

Part II

Taking and Alienating Property



Property, Equality and the Freedom to Discriminate: The Case of the Discriminatory Gift

JONAS-SÉBASTIEN BEAUDRY AND ARUNA NAIR*

I. INTRODUCTION

THE INSTITUTION OF private property is in tension with the value of equality in a number of respects. A private owner's freedom to determine who should have access to a resource and who should be excluded from it has the consequence of limiting the opportunities of others to make use of the resource in question. This consequence may be troubling from a number of perspectives on the demands of equality as a political value. Classic objections¹ have to do with the implications for equality of opportunity and access to resources, in societies where ownership status and access to ownership status is not equally distributed, as well as the potential for domination in the relationship between the owner and the excluded or excludable other. In this chapter, we consider how this tension plays out in relation to a particular iteration of the demands of equality: equality as freedom from discrimination on certain protected grounds, such as race, gender, sexual orientation and religion.

In many common law jurisdictions, the legislature² has forbidden owners of private property³ to make discriminatory decisions in particular contexts – for example, in regulating access to land that is otherwise open to the general public, or in letting property to tenants. However, in other contexts, the position

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¹ J Harris, *Property and Justice* (Oxford, Oxford University Press 2002) ch 14.

² eg Equality Act 2010 (England and Wales); Canadian Human Rights Act 1985 (Canada).

³ Given our focus on dispositive decisions, we define 'owners' broadly to include all holders of private rights who can dispose of those rights at will.

is less clear and the matter has been left to the judiciary. This is particularly the case in relation to private trusts and gifts. Recent cases in Canada have held that private trusts that impose discriminatory conditions for receipt of benefits can be struck down by the courts on the grounds of public policy;⁴ a further extension to capture absolute testamentary gifts that are discriminatory in their motives has also been mooted in the case law,⁵ while it has been suggested that the same principle could also be engaged to void absolute gifts made *inter vivos* for similar motives.⁶ English law, by contrast, has rarely addressed these questions directly. The Equality Act 2010 prohibits certain discriminatory provisions in charitable trusts,⁷ and discrimination in the ‘disposal’⁸ of property. However, the leading English case on the question denies that discriminatory clauses in *private* trusts are a matter of concern for public policy,⁹ and no attempt has been made to invoke any such principle to strike down absolute gifts, testamentary¹⁰ or *inter vivos*.

The question in these cases – whether, at common law, a private owner is bound to avoid discrimination when exercising her powers to settle trusts or make gifts – is located at the nexus of two important debates. Within the context of discrimination law, it is a vexed question why certain non-state actors – landlords, employers etc – owe duties of non-discrimination¹¹ and why, for example, such choices as the selection of friends or sexual partners are excluded from the scope of these legal duties.¹² The relationship between a private owner and the recipients of her bounty – whether under a charitable or private trust or by way of absolute gift – provides a useful test case for understanding the limits of these norms. Meanwhile, within the realm of property scholarship, much recent attention has been paid to the task of defining the limits of private property at common law;¹³ the progressive property¹⁴ tradition, in particular, has demanded a shift in attention away from a straightforwardly rights-centred notion of private property and towards a social and

⁴ eg *Re Leonard’s Will Trusts* [1990] 74 OR (2d) 481; *Murley v Murley* [1995] NJ No 177.

⁵ *McCorkill v Streed* [2014] NBQB 148; *Spence v BMO Trust Company* [2015] 123 OR (3d) 611, overruled at [2016] ONCA 196; cf *Grams v Grams Estate* [2015] SKQB 274.

⁶ M Harding, ‘Some Arguments Against Discriminatory Gifts and Trusts’ (2011) 31 *OJLS* 303.

⁷ Equality Act 2010, s 193.

⁸ *ibid* s 33.

⁹ *Blathtwayt v Cawley* [1976] AC 397.

¹⁰ cf *Hand v George* [2017] EWHC 553 [70] (Rose J).

¹¹ See T Khaitan, *A Theory of Discrimination Law* (Oxford, Oxford University Press, 2015) ch 7; S Moreau, *Faces of Inequality: A Theory of Wrongful Discrimination* (Oxford, Oxford University Press, 2020) ch 7.

¹² eg Moreau (n 11) 233–34.

¹³ eg G Alexander, *Property and Human Flourishing* (Oxford, Oxford University Press, 2018); J Singer, ‘Property as the Law of Democracy’ (2014) 63 *Duke Law Journal* 1287; L Katz, ‘Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right’ (2013) 122 *Yale Law Journal* 1444; AJ MacLeod, *Property and Practical Reason* (Cambridge, Cambridge University Press, 2015).

¹⁴ See G Alexander, E Penalver, J Singer and L Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743.

relational conception that focuses on the duties and restrictions that intrinsically limit those rights. Again, the case of the discriminatory gift or trust is a helpful test case for this debate, since the issue in these cases depends on whether the common law subjects private owners to certain obligations, or to certain restrictions on their powers, simply by virtue of their status as owners.

In this chapter, we do not aim to solve the narrow doctrinal problem posed by the case law, determining the nature and scope of any legal rule that might permit the courts in each jurisdiction to strike down discriminatory gifts: thus, for example, we do not ask whether it is open to the English courts to interpret the term ‘disposal’ in the Equality Act 2010 as intended to include such dispositions as gifts and trusts. Nor, however, do we aim to answer a purely normative question, in the sense of determining whether, in an ideal legal system, the courts would strike down discriminatory dispositions by a private owner (assuming private property would exist within such an ideal order). Rather, we seek to provide an interpretive account of the way in which the common law addresses the problem at the level of principle, examining the knotty intersection between the values embodied in existing anti-discrimination norms on the one hand and the values embodied in the common law conception of private property on the other.

Thus, our aim is to map out possible reasons why the law forbids discrimination by non-state actors and examine how these reasons intersect with the legal and social roles of the private owner in the common law tradition. In section II below, we consider the first question, outlining a range of reasons why anti-discrimination norms might exist, with a focus on explanations that provide the strongest justification for the application of such norms to private owners. We conclude that there are three possible grounds for applying anti-discrimination norms to private owners. First, the demands of formal equality play a role in situations where an owner is subject to a duty to act reasonably in the pursuit of some end: here, discrimination may be forbidden because it involves the decision-maker taking into account matters irrelevant to the prescribed end. Secondly, substantive equality may require equality of access to certain valued opportunities and resources that have historically been systematically denied to members of certain groups; here, owners may be subject to anti-discrimination norms because they are in the position of ‘gatekeepers’ who determine access to such opportunities and resources. Finally, substantive equality may require the state to refuse its endorsement to expressions of prejudice that replicate injurious stereotypes and deny recognition to central aspects of identity. In this context, the question is whether the owner’s act can take effect only with the state’s endorsement of its expressive meaning or whether the general law limiting freedom of expression is engaged.

Section III then examines the circumstances in which a private owner might be said to occupy any one of the duty-bearing roles identified in section II. We first consider and reject the view that a private owner, qua private owner, might be subject to a duty to act reasonably, in the sense of only taking action that can

be rationally related as a means to some end prescribed by law. In the absence of forced heirship or legislation requiring owners to act reasonably in their exercise of testamentary freedom, there is no scope for the application of the principle of formal equality to the kind of discriminatory gift that the Canadian cases are concerned with. We go on to discuss the role of the owner as a gatekeeper, and argue that it is owners' power to determine the terms of others' access to the public domain – including the market – that forms the heart of the case for extending anti-discrimination norms to them. We argue that access to private bounty, in the form of gifts and private trusts, is not a life-defining benefit that is necessary for the achievement of an autonomous life; the dependence on the judgement of the donor which is inherent to the notion of such a gift is inconsistent with the law's focus on autonomy in this area. Finally, we go on to consider the view that decisions by owners are expressive acts that require the endorsement of the state to take effect and thus must be held to the same standard as acts of the state itself. We conclude that it is the expressive meaning of the discriminatory gift that provides the strongest case for extending anti-discrimination norms to such gifts, but that these arguments are weakest when applied to absolute gifts to a defined person, testamentary or *inter vivos*.

II. THE SCOPE OF ANTI-DISCRIMINATION NORMS: DIMENSIONS OF EQUALITY

In this chapter, we understand discrimination in the pejorative sense of wrongful denial of *equality*.¹⁵ In the next section, we present different foundations or constitutive elements of the various theories of equality that have been called upon to explain when unequal treatment is wrong, that is, why discrimination against persons based on certain protected characteristics is considered to be wrong.

A. Formal Equality

Formal equality is associated with the Aristotelian principle that 'things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood'.¹⁶ The idea of formal equality has a number of appealing features: it seems simple, and it seems to embody the values of consistency and of recognising merit.¹⁷ It seems to cohere with our intuition that people should receive the same pay for the same labour, independently of

¹⁵ We follow Canadian case law in connecting inequality with discrimination: see the Canadian Charter of Rights and Freedoms, s 15.

¹⁶ Aristotle, *Ethica Nichomacea*, W Ross trans (Oxford, Clarendon Press, 1925) book V3, 1131a-6.

¹⁷ S Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712, 716–19.

race, gender, disability or religion, because these differences among workers are irrelevant to the value of their labour. In this way, the principle of formal equality seems to track a principle of rationality,¹⁸ requiring a moral agent to take relevant factors into account in her treatment of others and to disregard irrelevant factors.

Nevertheless, the Aristotelian formula, taken by itself, has been criticised as ‘empty’ or ‘circular’, since it does not provide criteria defining how people are relevantly alike and what sorts of treatment are suitable for those who are not relevantly alike.¹⁹ Without such criteria, as Peter Westen has argued, ‘equality remains meaningless, a formula that can have nothing to say about how we should act’.²⁰ Without substantive moral standards, the ‘similarly situated’ could be taken to mean ‘similarly oppressed’, as Bernard Williams has noted.²¹ In *Andrews v Law Society of British Columbia*,²² the Supreme Court of Canada adopted this line of criticism, arguing that the ‘similarly situated’ test could ‘justify the Nuremberg Laws of Adolf Hitler and ... the formalistic “separate but equal” doctrine of *Plessy v Fergusson*’.²³

Let us consider the implications of using formal equality as a basis for an obligation of equal treatment that can directly bind owners of private property. Such an obligation would not necessarily capture cases of direct discrimination by owners, such as a landlord who refuses a tenancy to a prospective tenant purely on the grounds of his race, or a testator who deprives his daughter of benefits under his will purely on the grounds of her sexual orientation. Both the landlord and the testator could fulfil a principle of formal equality by discriminating equally against all non-Caucasian or non-heterosexual people. Formal equality lacks an account of why people are *relevantly* similar for the purposes of these particular decisions by these particular agents. A landlord is *prima facie* entitled to reject a prospective tenant on the grounds of his credit rating, employment history, smoking habits or possession of pets; a testator, in jurisdictions that recognise testamentary freedom, is *prima facie* entitled to deprive his daughter of benefits under his will on the grounds that he dislikes her career, personal habits, family, personality or choice of hobby. As Westen explains, we can only say that persons are relevantly similar for the purpose of equal treatment if we have a ‘rule – a prescribed standard for treating them – that both fully satisfy’.²⁴ Unless we can identify a baseline standard that landlords and testators respectively are obliged to comply with in choosing tenants and legatees, and show that features like race and sexual orientation are irrelevant under those

¹⁸ cf J Gardner, ‘On the Grounds of Her Sex(uality)’ (1998) 18 *OJLS* 167, 168.

¹⁹ P Westen, ‘The Empty Idea of Equality’ (1982) 95 *Harvard Law Review* 537, 547.

²⁰ *ibid.*

²¹ B Williams, *The Idea of Equality* in *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge, Cambridge University Press, 1973) 230, 231.

²² *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

²³ *Plessy v Fergusson* [1989] 1 SCR 143, 166.

²⁴ Westen (n 19) 545.

standards, a demand for formal equality of treatment will be of limited value in solving flagrant instances of inequality.

B. Substantive Equality: Autonomy and Dignity

In *Law v Canada (Minister of Employment and Immigration)*,²⁵ the Supreme Court of Canada explained the equality rights under the Canadian Charter of Rights and Freedoms by reference to the notion of human dignity and linked human dignity to ‘the realization of personal autonomy and self-determination’.²⁶ On this basis, we might define the wrong of discrimination as the replication of historic injustices that have prevented members of affected groups from realising their personal autonomy. This notion of autonomy has been linked on the one hand to access to particular resources, and on the other to freedom from stereotyping and prejudice.

(i) *Autonomy as Positive Freedom: Discriminatory Denial of Access to Resource*

Réaume has argued that discrimination law is partly concerned with ensuring that each person has the ability to access ‘dignity-constituting benefits’;²⁷ she suggests that discrimination is wrongful where it involves the denial of some benefit where ‘the benefit at stake is important to a life of dignity’.²⁸ One dimension of this conception of autonomy is that it may place the state under positive obligations to provide a level of social assistance to those who are deprived of these benefits.²⁹ It can also explain why a duty not to discriminate applies to non-state actors, such as employers and landlords. Gardner has argued that employers come under a duty of non-discrimination because they occupy ‘a special privileged position in the distributive mechanics of society’;³⁰ the benefit that the employer has it in her power to disburse – the status of an employee – is one that, in our society, has central organising significance in the life of the individual and determines many of the choices available to her, while the formation and preservation of the employment relationship ‘involves a peculiarly large amount of control for one of the parties (the employer)’.³¹ If equality requires that people have equal access to particular benefits which are necessary for dignity or autonomy, then it is reasonable to apply the duty of non-discrimination to a private party who has an asymmetric power to grant

²⁵ *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

²⁶ *ibid* [53].

²⁷ D Réaume, ‘Discrimination and Dignity’ (2003) 63 *Louisiana Law Review* 1, 42.

²⁸ *ibid*.

²⁹ *cf Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

³⁰ J Gardner, ‘Liberals and Discrimination’ (1989) 9 *OJLS* 1, 11.

³¹ *ibid*.

or withhold such benefits: ‘gatekeepers of opportunity’,³² as Khaitan describes them. Since this justification is focused on the outcome of discrimination rather than on the quality of the decision-making that leads to that outcome, it captures instances of indirect as well as direct discrimination.

The scope of this duty-bearing role depends on which benefits qualify as dignity-defining in this sense.³³ On a very broad view, focused on human flourishing, we might include such goods as friendship;³⁴ if so, individuals might be under an obligation to avoid discrimination in extending opportunities for friendship. However, we might object to creating a *legal* obligation of this kind even if we consider that access to opportunities for friendship is indeed a benefit that is important to dignity. First, such an obligation, if legally enforceable, would involve a significant burden on the liberty of the individual. As Khaitan has argued, the extension of duties of non-discrimination to non-state actors brings with it a countervailing concern for preserving the negative freedom of these non-state actors; in such a case, it becomes necessary for the law to balance its concern for the autonomy or positive freedom of the victim of discrimination with its concern for the negative freedom to choose one’s friends, associates and contract partners.³⁵ In the intimate sphere, involving relationships such as friendship or romantic partnership, the balance tilts in favour of negative freedom. Secondly, we might say that it is constitutive of the good of friendship³⁶ that it is voluntarily chosen and voluntarily maintained: a legally enforceable right to compel another person to be my friend, or to extend the opportunity of friendship to me, would not – if enforced against that other, on pain of a legal remedy – facilitate my participation in the good of friendship at all.

(ii) *Autonomy and (Mis)recognition: Discrimination as an Expressive Act*

We have so far focused on autonomy as requiring access to particular benefits, mediated by the decisions of others. On this view, the animus that may motivate discrimination matters only insofar as it has the consequence of denying the benefit at issue to the target of discrimination. Recognition theory, by contrast, argues that expressions of animus may in themselves, and apart from any further decision that they motivate, damage autonomy. As one of its founders, Charles Taylor, explains, this theory is predicated on ‘the thesis that identity is partly shaped by recognition or its absence’,³⁷ such that ‘the misrecognition of others’,

³² Khaitan (n 11) 210.

³³ For different accounts of what those ‘benefits’ could be, see Moreau (n 11) 126; A Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999); M Nussbaum, *Women and Human Development* (Cambridge, Cambridge University Press, 2000).

³⁴ J Finnis, *Natural Law and Natural Rights* (Oxford, Oxford University Press, 2011) 141–46.

³⁵ Khaitan (n 11) 200.

³⁶ See Moreau (n 11) 233–34.

³⁷ C Taylor, ‘The Politics of Recognition’ in A Guttman (ed), *Multiculturalism: Examining the Politics of Recognition*, 2nd edn (Princeton University Press 1995) 25.

the ‘mirror[ing] back to them [of] a confining or demeaning or contemptible picture of themselves’,³⁸ itself prevents the development of an authentic identity. Sangiulano argues that misrecognition, in this sense, has psychological effects that damage autonomy: it disrupts ‘The dialogical construction of subordinate groups’ identities [and their ability] to authentically conceptualize their way of being-in-the-world in positive terms’.³⁹ In a similar vein, Deborah Hellman argues that ‘Discrimination is wrong when it demeans’, that is, when it treats someone as not fully human or not of equal moral worth’. To demean is ‘partly an expressive act’; it means ‘to put down – to debase or degrade’.⁴⁰ Harry Frankfurt’s explanation of the harm done by disrespect (which he takes to be what is ultimately at issue when people suffer from inequality) describes the subjective dimension of this harm as an ‘assault upon [someone’s] reality’, because ‘the person is dealt with as though he is not what he actually is’, which may ‘evoke painful feelings of resentment’ and an ‘inchoate anxiety’.⁴¹

Where an expressive act instantiates a demeaning or harmful stereotype of the other, of a kind that denies their equal moral worth, the extension of a duty to avoid that act to a non-state actor depends, first, on whether it could plausibly be said that the demeaning expressive act in question ‘is imbued with the force of law’.⁴² This is because, as Sangiulano argues, the psychological impact of misrecognition is at its most significant when it is the law itself that presents members of the affected social groups with a demeaning or contemptible picture of themselves. It is the state’s endorsement of a prejudicial perspective that is likely to be so pervasive, and so powerful, that it disrupts the freedom of members of the stigmatised group to articulate a different identity for themselves. Absent endorsement by the state, a non-state actor’s expressive act may also be so harmful that her countervailing interest in freedom of expression cannot justify the law in permitting it. Here, we might ask whether the expressive meaning of a particular act is such that it would qualify as incitement to hatred, violence or discrimination within the meaning of domestic codes that criminalise such expressive acts.

III. THE SCOPE OF PRIVATE PROPERTY: THE PLURAL ROLES OF THE OWNER

Thus, there are three key roles to which more or less stringent anti-discrimination norms may apply: decision-makers who are under duties to act reasonably in the pursuit of some prescribed end; ‘gatekeepers of opportunity’, whose decisions

³⁸ *ibid.*

³⁹ AR Sangiulano, ‘Substantive Equality as Equal Recognition: A New Theory of Section 15 of the Charter’ (2015) 52 *Osgoode Hall Law Journal* 601, 610.

⁴⁰ D Hellman, *Why Is Discrimination Wrong?* (London, Harvard University Press, 2008) 35.

⁴¹ H Frankfurt, ‘Equality and Respect’ (1997) 64(1) *Social Research* 3, 12.

⁴² Sangiuliano (n 39).

govern whether others can access opportunities that are necessary for autonomy; and those who engage in expressive acts endorsed by the state. In this section, we consider the extent to which private owners may occupy one or more of these roles.

**A. Owners as Decision-Makers Bound by Rules and Standards:
Is Ownership an Office?**

Blackstone famously defines private property as ‘that sole *and despotic* dominion which one man claims and exercises over the external things of the world’.⁴³ As the reference to despotism implies, the arbitrary character of the owner’s dominion, the absence of any obligation to account to others for his decisions, is an important part of the traditional notion of property in common law jurisdictions. If the Blackstonian account is accepted without qualification, it follows that no rules or standards whatever govern the decisions of an owner, qua owner, and that his discriminatory decisions cannot be challenged on the grounds that they violate the principle of formal equality.

Blackstone’s formulation is, of course, not universally accepted – certainly not without qualification.⁴⁴ In the modern law, private owners, especially landowners, are often constrained in the public interest. An owner may be compelled to sell her rights in situations where it is in the public interest that she does so. She may be forbidden to make certain uses of her land, as by environmental and planning regulations. In addition to such legislative constraints, various common law doctrines limit the ‘despotic’ potential of ownership in the public interest: examples include the tort of nuisance, the effect of claims arising by proprietary estoppel and of titles arising by adverse possession, and the refusal of specific relief for rights violations such as trespass.

However, the question is whether these constraints operate by placing an owner under an obligation to act for particular ends, such that her decision-making may be challenged on the grounds that she has taken into account facts that are irrelevant to those ends. As Sir Thomas Bingham MR, as he then was, explained in *R v Somerset City Council*, the absence of any such general standard governing decision-making is traditionally understood to be one of the differences between the position of a private landowner and that of a public authority:

To the famous question asked by the owner of the vineyard (‘Is it not lawful for me to do what I will with mine own?’ St. Matthew, chapter 20, verse 15) the modern answer would be clear: ‘Yes, subject to such regulatory and other constraints as the law imposes.’ But if the same question were posed by a local authority the answer

⁴³ 2 Bl Comm 3 (emphasis added).

⁴⁴ G Alexander, ‘The Social-Obligation Norm in American Property Law’ (2009) 94 *Cornell Law Review* 745, 754.

would be different. It would be: ‘No, it is not lawful for you to do anything save what the law expressly or impliedly authorises. You enjoy no unfettered discretions.’⁴⁵

This distinction between a ‘regulatory constraint’ and a ‘fettered discretion’ captures the difference between a decision that one is forbidden – or required – to make, and a decision that one is free to make but that, if made at all, must be made for particular reasons. Legislative norms affecting private owners tend to take the form of regulatory constraints: an owner may be compelled to sell her land, or prevented from making some use of that land, in certain defined circumstances. In such cases, there is no decision to be made – the owner must do or refrain from doing what the state requires or forbids – and no room for the application of a formal equality standard. For instance, the state may be seeking to acquire a plot of privately owned land in order to build a hospital. One owner may refuse to sell her land because she has a racial animus against the community that will be served by the hospital, while another refuses because he wants to retain the land as his home. If the building of the hospital is in the public interest, such that it can justify the state’s exercise of its powers of compulsory acquisition, both owners will be compelled to sell. The justification for the state’s intervention has to do with the aggregate consequences of the owner’s refusal to sell rather than the reasons for that decision; it is unlikely to be proper for the state to take the distasteful motives of an owner into account in deciding whether to exercise its powers of compulsory acquisition.⁴⁶ By contrast, a fettered discretion requires its holder to act for a given end, and so the motive behind a purported exercise of discretion can be relevant to whether it is lawful.

Owners undoubtedly do possess fettered discretions in particular contexts. Trusteeship is the obvious example. Trustees must act in the exclusive best interests of their beneficiaries or exclusively to promote the trust purposes; their decisions can always be challenged if they are made for reasons irrelevant to this end. In *Fox v Fox’s Estate*,⁴⁷ for example, Mrs Fox was the donee of a power to encroach upon assets otherwise belonging to her son, Walter, for the benefit of her grandchildren. In purported exercise of this power, she gradually transferred all the assets to the grandchildren; at least one of her reasons was that she objected to Walter’s decision to marry outside the Jewish faith. She also changed her own will to disinherit him. The Ontario Court of Appeal held that her purported exercise of the power was *ultra vires*, rendering her transfer of assets to her grandchildren a breach of trust. This was because she was motivated by an irrelevant consideration: ‘the fact that her son intended to marry a gentile was completely extraneous to the duty ... to be concerned about the

⁴⁵ *R v Somerset City Council* [1995] 1 WLR 1037, 1042.

⁴⁶ *cf R (Sainsbury’s Supermarkets Ltd) v Wolverhampton City Council* [2010] UKSC 20 [9] (Lord Collins).

⁴⁷ *Fox v Fox’s Estate* (1996) 28 OR (3d) 496 (CA).

welfare of her grandchildren'.⁴⁸ This is the logic of formal equality: in exercising her power, Mrs Fox was under a duty to act for a prescribed end (the welfare of her grandchildren) and was forbidden to take the religion of her son's spouse into account because it was irrelevant to that end.

In the case of a trustee or other fiduciary, this logic is not limited to specific powers, but applies to all decision-making of the fiduciary qua fiduciary;⁴⁹ it will capture a trustee who makes investment decisions which reflect her personal religious beliefs⁵⁰ or a company director who contracts with one supplier rather than another because of a gender bias. Outside the fiduciary context, the principle may apply to discrete decisions affecting others where these are subject to duties to act reasonably or in good faith.⁵¹ In *Fox v Fox's Estate*, the judges took it to be uncontroversial that the principle did not apply to powers of testation. While Gallighan JA considered that provisions of wills that give trustees a duty or a liberty to discriminate might be void on the grounds of public policy, he distinguished outright testamentary gifts made for discriminatory reasons.⁵² McKinlay JA described Mrs Fox's dealings with the trust estate as a breach of trust precisely because she had treated the assets included in that estate as if they were her own.⁵³ The implication is that owners do not hold their powers of testation subject to any duty to act reasonably or in good faith, at least in jurisdictions affirming a principle of testamentary freedom.⁵⁴ On this view, public policy limits on powers of testation represent regulatory constraints rather than fetters on discretion: the owner is barred from making certain decisions because of the harmful social consequences of decisions of that type,⁵⁵ not because the power itself is fettered by an obligation to act for particular reasons. The distinction matters because, in the case of a fettered discretion, no countervailing principle favouring a freedom to discriminate can apply; if the owner's powers are inherently limited by a duty to act in good faith, she cannot invoke some other interest of her own to justify an ultra vires exercise of the power.

These arguments depend on the premise that owners are not obliged to act for any particular reasons simply because they are owners. An alternative approach can be found in Larissa Katz's account of ownership as an 'office'.⁵⁶ Katz argues that the common law recognises a general principle that owners are

⁴⁸ *ibid* [13].

⁴⁹ eg *Cowan v Scargill* [1985] Ch 270; *Klug v Klug* [1918] 2 Ch 67.

⁵⁰ cf *Harries v Church Commissioners of England* [1992] 1 WLR 1241.

⁵¹ eg Landlord and Tenant Act 1927, s 19 (England and Wales).

⁵² *Fox v Fox's Estate* (1996) 28 OR (3d) 496 (CA).

⁵³ *ibid* [49].

⁵⁴ The position will be different where legislation authorises the court to vary the provisions of a will where the testator has not made reasonable provision for certain classes of person; a claimant within the protected class may be able to argue that a testator who has refused to make provision for her because of a discriminatory animus has acted unreasonably.

⁵⁵ cf *Re Millar Estate* [1938] SCR 1.

⁵⁶ L Katz, 'Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right' (2013) 122 *Yale Law Journal* 1444. See also AJ MacLeod, *Property and Practical Reason* (Cambridge, Cambridge University Press, 2015).

subject to the kind of ‘jurisdictional limits on reasons’⁵⁷ that we are familiar with in relation to holders of public power, like local authorities and judges. She derives this principle from her broader theory of private property, the view an owner is effectively an office holder who is given the power to ‘set the agenda’ for the resource that she owns – to decide what the most worthwhile use of that resource is – in order to solve the coordination problems that would otherwise arise from good-faith disagreements about the worthwhile use of scarce resources. Where an owner makes a decision ‘just for the reason that it will harm others’,⁵⁸ the law refuses to give effect to that decision not just because it is malicious, but because she has exceeded her authority, acting for a reason that is not related to the task of identifying the most worthwhile use of the resource owned. Since this principle is basic to the concept of ownership itself, it cannot be particular to any one set of decisions – like a trustee’s duty, it must be global, encompassing every aspect of the owner’s decision-making.

On this view, owners, like trustees, are forbidden to act for discriminatory motives unless they can show that the discrimination is rationally related to the end they ought to have in view, ie determining the most worthwhile use of the owned resource. To make sense of this, we need to understand what it means to say that, although the owner wants to use her resources to promote some end – eg to punish her son for marrying outside her faith – the achievement of that end does not represent her own view of the most worthwhile use of those resources. Katz offers the following examples of improper motives: ‘to put an end to another’s tort, to extract a gratuitous benefit from a neighbor, to bring a reluctant partner to the bargaining table, to force a free rider to contribute to a common good’.⁵⁹ The common thread is that the owner is acting improperly when her decision reflects a purely instrumental approach to the resource under her control, motivated by her desire to alter the behaviour of others. Conversely, she will be acting properly only when her decision reflects a genuine judgement of value – whether her own, or that of someone else whose judgement she is willing to substitute⁶⁰ for her own – that is sensitive to qualities of the owned resource itself. Thus, in her discussion of *Bradford Corporation v Pickles*,⁶¹ Katz suggests that the landowner would have been within his rights to use his land for mining if he had considered this to be the best use of the land, even if he foresaw harm to Bradford as a consequence; he would also have been entitled to sell an easement entitling the town to receive water from his land, because *the town* valued that use of the land and he was willing to substitute its judgement for his own for the sake of personal profit. In both these instances, the value judgement that governs the actual use of the land has to do with its own special

⁵⁷ Katz (n 56) 1450.

⁵⁸ *ibid* 1451.

⁵⁹ *ibid* 1463.

⁶⁰ *ibid* 1459–63.

⁶¹ *Bradford Corporation v Pickles* [1895] 1 AC 587.

characteristics and qualities, either as a mine or as a water source. The forbidden decision is the decision to use the land for a purpose that is not valued in itself, but as an instrument to achieve a further end that reflects no one's value judgement about the best use of the land as such.

Decisions to make discriminatory gifts and settle discriminatory trusts are likely to exceed the authority of the owner so defined. However, this argument is over-inclusive: if accepted, it seems likely that many non-discriminatory gifts and most trusts would also fail on the same basis. An absolute gift can involve the owner identifying someone else as a person whose judgement about the most worthwhile use of the thing should be substituted for her own, and making a transfer on that basis. However, it may often be the case that such gifts are made not on the basis that the owner is prepared to accept the recipient's judgement as to the best use of the thing, but simply because she favours some unrelated trait of the recipient (or objects to some unrelated trait of a non-recipient). In *Re Brocklehurst*,⁶² for example, the testator made a gift of shooting rights over his land which, as Lord Denning MR noted, was 'a disastrous transaction for anyone who was to inherit the estate':⁶³ the donee was given an assignable 99-year lease of shooting rights over the entire estate, a transaction that rendered the land virtually unsaleable. There was no evidence that the testator made this decision because he believed it would promote the most worthwhile use of the land. Lord Denning suspected that his motive was to 'work the destruction of [the] estate',⁶⁴ to spite its present owner; Lawton and Bridge LJ considered that he may simply have been indifferent⁶⁵ to the preservation of the estate and cared more about expressing his friendship with the donee. Regardless, the majority of the Court of Appeal denied that his motives made any difference to the validity of his gift. As the absolute owner of the land, he was entitled to grant rights over it for whatever reason he chose – including the purely instrumental motives of benefiting his friends and/or spiting his relatives.

Katz's analysis is even more difficult to apply to express trusts, where the whole idea of anyone's judgement about the best use of the trust asset, based on its own intrinsic characteristics, will often have dropped out of the picture. Here, assets are vested in trustees who have a duty to maximise the value of, or return on, those assets; they are not normally permitted to exercise their general judgement about what would be the most worthwhile use of each particular asset. Meanwhile, unless the beneficiaries become legal owners of the trust assets – thus bringing the trust to an end – they are not allowed to exercise their judgement either: they remain passive recipients of the income or wealth generated by the trustee's decisions, on the terms prescribed by the settlor. Express trusts thus *essentially* involve the instrumental use of assets for ends that are

⁶² *Re Brocklehurst* [1978] Ch 14.

⁶³ *ibid* 26.

⁶⁴ *ibid* 32.

⁶⁵ *ibid* 35 (Lawton LJ) and 45 (Bridge LJ).

not specifically related to intrinsic qualities of those assets: assets take their place in a trust fund as items of interchangeable wealth, rather than as things possessed of intrinsic characteristics that make them suited to one use rather than another,⁶⁶ and this ceases to be the situation only when the trust itself ceases to exist. If this kind of instrumentalisation of resources is beyond the authority of a private owner, private owners should not possess the power to create express trusts at all.

It is unlikely, therefore, that ownership in the common law tradition is an office that attracts the principle of formal equality that applies to genuine office holders like public authorities and fiduciaries. Not only do the tort cases not speak with one voice,⁶⁷ as Katz acknowledges, but the application of the principle to the dispositive powers of owners is difficult to square with the basic premises of these areas of law. Rather, the principle of formal equality applies only in discrete relational contexts, where the owner owes a duty to act reasonably to a defined other; the power to make a gift, or to settle a trust, is not one of those contexts. Whether a discriminatory motive can render such a gift or trust void, on public policy grounds, thus depends on some argument other than that provided by the principle of formal equality.

B. Owners as Gatekeepers: Markets, Gifts and Depersonalisation

We have seen that there is a case for extending a duty of non-discrimination to ‘gatekeepers of opportunity’, those who determine other people’s access to resources that are essential to autonomy. A private owner can be understood as a gatekeeper, in this sense, in two respects. First, a person with a title to a physical asset, such as land, is *literally* a gatekeeper, entitled to exclude others from that asset and to set the conditions of their access. Secondly, the holder of any asset will have a power to transfer it, and thus to make distributive decisions regarding whatever resources are connected with it; this can include access to physical things, but can also include the receipt of an income stream from shares or the right to draw on the credit balance of a bank account.

It might be argued that the application of a duty of non-discrimination to these decisions should depend on the importance to autonomy of the contested resource. In each case, we might ask what the relative importance of the resource is to those seeking access to it and weigh this against the owner’s countervailing interest in his freedom to exclude or dispose of the resource at will. Such an approach would reflect Alexander’s account of the general social obligation norm that applies to private owners.⁶⁸ On this view, when a person requires

⁶⁶ cf B Rudden, ‘Things as Thing and Things as Wealth’ (1994) 14 *OJLS* 81.

⁶⁷ eg *Bradford Corporation v Pickles* [1895] 1 AC 587; *Allen v Flood* [1898] AC 1; *Chapman v Honig* [1963] 2 QB 502.

⁶⁸ G Alexander, *Property and Human Flourishing* (n 13).

access to a particular resource in order to develop some capability essential to his flourishing, the owner is under a prima facie obligation to facilitate access; the obligation is limited by countervailing interests of the owner that are equally necessary for her own flourishing, such as personal security and associational freedom.⁶⁹ Since most scholars in this tradition accept that housing is necessary for autonomy, this would justify applying anti-discrimination norms to all owners of land suitable for providing housing or shelter. For example, there would be a strong case for denying the landowner's right to exclude on the facts of a case like *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,⁷⁰ where the landowner was a company whose farmland had been occupied by a large group of people awaiting housing by the state and where the company's decision to seek an order evicting the occupiers was likely to have a disparate impact along racial lines. By contrast, it would be harder to apply such a duty to the owner of a theatre⁷¹ or bar;⁷² the opportunity to visit a theatre, considered in itself, is less obviously linked to autonomy than that of living in a secure home.

However, the duties of non-discrimination owed by private owners do not in fact track the relative importance of the resources under their control. Outside the unique context provided by the justiciable socio-economic rights recognised by the South African Constitution, it is doubtful that a common law court would respond to the facts of a case like *Modderklip* by refusing to give effect to the landowner's decision to seek possession. As Alexander notes,⁷³ the Constitutional Court of South Africa acknowledged *Modderklip*'s right to an eviction order, while making the availability of such an order contingent on the state performing its duty to rehouse the occupiers and requiring the state to pay compensation to *Modderklip*. The requirement that the state pay compensation suggests that there is no duty of non-discrimination which governs the exercise of the *landowner*'s right of exclusion in such a case; where a landowner is under a duty of non-discrimination in relation to eviction decisions, there is no question of compensation. Meanwhile, such duties apply in many scenarios where the resource at issue cannot realistically be characterised as essential for dignity: the owner of a cake who declines to sell that cake to a particular prospective buyer, on the grounds of sexual orientation,⁷⁴ would be as much in violation of a non-discrimination duty as the landowner who refuses a prospective tenant on the same grounds, even though access to baked goods is less important to a life of dignity than access to housing.

Rather than focusing on the relative significance of the particular resource belonging to the owner, this set of anti-discrimination norms focus instead on

⁶⁹ *ibid* 193.

⁷⁰ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

⁷¹ As in *Loew's Theatres v Reynolds* (1921) 30 Que KB 459.

⁷² As in *Christie v York Corp* [1940] SCR 139.

⁷³ Alexander, 'The Social-Obligation Norm' (n 44) 789–91.

⁷⁴ *cf Lee v Asher's Baking Company Ltd* [2018] UKSC 49.

the extent to which the owner has chosen to make her resources ‘public’: for example, by offering services to members of the public at large or by choosing to sell her rights in the marketplace. Here, the dignity-defining opportunity at issue is not access to the resource itself – be it housing, cake or the enjoyment of a theatrical performance – but rather the opportunity to participate in the public square on equal terms with others. As Khaitan argues, an owner enters the public square in this sense when the conditions that she has set for access have an essentially ‘depersonalised’⁷⁵ or public character: that is, where she has implicitly agreed to contract with anyone who offers suitable terms, or to grant access to her resources to anyone who meets the impersonal criteria that she has set for access to those resources. The opportunity to participate in such ‘depersonalised’ transactions can in itself be understood as necessary for autonomy.

The importance of this type of freedom can usefully be understood by considering the effect of its absence. Under the doctrine of coverture, married women lacked the freedom to contract or acquire property at common law. In *Manby v Scott*,⁷⁶ a wife who had left her husband had purchased clothes from a mercer without the husband’s consent; the question before the court, on which the judges divided, was whether the mercer could sue the husband for the price. The judges who took the view that the husband should be charged did so because they considered that it was important that she be able to obtain necessities: ‘for ... if nobody would trust her so as to charge the husband she must starve’.⁷⁷ Their focus was on the wife’s access to resources necessary for survival. The judges who objected, however, focused on the idea that she would be able to obtain what she pleased from strangers without any involvement of her husband: their problem was with the idea that ‘the wife shall ... judge of the fitness of her apparel ... without asking the advice or allowance of her husband’.⁷⁸ Her remedy for starvation, they considered, ought to lie in the ecclesiastical court, which would have heard her complaint if her husband were wrongfully withholding necessities from her. This was a deeply ‘personalised’ remedy, involving a close scrutiny of the rights and wrongs of the marriage, the reasons for her absence from her husband and the possibilities of reconciliation.⁷⁹

As this example suggests, the problem with coverture was not so much that it prevented married women from obtaining the necessities of life, but rather that it confined their means of obtaining these necessities – or anything else – within the private sphere and thus prevented them from exercising their own judgement about which things they needed. Although the wife’s ability to obtain clothes under a sale transaction did in fact involve another person’s decision – the

⁷⁵ Khaitan (n 11) 204.

⁷⁶ *Manby v Scott* [1558–1774] All ER Rep 274; also reported at (1662) 124 ER 561, (1659) 86 ER 781, (1663) 83 ER 1065.

⁷⁷ *Manby v Scott* [1558–1774] All ER Rep 274, 275 (Twisden and Mallet JJ).

⁷⁸ *Manby v Scott* (1659) 86 ER 781, 783–84 (Hyde J).

⁷⁹ *Manby v Scott* (1662) 124 ER 561, 568.

mercator's decision to sell them to her on the agreed terms – this did not mean she was subjected to that other's *judgement* as to whether she really needed the clothes. In the paradigm case of sale, a seller has no interest in the role that the purchased assets will play in the buyer's future plans. His only interest will be in whether she can pay. To be barred from the role of a buyer in the market, as the judges in *Manby v Scott* noted with approval,⁸⁰ is thus inconsistent with autonomy in its basic sense of self-government precisely because one lacks the freedom to participate in such 'depersonalised' transactions. Once coverage and analogous legal barriers to participation in the market are abolished, anti-discrimination norms then reinforce autonomy by forbidding sellers to repersonalise sale transactions only because they are dealing with members of protected classes.

This analysis justifies a principle that owners should not be able to make gifts or settle trusts that create 'depersonalised' or 'public' criteria for access to the trust assets, while at the same time placing obstacles to access only in the way of people with protected characteristics. Any provision of a trust instrument that defines the administrative powers of trustees in discriminatory terms – directing them to discriminate in their participation in the market, for example – is likely to be void on these grounds.⁸¹ Charitable trusts, which also stipulate depersonalised criteria for access to the resources held on trust, may⁸² also be captured by this principle.⁸³ In *Re Leonard's Will Trusts*, for example, the trust at issue provided scholarships to young people, on conditions that specifically excluded 'all who are not Christians of the White Race'.⁸⁴ One reason why these clauses were struck down had to do with the 'public'⁸⁵ character of the trust: the benefits of the trust fund were generally available for distribution under depersonalised criteria, such as need or educational attainment, while those with certain protected characteristics were specifically excluded. Private gifts and trusts, on the other hand, have an inherently personalised character: they necessarily reflect the donor's judgement as to the needs or merits of the individual donees and can reflect a deep concern as to the role that the assets will play in her life. It is important to the autonomy of a donee that she be free, if she dislikes these judgements, to disclaim the gift; it may also be argued that a donee will only have a real freedom to do this if she has other options to provide for her own needs, including assistance from the state. However, it is less plausible that the mere opportunity to be an object of private bounty is, in and of itself, necessary for autonomy.

⁸⁰ *Manby v Scott* (1659) 86 ER 781, 784 (Hyde J): 'when the wife departs from her husband against his will, she ... sets up a new jurisdiction; and assumes to govern herself'.

⁸¹ *cf Re Peach Estate* (2009) NSSC 383.

⁸² For a different argument, based on the expressive meaning of the trust, see text to n 112 below.

⁸³ Khaitan (n 11) 204.

⁸⁴ *Re Leonard's Will Trusts* [1990] 74 OR (2d) 481 [14].

⁸⁵ *ibid* [35] (Robins JA).

C. Ownership as an Expressive Role: Gifts, Trusts and the Endorsement of the State

The only plausible justification for striking down private gifts, therefore, has to do with their expressive meaning: either because the enforcement of a discriminatory gift involves the state's endorsement of its expressive meaning, or because the expressive meaning of the gift is so harmful that it is forbidden by the general law.

The most obvious situation where it can be said that the enforcement of a gift necessarily involves the state's endorsement of its expressive meaning is that of the charitable trust. Such trusts are directly to be enforced by agents of the state, and can only be enforced if the law considers that their purposes are beneficial to the public;⁸⁶ a finding that a trust is for the public benefit requires state endorsement of the trust purposes as a positive social good. Thus, in *Re Leonard's Will Trusts*, the court did not focus merely on the discriminatory character of the terms of the trust, but also on the expressive meaning conveyed by those terms, given the settlor's avowed belief that the 'white race is best qualified by nature to be entrusted with the preservation, development and progress of civilization'.⁸⁷ The trust was struck down because its terms were 'premised on ... notions of racism and religious superiority'⁸⁸ that were inimical to the principle of equal respect for all religions and races that forms an important part of contemporary public policy in Canada. The terms of the trust excluded non-white and non-Protestant persons for reasons that present such people with a demeaning picture of themselves as unfit to advance the cause of civilisation. For the state to enforce the trust as being for the public benefit is to endorse such a picture, and thus to fail to respect the principle of equal respect. This interpretation of the *Leonard* principle would explain why discriminatory clauses in other charitable trusts have subsequently been upheld, because they do not share the objectionable expressive meaning of the *Leonard* clauses.⁸⁹ For example, a scholarship for the exclusive benefit of women graduates was upheld on the grounds that, unlike the *Leonard* trust, the settlor had not been motivated by notions of 'superiority'; the terms of the scholarship were not premised on the objectionable theory that 'women ... make better scientists than men'.⁹⁰ It is the theory on which the trust is premised that justifies the law in striking it down, where the trust is charitable and the underlying theory is one that the state cannot endorse.

The question then arises whether a similar argument can hold in the case of private gifts and trusts, although these do not need to be for the public benefit in

⁸⁶ *Pemsel v Special Commissioners of Income Tax* [1891] AC 531, 584 (Lord MacNaghten); Charities Act 2011, s 2(1)(b) (England and Wales).

⁸⁷ *Re Leonard's Will Trusts* [1990] 74 O. (2d) 481 [38] (Robins JA).

⁸⁸ *ibid* [39].

⁸⁹ eg *Re McConnell's Estate* (2000) 185 DLR (4th) 182; *Re Esther G Castanera Scholarship Fund* [2015] MBQB 28.

⁹⁰ *Re Esther G Castanera Scholarship Fund* [2015] MBQB 28 [37].

order to be enforceable and can be enforced at the behest of private parties. One possible argument is that the state's endorsement of such gifts simply flows from the *in rem* character of property rights: all decisions by owners, regarding the use of their property, are effectively endorsed by the state because of the state's role in policing the subsequent enforcement of rights against third parties. This is a possible implication of Reichman's suggestion that, because the concept of property entails a demand by the owner that the community at large 'respect ... her choices regarding the use of her property', this creates a correlative obligation on the part of the owner to respect 'the community's definition of who belongs to the community'.⁹¹ For example, in *Spence v BMO Trust Company*,⁹² the Ontario Superior Court struck down a testator's absolute gift to his daughter Donna and her children, on the grounds that he had failed to make any gift to his other daughter, Verolin, because he objected to her interracial relationship. Here, Mr Spence, in choosing to give assets to Donna instead of Verolin, made a demand that the community at large accept Donna as the lawful owner of those assets. If his reason for making the gift to Donna was because he objected to Verolin's interracial relationship, we might say that this choice denies the equal moral worth of some persons on racial grounds and thus that, if the state were to endorse the legal effect of Mr Spence's decision – requiring all others, including Verolin, to respect Donna's title to the assets – it would effectively be endorsing his definition of who belongs in the community, and his denial of the equal moral status of some people.

Such an analysis, however, ignores an important distinction between the state's enforcement of an owner's decision and the state's endorsement of the reasons for the decision. When the Ontario Court of Appeal, overruling the decision of the Superior Court, recognised the validity of the gift in *Spence*,⁹³ it merely endorsed the conclusion that Donna, not Verolin, had become the owner of the assets; it did not endorse Mr Spence's view that Donna, not Verolin, *deserved* those assets. It would be open to Donna, in the circumstances, to disregard her father's reasons for giving her the assets and provide for her sister and nephew if she wished; the law does not hold her to the expressive meaning of her father's decision.⁹⁴ Thus, the state's recognition of the validity of an absolute gift to a named beneficiary, as in *Spence*, does not involve any endorsement of the owner's motive for making that gift, whatever its expressive meaning.

Conditional gifts, and gifts to a class defined by reference to abstract criteria rather than to named beneficiaries,⁹⁵ are more complicated. Where criteria for

⁹¹ A Reichman, 'Property Rights, Public Policy and the Limits of the Legal Power to Discriminate' in D Friedmann and D Barak-Erez (eds), *Human Rights and Private Law* (Oxford, Hart Publishing, 2011) 245, 254.

⁹² *Spence v BMO Trust Company* [2015] 123 OR (3d) 611.

⁹³ *Spence v BMO Trust Company* [2016] ONCA 196.

⁹⁴ *ibid* [71] (Cronk JA).

⁹⁵ We are grateful to John Mee for the point that absolute gifts to a class may resemble conditional gifts in this respect.

the receipt of benefits are laid down by the donor, and the courts are required to enforce the application of those criteria by executors or trustees, the law may come closer to endorsing the donor's perspective. This is because applying such criteria may require a degree of imaginative engagement with the ends pursued by the donor; the courts, in assessing whether those applying the criteria have acted properly, may also be drawn into such engagement. Thus, there is a case for striking down such gifts where they prescribe criteria for receipt that are demeaning in their expressive meaning and where the court cannot apply those criteria without being drawn into a partial endorsement or validation of their meaning. As Harding has noted,⁹⁶ courts have sometimes held that discriminatory gifts lack the certainty necessary for a valid gift; in these instances, he suggests, complaints about conceptual uncertainty may conceal judicial distaste for the donor's discriminatory goals. However, the notion of conceptual uncertainty may itself capture some aspects of what is objectionable about a discriminatory gift, as where the only way to determine what the donor means is to grant the premises of a system of thought that the judiciary are unwilling to endorse. For example, a gift in favour of 'Aryans' might be struck down for its uncertainty, not because it is factually impossible to understand what a donor means by the term – research into the racialised belief systems that use that term would be possible and 'expert' evidence as to its meaning could be provided – but because the only way to do so is to seriously engage with a theory committed to a denial of rights to some, an exercise the court will refuse to engage in because of its expressive meaning.

In other cases, the expressive meaning of a gift might be so harmful that the donor is barred from making such a gift *despite* lacking the endorsement of the state. The New Brunswick case of *McCorkill v Streed*⁹⁷ could be interpreted in these terms. In that case, the donor had made an absolute testamentary gift to a US-based corporation (the National Alliance), which the court struck down on the grounds that the objectives of the National Alliance involved the promotion of 'racist, white supremacist and hate-inspired'⁹⁸ speech of a kind that, while lawful in the USA, would be criminal under the Criminal Code of Canada. Since the donor's gift was intended to facilitate speech of a kind which is unlawful in Canada and which can certainly be characterised as asserting the unequal moral worth of various minority groups, the law might decline to give effect to that decision for the same reason that it might prohibit the decision to make *inter vivos* gifts to terrorist organisations.⁹⁹

This principle would justify striking down gifts, including absolute gifts, in circumstances where the gift is closely analogous to other expressive acts that are criminalised in the particular jurisdiction. Different common law jurisdictions

⁹⁶ Harding (n 6) 308.

⁹⁷ *McCorkill v Streed* [2014] NBQB 148.

⁹⁸ *ibid* [48] (Grant J).

⁹⁹ For this analogy, see B Ziff, 'Welcome the Newest Unworthy Heir' (2014) 1 *Estates and Trusts Reports* (4th) 76.

tend to strike the balance between freedom of expression and criminalisation of certain forms of speech in different places. English law, for example, criminalises a range of expressive acts, both in public and in private;¹⁰⁰ however, there are exceptions for acts carried out within a ‘dwelling’¹⁰¹ and not intended to be seen or heard by others outside that dwelling. Under the Canadian Criminal Code, incitement to hatred tending to cause a breach of the peace is criminal where it takes place ‘in any public place’,¹⁰² while wilful promotion of hatred is criminal where it takes place ‘other than in private conversation’.¹⁰³ In general, such provisions can be understood to be concerned primarily with the regulation of public behaviour, managing ‘the competing rights and interests of people sharing public spaces’.¹⁰⁴ These principles are unlikely to justify striking down dispositions in a will on the grounds that they are meant to communicate a message of hatred, or to cause distress, to a particular person who is not a donee; such a targeted form of expression, which acquires its meaning only because there is a sufficiently intimate relationship between the parties to warrant the expectation of a gift, seems closer to the ‘private conversation’ or the speech within a ‘dwelling’ that is excluded from the reach of such laws.

This approach could be explained within the framework of recognition theory, on the grounds that there is a case for forbidding degrading expressive acts by private actors – even where there is no state endorsement of those acts – where their cumulative effect is still to disrupt the formation of identity and where the effect has little to do with the authenticity of a silenced person’s underlying attitude. As between relative strangers, the positive effect of forbidding an expressive act may have relatively little to do with the authenticity of others’ façade of respect: the mere absence of demeaning speech might be sufficient to allow members of the relevant groups to form a stable and positive sense of their own identity without inquiring into the sentiments that lie beneath the silence of the people they pass in the streets. It is questionable how far this can be true of the precise harm inflicted by demeaning expressive acts made in the context of intimate and familial relationships. To the extent that Mr Spence’s racially inflected rejection damaged his daughter and grandson’s ability to form a stable sense of their own identity, for example, it seems improbable that the remedy of setting aside his will would redress this injury. In intimate and familial contexts, it seems likely that the authenticity of the other’s recognition of one’s equal moral worth is what matters to the formation of identity; if so, the law is not a suitable tool for ensuring that people receive the authentic positive regard

¹⁰⁰ eg Public Order Act 1986, s 4A (intentional infliction of distress through threatening, abusive or insulting expressive acts), ss 17–29 (incitement of racial hatred), ss 29A–JA (incitement of religious hatred or hatred on the grounds of sexual orientation).

¹⁰¹ eg Public Order Act 1986, s 4A(2), s 5(2), s 18(2), s 29B(2).

¹⁰² Criminal Code (Canada), s 319(1).

¹⁰³ *ibid* s 319(2).

¹⁰⁴ J Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71 *CLJ* 355, 361.

of their families for the same reason that it is not a suitable tool for ensuring that people receive adequate opportunities for friendship.

IV. CONCLUSIONS

We have argued that an owner of private property is subject to more or less stringent anti-discrimination norms based on the relational context in which she is acting. As a trustee, as a testator in a jurisdiction that limits testamentary freedom and in certain other legal relationships – as a neighbour, or as a landlord or mortgagee – there may be a duty to act reasonably, and this excludes acting for reasons that discriminate against people based on their protected characteristics. As a participant in the public square, such as a seller of goods and services or (perhaps) the settlor of a charitable trust, there are specific duties of non-discrimination that flow from the public character of the owner's role; purely idiosyncratic concerns and preferences are reigned in because of the importance to others' autonomy of equal access to the public square, and it is in this context that considerations of public policy may most readily be invoked to limit the owner's freedom. However, there is a residual domain where the owner's autonomy is relatively untrammelled by such considerations and where her acts are understood to have an expressive significance that the law will normally respect, unless she requires the active endorsement of the state to achieve her ends – as in the case of a charitable trust – or where she is in the domain of the criminal law, as where her gift is motivated by the criminal ends of her intended recipient. Thus, it appears that the principles that govern a private owner's *dispositive* freedoms, examined in this chapter, reveal a classically rights-centred notion of private property that is at odds with accounts of private property that treat it as inherently limited by any conception of social and relational good. While the state does regulate the owner's exercise of these freedoms in certain 'public' contexts, including when she is participating in the market, the domain of gift-giving remains a domain of relatively untrammelled autonomy on the part of the donor and, correlatively, of subordination on the part of the donee.