

REGULATING EGOISM IN PERPETUITY

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This is an accepted chapter in an edited collection to be published by Hart ('Debates in Charity Law'), which will be on the market in February 2019. The chapter has been through a process of anonymous external review. It has also been through multiple stages of internal review. While the chapter is not yet styled or proofed, I have been advised to submit to rolling reading at this point in the REF calendar. There will be no substantive changes on publication.

While ordinary trusts are time-limited, the charitable foundation lasts forever.² It is, in consequence, a perpetual legal vehicle through which a donor might seek to egoistically project her character and values into the future after their death. Unfortunately, that self-serving drive leads to bad charity, causing waste, as it crowds out higher utility – or altruistic – uses of capital. Through attention to egoistic theory, as it has developed in contemporary donative economics,³ this chapter explores the nature of the motivation to create perpetual foundations, and flowing from that theorisation, it then critically develops a policy justification for the protection of the donor's plans ('plan-protection'), alongside development of a legal-conceptual method for the utility-orientated reform of foundations.

A dispute over a change of organisational course, where a judge might be asked to set aside the donor's plan, normally arises out of the dissatisfaction of reform-minded trustees. This legal scenario, which pits the perpetual vision of a dead benefactor against the sentiment of a charity board is both striking and the basis of a substantial body of precedent. By way of illustration, in creating the Leonard and Beryl Buck Foundation, a donor named Beryl Buck, set up a charity funded by oil capital.⁴ Such foundations – so often the creature of a wealthy donor – can act as perpetual memorials, and it is possible to discern, even after her death, elements of the donor's personality and values from the terms of her foundation. It is telling that she named the foundation after herself and her husband, and also that she attempted to restrict the function of the charity to religious and educational purposes in service of the needy of Marin County, California – a geographically small, but extremely wealthy part of San Francisco, where she had lived. Yet these restrictions, the terms-of-gift flowing from the character of the donor, proved to be difficult to carry through. The charity was extremely wealthy, and its bounty was difficult to expend in such a small and prosperous area.

¹ With thanks to Michael Gordon, Robert Knox, Jennifer Sigafos and the anonymous reviewer for comments on earlier drafts of this chapter.

² *Re Faraker* [1912] 2 Ch 488 (CA); Law Commission, *The Rules against Perpetuities and Excessive Accumulations* (Law Com LC251, 1998). Here the ordinary-language term 'foundation' is used to mean a 'perpetual charitable trust' as it indicates an organisation founded from individual capital.

³ See generally on egoism in connection with giving in donative economics: 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; Sen, 'Rational Fools: A Critique of the Behavioural Foundations of Economic Theory' (1977) 6 *Philosophy and Public Affairs* 317.

⁴ See for an excellent exegis and analysis of the case: R. Sisson, 'Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres' (1988) 74 *Virginia Law Review* 635 – 654; *Re Buck*, No. 23259 (Cal. Super. Ct., Marin Cty., Aug. 15, 1986).

A reform-minded trustee,⁵ concerned not to waste philanthropic capital, applied to court to make grants in the less well-off parts of San Francisco. And so, as is commonly the case, efficiency was set in conflict with the donor's wishes. Despite the social utility of the reform proposal, the trustee met considerable local legal resistance. Although the litigation was in the end resolved outside of court, the trustee lost the battle, and Beryl Buck's plans were left protected in perpetuity. The impasse faced by Beryl Buck's foundation reflects a policy problem, which has been the focus of sustained academic investigation over a long period. Very often, a reform contrary to the plan of the donor will increase the efficiency of the foundation. Thus, on the one hand, it is sometimes said that tolerance of wasteful charity undermines the true social purpose of organisations.⁶ On the other hand, a counter argument can be made that strict plan-protection of the donor's vision is likely to encourage donation.⁷ That is to say, donors such as Beryl Buck are incentivised by their ability to place perpetual restrictions on their gifts.

Prompted by this debate in charity law, this chapter ultimately develops a compromise between adherence to the original plans of the donor, and the policy imperative that capital in foundations should be spent efficiently. It does so through recourse to motivational theory, as it has developed in contemporary donative economics. Applying that theory of volition,⁸ it points a way to understand what motivates people to create perpetual foundations, and then assess whether reform deters their giving. Donative economics is, in essence, a theory of pleasure in giving. All founders derive satisfaction from charity, as that makes for the cause of the action. This is a standard economic view and does not by itself shed much light on foundations. In order to reveal something of substance about the nature of foundation-creation, it is necessary also to pinpoint what donors are deriving pleasure in. The analytical split between egoism and altruism within the theory is an attempt to do that. It posits a framework in which donors have either a primarily altruistic or a primarily egoistic motivation, so providing a way to map the source of satisfaction in giving.

The altruistic motivation in creating a foundation is the most intuitive. It is the circumstance where a founder derives pleasure in the self-less material help of others. If Beryl Buck's motivation had been purely altruistic, she would have had no concern for the perpetuation of her and her husbands' name, or social esteem in her own local community. Her satisfaction would instead have flowed primarily from the consumption-activity of others – i.e. she would have consumed vicariously by establishing a charitable organisation from which others would benefit.⁹ More generally, this altruistic drive might be understood by analogy to buying dinner for an ungrateful child, and yet still deriving a pleasure in that thankless endeavour. Altruism,

⁵ It was an institutional trustee asking for reform in this case, named the San Francisco Foundation.

⁶ A. Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property* (London, Chatto & Windus, 1880) 230; J. Garton, 'Justifying the Cy-Pres Doctrine' (2007) 21 *Trust Law International* 134; R. Atkinson, 'Reforming Cy Pres Reform' (1992) 44 *Hastings LJ* 111, where it is argued on effectiveness grounds that trustees should have ultimate control of the charity assets.

⁷ S. Gary, 'The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing' (2010) 85 *Chicago-Kent Law Review* 977, 1002; Peter Luxton, 'Cy-près and the Ghost of things that might have been' (1983) 47 *Conv* 107, 116; J. Macey, 'Private Trusts for the Provision of Private Goods' (1985) 37 *Emory L.J.* 295, 304.

⁸ Both economic altruism and egoism in donative economics depend on the exercise of voluntary choices. See, eg K. Boulding, 'Notes on a Theory of Philanthropy', in F. Dickinson (ed), *Philanthropy and Public Policy* (Cambridge, Cambridge University Press, 1962) 57, 60-63.

⁹ See eg: 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.

conceived in this manner, is the merging of the wants and desires of others with those of the donor, so that she consumes the consumption of another.

By contrast, egoistic satisfaction arises where the material consumption of another is not in fact the motivation behind the gift.¹⁰ An egoistic donor will take pleasure from a self-benefit. So, with reference to child's dinner analogy, an egoistic donor might need the child to reward her with an endearing 'thank you'; or she might be driven to impress the child's parents; or perhaps she just knows that she will feel an indulgent warm glow, a self-congratulatory sense of her own objective goodness. The key point is that without a reward incidental to the consumption by the child, no dinner would be forthcoming. For the purely egoistic donor, it is the pleasure in self-benefit, not pleasure taken in the consumption of others, which motivates the giving. Donors will often be driven by both egoism and altruism at once,¹¹ but where their egoism is unalloyed, the self-benefit provides the totality of the drive to give.

In the light of donative economics, it is argued in this chapter that the drive to perpetuity – to create a restricted organisation which lasts forever – is *per se* egoistic. Rejecting an inference from existing fundraising literature that the pleasure in perpetuity might be analogous to pleasure taken in ordinary commodity consumption, it is instead theorised as pleasure in the creation of a legacy, understood as the ability of a donor to project her character and values into the future. It follows from this, as a connected critical claim, that plan-protection can be justified in policy terms. If the motivation to create perpetual foundations is understood as springing from pleasure taken in contemplation of a perpetual legacy, then the risk that donors' plans will be altered, would reduce the amount of capital in charity.

To focus squarely on that policy justification for plan-protection would be an incomplete use of the theory. The altruistic side of the binary can be put to work, as a part of a second critical claim that egoistically motivated charity is likely to be of low social utility. This is because an altruistic donor, someone who is motivated by a selfless concern for others, is more likely to apply capital in a manner free from egoistic encumbrances, such as Beryl Buck's locality restriction, or idiosyncratic methods of welfare delivery. Thus, it can be said that a legal system containing a plan-protection norm encourages egoistic giving, but that net increase in charitable wealth comes at the cost of inefficiency. Foundations that are deeply encumbered by the donor's egoistic search for legacy will be less efficient than those that are not.

The application of donative economics leads to a final critical claim. At first blush, it might seem that the working through of theory leads only to a Hobson's choice between the encouragement of egoistic charity and the discouragement of all charity. But the theory can also point the way to a legal compromise. It will be argued that egoistic donors might still be induced to donate with a weaker legal norm than plan-protection in perpetuity. There is no need provide plan-protection forever. A similar policy effect might be brought about by a period of immunity from reform, so that donors should still be induced to create foundations, but after a certain time is up, their charity would face utility orientated modification.

¹⁰ 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.

¹¹ 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

DONATIVE ECONOMICS AND LEGAL SCHOLARSHIP

Donative economics, as it has emerged in recent decades, contains a focus on egoism (‘egoistic theory’) which is not widely acknowledged either in legal scholarship or popular perceptions of charity. In non-academic discourse, donors who apply capital to valid charitable goals are often thought to be motivated by an altruistic wish to help others. There is a social perspective, existing far beyond scholarship, which links selflessness with charity. There, charity is much more readily associated with personal sacrifice than egoism. This is a historical and persistent understanding, so John Wesley famously implored people to earn all they can by honest industry, save all they can, and then give all they can of that: ‘portion of the Lord’s goods which he has for the present lodged,’ in their hands.¹² In a similar spirit but a more modern framing, Ben Witherington writes that charitable activity does not: ‘refer to a warm mushy feeling,’ but instead derives from: ‘sacrificial action’.¹³ Contemporary fundraising methods such as marathons and sponsored sleep-outs key into this same social understanding of charity, linking it – at least symbolically – with suffering or selflessness.¹⁴

Reflecting the general discourse, legal scholarship similarly omits egoistic self-benefit in gifts. A paradigmatic example of the legal view of egoism links the concept with the world of commerce rather than charity. Melvin Eisenberg famously draws a theoretical distinction between non-enforceable gift-promises and enforceable contracts,¹⁵ which is built upon an interpretation of gifts as being motivated by feelings akin to family selflessness. Eisenberg presents reciprocal self-benefitting arrangements as belonging to a world of exchange – i.e. egoistic transactions in business.¹⁶ By contrast, gift-promises are said to lie in our affective impulses towards our better emotions – ‘love, friendship, affection and the like’.¹⁷ While this emotion and family driven frame does not directly exclude the possibility that gift-promises might be motivated by non-altruistic impulses, the character and nature of donation is impliedly selfless and juxtaposed against commerce.

However, this linking of gifts and selflessness in both legal and public discourses is challenged by contemporary donative economics, which very directly connects egoism with giving of all types. James Andreoni’s now well-known egoistic argument takes the form of a logical case,¹⁸ his model is that if end-driven, economically altruistic motivation were to be treated as the sole cause of donation, then free-riding on the generosity of others should in that frame lead to low levels of overall giving. If all donors were motivated entirely by the achievement of altruistic material ends, then they would not be motivated to donate in circumstances where *someone else* is prepared to provide them.¹⁹ Founders would sit back and allow others to do the work. So, Andreoni’s argument for the existence of egoism in giving rests on the elegant empirical observation that charitable crowding out is rare.

¹² A Outler & R Heitzenrater, *John Wesley’s Sermons: An Anthology* (Nashville, Abingdon Press, 1991) 355.

¹³ B Witherington III, *John’s Wisdom, A Commentary of the Fourth Gospel* (Louisville, Westminster John Knox Press, 2005) 247-8.

¹⁴ See eg: C. Olivola & E. Shafir, ‘The Martyrdom Effect: When Pain and Effort Increase Prosocial Contributions’ (2011) 26 *Journal of Behavioural Decision Making* 91.

¹⁵ M. Eisenberg, ‘The World of Contract and the World of Gift’ (1997) 85 *California Law Review* 821.

¹⁶ See also: M. Chen-Wishart, ‘In Defence of Consideration’ 13 *Oxford University Commonwealth Law Journal* 209, 223.

¹⁷ Eisenberg, ‘World of Contract’ (n15) 848.

¹⁸ Andreoni, ‘Impure Altruism’ (n10).

¹⁹ See eg: B. Kingma, ‘Public good theories of the non-profit sector: Weisbrod revisited’ (1997) 8.2 *Voluntas* 135, 139

It would be difficult to overstate the social scientific impact of the egoistic perspective. There is now a substantial branch of experimental literature, applying and testing variants of Andreoni's theory of motivation in relation to crowding out.²⁰ There is also a stream of applied fundraising technique which seeks to present public charitable goals as private and individually achievable goods, such as building a particular well, or feeding an identifiable farm animal.²¹ The theory, as it is turned to practice, is that by particularising a fundraising goal, individuals feel that they can solve a social problem alone, and so the charitable drive is not crowded out. A different research-informed fundraising technique focusses directly on egoism and material self-benefit, so that fundraisers regularly provide incentives for donors,²² building rewarding 'relationships' over time, or directly incentivising donors with material benefits, such as freebies, prizes and lotteries.²³

Given its social science influence, it is surprising that donative economics, in the vein developed by Andreoni, has not yet been worked through in charity law research. One potential explanation is perhaps that its focus on pleasure in self-benefit might be thought to jar with the spirit of the wider legal project as it relates to charity. Egoistic theory might be interpreted as alien to the main questions of scholarship as it currently exists, which treat charity law rules as a type of semi-codified, state-backed, and objective regulation of beneficial human behaviour.²⁴ There is little space for subjective egoism in such a frame. Another contemporary impediment is that altruism, at least understood as a type of public spiritedness, is a key state public policy interest, and that much legal scholarship reflects and investigates contemporaneous state policy concerns. So, for example, Tina Stowell, the Chair of the Charity Commission, has publicly elaborated a conceptual policy alignment between charity and altruism, taking the view that when citizens donate: 'we give to something that is... important and precious: the charitable instinct itself.'²⁵ Much practical policy analysis of charity can be understood as a search for methods to harness or encourage that spirit.²⁶ In turn, a certain vein of scholarship becomes a 'friend' of the state's altruistic cause – a project intended to facilitate its social goals.

It should be conceded that it is natural to look for altruism in charity. The drive can be understood as at least a critical starting point for delineating charity scholarship from the private law disciplines which – with the possible exception of family law – seldom claim, at

²⁰ See eg: W. Harbaugh, 'The Prestige Motive' (n10). C. Landry et al, 'Towards an Understanding of the Economics of Charity' (2006) 121 *The Quarterly Journal of Economics* 747; A. Buraschi & F. Cornelli, 'Donations' (2002) *CEPR discussion paper* 3488; W. Lindahl, *Principles of Fundraising: Theory and Practice* (Boston, Jones and Bartlett, 2010) 98.

²¹ 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; N. Eliasoph, *The Politics of Volunteering* (Cambridge, Polity Press, 2013) 160.

²² Cases where freebies have been so extensive that tribunals have consider whether or not they amount to consideration: *Serpentine Trust Limited v HMRC* [2014] UKFTT 876 (TC); *Friends of the Earth v HMRC* [2016] UKFTT 0411 (TC).

²³ See eg: M. Worth, *Fundraising: Principles and Practice* (Thousand Oaks, SAGE, 2016) 309-314.

²⁴ A sophisticated analysis of altruism in relation to charity law is found in M Harding, *Charity Law and the Liberal State* (Cambridge, Cambridge University Press, 2014) 198 and in M. Turnour, 'Modernising charity law: steps to an alternative architecture for common law jurisprudence' in M. McGregor-Lowndes & K. O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham, Edgar Elgar, 2010) 228.

²⁵ T. Stowell, 'Chair's Speech to the Charity Commission Annual Public Meeting' (2019) www.gov.uk/government/speeches/chairs-speech-to-the-charity-commission-annual-public-meeting.

²⁶ See eg: S. Moody, 'Policing the Voluntary Sector: Legal Issues and Volunteer Vetting' in A. Dunn (ed), *The Voluntary Sector, the State and the Law* (Oxford, Hart, 2000) 39; C. Mitchell, 'Reviewing the Register' in C Mitchell and S. Moody (eds), *Foundations of Charity* (Oxford, Hart, 2000) 175.

the level of ethics, to be more than systems for the settlement of self-interested disputes. But it is also necessary for charity law scholarship to peer across to the egoistic side of the theoretical binary. There is more to charity regulation than public spiritedness and codified goodness. As it will be seen, acknowledgement of egoism has far-reaching regulatory consequences. To obscure it from analysis, is to omit a prime driver in charitable giving, and in turn, to miss an impulse which flavours policy reality. An analytical working through of egoistic theory, as drawn from donative economics, marks that point in this chapter. Theorising the perpetual foundation as an egoistically shaped legal form, a legal entity which provides donors with pleasure in self-benefit, begs regulatory questions. Acknowledgement of egoism in perpetuity opens up a space in which it becomes possible to interrogate the terms on which donors should be permitted their self-regarding enjoyment in the creation of a charity in the first place. Or put another way, it puts donors on the back-foot. Given their pleasure-driven desire to establish perpetual foundations, the law can be understood as being in a strong position to make regulatory demands upon them.

Understanding the drive to establish a perpetual foundation as egoistic, also raises policy questions about the social effect of that fundamental legal form. This is shown by the argument developed in this chapter, that organisations created in an altruistic spirit are likely to be of higher social utility than those founded in pursuit of a perpetual egoistic legacy, and in turn, that state-driven reform of foundations – i.e. the ability of a court, normally acting at the behest of trustees, to alter the purposes of a foundation – is socially useful.

THEORISING EGOISM IN CONNECTION WITH LEGAL PERPETUITY

This section develops a theory on the motivation to establish a perpetual foundation, characterising it as an egoistic drive. It is seen that the desire to create a foundation might be drawn from the legal possibility of perpetuity, where that ability is perceived as a self-benefit by the founder. Rejecting a view drawn from the literature that pleasure in perpetuity might be understood as analogous to ordinary commodity consumption, it is instead argued that the egoistic motivation in perpetuity is best conceptualised as a social desire, held by the donor, to project her character and values into the future after death – i.e a desire for legacy.

At first blush, a possible theoretical analogy between the pleasurable consumption of legal perpetuity and legally created commodities might seem attractive. It is a position suggested by existing experimental research into egoism, which strongly links charitable giving and commodity consumption. The law is able to create commodities, such as prize tickets, entirely from within its own structures. The perpetually existing foundation could be understood a market good of a parallel type, something which is ‘bought’ and consumed by the donor in pursuit of pleasure.

It is certainly true that a strand of contemporary egoistic theory investigates the impulse to charity through that commodity-consumption frame. To this end, Craig Landry et al show that lottery fund-raising, which holds out the prospect of a windfall for donors, increases charitable giving.²⁷ Similarly, in a study of records at the English National Opera, Andrea Buraschi and Francesca Cornelli find that certain donors are influenced by the prospect of marketised extras, such as access to gala dinners.²⁸ A connection between the consumption of market goods and egoistic motivation can also be seen from the case-law, being most clearly evidenced in public

²⁷ C. Landry, ‘Towards an Understanding of the Economics of Charity’ (n15).

²⁸ Buraschi, ‘Donations’ (n20).

appeals, where inducements are offered in order bring about donation. In one instance, *Re West Sussex Constabulary's Widows, Children and Benevolent Fund*, a case involving an appeal in which the donors were promised direct material goods in return to for giving, Goff J stated precisely:

‘...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...’²⁹

In this analysis, Goff J comes very close to recognising the same commodity concept of charitable egoism as that which appears in experimental research. The judge acknowledges that donors might give for pleasure in material goods incidental to altruism. This frame directly links an egoistic market activity – paying in exchange for something – with the act of egoistic giving.

With reference to this research literature, it is tempting to directly extend the same egoistic logic to the establishment of perpetual charitable foundation. On such a view, ‘the perpetual charitable foundation’ might be understood as a type of law-created commodity, or something that the donor ‘gets’ in exchange for donation. So just as a donor might receive material benefits from giving, such as fundraising inducements and membership passes, then ‘legal perpetuity’ could be understood in the same way. The donor could be interpreted as pleasurably consuming legal perpetuity as a commodified self-benefit, just as if it were a seat at a gala dinner.

One initial objection to transferring the commodity frame as it exists in the literature directly across to the context of legal perpetuity, is that the subjective experience of establishing a foundation is substantively very different from the pleasurable consumption of fundraising benefits. Inducements to give are normally intangible and fleeting, whereas the creation of a perpetual charity requires long term involvement and commitment. Goff J was referring to such ephemera as tickets and prizes, and in a different judgment, Lord Denning has described fund-raising activity, as comprising of: ‘...a flag day, a whist drive, a dance, or some such activity.’³⁰ By contrast, a donor taking pleasure in the creation of a foundation can expect fewer immediate rewards. Her legal experience is inherently long-term, future looking and intangible. If there is an egoistic pleasure in achieving perpetual charity through law, it must be of a disciplined sort distinct from immediate consumption.

In order to meet this objection, the commodity frame might be extended. While accepting that legal perpetuity is something experiential and long-term, one potential parallel for the pleasure taken in establishment of a perpetual foundation might be the purchase of a sport season ticket – i.e. a long term consumer experience, where the pleasure lies in future anticipation of the matches rather than the purchase of the ticket itself.³¹ A more complex linking, in the light of the fact that foundations do inevitably take a physical or ‘bricks and mortar’ form, might be to relate the establishment of a perpetual foundation with the pleasure found in the consumption of quasi-physical commodities, such as DVD box sets, or the purchase of computer game cartridge. There, physical consumption is combined with experiential consumption.³²

²⁹ *Re West Sussex Constabulary's Widows, Children and Benevolent Fund* [1971] Ch 1 (Ch), 11.

³⁰ *Re Hillier's Trusts* [1954] 1 WLR 700, 714 (CA).

³¹ M. Morgan & J. Summers, *Sports Marketing* (London, Thomson, 2005) 138.

³² See T. Carter, ‘The Psychological Science of Spending Money’ in E. Bijleveld & H. Aarts (eds), *The Psychological Science of Money* (London, Springer, 2014) 228.

Viewed in these terms, the commodity analogy can be broadened, at least at the level of theory. The donor, in establishing a perpetual foundation, could be understood as taking a long-lasting anticipatory and experiential enjoyment in the consumption of legal perpetuity – and that pleasure could be termed as the egoistic drive to perpetual charity. However, the analogy ultimately simplifies too much to be workable without artificiality. A key distinction between the establishment of a perpetual foundation and the purchase of a market good is that the legal creation of a perpetual charity is socially significant act. The core rationale behind the establishment of a foundation is to affect society, and so to separate out the motivation behind perpetuity from a desire to impact upon the world is inevitably to remove an important conceptual element from the picture. As such, a comparison with the purchase of a DVD or a sports ticket is ultimately lacking. While ordinary commodity consumption is a decision impacting primarily on the consuming individual, the creation of a perpetual foundation is, by definition, a type of consumption with far-reaching implication for others.

Thus, a more sophisticated understanding of the drive to perpetuity must account for its social aspect. A link between social acclaim and egoistic donation is present in the research literature. James Andreoni and Ragan Petri show that where donors are identifiable, the size of their in-study donation will increase. In experimental studies, they find that: ‘by unmasking subjects, we allow for various social effects, like pride, shame, social comparison and prestige, to work.’³³ A very direct example of egoistic gifts motivated by a social reward, is found in the phenomenon of charity auctions, where donors are encouraged to make donations which are both public and prominent in a context of positive social recognition.³⁴ On a smaller scale, this category of public giving is familiar to many of us, arising in run-of-the-mill social interactions, such as work-place collections.³⁵

In a sophisticated review of rich data in historic wills, Leslie McGranahan finds that: ‘individuals give in part to influence how they will be perceived,’ and that they may be: ‘motivated by the desire to garner the approval and approbation of others.’³⁶ As such, his analysis identifies, as recorded in testamentary documents, an egoistic drive to bequeath located in the good opinion of the community. The logic of McGranahan’s study is that the impulse to donate to charity is the same as that present at a charity auction, or a whip-round at work. He understands the testators as being motivated by social acclaim.

By emphasising a non-market understanding of egoism, McGranahan points in the correct direction, but the social context of the research – legacies on death – suggests more than he is able to take from it. To conceptualise the egoistic drive behind legal perpetuity, it is necessary to broaden the source of satisfaction in giving. While McGranahan is right to identify egoism in the historic English wills, his square focus on social acclaim side-steps an analysis of something apparent in his own data – *legacy*. That is ultimately a drive which goes deeper than the good opinion of the community.

Legacy allows people to project their personality and their values into the future. It enables them to influence others and to shape the world after their death. Legacy is not solely about property transfer, but also about values. So, in the Jewish tradition of legacy letters, the

³³ J. Andreoni and R. Petrie, ‘Public Goods Experiments Without Confidentiality: A Glimpse into Fund-Raising’, (2004) 88 *Journal of Public Economics* 1605, 1620.

³⁴ See, eg Harbaugh (n9); Andreoni, ‘Public Goods Experiments Without Confidentiality’ (n33).

³⁵ G. Becker, ‘A Theory of Social Interactions’ (1974) 82 *Journal of Political Economy* 1063, 1083.

³⁶ L. McGranahan, ‘Charity and the Bequest Motive: Evidence for Seventeenth-Century Wills’ (2013) 6 *Journal of Political Economy* 1270, 1289.

deceased might present a story of their life as well as ethical advice to later generations. There, the motivation is to help descendants, but also to provide solace to the author in contemplation of death.³⁷ The motivation to establish a foundation is often a manifestation of this widely shared drive to project character and values into a future after death. It is often an egoistic drive because the pleasure comes from the anticipation of that projection, rather than the material consumption of others. And so, investigating the concept of legacy, Elizabeth Hunter and Graham Rowles find that the passing-on of values is a particularly powerful impulse amongst interviewees.³⁸ In later work they find 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.’³⁹ Founders build social monuments to themselves. Or another way of understanding the same concept is in terms of ‘post-mortem identity,’ or securing remembrance.⁴⁰

This drive to egoistic remembrance links to foundation-creation. It is strikingly explicit in *Protecting Donor Intent: How to Define and Safeguard Your Philanthropic Principles*,⁴¹ a guide for founders concerned that their capital might be applied to causes of which they disapprove. There, Jeffrey Cain sets out a checklist that self-projecting donors might ask themselves, including an assessment of their religious values and: ‘the ideas, traditions, persons, events, and circumstances...’⁴² that shaped them as a person. Cain suggests that donors might create legacy statements, alongside: ‘other collateral material intended to convey the character, passions, goals and ideas of their founder to future generations.’⁴³ He goes so far as to detail one foundation with interactive foyer kiosks explaining the life, values and beliefs of the founder.⁴⁴

A theoretical focus on legacy enables a different understanding of the egoistic drive to legal perpetuity. It enables the establishment of a perpetual charitable foundation to be understood as a way of achieving a lasting impact after death. Such a view of charitable perpetuity has – obliquely at least – been recognised in the courts, so in *Re Weir Hospital*,⁴⁵ Farwell LJ stated his view that: ‘one of the strongest inducements to gifts of this nature is that desire for posthumous remembrance which has inspired similar gifts for centuries.’⁴⁶ And a darker acknowledgement of the drive to project personality into the future also occurs in judicial comments relating to the interpretation of the donor’s wishes after death. In *Re Woodhams*, Vinelott J referred to donor intention as a, ‘will o’ the wisp,’⁴⁷ linking the donor’s perpetual wishes to an ephemeral and atmospheric ghost. In the same vein, in *Harwood v Harwood*, Week J referred ironically to the task as, ‘divination.’⁴⁸

³⁷ See eg: J. Riemer & N. Stampfer, *Ethical Wills and How to Prepare Them: A Guide to Sharing Values from Generation to Generation* (Woodstock, Jewish Lights Publishing, 2015).

³⁸ E. Hunter and M. Rowles, ‘Leaving a Legacy: Toward a Typology’ (2005) 19 *Journal of Aging Studies* 327.

³⁹ 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.

⁴⁰ S. James, *Women’s Voices in Tudor Wills: Authority, Influence and Material Culture, 1485 - 1603* (Oxford, Routledge, 2016) 2.

⁴¹ J. Cain, *Protecting Donor Intent: How to Define and Safeguard Your Philanthropic Principles* (The Philanthropy Roundtable, 2012).

⁴² *Ibid* 16.

⁴³ *Ibid* 19.

⁴⁴ *Ibid* 20.

⁴⁵ *Re Weir Hospital* [1910] 2 Ch 124 (CA).

⁴⁶ *Ibid* 138.

⁴⁷ *Re Woodhams* [1981] 1 WLR 493 (Ch), 502.

⁴⁸ *Harwood v Harwood* [2005] EWHC 3019 (ch), [25].

In place of understanding the pleasure in perpetuity through a pleasure in commodity consumption frame, or even as a mere striving for social acclaim, it can be interpreted as a means for the donor's self-projection after death. The remarkable case, *M'Caig v University of Glasgow*,⁴⁹ illustrates this point. In that instance, a landowner in Oban, the last male in his line, attempted to establish a foundation in which his estate rental would be perpetually devoted to the continual and ongoing erection of (seemingly numberless) statues of himself in prominent places. The landowner further directed that statues of himself and his family should be placed atop a colossal circular tower that he already built in Oban. The circumstances of the gift were too much for the court, and so the Lord Justice Clerk stated with candidness that: '[the donor] seems to have been possessed of an inordinate vanity as regards himself and his relatives, so extreme as to amount almost to a moral disease...'⁵⁰ But looking beyond the condemnatory tone of the judge, and his policy-based rejection of the peculiar enterprise, it is possible to understand the case as only an extreme example of a motivation which is often acceptable. The donor in attempting to build numberless statues of himself, should be interpreted as acting within the scope of an egoistic spirit that motivates many founders in search of self-projection.

This does not mean that foundation-creation is an entirely egoistic project. It is crucial to emphasise that while donative economics provides a binary model, it is possible for donors to derive simultaneous pleasure in motivations on both sides of the altruistic/egoistic divide. The well-known circumstances of the Barnes Foundation,⁵¹ as much litigated as it is celebrated, illustrates that point. Arthur Barnes, amassing capital in pharmaceuticals and selling out immediately before the stock market crash of 1929, had put together a collection of art of comparable quality to the great galleries of the world, including 181 paintings by Renoir, and 69 by Cézanne. Creating a foundation to house his masterpieces worth many billions of dollars, and naming the institution after himself, he sought to lock a personal vision into a strictly unchangeable charitable constitution.

The collection was to be free for 'plain people'; the art was to be hung precisely as he left it; the gallery was to be located in the quiet Philadelphia suburb of Merion where Barnes had lived, and in consequence of zoning regulation, subject to daily visitor limits. Beyond even that, it was only to open to the public for two days a week. Viewed through the prism of a link between egoism and perpetuity, the Barnes Foundation – an organisation where a very personal institutional vision was foregrounded – carries the hallmarks of egoistic legacy, or a pleasure in giving derived from the self-projection of the character and values of the donor after death. In this regard, it is comparable with the plainer statue-building egoism in *M'Caig*. But it would also be wrong to say that an altruistic motivation did not simultaneously run through the gift. As Heinrich Schweizer notes,⁵² the scheme is comprehensible as a good faith attempt to achieve education in art for the benefit of others, rather than to create a mass-access gallery. As such, Barnes can be understood as exhibiting a mix of altruistic and egoistic motivation, albeit through a means where the latter crowded out the former.

The fresh understanding of the drive to perpetuity as developed here – that it aligns with a complex desire to project character and values into the future after death – is more sophisticated than the commodity analogy suggested by the experimental literature. It explains more deeply

⁴⁹ *M'Caig v University of Glasgow* (1906) 14 SLT 600.

⁵⁰ *Ibid* 602.

⁵¹ H. Schweizer, 'Settlor's Intent v Trustee's Will: The Barnes Foundation Case' (2005) 29 *Columbia Journal of Law & the Arts* 63; S. Gary, 'The Problems with Donor Intent' (n7), 985.

⁵² *Ibid* 67.

what the donor ‘gets’ by way of a self-benefit when creating a foundation. The drive to create a perpetual foundation is a type of egoism, motivated by the desire to create legacy.

A JUSTIFICATION FOR FOUNDER PLAN-PROTECTION

Legal perpetuity requires a commitment from the legal system to protect the donor’s plans – i.e. for courts to refrain from altering them even as time passes. It is not at all obvious that the law *should* provide this plan-protection. Where it exists, it is an extraordinarily significant legal commitment, leaving property inalienable for the duration of the legal system. This section argues that while the donor is not ‘owed’ any obligation by the law, plan-protection in perpetuity can still be justified as a way of incentivising donation by harnessing the egoistic drive to self-project to encourage donation to legally recognised charitable purposes.

If plan-protection were to be justified as an obligation owed by the law, the founder might be cast as a party to an obligation-generating deal. That arrangement could be expressed as an duty owed to the donor in return for her ‘gift’ of capital. Such a view is seen at least implicitly in certain judicial statements, so in *Re Weir Hospital*,⁵³ Farwell LJ said directly that the court was: ‘bound to carry ... intention into effect.’⁵⁴ And in *Philpott v Saint George’s Hospital*,⁵⁵ Sir John Romilly MR said: ‘...instances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect.’⁵⁶

It can be countered that it is artificial to conceptualise the donor as entering into an obligation-generating relationship with ‘the law’. There is an immediate and plain sense in which this is true; the law, as a body of rules regulating the perpetual foundation, cannot owe a duty as it has no agency to do so. However, the claim that ‘the law’ owes the donor plan-protection can be fleshed out into a claim that some group or body is, at least in a theoretical sense, bound to the donor. Such a view can be found in the literature. So, Alex Johnson states directly that, ‘the settlor who establishes a charitable trust is viewed as entering in to a contract with the public...’⁵⁷

It is, then, theoretically viable to say that the general public owes the donor an obligation and that the law carries this through on her behalf. According to that rationale, the judicial statements to the effect that the ‘law’ has a duty of plan-protection are effectively the same as saying that the ‘public’ have such a duty. In a related vein, Mehmet Bac assesses whether a reciprocal obligation could be owed by the charitable ‘trust’.⁵⁸ Being an organisation established formally for the public benefit, this perspective elides with that of Alex Johnson, as the ‘public’ could be said to be represented by the charitable trust through the class of people that the foundation, as a matter of fact, benefits. In this manner, it is possible to theorise a justification for plan-protection through the frame of a duty owed by the public, whereby the law as a representative of that public, is under an obligation to protect the donor’s plans.

⁵³ *Weir* (n45).

⁵⁴ *Ibid* 135.

⁵⁵ *Philpott v Saint George’s Hospital* (1859) 27 Beav 107.

⁵⁶ *Ibid* [112].

⁵⁷ A. Johnson Jr, ‘Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine’ (1999) 21 U Haw L Rev 353, 357.

⁵⁸ M. Bac, ‘Restricted Charitable Donations and the “Cy Pres” Doctrine’ (2002) 14 *European Journal of Law and Economics* 15, 16.

Yet the obligation-based justification miscasts the relationship of the donor to the law. When the enormous normative strength and significance of plan-protection in perpetuity is considered, it is evident that the donor brings nothing to the negotiating table, other than a request for a privilege. Plan-protection is something that many donors positively want, as it provides them with an egoistic self-benefit. While the law might choose to carry through a desire of the donor, it is not realistic to conceive the law as being bound to do so. It is rather that the law is performing a favour for the founder, providing her with something that she could not otherwise have. As is not normally possible to have a duty to perform a favour, it is wrong to frame the one-sided facilitation of a person's desires in terms of carrying out an obligation.

The scale of the favour accorded by plan-protection is apparent in all circumstances where charitable foundations endure for a long period, but its magnitude is thrown into relief where the donor's original plans have become low utility. So, in one striking example, *Attorney General v The Earl of Craven*,⁵⁹ a gift had been made both for the reception of plague patients, and to provide them with a burying-place and a pest-house was preserved until at the least Nineteenth Century, despite the very low likelihood of the plague recurring. To be able to lock up capital to low utility purposes for a very long period is an extraordinary privilege. It is a long-term commitment from the legal system to carry through of the founder's wishes even as the world changes around them.

Attention to egoism in donative economics helps point the way to a justification for plan-protection based in policy rather than obligation. As many donors positively wish to project their character and values into the future, plan-protection might be understood as a policy technique to amplify that drive, rather than something which is owed. It can be interpreted as a policy tool to encourage donation. So, a founder with knowledge of an existing legal norm to protect the constitution of her charity, will be better incentivised to establish the foundation in the first place. While the law cannot be said to owe the donor plan-protection, there is still a potential policy justification in incentivising donors to transfer capital to foundations – favours do not have to be selfless.

The view that plan-protection encourages giving can be found elsewhere. Most directly, Eric Pearson argues for a restrictive approach to the modification of established charitable trusts. He does so on the basis that a parsimonious legal reform-test, where only charities which cannot reasonably function should be able to modify their established purposes, would increase the net sum of funds in charity.⁶⁰ Reinterpreting this view through a theoretical frame, Pearson's position might be construed as being that a donor might, taking an egoistic pleasure in the prospect of a projection of their own character and values, and being assured that her plans are uniquely protected from alteration, become a charitable founder for exactly that reason.

Pearson's point can be brought out through *Re Weir Hospital*.⁶¹ In that case a donor, named Benjamin Weir, had left his house in Streatham, as well as a considerable amount of other capital, as a site for a medical facility. His personality was very clearly impressed upon the foundation. Not only was the hospital to be located in his former home, he also directed that the institution should bear his name, and that his portrait, as well as pictures worked by his daughter should be hung in the board room. He further directed that the boardroom was to be

⁵⁹ *Attorney General v The Earl of Craven* (1856) 21 Beav 392.

⁶⁰ E. Pearson, 'Reforming the Reform of the Cy Pres Doctrine: A Proposal to Protect Testator Intent' (2006) 90 *Marquette Law Review* 127, 149.

⁶¹ *Weir* (n45).

kept in good order.⁶² Despite all this, the Charity Commissioners took the view that Benjamin Weir's funds could be more usefully spent by applying the money to a general hospital relatively nearby, and sought to direct much of the capital to that higher utility cause.

Proceeding in a manner which would be in sympathy with egoistic theory, the Court of Appeal resisted any alteration by the Commissioners and insisted that the donor's plans be precisely followed. Each of the judges said that the plans of donors should be protected unless it was impossible to follow them. Farwell J said precisely that: 'no doubt should be cast on the permanency and security of bequests,'⁶³ so that donors would continue to give in future. So, the judge assumed a legal norm protecting Benjamin Weir's plans would have been, at least in part, what caused him to leave his house as a charity and establish a medical facility in his name. The court was likely correct. It is clear from the care taken by Benjamin Weir to link his personality to the character of the foundation, that egoism informed his motivation to donate.

At first sight, there appears a possible objection to the judicial policy position in *Re Weir Hospital*. Even accepting, on the basis of theory, that plan-protection encourages the creation of foundations, it could be said that the law should not, as a matter of policy, care too much about the choices of Benjamin Weir and his ilk. This is because there are perhaps alternative and more socially beneficial uses for his capital other than voluntary charity, particularly after it is accepted that perpetual foundations have a tendency towards egoism. Most obviously, the state might take a proportion of his capital on death, so as to expend it in a manner accountable to the political process. Not only does the tax mechanism iron away the egoism of individuals, it also brings capital under collective control, so that the democracy might be able to provide for itself.

It is increasingly said that wealthy philanthropists should pay more tax,⁶⁴ and in circumstances where large amounts of capital are increasingly accumulating in the hands of a small number of individuals,⁶⁵ that is a thought unlikely to fall from public consciousness. However, regardless of the merits of that widely held position, it would be wrong to think of this normative claim as being in any straightforward tension with a pro-donation policy at law. The two positions – that capital should be more intensively taxed and that the law should encourage donation – are not ordinarily in conflict. There is no capitalism in the world with a 100% tax rate, as all polities leave some discretion to individual expenditure in both life and after death. And it is only that totalising circumstance, where the state takes all or nearly all of the capital of an erstwhile donor, that taxation could be understood as making a pro-donation policy redundant. Put differently, unless or until state political economy is very much changed, there remains a policy imperative in favour of the encouragement of donation. This is because discretionary wealth will persist as a matter of fact. Admitting that these political circumstances are contingent does not weaken the importance of pro-donation policy so long as they persist.

So long as potential founders have discretionary control over their wealth, the law has a social interest in plan-protection. It is a mechanism to encourage donation. However, this is a policy choice of the law, not any type of duty. All the cards are stacked in the hands of the legal system which provides plan-protection. So as to facilitate the donor's plans, the law must give an

⁶² Ibid 125.

⁶³ Ibid 138.

⁶⁴ See eg: A. Giridharadas, *Winners Take All: The Elite Charade of Changing the World* (New York, Knopf, 2018) 8.

⁶⁵ See famously: T. Piketty, *Capital in the Twenty-First Century*, (Cambridge, Harvard University Press, 2014); J. Stiglitz, *The Price of Inequality*, (London, Penguin, 2013).

extraordinarily long-term commitment. Even so, there remains possible policy advantage in encouraging donation to charitable purposes – it is an incentivising tool.

AN ANALYTICAL ROLE FOR ALTRUISM

Even if plan-protection encourages giving, there remains analytical space for the consideration of countervailing policy concerns. It is seen in this section that plan-protection also causes a policy problem; it encourages low-utility giving. That point is made through comparative attention to altruism, understood as a pleasure taken in the material benefit of others. Altruistically motivated gifts will not be encumbered with the donor's egoistic self-projection, and in consequence, they are likely of a higher social utility than their primarily egoistic counter-parts. In turn, it can be said that – insofar as it encourages egoistic giving – plan-protection causes the existence of low utility charitable foundations.

The connection between egoistic charitable motivation and low social utility is not widely accepted. So, Pearson argues not only that the plans of donors should be protected in perpetuity, but also in particular, that low-utility organisations should not be readily reformed. For Pearson, charities which are merely low-utility – or as he puts it, 'wasteful' – should be proactively protected from any alteration by charity law.⁶⁶ Within this frame, it could be said that while low utility charities are unfortunate, perpetual plan-protection remains necessary to incentivise foundation-creation, and wasteful organisations are an incidental cost, a price worth paying so as to create a legal environment in which the overall sum of gifts in charity is maximised.

Yet the view that wastefulness is an incidental but acceptable cost of plan-protection assumes that the phenomenon of low charitable utility is a free-standing occurrence: something which is not inherently caused by the law, but is instead independent of it. It imagines waste as distinct and unconnected from the policy of plan-protection. With attention to donative economics, it can be seen that low social utility charity and perpetual plan-protection are causally linked. While it is true that perpetual plan-protection can be said to encourage donation to charitable purposes, to focus on that point alone as Pearson does, is to miss a deeper analysis of a directly associated cost. Perpetual plan-protection also creates a policy problem because it actively encourages waste.

The causal link between plan-protection and waste is neither obvious nor intuitive. One potential method for its explication is straightforwardly empirical – to collate examples of low utility as they exist in long-protected perpetual foundations. This has the effect of highlighting, through illustrations, the character and extent of low utility charity, and then from the evidence in the catalogue, a link between waste and plan-protection can be drawn out. This broadly marks the method of William Beveridge in *Voluntary Action: A Report on Methods of Social Advance*, where he reviewed examples, in a 'Chamber of Horrors',⁶⁷ of wastefulness over time, so linking the problem of low utility with perpetual plan-protection.

As a method to draw out an inherent connection between plan-protection and low charitable utility, recording and reviewing instances of waste is inevitably analytically limited. It brings little to the conceptual stall. Although the approach has a rhetorical or persuasive force, it relies upon a pre-existing and shared understanding of what charitable waste might look like. In the

⁶⁶ Pearson, 'Reforming the Reform' (n60) 128.

⁶⁷ W. Beveridge, *Voluntary Action: A Report on Methods of Social Advance* (Oxford, Routledge, 2015) 364.

light of this, it must be admitted that some examples are so marked that wastefulness is difficult to deny, such as Pursglove School where the curriculum was entirely restricted to Latin subjects,⁶⁸ and Tancred Hospital which was described as wretched and subject to scandals,⁶⁹ but ultimately Beveridge's approach provides only examples of charitable waste in place of a theoretical explanation of it.

It is through direct regard to the nature of economic altruism, that a structural link between plan-protection and low utility charity can be found. It will be remembered that altruistic gifts are those which are genuinely motivated by the material benefit of others rather than self-benefit. In altruistic gifts it is more likely that the benefits of the transfer will accrue to others, because the donor is not herself benefitting. And so higher social utility is inherent to the altruistic motivation. In the contemporary era, a significant school of economically informed analysis of altruism has developed which deploys the altruistic side of the egoistic/altruistic binary as a critical tool, or a mechanism to divide between 'useful' and 'low utility' charity. Most famously, Peter Singer presents a sustained case in favour of deliberative and careful giving, where through consistent appraisal, donors might assess the material effectiveness of their gifts.⁷⁰

The logic of Singer's economic altruism is calculative and so utility-orientated. Donors are encouraged to identify areas of the most acute social need and, following that assessment, direct capital where it will be the most impactful.⁷¹ The method of giving – in which donors are in effect encouraged to rationally remove the traces of their egoistic personality from the gift – is intended to maximise social welfare. So, in *Strangers Drowning*,⁷² through reportage, Larissa MacFarquhar details the life of a donor whose altruistic concern with others is witnessed through a serious and constant assessment of charitable effectiveness. She researches intensively how her money can be best spent, and anxious to prolong the lives of others, donates for the provision of bed-nets in low-income countries. Unconcerned with egoistic self-projection, she removes egoistic self-projection from her charitable giving. The consequence, which is the main thrust of Singer's theoretical mission, is to create a type of donation which is maximally socially useful.

In *Strangers Drowning*, MacFarquhar's self-less and altruistic donor gives privately in pursuit of well-researched objectives, and without establishing any foundation in her name. However, certain altruistic founders might establish new organisations in a spirit of social utility. Famously, GiveWell, in a direct deployment of Singer's ethical frame, ranks foundations on the basis of their social impact. It lists organisations taking a calculative and scientific approach to capital transfer, with a focus on maximally cost-effective medical interventions. Some take the name of original founders, such as Helen Keller International, which supports vitamin A supplementation to inhibit child mortality. Similarly, the Carter Center, taking the name of the former United States President, operates a de-worming programme, informed by utility-based research. All are careful to avoid wasteful expenditure, focussing systematically on need.

The analytical point that should be drawn from the emergence of these of utility-oriented and streamlined organisations, is not, without more, an endorsement of Singer's all-encompassing

⁶⁸ Ibid 367.

⁶⁹ Ibid 375.

⁷⁰ P. Singer, *The Most Good You Can Do: How Effective Altruism Is Changing Ideas About Living Ethically* (London, Yale University Press, 2015) 117.

⁷¹ P. Singer, 'Famine, Affluence, Morality' (1972) 1 *Philosophy & Public Affairs* 229.

⁷² L. MacFarquhar, *Strangers Drowning: Voyages to the Brink of Moral Extremity* (St Ives, Penguin, 2016).

and calculative view of charity. It is instead the plainer empirical lesson that economically altruistic foundations, those which are orientated around a genuine concern for the charitable consumption of others, will tend towards increased social utility. The egoistic self-projection of the donor is a hindrance on that social utility, as it diverts funds away from core charitable concerns, most notably, the relief of need.

Equipped with the insight that altruism, as a motivating force, tends to higher social utility, it is possible to work through a theoretical analysis of plan-protection that was not open to Beveridge. In his catalogue of wasteful organisations, he details one Thomas Nash. That donor had attempted, although it appears his foundation foundered, to establish a perpetual charity which would cause muffled bells to be rung out on the anniversary of his wedding day, and for ‘merry mirthful peals’⁷³ to sound out on the day of his death. It was a malign type of perpetuity that he had in view, as he said his death would mark his release from marriage. It is clear from the scope of his gift, that Thomas Nash was not solely, or perhaps at all, concerned with the ostensible goal behind the enterprise – bell ringing. Instead, he was motivated by a drive akin to the utilitarian category of: ‘pleasures resulting from the view of any pain supposed to be suffered by the beings who may become the objects of malevolence’.⁷⁴

The case, as described by Beveridge is so egoistic as to in fact be unusual, but from its extreme aspect, an altruistic critique for plan-protection can be seen in relief. It is clear that without a legal protection for his attempted foundation, there would have been no incentive to attempt to establish it at all. Viewed from within Singer’s framing of altruism, the material good of others was far from the forefront of Thomas Nash’s mind, and the drive to a perpetual projection is self-evident. Altruistic concern is missing in the donation, but the drive to establish an everlasting and spiteful plan as an egoistic self-projection weighed strongly.

The character of a foundation is linked to any egoistic motivation behind the original gift. In consequence, it is possible to draw out a critique of legal plan-protection – i.e. it is a cause of low social utility organisations. In the case of Thomas Nash, a bad perpetual motivation was linked to bad charity. A donor who wishes primarily to project her character and values into the future will tend to create a less socially useful trust than a donor animated by something akin to Singer’s altruism, as that type of altruistic donation requires genuine concern for the material consumption of others. In turn, it can be said that in encouraging the drive to egoistic perpetuity through the legal provision of plan-protection, the law actively encourages low-utility trusts. Charitable waste is not an incident of plan-protection, it is instead inherent to it.

Regardless of its spitefulness, Thomas’s Nash’s bell-ringing is imbued with an air of historical picturesqueness. However, this will not always be the case. Wastefulness, as it connects with the drive to egoistic self-projection might be more irredeemably malign. This is perhaps clearest where the donor’s egoistic self-projection is harmful. So, in *Dominion Student Hall Trust v Attorney General*,⁷⁵ a case was brought to remove a race restriction to dominion students of European origin from student residences in London. Being called upon to reform the repugnant condition, Evershed J creatively interpreted the donor’s character. He held that the founder had wished primarily to promote community amongst commonwealth subjects, and so found his plans to be broad enough to license a removal of the restriction, which was deemed incidental.

⁷³ Beveridge, *Voluntary Action* (n67) 375.

⁷⁴ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford, Clarendon Press, 1970) 44.

⁷⁵ *Re Dominion Students’ Hall Trust v Attorney General* [1947] Ch 183 (Ch).

While the judge's reform increased the social utility of the foundation, there is no clear evidence that the restriction was not in fact core to the donor's egoistic drive, or that he intended anything other than for the bar to remain fixed in perpetuity. In line with analysis developed in this chapter, the foundation can be understood as embodying an egoistic and – in consequence – low utility attempt to project values into the future.

Although there is more than one lens through which to critique the repugnant foundation in *Dominion Student Hall Trust v Attorney General*, when assessed specifically through the prism of egoistic theory, it is apparent that it lacked economic altruism. The race restriction limited the ability of the trust to materially and effectively better the lives of others. When the charity was reformed – i.e. when a policy of plan-protection was abandoned – its material usefulness was increased. In effect, the court sought to cast the donor as more economically altruistic in Singer's sense, deploying the donor's capital in order to advantage other people in a manner in which the law considered socially useful. It can straightforwardly be said through the prism of economic altruism, that the court-driven reform improved the charity's material utility by removing the donor's egoistic traits.

In the previous section, it was possible to draw out a justification for plan-protection that did not rely on a duty owed to donors. That justification is located in the encouragement of capital applied to charity. However, it would be limiting to focus on that justification without considering its costs. The view that only absolutely impossible trusts should be alterable, relies upon the fact that a legal regime of that type will harness the egoistic drive of donors and so encourage philanthropy. Yet it neglects an assessment of the problems inherent to a system which encourages charitable waste. It does not peer across into the altruistic side of the binary to look at what is lost through the adoption of the policy.

A LEGAL-CONCEPTUAL METHOD FOR POLICY COMPROMISE

It has been seen that there is no legal duty owed to self-projecting founders. There is no obligation to tolerate low utility. And so, the end point of the theoretical analysis is a policy conflict. On the one hand, plan-protection is justifiable on the basis that it encourages donation. On the other hand, plan-protection leads to the establishment of low social utility organisations, encumbered by the donor's egoistic self-projection. To accept this as a state of fact, would lead to a dilemma between 'better funded' and 'better quality' charity. To avoid that, this section searches for a legal-conceptual compromise, a method to reform organisations in a way which will increase their social utility while still incentivising donors to give.

In a sophisticated study of charitable alteration, John Eason proposes an analytical method to reform foundations.⁷⁶ He presents a reform approach by way of a metaphor in which charitable organisations are presented as a 'funnel', with the broadest understandings of charity – i.e. general purposes such as 'the relief of poverty', 'the advancement of education', or 'the advancement of health' – at the mouth of that funnel.⁷⁷ A court seeking to reform the gift has only to move partially up the funnel and reshape the gift from the specific to the less specific. Interpreted in the light of egoistic theory, Eason's funnel method appears to hold out the possibility of a compromise between plan-protection and reform in favour of social utility by keeping the donor's plans in focus, but simultaneously permitting a judge-led reshaping of the

⁷⁶ J. Eason, 'Motive, Duty and the Management of Restricted Charitable Gifts' (2010) 45 *Wake Forest Law Review* 125.

⁷⁷ *Ibid* 153.

foundation, by whittling away the donor's egoistic traits. By moving up the funnel (e.g. from a museum in the donor's own home to the general promotion of cultural goods) it can be said that the donor's personality is being progressively removed.

There are some circumstances where the method might successfully reconcile plan-protection with utility-orientated reform. These are where a relatively minor change might make a big difference to material welfare. *Attorney General v Wansay*,⁷⁸ although a historic precedent, appears almost as a lesson in Eason's method. In that case, a foundation provided annual apprenticeships for two poor boys from a particular Presbyterian congregation from a particular parish, but there was too much in the fund, so causing an unexpended surplus. In altering the trust, Lord Eldon moved methodically 'up the funnel', holding that (i) the surplus could be applied to boys from other parishes; (ii) if that was not possible, it could be applied to daughters of the parish, (iii) for the sons of Presbyterians generally; and (iv) for the building of a Presbyterian school. In this manner, the judge progressed more-or-less systematically through variants and levels of utility-increasing abstraction, finishing in a final support for reform to create a local school. He was able to increase the social usefulness of the foundation by incrementally removing the character of the donor.

Eason's analytical method is vulnerable to criticism on the basis that it, in the last resort, provides very little plan-protection for the creators of foundations. It is true that in *Wansay*, Lord Eldon stopped funnelling upwards at the level of a 'Presbyterian school', but there is nothing inherent in the method to stop courts from abstracting to an extremely general level – i.e. no particular logical reason why the judge, who was after all confronted with a large and unexpended bounty, should have stopped the process of abstraction at that point. Depending on the size of the funds available, he could have progressed to education in general, or even all of legally valid charity. Once a foundation is understood as a funnel encumbered with egoistic limitations, the logical tendency is to generalisation. At core, the concept of funnelling is directional towards its more abstract end.

This generalising tendency can be seen very clearly in the testamentary case, *Re Royce*.⁷⁹ There, a gift was left to the Vicar and Churchwardens of Oakham Church so as to benefit the choir. The donor's personality was deeply impressed upon the gift, as he had been a member of the choir for over 60 years. In parallel with *Wansay*, there was too much money, although in this instance, the surplus had never vested. Simonds J reformed the gift so that it could be received by the church alone. In doing so, he stated that a bequest: 'for the purpose of musical services in a church is for the advancement of religion.'⁸⁰ There were no careful incremental steps taken. The donor's plans were stretched out so as to encompass abstract religious purposes.

Viewed through Eason's funnel metaphor, it cannot be said that the judge's approach in *Re Royce* was conceptually wrong. High abstraction is a natural expression of its logic. Simonds J removed the projected personality of the donor from the bequest almost entirely. Where this happens, 'the reformed plan' does not significantly resemble the actual wishes that the donor had in her mind at the time the foundation was established. It reflects instead an adapted and altered version of it, a formalised and highly legalistic conceptualisation. In consequence of this generalising tendency, the method does not as a matter of fact avoid the dilemma between plan-protection and reform in favour of social utility. There is no guarantee of plan-protection within the approach, and so its incentivising effects on donation are *prima facie* lost.

⁷⁸ *Attorney General v Wansay* (1808) 15 Ves 231; 33 ER 742.

⁷⁹ *Re Royce* [1940] Ch 514 (Ch).

⁸⁰ *Ibid* 521.

Despite this conceptual limitation, it might still be countered that even if the process contains a tendency to remove the egoistic self-projection of the donor entirely from the gift, the approach might still be defended as being reasonably effective as a rough-and-ready policy technique. If the point of the funnelling process is understood as maintaining sufficient donor confidence in the plan-protection norm as to encourage donation, then the *appearance* of a donor-centred approach might still be sufficient to achieve that confidence. While this should be acknowledged – i.e. the funnelling method, although ineffective at the conceptual level, might yet still ensure the confidence of certain donors through a type of legal smoke-screen – such a defence comes at the cost of legal robustness. The rationale behind adopting Eason’s approach shifts from the prospect of an analytically sound compromise between plan-protection and utility-orientated reform, to reliance upon a policy-only and technically disingenuous device.

The key conceptual weakness with the funnelling approach is that it attempts a single methodological compromise. It aims to reconcile the policy drive to reform foundations alongside plan-protection within the same conceptual device. But it is not necessary to attempt the two things at once. Rather than attempting to devise a single method which simultaneously achieves plan-protection as well as reform at the same time, a balance might be struck by separating out the two conflicting goals *in time*. The donor’s plans might be given a period of immunity from reform. Her plans might be protected for a period, and then the court might be permitted to reform the foundation according to the priority of social utility.

This is the conceptual method suggested by John Stuart Mill in ‘Endowments’.⁸¹ There, he proposes that charitable foundations ought to be given immunity before they can be freely reformed, recommending: ‘a term at the expiration of which their appropriation should come under the control of the State.’⁸² In suggesting a protected period prior to permitting state-driven reform of foundations – or nationalisation – Mill did not draw upon any theory of egoism. The key driver behind Mill’s argument is a concern to protect the liberty of innovation. This is in part because he understood foundations as ‘trials’ in which funds might be put to novel social uses, saying: ‘since trial alone can decide whether any particular experiment is successful, liberty should be allowed of carrying on the experiment until the trial is complete.’⁸³

It is not necessary to accept Mill’s justification located in ‘temporary experimentation’ in order to support a time-limited compromise between perpetuity and court-driven reform. Viewed through the prism of egoistic theory, a defence of time-limited plan-protection based in a belief in donor experimentation is quite hard to mount. It has been seen that the donor’s desire to egoistically self-project is often an encumbrance on the use of capital, and that the drive to egoism causes organisations to tend towards low utility. To say that experimentation is a key policy priority at law would mean placing a very high faith in the ability of exceptional organisations to act as entrepreneurs, and an equally high tolerance of the mass of lower utility egoistic organisations beneath them. It is a ‘lode-star’ argument placing trust in the role of unique charitable organisations to act as pioneers.

Regardless of the merits or demerits of his rationale, Mill’s proposal can be adapted in the light of insights from egoistic theory. His suggestion of a limited period of plan-protection prior to

⁸¹ J. Mill, ‘Endowments’ in J. Robson (ed), *The Collected Works of John Stuart Mill Volume IV: Essays on Economics and Society Part II* (Toronto, Liberty Fund, 1824) 615.

⁸² *Ibid* 619.

⁸³ *Ibid* 618.

reform holds out the prospect of a different type of compromise to the funnelling method – one where time-limited plan-protection continues to incentivise egoistic giving, but the foundation is not encumbered with costs of the donor’s egoistic social testimony for all time.

The natural objection to a time limit is that it will dampen the spirits of egoistic donors. On the logic of the theory, that must be true to an extent. It has been argued that donors are motivated by the projection of their character and values, so it is also the case that once that projection is limited, then donors will be less legally incentivised. Related to this, it is possible for the hyper-wealthy to ‘forum shop’, and so search for a jurisdiction which allows untrammelled perpetuity. This would come at a clear social policy cost to any time-limiting jurisdiction, as the largest foundations commonly expend disproportionate amounts of capital in the community around them. In precisely the same manner as jurisdictions compete over the loss of business capital from within their borders, it should be accepted that a time-limit on the donor’s plans might lead to a loss of philanthropic capital from the given jurisdiction.

However, the time limit is a compromise with egoism, rather than a shutting of the door. The proposal still provides a power to lock in egoistic specifications for a period. It has also been seen that donors will normally have mixed motivations. Although it is possible to point to donors who were apparently motivated solely by egoism in connection with perpetuity, such as Thomas Nash’s malevolent bell-ringing foundation, or the remarkable attempt to build ceaseless numbers of statues in the image of the founder in *M’Caig*, such instances are unusual. It has been seen that even organisations with low social utility will normally reflect competing impulses. For most donors, while a time limit will be disincentivising according to theory, it should not normally be entirely fatal to the complex over-arching drive to create a foundation.

There is also scope for policy experimentation over time. Just as states vary their business taxes, tentatively feeling their way in a world dominated by mobile capital, the time-limit might be treated in the same manner. So, a fifty-year limit could, through legislative action, become one hundred years were there evidence of negative social consequences. In essence, a time-limiting jurisdiction has to assess its policy options within a cost/benefit analysis. On the ‘cost’ side of the ledger, it might weigh the possibility of lost foundations to other jurisdictions and deterred net donations. On the ‘benefit’ side, it should account for its own ability to improve the social utility of organisations as time passes.

But there is a further policy problem attached to the compromise. If the period of immunity is treated as sacrosanct, and so completely ring-fenced from any court-led reform, there is a risk of creating a legal space in which donors might try and establish egoistic trusts which are socially harmful. Racist and discriminatory gifts are not unknown the courts. In such circumstances, past judges have on occasion, relied upon a process akin to Eason’s funnelling method in order to reform.⁸⁴ So it has already been seen in *Dominion Student Hall Trust v Attorney General*, that where a donor attempted to place a race restriction upon the foundation’s beneficial class, the judge moved ‘up the funnel’ and removed the restriction, finding with some artificiality that the trust was established primarily to promote community amongst all commonwealth subjects.

The formalistic expedient in *Dominion Student Hall Trust v Attorney General* would not be available in a system where foundations enjoyed a sacrosanct period of immunity. The approach *prima facie* protects socially harmful trusts alongside those which are merely

⁸⁴ *Re Lysaght* [1966] 1 Ch 191 (Ch); *Dominion* (n75).

wasteful. Given that the justification for the policy compromise is to increase the amount of funds allocated to purposes with social utility, an outcome leading to the protection of actively harmful foundations would be self-defeating. Aware of the risks of social harm connected with a period of immunity, Mill suggested a discretionary power for courts to set aside the donor's plans where they amount to a: 'clear and positive public mischief.'⁸⁵ This power would enable courts to identify harmful trusts and reform them. Such an ability is necessary. Without it, foundations might become vehicles – albeit of a temporary sort – for the worst type of projected character and values.

In taking stock of this final policy exigency, it should be clearly and directly recognised that analysis has led only to weak support for plan-protection. The principle, as it is left standing, is a shadow of the common law rules. The end-point of the argument is that foundations would be subject a court-led reform process wherever they are deemed socially harmful, and they would only enjoy plan-protection for a limited period of time, kept under review by the legislature. Ultimately, this is the logical implication of an analysis which has theorised the drive to perpetuity as the egoistic projection of character and values into the future in combination with an argument that such an impulse should only be accommodated by the law if it can be justified.

CONCLUSION

This chapter applies egoistic theory in donative economics to the law of the perpetual charitable foundation to make a series of linked critical claims. Through an interpretation of the theory, the drive to create a foundation is linked to an egoistic desire to project character and values into the future. Then, again through that insight, it is seen that the protection of the donor's plans can be justified at the policy level as a means to encourage donation. Finally, it is argued that because egoistically motivated foundations tend towards low utility, it is desirable to permit their reform after a period of immunity.

The first stage in the chain of argument – that theory can shed light on the drive to establish perpetual organisations – requires the development of a frame to understand the egoistic drive in the context of perpetuity. In the literature, egoistic giving is sometimes understood as analogous to commodity consumption, where the giving is directly connected to pleasure in fundraising inducements. But in the context of donating to create a perpetual foundation, the frame is reductive. It is artificial to say that the donor 'consumes' perpetuity. A much fuller view of the egoistic impulse to charity relies on an account of its social aspect. The specific drive to create a perpetual foundation is, at root, a motivation to project the character and values of the donor into the future. Often, the donor is hoping to achieve a legacy after death.

The second stage in the chain – justifying plan-protection over time – seeks a rationale for the founder's significant legal power to impress egoistic plans on property. In the literature, a justification is sometimes found in the concept of obligation – i.e. the view that the law owes plan-protection to the donor. But that argument tends to artificiality; where there is an egoistic drive to self-projection perpetuity, the law is facilitating the donor's plans. The law permits the donor a privilege. So, a much better justification is found in policy. Plan-protection incentivises egoistic self-projection, so increasing the number of foundations created.

⁸⁵ Mill, 'Endowments' (80) 620.

The third stage in the chain – a critical search for methods to reform the plans of donors – flows from the insight that egoistically created foundations will tend to low social utility and that there is no duty to maintain them. The encouragement of egoistic donation through legal plan-protection carries a cost as well as a benefit. In this regard, theory has further explanatory power. Being a binary theory, it provides a critical mirror, so making it possible to peer across to compare altruistically and egoistically motivated gifts. An altruistic foundation, unencumbered with the donor's self-projection, has a higher social utility than an organisation formed in a spirit of egoism, and so it can be said that a strong legal norm assuring plan-protection donors can lead to wasteful charity.

Ultimately, analysis in egoistic theory leads to a dilemma. Plan-protection both encourages the creation of foundations and also causes their low utility. Rejecting Eason's funnelling method as unworkable, this chapter argues in favour of limiting the amount of time in which donors might be able to impress personal plans upon foundations. In recommending such a compromise, it should be accepted that the hyper-wealthy might 'forum shop', and so philanthropic capital could be lost to the time-limiting state. However, it is also true that a wealthy individual specifically intent on the perpetual projection of their personality and character is unlikely to establish a high-utility foundation in the first place. In line with theory, a period of foundation immunity, subject both to judicial policy control and legislative assessment over time, still provides an egoistic incentive.