, the law is put to much heavier work. It is at this pressure point of failure, where, for example, a donor has left insufficient funds,⁴ a trustee disclaims⁵ or a nominated charity has closed down,⁶ that the law, which attempts to effect what the donor would have subjectively wished,⁷ leaks its assumptions about the nature of the donor's motivation.

Critical economic analysis of the law's understanding of donor motivation marks a fresh line of enquiry. While economics and charity law have in recent times formed a fruitful critical pairing,⁸ contemporary economic enquiry turns mostly upon issues of broad political economy: that is, charity's role within the so-called third sector between state and market.⁹ Individual-level economic understandings of donor motivation have been left more or less untouched in legal scholarship. On the very rare occasions where micro-level economic concepts are applied to law, the focus has been on the impact of the law upon overall distributions of charitable wealth.¹⁰

This chapter departs from previous 'public' economic approaches, using micro-level concepts (economic altruism and economic egoism) to critique the courts' understanding of individual minds. This enables a fresh conceptual claim: that the rationale for return is based in frustrated economic altruism.¹¹ Building on that claim, it is further argued that where gifts are driven by unalloyed egoism, judges—unable to recognise the fact—sometimes return gifts without cause. The application of donative economic theory will therefore both reveal the altruistic basis of the law of return and also problematise the law's treatment of egoistic gifts outside that altruistic rationale. Most broadly, it will throw up deep-seated and hitherto unexamined legal assumptions about donative intent.

On an original view within economic donative theory, donors are modelled as altruistic.¹² Altruism in this context has a meaning more focused than the ordinary

⁴ *Re Wilson* [1913] 1 Ch 314 (Ch); *Re Good Will Trusts* [1950] 2 All ER 653 (Ch); *Re Woodhams* [1981] 1 WLR 493 (Ch).

⁵ *Re Robinson* [1923] 2 Ch 332 (Ch); *Re Lysaght* [1966] 1 Ch 191 (Ch).

⁶ *Re Rymer* [1895] 1 Ch 10 (CA); *Kings v Bultitude* [2010] EWHC 1795 (Ch), [2010] WTLR 1571; *Phillips v Royal Society for Birds* [2012] EWHC 618 (Ch), [2012] WTLR 891.

⁷ See, eg, *Re Broadbent* [2001] EWCA Civ 714, [2001] WTLR 967, [44]; *Executor Trustee and Agency Co of South Australia Ltd v Warbey* (No 2) (1973) SASR 336, 345.

⁸ See, eg, J Garton, *Regulation of Organised Civil Society* (Oxford, Hart Publishing, 2009); J Garton, *Public Benefit in Charity Law* (Oxford, Oxford University Press, 2013).

⁹ J Phillips et al, *Between State and Market* (Montreal, McGill-Queen's University Press, 2001); L Salamon, *The State of Non-profit America*, 2nd edn (Washington, Brookings Institution Press, 2012); H Anheier, *Non-profit Organisations: Theory, Management, Policy*, 2nd edn (London, Routledge, 2014).

¹⁰ M Bac, 'Restricted Charitable Donations and the "Cy Pres" Doctrine' (2002) 14 *European Journal of Law and Economics* 15, 17; J Garton, 'Justifying the Cy-Pres Doctrine' (2007) 21 *Trust Law International* 134, 145–49.

¹¹ See M Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) 89–92 for analysis of a connection between altruism, charity law and political liberalism.

¹² P Warr, 'The Private Provision of a Public Good is Independent of the Distribution of Income' (1983) 13 *Economic Letters* 207; R Roberts, 'A Positive Model of Private Charity and Public Transfers' (1984) 92 *Journal of Political Economy* 136.

use of the word. Altruistic donors, in the economic sense, are minded to give because they derive satisfaction from the consumption of others.¹³ They care about the charitable ends to which their gifts are applied. In *Strangers Drowning*,¹⁴ MacFarquhar describes the lived experience of individuals she calls ‘do-gooders’.¹⁵ One of these, Julia Wise, matches altruism in the economic sense. Described as both rational and ardent,¹⁶ she gives as much of her income away to charity as she can, leaving the minimum possible for her own restricted life. However, it is her motivation rather than her resulting penury which is important. She gives out of a concern to materially better the lives of others. She funds cost-effective medical interventions in low-income countries. Crucially, she is motivated only by material outcomes; economic results that benefit others. She gets no egoistic glow; only the ends matter.

Alongside altruism, in more recent times, donative economic theory has developed a complementary type of motivation—egoism, or the consumption of joy-of-giving.¹⁷ It is central to the concept that an entirely egoistic donor is unconcerned with charitable outcomes. That is, she might happen to give to charity, but she will not care whether other people consume the charitable goods she incidentally provides. Her motivation does not lie in the material advantage of other people. Beveridge, in *Voluntary Action*,¹⁸ a post-war report on the charitable sector, detailed the case of George Jarvis, who had been a man of substantial property in Herefordshire and who almost perfectly represents pure charitable egoism in this economic sense.¹⁹ George Jarvis’s neighbours reported that no intention to make a gift to charity had ever entered his mind until he became displeased with his daughter’s choice of husband. Beveridge writes that ‘he lived to see her become a mother and grandmother, but nursed his resentment to the end’.²⁰ Out of apparent spite to his daughter, upon his death, he established a charity for the relief of the poor, so as to disinherit her. George Jarvis can be described as an egoistic donor in the economic sense. In contrast to Julia Wise, the charitable outcome of his gift was unimportant. He was entirely indifferent whether poverty was in fact alleviated, he just wanted to spite his daughter. He was motivated by a joy-of-giving, albeit of a malign type.

The altruistic motivation of Julia Wise comes to us more readily than the purely egoistic intent of George Jarvis. We more naturally associate outcome-driven altruism with charitable giving. However, economic egoism, where the charitable goods supplied by the donor are incidental to the motivation behind the gift, does occur in a familiar modern context; it is often deliberately induced in circumstances of professionally organised fund-raising drives.²¹ So, for example, in *Serpentine Trust*

¹³ See, eg, Kotzebue (n 1) 5–10.

¹⁴ L MacFarquhar, *Strangers Drowning: Voyages to the Brink of Moral Extremity* (St Ives, Penguin, 2016).

¹⁵ *ibid* 3.

¹⁶ *ibid* 71.

¹⁷ See, eg, Andreoni (n 2); Harbaugh (n 2). Landry et al, ‘Towards an Understanding of the Economics of Charity’ (2006) 121 *The Quarterly Journal of Economics* 747; Buraschi and Cornelli, ‘Donations’, CEPR Discussion Paper 3488 (2002).

¹⁸ W Beveridge, *Voluntary Action* (Oxford, Routledge, 2015).

¹⁹ *ibid* 374.

²⁰ *ibid*.

²¹ See, eg, M Worth, *Fundraising: Principles and Practice* (Thousand Oaks, SAGE, 2016) 309–314.

Limited v HMRC,²² a set of inducements made by an art gallery, including inter alia opportunities for private hire, priority booking and free invitations to events, were held to be so vital in attracting donations as to be classed as transfers for consideration.²³ For any donors induced by these financial benefits alone, the charitable ends to which their money would be applied will have been entirely incidental to their motivation to give. They will have been egoistic consumers, unconcerned with the cultural cause.

First, I begin by acknowledging both the contribution and the limitations of this micro-level economic framework. Secondly, the altruistic basis of the law is uncovered. This builds into a claim that the rationale for return is found in frustrated altruism. Thirdly, I assess return in the context of purely egoistic giving. It is argued that, at the level of legal principle, egoistic gifts should always be kept in charity. Fourthly, moving to an applied precedential analysis of the theory, I then argue that the courts return egoistic gifts without any coherent doctrinal reason for doing so. Finally, equipped with a theoretical vantage point, I argue that attempted statutory reform in the context of public appeals suffers for want of clear theory.

II. THE LIMITS AND CONTRIBUTION OF A BINARY FRAMEWORK

Economic donative theory lends the analysis a particular view of donor motivation. In turn, it becomes possible to match that view with the existing law of return and so criticise the courts for their egoistic blind spot. It is important to note that donative theory builds on the voluntary nature of charity, emphasising that donors make choices according to their motivational preferences.²⁴ Yet it supplies only a binary framework of egoism and altruism. Every charitable impulse is slotted within two poles.

It is necessary to acknowledge the limits of the binary and to explain why, despite those limits, the framework is relevant to legal argument. In consequence of its double-edged nature, economic donative theory cannot provide us with a full-fledged understanding of charity in complex society. It can tell us that donors might derive egoism-based or altruism-based satisfaction, but it cannot tell us why. Notably, the binary cannot explain why some of us might be compelled to take great risks for others, or why we might care so much that we have the capacity to take those risks. Monroe claims, with reference to risk-takers, ‘that altruists simply have a different way of seeing things. Where the rest of us see a stranger, altruists see a human being.’²⁵ By its nature, the altruistic/egoistic binary is too formalistic to fully explain why some of us are Good Samaritans.²⁶

²² *Serpentine Trust Limited v HMRC* [2014] UKFTT 876 (TC).

²³ *ibid* [43].

²⁴ Based in neoclassical economics, both altruism and joy-of-giving depend on rational choice. See, eg, K Boulding, ‘Notes on a Theory of Philanthropy’ in Dickinson (ed), *Philanthropy and Public Policy* (Cambridge, Cambridge University Press, 1962) 57, 60–63.

²⁵ K Monroe, *The Heart of Altruism: Perceptions of a Common Humanity* (Princeton, Princeton University Press, 1996) 3.

²⁶ See, eg, R Wuthnow, *Acts of Compassion: Caring for Others and Helping Ourselves* (Princeton, Princeton University Press, 1991) 167–191.

But economic donative theory can make an important critical contribution to legal analysis, not least because the altruistic side of the binary so closely matches judges' own views of donors. In this chapter, the binary will be put to an analytical use: as a heuristic, it will help to unlock and then critique the courts' framework of return. Weaved throughout this chapter, it will be seen from the luxuriously detailed individual analyses of gifts made by judges that courts see charitable motivation as altruistically outcome-driven in the economic sense. And, most importantly, the concept of self-interested, ego-driven donation provides a new tool with which we can assess the law's basic assumptions. The economic framework is a methodological trowel for digging up and then critiquing the courts' own concepts.

III. THE LAW OF RETURN AND FRUSTRATED ALTRUISM

It is argued that the rationale for return flows from a judicial view of donors as altruist consumers. First, it is seen that donors are treated in law as being motivated by the achievement of altruistic outcomes, or, put another way, the delivery of charitable goods. Secondly, it is argued that judges divide between types of altruist. The law only returns to irredeemably frustrated altruists, termed as having a 'particular charitable intention'²⁷ at law.

A. Donors are Assumed to be Economic Altruists

Roberts defines altruism in charity as 'the case where the level of consumption of one individual enters the utility function of the other'.²⁸ Economic altruism is therefore the motivation to expend on the consumption of other people. This is a commonplace in our lives. We routinely give towards the material advantage of others. Crucially, such altruistic material impulse is outcome-orientated: we want to see something consumed by another person when we give. Culyer states, in the context of health-care provision, that 'It is possible to model altruism in utilitarian terms ... in a health context, one is, perhaps, pleased to see another person healthier or with greater access to health care than would otherwise be the case'.²⁹

An altruistic donor in a health context genuinely wants to see better health care delivered as a charitable good that others might consume.³⁰ Rutherford describes the theory as 'charity as caring about the ends'.³¹ The key point is the focus on

²⁷ See, eg, *Woodhams* (n 4) 501; *Lysaght* (n 5) 202; *Re Ulverston and District New Hospital Building Trusts* [1956] Ch 622 (CA), 640.

²⁸ Roberts (n 12) 95.

²⁹ A Culyer, *The Dictionary of Health Economics*, 3rd edn (Cheltenham, Edward Elgar, 2014) 637.

³⁰ If the donor wishes she consume the good herself, then she is at least partly egoistic according to the definition here, as she will give in to an enjoyable anticipation of personal reward. For example, an individual might donate to public radio simply because she wants to wake up to it in the morning. Compare H Hansmann, *The Ownership of Enterprise* (Cambridge, MA, Harvard University Press, 1996) 230–31.

³¹ Rutherford (n 2) 1038.

outcomes. So one way of understanding economic altruism is simply to say that the donor genuinely cares about her stated charitable objectives. For example, it is well known that Andrew Carnegie put much of his great industrial wealth towards the provision of public libraries.³² For him to be classifiable as an economic altruist, it is sufficient that he was genuinely concerned to provide that charitable good for the consumption of others, and equally, that his true motivation was not a purely egoistic legacy. In that case, he would have been motivated only by the joy-of-giving.

Genuine concern with outcomes is the key to economic altruism. The mesh with legal charity is clear, as the law provides a catalogue of contexts in which expenditure on outcomes benefiting others is recognised. This is an ancient function of the law. The Preamble to the 1601 Statute of Charitable Uses, from which the modern law developed,³³ contains a brochure of broad material ends to which charitable funds might be validly applied. Of the lengthy list, many items remain familiar, such as the relief of aged, impotent and poor people, and the supportation, aid and help of young tradesmen. A more modern list is found in sub-section 3(1) of the Charities Act 2011, encompassing, in updated language, much of the historic law³⁴ and adding contemporary concerns such as the advancement of amateur sport³⁵ and the welfare of animals.³⁶

The courts make the intuitive assumption that when donors give towards one of these charitable outcomes, they do so because they genuinely care about the consumption of others. The charitable pipeline is seen as altruistic plumbing to deliver an intended economic advantage to other people. The best evidence for this is the framework of frustrated outcomes and consequent return detailed in the next section. However, there is another clue: common law judicial deference to the donor's planned outcomes.

At common law, judges have proclaimed themselves bound to carry through the donor's most precise schemes, and equally bound to refrain from subverting them. This is most apparent in circumstances where donors have made workable but low-utility gifts and the courts have been called upon to reshape them into something more socially worthwhile. At common law,³⁷ the courts have refused to do so. Or, in the words of Sir John Romilly in *Philpott v Saint George's Hospital*, 'instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect'.³⁸

The judge does not pass comment; she simply effects the donor's wishes. It is therefore a matter of logic that the donor is thought to care about outcomes. So, in *Philpott*, Romilly MR continued to say that he would not speculate upon whether

³² See, eg, A Van Slyck, *Free to all: Carnegie Libraries and American Culture 1890–1920* (Chicago, University of Chicago Press, 1995) 8–19.

³³ See, eg, Beveridge (n 18) 193.

³⁴ *ibid.*

³⁵ Charities Act 2011, s 3(1)(g).

³⁶ Charities Act 2011, s 3(1)(k).

³⁷ This is no longer true in statute. See, eg, Charities Act 2011, s 67(3)(c).

³⁸ *Philpott v Saint George's Hospital* (1859) 27 Beav 107, 112, 54 ER.

‘a different mode of application of the funds in charity should have occurred to the mind of the testator’.³⁹ The same sentiment can be found in *Re University of London Medical Sciences Fund*, Williams LJ saying that ‘the Courts [have never] thought it right to be benevolent with a testator’s money contrary to the plain intention of the will’.⁴⁰ Again, in *Attorney General for Northern Ireland v Forde*, Wilson J clearly articulated his respect for original donative intention, stating that he had ‘always understood that the law was that a testator could leave his property by will to whomsoever he liked ... the duty of the court was simply to read the will’.⁴¹

Donors are assumed to be motivated by their stated plans. This is expressed by judicial deference to the donor’s chosen charitable goal, even where it is low utility. This flows as a matter of logic from an assumption that the judge is genuinely committed to its delivery. Courts envisage a limited role for themselves: they effect and protect the donor’s wishes, and they proclaim themselves resistant to any temptation to subvert her plans. An assumption of economic altruism is central to this judicial attitude; there would be no need to show such deference to a charitable end goal if it was thought that the donor did not truly care about its effectuation.

B. Return is for Irredeemably Frustrated Altruists

The clearest evidence of a judicial assumption of economic altruism is found in the relationship between frustration and return. Donors are considered genuinely motivated by the provision of charitable goods—material outcomes—for others. This leads to a micro-level economic understanding of the judicial rationale for return: where a gift fails, a donor will get it back because her outcomes are found to be frustrated.

The relationship between frustrated altruism and return is a complex one. Return is not automatic for every frustrated donor. The courts have attempted to classify their altruists into types: those who are irredeemably frustrated by failure and those whose frustration can be relieved by a judicial tonic. Upon a failure, only the truly frustrated will get a return. This is because, over a long period,⁴² judges have taken the view that some donors who have made failed gifts would, in fact, prefer for them to be modified and kept in charity on new terms.⁴³ These donors, for whom frustration is thought redeemable, are described as having a general charitable intention.

Re Royce provides an example of the courts’ approach to redeemable frustration and general intention. In the case, a gift was left to the vicar and churchwardens of Oakham Church for the benefit of the choir. The amount left was far in excess of anything that the choir needed, so the surplus sum was held to have failed. In order to prevent a return, Simonds J found a very general intention for the advancement of

³⁹ *ibid.*

⁴⁰ *Re University of London Medical Sciences Fund* [1909] 2 Ch 1 (Ch), 8.

⁴¹ *Attorney General for Northern Ireland v Forde* [1932] NI 1, 12.

⁴² See generally R Mulheron, *The Modern Cy-près Doctrine: Applications and Implications* (London, Routledge, 2006) 106–20.

⁴³ The concept of modification is well explained in *Woodhams* (n 4), 503.

religion behind the gift. He stated that ‘The charitable intention (and I use the word “charitable” in its legal sense) in giving money for the purpose of musical services in a church is for the advancement of religion’.⁴⁴

The donor was thought to have a type of intention which would license the courts to fix the failure, apply it to general religion and so keep the gift in charity. This precedential creation is an economically altruistic state of mind. A generally minded donor, such as found in *Royce*, is thought to be flexible, but still genuinely committed to the delivery of charitable goods for the consumption of others. The logic of the courts is, in essence, that her altruistic intention was so broad—in *Royce*, as broad as general religious consumption by humankind—that modification to keep the gift in charity would not frustrate her wishes.

A second class of donors, those with a so-called particular charitable intention,⁴⁵ comprises donors thought so irredeemably frustrated by the failure that nothing can be done for them. They are deemed to have been motivated only by a more specialised and unfixable charitable goal, causing the gift to be returned. To this end, Buckley J stated in *Re Lysaght* that ‘a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way’.⁴⁶

The best-known example of this narrow and return-causing intention is *Re Wilson*,⁴⁷ where restrictions and conditions attached to a gift were so detailed as to present a picture of a donor wedded to specifics and details. The testator, a vicar from Cumberland, had sought to establish a school. His will outlined a personal charitable vision; the school and a schoolmaster’s house were to be paid for by the voluntary subscription of landowners and proprietors in specified parishes. The schoolmaster was to teach Latin, Greek and the elementary parts of mathematics to a timetable; scholars were to go free, but the cost for other pupils was to be 2s 6d at Midsummer and a quarter penny at Christmas. Faced with evidence of tightly particular outcomes, the court thought the failure irredeemable and so effected a return.

Crucially, the particular charitable intention—as developed by judges—is altruistic in the economic sense. It is perhaps true that the milk of material human kindness runs a little less fully in a donor with only a narrow and inflexible goal in mind, but this conception of intention still marks a gift motivated by the economic benefit of other people, so it is materially altruistic. The donor is thought to be driven by the delivery of charitable outcomes, albeit outcomes so inflexible and precise as to be irredeemable by the court through a process of judicial modification.

So, in an intention case, the court merely selects between two types of economic altruism, effecting a return where irredeemable frustration is found. The claim that the rationale for return rests in frustrated economic altruism is a layered one. Return is not automatic. Only the irredeemably frustrated get their money back. However, there is a clear conceptual point in play. The linked ideas of irredeemable frustration and return depend upon an assumption of economic altruism. It is only possible for donors who genuinely care about the delivery of charitable goods to others to

⁴⁴ *Re Royce* [1940] Ch 514 (Ch), 521.

⁴⁵ See n 27 above.

⁴⁶ *Lysaght* (n 5) 202.

⁴⁷ *Wilson* (n 4).

suffer frustration. An egoistic donor, who gives without thought or concern for the material benefit of others, will not be frustrated if such others do not receive it.

IV. THE EGOISTIC MOTIVATION

English judges have not taken a course in economic altruism. Nevertheless, an apparently intuitive understanding of economic altruism has been seen to underpin the law of return. The rationale for return is that where a donor's assumedly altruistic charitable outcome is irredeemably frustrated, she should get her money back.

An analysis in donative economics has led the argument to this point, but the methodological trowel can dig further still. Since the 1980s, donative economists have developed in egoistic consumption a complementary model of motivation based in self-interest. It posits that some donors give out of a desire for a self-interested joy-of-giving. The altruistic rationale for return, uncovered in the preceding section, cannot apply to them. Such donors give without concern for charitable outcomes. They give in consumption of a joy-in-giving and are indifferent to other-regarding charitable goods. In consequence, they are indifferent whether or not other people materially benefit from their gift, and so its failure does not frustrate them. First, the theoretical challenge posed by economic egoism to altruism will be analysed, then it will be argued that egoistic gifts are outside the legal rationale of return.

A. Economic Egoism and Charitable Gifts

Economic egoism is the 1980s child of its altruistic parent.⁴⁸ Within the literature,⁴⁹ egoistic motivation has been developed to provide an alternative aspect to the donor drive. Importantly, a purely egoistic donor will not be frustrated if certain charitable ends are not delivered. Her motivation is not charitable. The charitable end is incidental to her intent. She gives only because it is enjoyable to do so and without concern that any charitable plan is realised.

A theory of egoistic motivation developed from a testable empirical flaw in altruistic models, so causing the emergence of an alter ego to altruism.⁵⁰ It arose because goal-regarding motivation suffers from a free-rider problem. That is, if donors are modelled as deriving satisfaction from the delivery of charitable goods, they will have no motivation to give in circumstances where other hearts are willing to provide.⁵¹ All they care about is that the goals are met by someone, not necessarily themselves.

That testable hypothesis has been found wanting.⁵² There is no large-scale free riding; individuals give to charity even in the presence of contributions from

⁴⁸ For the chronological development of economic donative theory see J Andreoni, *The Economics of Philanthropy and Fundraising, Volume 1. Theory and Policy Toward Giving* (Cheltenham, Edgar Elgar, 2015).

⁴⁹ Andreoni (n 2); Harbaugh (n 2).

⁵⁰ See generally Kotzebue (n 1) 10–13; see especially Andreoni (n 2).

⁵¹ Warr (n 12); Roberts (n 12).

⁵² See especially Andreoni (n 2).

other donors. Egoism emerged as a theoretical response to that donation behaviour. In place of caring altruistically about charitable outcomes, it theorises that some donors give because they enjoy it. A new consumable good—often termed ‘glow’⁵³—is brought into the donor’s thought processes. Kotzebue describes the donor’s motivation as ‘driven by the (essentially egoistic) wish to consume a purely private good’.⁵⁴ Thus egoistic motivation adds a new element to donative theory, located in the familiar economic terrain of self-interest. Boulding graphically illustrates the point: ‘If we drop a dime in the blind man’s cup, it is because the blind man gives us something. We feel a certain glow of emotional virtue, and it is this that we receive for our dime.’⁵⁵

The mechanisms inducing joy-of-giving may, however, be less socially desirable than emotional virtue. A striving for social recognition is a key psychological driver of public consumption,⁵⁶ and research by Andreoni and Petri suggests that where donors are identifiable, the size of their in-study donation will increase. They find that ‘by unmasking subjects, we allow for various social effects, like pride, shame, social comparison and prestige, to work’.⁵⁷ A second, and directly intuitive, mechanism to induce a joy-of-giving is found in circumstances where donors are enticed by the supply of, or the chance of winning, private material inducements. Landry et al show that lottery fund-raising increases the sum of voluntary contributions.⁵⁸ Similarly, in an analysis of records at the English National Opera, Buraschi and Cornelli find a class of donors induced to give by special events and gala dinners.⁵⁹ Where there is inducement through the supply of social benefit or material reward, the potential for egoistic joy-of-giving is clear.

In economic donative theory, it is consumption of the joy-of-giving which provides the satisfaction, not material inducements or intangible social rewards per se.⁶⁰ They operate only to indicate circumstances of egoistic consumption of charitable goods. Such egoistic pleasure is not kryptonite to altruism. There is nothing in theory to prevent a donor from holding both egoistic and altruistic intentions at the same time. In economic donative theory it is common to understand donors as existing on a spectrum with ‘pure altruism’ at one end and ‘pure egoism’ at the other. Thus, it is possible, in between both ends of the spectrum, to both care about charitable ends and simultaneously derive an egoistic joy-of-giving.⁶¹ For example, a donor to a charitable lottery might both get a thrill from entry to the draw and

⁵³ Popularised by Andreoni (ibid).

⁵⁴ Kotzebue (n 1) 1035.

⁵⁵ Boulding (n 24) 58.

⁵⁶ Harbaugh (n 2); Dellavigna et al, ‘Testing for Altruism and Social Pressure in Charitable Giving’ (2012) 127 *The Quarterly Journal of Economics* 1.

⁵⁷ J Andreoni and R Petrie, ‘Public Goods Experiments without Confidentiality: A Glimpse into Fund-Raising’ (2004) 88 *Journal of Public Economics* 1605, 1620.

⁵⁸ Landry (n 17).

⁵⁹ Buraschi (n 17).

⁶⁰ See, eg, Harbaugh (n 2).

⁶¹ J Andreoni, ‘Philanthropy’ in S Kolm and J Ythier (eds), *Handbook of the Economics of Giving, Altruism and Reciprocity* (Amsterdam, Elsevier, 2006) 1126; P Glimcher et al, *Neuroeconomics: Decision-Making and the Brain* (Amsterdam, Academic Press, 2009) 317; B Kingma, ‘Public Good Theories of the Non-profit Sector: Weisbrod Revisited’ (1997) 8 *Voluntas* 135, 139.

genuinely hope her money will go to good causes. Or a relative disinheriting mainly from spite might also care about the cats' home.

However, it is those economic models of donation where individuals are driven by nothing other than economic egoism—deriving no utility from charity itself—which challenge the law, and, in turn, provide the focus of the following section.⁶² This is because, as will be seen, an entirely egoistic donor will sit outside of the law's rationale for return. A donor motivated only by egoism will have no concern at all for the provision of charitable goods. In turn, her charitable intention cannot be frustrated on failure, and there is no need, at law, to give the money back.

B. Why Purely Egoistic Gifts Should Be Kept in Charity

It has been argued that the law of return is based in frustrated altruism, so its rationale does not apply to an egoistic motivation that has not been at all frustrated. Later sections will discover instances of unacknowledged egoism in the precedents to pinpoint examples of return without any doctrinal basis. Here, however, the appropriate legal response to egoistic gift making is plotted. It is argued that purely egoistic transfers should continue to be treated as charitable gifts, but that they are outside the altruistic and end-driven rationale for return. They should be kept in charity.

The law is only seriously challenged by purely egoistic donors. Where an individual simultaneously derives a joy-of-giving and also genuinely wishes to materially advance the lives of others, she can still be scooped up within the legal net of altruism. She can, without distorting the truth, be said to be at risk of frustration if the altruistic side of her motivational binary cannot be effected. In such circumstances, the judicial blind spot to egoism is of conceptual interest, but of no legal consequence. It is only where the donor is a pure egoist⁶³ that the doctrine of return is truly challenged. In that circumstance, where a donor is not motivated by altruistic outcomes at all, charitable failure cannot frustrate her self-interested intent.

It is now possible to go where judges cannot, and map the purely egoistic motivation on to the law. Lost in a colder world of self-interest, it is initially tempting to leave behind charitable precedents and instead take recourse in the law of private express trusts. If egoistically motivated gifts were considered non-charitable, this would cause their return as a matter of precedent. As is well known, Megarry J suggested in *Re Vandervell's Trusts (No 2)*⁶⁴ that upon failure of a non-charitable gift, a resulting trust will occur automatically without any regard at all for intention. A later approach is more circumspect, but has similar effect. In *Air Jamaica Ltd v Charlton*, Lord Millett said of the resulting trust that it 'responds to the absence of any intention on his part to pass a beneficial interest to the recipient'.⁶⁵ Thus there

⁶² See especially Harbaugh (n 2); Buraschi (n 17); A Glazer and K Konrad, 'A Signalling Explanation for Charity' (1996) 86 *American Economic Review* 1019.

⁶³ Harbaugh (ibid).

⁶⁴ *Re Vandervell's Trusts (No 2)* [1973] 3 WLR 744 (Ch), 764.

⁶⁵ *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412.

is a strong, but not irrefutable,⁶⁶ precedential presumption of return in most failed private express trust cases.⁶⁷

Yet taking cold comfort in the law of private trusts does not quite wash. Even though entirely ego-driven donations are non-altruistic, such gifts cannot without strain be classed as legally ‘non-charitable’. Ego-motivated donors will be aware that their gifts were, before failure, destined for a legally recognised charitable end. They will expect their gift to go to charity, even if they are unmoved by the prospect. The distinction between an ego-driven and an altruistic, outcome-driven donor goes to the nature of charitable motivation as it is understood at law, but it does not relate to any wider legal taxonomy. It is therefore necessary to look for a way to fit egoistic donors within the law of charitable return.

There is no doubt that the altruistic, outcome-driven logic of return does not apply in egoistic cases. The legal problem is that while an egoistic donor will be unconcerned with altruistic charitable ends, the law of return assumes their central importance. We have seen that courts treat donors as altruists, and that they return gifts in consequence of irredeemably frustrated altruistic goals. In consequence, the first reason not to return in cases of egoistic donation is simply that such donors are outside this rationale of the law. An egoistic donor has suffered no frustration of her altruistic plans. Despite the failure of her gift, she remains content because she derived egoistic satisfaction from the process of giving. For example, in *New Forest Agricultural Show Society v The Commissioners of Customs and Excise*, Nicol J described, in relation to fundraising, such a joy-driven enterprise as ‘a function held in a vicarage or possibly manor garden (in the church hall if wet)’, including enjoyably social, yet profitable, competition, such as ‘guessing the length of a phenomenally large runner bean or the weight of a huge fruit cake, with a fee payable for each guess’.⁶⁸ Donors sampling such bucolic and personally profitable pleasures will have been satisfied at the point of giving. It would be wrong to call them frustrated altruists in any sense.

Alongside the negative reason not to return, there is also a second positive legal reason to keep egoistic gifts in charity. While an egoistic donor is evidently not motivated in the altruistic sense that she desires to see charitable outcomes, her gift is still a product of rational choice. She will expect it to go to charity, regardless of being unmoved by the prospect. She has therefore a type of legal expectation for the law to grasp a hold of. It must be conceded, however, that the grip is weak. Merely effecting what the donor can be said to have expected lacks the same legal normative force as carrying through what the donor positively wished, but in circumstances where there is no frustration at all, keeping the gift in charity remains a legal effectuation of her decision to give. While a tombola player, motivated by the chance of winning a prize, will not in truth be concerned about the state of the church roof, she will in a weak sense expect the gift to be applied to legal charity. Although that is not the motivation, it is the incidental expectation.

⁶⁶ See W Barr and R Stevens, *Pearce & Stevens’ Trusts and Equitable Obligations* (Oxford, Oxford University Press, 2015) 212.

⁶⁷ See also *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1966] AC 669, 708.

⁶⁸ *New Forest Agricultural Show Society v The Commissioners of Customs and Excise* [2002] STI 1361, 2002 WL 1310956 (V&DT), [45].

Such a legal outcome—keeping purely egoistic gifts in charity—is, at root, intuitive. The altruistic donor's gift, if she was concerned with charitable outcomes, has truly failed. Her altruism is frustrated, and she is in a parallel position to a purchaser of unobtainable goods. By contrast, an egoistic donor will have been self-interestedly satisfied regardless of the failure. Following from her successful and contented consumption of joy-of-giving, she cannot also expect her money back.

V. RETURN WITHOUT A RATIONALE IN CONTEXTS OF PURE EGOISM

It has been argued that the rationale for return rests on a legal understanding of donors as irredeemably frustrated economic altruists. It has also been argued that when purely egoistic gifts are found, the courts should not return them. It will now be argued that, in the context of failed testamentary gifts and failed public appeals, the blind spot to egoism causes fundamental doctrinal problems.

A. Return without a Rationale: Purely Egoistic Motivation in the Testamentary Context

Egoism is present but not prevalent in testamentary giving, so while the existing framework of return falls into conceptual difficulty in egoistic cases, such instances of egoistic donation are infrequent enough to leave the system of testamentary construction as a whole unscathed. This section criticises the courts' approach to egoistic motivation where it arises, but concludes with an acknowledgment of the broadly altruistic nature of testamentary charity.

A first instance of purely egoistic donation in testamentary cases—gifts motivated by spite—graphically illustrates problems with existing rules which assume altruism. This is a most unfortunate joy-of-giving. Testamentary gifts to charity may disappoint survivors, and exclusion of hopeful recipients through a gift to charity, might induce a utilitarian joy akin to Bentham's 'pleasures resulting from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence'.⁶⁹ Spiteful testamentary donors will give without concern for charitable ends, directing funds to charity in a far more malign frame of mind. The will in *Mills v Farmer* shows a striking but rare example of open hostility. In the case, a testamentary donor partly disinherited his kin. He stated in his will that he would later name charitable objects, but he did not do so, leaving the court confronted with the vaguest of intentions. His testamentary papers included the telling direction: 'It is needless to have any of my relations attend my funeral, as it is apt to breed ill will amongst them; and their grief on such occasions, is generally attended with hypocrisy.'⁷⁰

⁶⁹ J Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, Clarendon Press, 1970) 44.

⁷⁰ *Mills v Farmer* (1815) 19 Ves JR 483, 484, 35 ER 595, 595.

In *Mills v Farmer*, the donor's motivational enmity was presumably confined to his family. Yet in one remarkable instance, *Re Satterthwaite's Will Trusts*,⁷¹ a donor was apparently motivated by her dislike of all humanity. Telling a bank official that she hated all human beings, the donor declared that she would leave everything to animals. She presented the bank official with a will written on brown paper but, after being advised to create a formal will, the donor then requested he compile a list of animal charities. With further insouciance to charitable outcomes, the gift was made by reference to the London classified telephone directory.

The altruistic framework of return cannot be coherently applied in such cases. They are outside its rationale and, as it has been argued, such gifts are best kept in charity. A court of construction searching for irredeemably frustrated altruism, prepared to return the gift where such altruism is found, misfires its precedents. Where donors are exclusively consuming joy-of-giving, charitable ends do not matter to them at all, and so the test for a general or a particular charitable intention has no traction. The law's inability to recognise purely egoistic giving causes it a conceptual problem: it forces the courts to look for an altruistic motivation which might not be there, and possibly to effect return without any reason for doing so. There is no frustrated altruism in these cases. The donors—being dead at the point of failure—have already consumed an egoistic joy-of-giving in life. However, the law is unable to recognise that state of mind. Without a theory of egoistic donation in its tool kit, it is not open for the courts to find that any altruistic charitable end was incidental to the gift. Instead, in each case, following the standard approach, the court looks incoherently for irredeemably frustrated altruism.

A second instance of purely egoistic donation in testamentary cases—a desire to create a personal memorial⁷²—provides a direct example of return without a legal rationale. In the Victorian case *Re Gwilym*, a donor hoped for the 'Gwilym Art Gallery and Museum' to be opened in her own house after death. However, she did not leave enough money for the plan, causing the gift to fail. Smith J noted her motivation directly, stating, 'as appears from the direction that her name is to be attached to the museum and art gallery, she desired to establish a permanent memorial to herself'.⁷³ On the application of ordinary principles, Smith J apparently found a particular charitable intention, returning the gift to her testamentary estate. Such an outcome is incoherent, but inevitable, in a system of construction that does not recognise egoistic giving. Smith J was forced to discover, despite clear facts, an irredeemably frustrated concern for the benefit of others. This is a failure of the law, rather than a failure of the judge. It was simply not possible, within the existing legal framework, to find that the donor had before death successfully consumed joy-of-giving in contemplation of her self-interested goals.

This conceptual legal problem is a limited one because it impacts on only a relatively small number of cases. Although pure egoism in the form of spite and vanity can be inferred in the case reports, such instances are striking because they

⁷¹ *Re Satterthwaite's Will Trusts* [1966] 1 WLR 277 (CA).

⁷² See *Re Pinion* [1965] Ch 85 (CA); *M'Caig v University of Glasgow* (No 2) 1907 SC 231.

⁷³ *Re Gwilym* [1952] VLR 282, 285.

are unusual. While testamentary donors, giving in contemplation of death,⁷⁴ might be motivated by ‘legacy’, it is a generally altruistic inheritance that they have in mind. In an interview-based investigation into the meaning of ‘legacy’ in the context of aging, Hunter and Rowles identify three types: ‘material’, ‘biological’ and ‘of values’.⁷⁵ For those authors, the ends to which property is devoted appears important; participants in their study suggested that it is the third element—the transmission of values—which holds the most salience. They state in later work that ‘a primary task in creating a legacy is determining the values we cherish most in life and conveying these values to our descendants and to our communities’.⁷⁶ In another parallel to our legal understanding of end-driven altruism, Wade-Benzoni et al suggest that legacies allow donors to ‘form a psychological bond with others in the future, thereby symbolically extending themselves into the future and helping to fulfil their desires to establish a positive legacy’.⁷⁷ While the personality of testamentary donors is undoubtedly wrapped up in their legacy, an end-driven and altruistic drive is likely to be present.

Altruism is also more commonly inferred in the case reports than spite and vanity. For example, gifts are often directed at social change and, where this is the case, it must be likely that altruistic contemplation of the future will motivate the gift. Historically there have been gifts to reform prisons⁷⁸ or to abolish slavery,⁷⁹ and more recently gifts for animal welfare have appeared in the reports,⁸⁰ alongside gifts for the promotion of peace.⁸¹ Gifts are also often marked by a local flavour, suggesting a desire to confer genuine benefit upon a particular community. Gifts to local churches are relatively common,⁸² such as in *Re Broadbent*,⁸³ where a bequest was left to a closed iron-framed mission church in Stalybridge. Community links can also be seen, such as in *Re Sanders’ Will Trusts*, where a gift was left to the working classes, preferably dockers working in the Pembroke Docks,⁸⁴ and also in *Re Bagshaw*,⁸⁵ where a testamentary donor left a gift to the Bakewell and District War Memorial Cottage Hospital, which treated patients within a radius of five miles from the Bakewell Memorial Cross. Localised gifts suggest a genuine community end.

⁷⁴ See E Jonas et al, ‘The Scrooge Effect: Evidence that Mortality Salience Increases Prosocial Attitudes and Behaviour’ (2002) 28 *Personality and Social Psychology Bulletin* 1342.

⁷⁵ E Hunter and M Rowles, ‘Leaving a Legacy: Toward a Typology’ (2005) 19 *Journal of Aging Studies* 327.

⁷⁶ E Hunter and M Rowles, ‘Beyond Death: Inheriting the Past and Giving to the Future, Transmitting the Legacy of one’s Self’ (2008) 56 *OMEGA* 313, 322.

⁷⁷ Wade-Benzoni et al, ‘It’s Only a Matter of Time: Death Legacies, and Intergenerational Decisions’ (2012) 23 *Psychological Science* 704, 704.

⁷⁸ *Re Prison Charities* (1873) LR 16 Eq 129 (Ch).

⁷⁹ *Attorney General v The Iron Mongers’ Company* (1834) 2 Mylne & Keen 57, 639 ER 1064; *Attorney General v Gibson* (1835) 2 Beav 317n.

⁸⁰ *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL).

⁸¹ *Re Harwood* [1936] Ch 285 (Ch); *Re Collier* (Deceased) [1998] 1 NZLR 81; *Re Koeppler Will Trusts* [1986] Ch 423 (CA).

⁸² *Royce* (n 44); *Re Lepton’s Charity* [1972] Ch 276 (Ch).

⁸³ *Broadbent* (n 7); For the legal/conceptual overlap between religion and community see M Turnour, ‘Modernising Charity Law: Steps to an Alternative Architecture for Common Law Charity Jurisprudence’ in M McGregor-Lowndes and K O’Halloran (eds), *Modernising Charity Law* (Cheltenham, Edward Elgar, 2010) 228.

⁸⁴ *Re Sanders’ Will Trusts* [1954] Ch 265 (Ch).

⁸⁵ *Re Bagshaw* [1954] 1 WLR 238 (Ch).

In testamentary cases, the altruistic framework for return falters on occasion, but it is tested only rarely. It is true that where egoistic motivation is obviously present, such as in cases of spite or vanity, the law of return falls into a conceptual incoherence. There is no frustration of altruistic intention, and it is argued that such gifts, being successful instances of egoistic consumption outside the rationale of return, should be kept in charity. Yet being beyond the paradigm case of testamentary altruism, they rarely trouble the courts.

B. Return without a Rationale: Purely Egoistic Motivation in the Public Appeals Context

Failed appeals are a relatively new legal problem in the precedents. The law of return developed over a long period of time in the context of wills,⁸⁶ yet failed appeals emerged as a persistent legal issue only in the twentieth century.⁸⁷ Their emergence followed both a wider diffusion of surplus wealth throughout society and the establishment of professional fund-raising practices.⁸⁸ A shift to the mass funding of charity was heralded by Beveridge in *Voluntary Action* by his optimistic statement that ‘the democracy can and should learn to do what used to be done for the public good by the wealthy’.⁸⁹

Appeals often combine Beveridge’s democratic virtue with self-interest.⁹⁰ Instances of purely egoistic donation will be identified from the case law. These are gifts made in return for a personal material reward and gifts made in pursuit of a social benefit, such as public prestige. While the law has developed a coherent response to material benefit, it flounders with regard to gifts made in socially advantageous contexts.

A first instance of public appeal donation—gifts motivated by a desire to receive a personal material benefit—is purely egoistic. Where donors are induced to pay into charity by the prospect of a personal reward, there is clear-cut joy-of-giving. There is also no incoherence to be found in the case law. There is no question of return. For example, if a contributor to a charitable campaign is motivated to receive concert tickets, publications or the chance to enter for prizes, she will be treated as having parted entirely with her money and so denied a right to return. In *Re West Sussex Constabulary’s Widows, Children and Benevolent Fund*, a case concerning contributions to a non-charitable pension and dependent relative fund, Goff J stated, after detailed consideration of the charitable case law, that the motivation was contractual: ‘The purchaser of a ticket may have the motive of aiding the cause or he may not; he may purchase a ticket merely because he wishes to attend the particular entertainment or to try for the prize.’⁹¹

⁸⁶ See, eg, Mulheron (n 42) 100–35.

⁸⁷ *ibid* 185–209.

⁸⁸ See, eg, J Hughes, ‘Beyond the Rattling Tin’ in C Hanvey and T Philpot (eds), *Sweet Charity: The Role and Workings of Voluntary Organizations* (London, Routledge, 1996) 173.

⁸⁹ Beveridge (n 18) 307.

⁹⁰ See, eg, W Lindahl, *Principles of Fundraising: Theory and Practice* (Boston, Jones and Bartlett Publishers, 2010) 98.

⁹¹ *Re West Sussex Constabulary’s Widows, Children and Benevolent Fund* [1971] Ch 1 (Ch), 11.

Although the courts are not equipped with a theory of egoistic donation, Goff J's statement comes startlingly close. It parallels the logic of economic analysis. The judge, who makes a distinction between outcome-driven gifts and those flowing from a joy-of-giving, shares its rationale. That is, if a donor is entirely motivated by such non-altruistic enjoyment as concert tickets, sweepstakes and lotteries, it is incoherent to look for irredeemable frustration of an intended altruistic outcome. In the case, Goff J stated: 'it appears to me to be impossible to apply the doctrine of resulting trust'.⁹² Similarly, in *Re British School of Egyptian Archaeology*,⁹³ subscribers to an educational archaeological society were held to be motivated by the receipt of handsomely produced academic research publications. Finding a contractual relationship with the charity, Harman J prevented a return. So in this instance of pure egoism, the law is both settled and clear: such gifts are kept in charity.

By contrast, a second instance of purely egoistic donation—gifts prompted by a social reward—is met without such clarity. Where gifts are made out of a drive for social benefit or prestige, they are analogous to an egoistic exchange for material reward. Yet this is not recognised by the law. By way of example, a paradigm circumstance of gifts made for social benefit is found at charity auctions, where donors are prompted to bid excessively in order to gain social recognition.⁹⁴ Circumstances of social reward are not always so cut-throat or dramatic. A donor might derive a social benefit from smaller-scale social interactions,⁹⁵ such as a collection amongst colleagues in a work place. Where the gift is motivated exclusively by a self-interested goal, the charitable end will be incidental to the decision to give. The motivation will be egoistic and not altruistic.

The issue of egoistic social benefit has surfaced—albeit obliquely—in three cases involving community fund-raising for hospitals: *Re Welsh Hospital (Netley) Fund*,⁹⁶ *Re Hillier's Trusts*⁹⁷ and *Re Ulverston and District New Hospital Building Trusts*.⁹⁸ Unfortunately, no clear legal principle has emerged from repeated litigation. Taking the three cases together, it can be seen that certain judges have held that gifts made in contexts of social benefit should uniformly be kept in charity,⁹⁹ but others have expressed a preference for return. So in *Welsh Hospital*, PO Lawrence J expressed, with reference to social fund-raising, a very strong view that return would be 'absurd on the face of it'.¹⁰⁰ In that case, funds had been raised, inter alia, 'from collections in streets and at churches ... in most of the towns and villages of Wales'.¹⁰¹ Lord Denning picked up the mantle in *Hillier's*, stressing the loss of a right to return for appeals in social contexts. The judge held that gifts raised

⁹² *ibid.*

⁹³ *Re British School of Egyptian Archaeology* [1954] 1 WLR 546 (Ch).

⁹⁴ See, eg, Harbaugh (n 2); Andreoni and Petrie (n 57).

⁹⁵ G Becker, 'A Theory of Social Interactions' (1974) 82 *Journal of Political Economy* 1063, 1083.

⁹⁶ *Re Welsh Hospital (Netley) Fund* [1921] 1 Ch 655 (Ch).

⁹⁷ *Re Hillier's Trusts* [1954] 1 WLR 700 (CA).

⁹⁸ *Ulverston* (n 27).

⁹⁹ It has also been argued that return can be displaced by an 'out and out' intention to transfer absolutely. See D Wilson, 'Section 14 of the Charities Act 1960: A Dead Letter?' [1983] *The Conveyancer and Property Lawyer* 40; Mulheron (n 42) 109–11.

¹⁰⁰ *Welsh Hospital* (n 96), 661.

¹⁰¹ *ibid* 655.

at ‘a church collection, a flag day, a whist drive, a dance, or some such activity’ are given ‘beyond recall’.¹⁰²

Yet at least two judges have countenanced the possibility of return with regard to funds raised in contexts of social benefit. So in *Ulverston*, Jenkins LJ stated *obiter* that if a person had, in the context of solicitation, put money into a collection box and could satisfy the court that he had done so, then he ‘should ... be entitled to have his money back in the event of the failure.’¹⁰³ And in *Hillier’s*, Romer J stated, in a dissenting judgment, that any donor, ‘whether large or small’,¹⁰⁴ should be entitled to a return in principle. This approach leaves the door wide open for the return of egoistic gifts, but supplies no rationale for doing so.

In contrast to testamentary donation, egoism is much closer to the paradigm in the context of appeals. In the context of gifts for material benefit (eg lotteries and prizes), the courts have come very close to recognising that fact. However, where there is a purely egoistic social benefit derived from a public appeal, return is just as inappropriate. But the courts, without a fully articulated theory of egoistic motivation, have been unable to clearly express this view.

VI. A CONCEPTUAL STICKING-PLASTER: REFORM OF PUBLIC APPEALS

In the preceding section it was argued that judges erroneously return purely egoistic gifts without a legal rationale for doing so in both testamentary and appeals contexts. In an ironic twist, targeted legislative reform prevents return, but without a satisfactory rationale for the change. Bereft of a theoretical underpinning, statute—directed at public appeals—turns the problem on its head. That is, return is prevented as a result of the statute, but the legal basis for doing so is theoretically flawed.

The key reform concerns gifts made by unidentifiable¹⁰⁵ and unknown¹⁰⁶ donors. Under section 64 of the Charities Act 2011, these donors are defined *inter alia* as those giving through a collection box, lottery, competition or sale.¹⁰⁷ They are automatically and conclusively presumed to have a general charitable intention,¹⁰⁸ with the effect that return is precluded.¹⁰⁹

The micro-level economic perspective uncovers a conceptual problem: the statutory provisions sweep egoists under an altruistic carpet. It will be remembered that the general charitable intention is a form of broad and permissive altruism; it is the flexible and altruistic state of mind that permits judges to keep gifts in charity. It is also clear that collection box, lottery, sale and competition donors are likely to be deriving either a social or material benefit from giving. They are most likely egoistic.

¹⁰² *Hillier’s* (n 97), 714.

¹⁰³ *Ulverston* (n 27), 633.

¹⁰⁴ *Hilliers* (n 97), 721.

¹⁰⁵ Charities Act 2011, s 63(1)(a).

¹⁰⁶ Charities Act 2011, s 64 (1).

¹⁰⁷ Charities Act 2011, s 64(1)(a) brings such donors under s 63(1).

¹⁰⁸ ‘Given for general purposes’, Charities Act 2011, s 63(1).

¹⁰⁹ *ibid.*

While keeping their gifts in charity accords with the argument in this chapter—that egoistic gifts should not be returned—fixing such egoistic donors with a statutorily presumed general altruism is conceptually flawed.

The legislative reform to the law of public appeals was administratively, and not theoretically, driven. So at the House of Lords Committee stage in relation to precursor legislation,¹¹⁰ Lord Silkin straightforwardly presented the view that the cases on appeals, insofar as they contradict or turn upon hair-splitting,¹¹¹ should be rationalised. Only Lord Denning, sitting in a legislative capacity, hinted at deeper theoretical issues, stating that ‘in a public appeal of this kind I would submit to your Lordships that a person gives his money and that that is the end of it, he does not expect to have it back’.¹¹²

The sensible administrative reform impulse behind the legislation can be forgiven. Return of gifts to unidentifiable donors is an impossibility, and so conclusively fixing them with a general charitable intention permits the courts to take the prudent step of definitively ruling out such implausible action. However, without a clear grasp of the relationship between donor motivation and the precedents, the law can be seen to have tied itself in a conceptual knot. It applies a model of outcome-driven altruistic intention—the general charitable intention—to a category of donors very likely to be egoistically consuming the joy-of-giving.

The conceptual problem manifests itself in real-world legal artificiality. So, on occasion, intuitively egoistic donors have been conclusively presumed to have an altruistic general charitable intention. For example, in ‘South Scarborough Swimming Pool Association’,¹¹³ the Charity Commission for England and Wales deployed the statutory power in relation to an underfunded swimming bath appeal,¹¹⁴ noting that part of the fund was raised by ‘dances, social evenings, sponsored events’.¹¹⁵ Deploying the statute, a general charitable intention was found, permitting the gift to be used for the benefit of the local area. Yet in the context of dances and social evenings, it seems far more likely that the donors were entirely motivated by joy-of-giving.¹¹⁶ The statute fixed the donors with a type of altruistic intention that they did not hold.

The statute, as it relates to unidentifiable donors, is a sticking plaster over a theoretical sore. From the economic perspective worked through in this chapter, it can be seen that the reason that egoistic donors should receive no return is that they have suffered no frustration; they have contentedly and successfully consumed a joy-of-giving. Instead, the legislation treats them as general altruists. The statute pushes the court to the right conclusion—keeping the gifts in charity—but by the wrong route. Without recognition of egoistic donation, and acknowledgement that such intention is outside the rationale of return, the conceptual sore is left to fester.

¹¹⁰ Charities Act 1960, s 14(2).

¹¹¹ HL Deb 22 March 1960 vol 222, col 135.

¹¹² *ibid* col 137.

¹¹³ Report of the Charity Commission for England and Wales (1980) 38.

¹¹⁴ At that time: Charities Act 1993, s 14.

¹¹⁵ Charity Commission for England and Wales (n 113) 38.

¹¹⁶ See also *Re Henry Wood National Memorial Trust v Moiseiwitsch* [1966] 1 WLR 1601 (Ch).

VII. CONCLUSION

Application of economic donative theory has uncovered the judicial rationale for return. The core point of the analysis is that the law treats donors as altruistic in the economic sense. Judges assume that donors care, and care deeply, about the delivery of material outcomes to others. In turn, this leads to the legal rationale for return. It is because the donor is thought to be giving in pursuit of genuinely desired charitable outcomes that, where those outcomes cannot be delivered, courts will return gifts with an apology note. Economic donative theory has shown that the rationale for return lies in an assumption of frustrated economic altruism.

Economic donative theory is a critical as well as an explanatory tool. It shows, as a legal conceptual problem, that the courts have no understanding of egoism. Judges, at the level of principle, are only able to proceed on the basis that the gift before them has been made in the spirit of economic altruism. This leads to a fundamental strain. Where a donor is motivated by a purely egoistic joy-of-giving, it makes no sense to ask whether or not her goals have been frustrated. She is happy regardless. If her true motivation was spite to family, entry into a lottery or the accrual of social esteem, then she will not care what the judge does with her gift upon its incidental failure.

These theoretical problems run deep, unsettling the doctrine once they are analysed. It is unsurprising that the sole attempt at legislative reform—in the context of public appeals—has been shown to founder. Without legal recognition of egoistic giving, both case law and statute will inevitably tie themselves in knots. To iron them out, the courts should start by acknowledging the existence of egoistic gifts and, in consequence, keep those gifts in charity on the basis that such self-interested motivation is outside the legal rationale of the doctrine.