

# Philosophizing about Discriminatory Gifts

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Matthew Harding, [Some Arguments Against Discriminatory Gifts and Trusts](#), 31 **Oxford J. Legal Stud.** 303 (2011).

In 2009, the Illinois Supreme Court upheld a decedent's right to make a gift with a religious restriction, the "Jewish Clause." [Estate of Feinberg](#) was extensively reported, bitterly litigated, and placed a white-hot spotlight on gifts with restrictive or discriminatory conditions attached. In [Some Arguments Against Discriminatory Gifts and Trusts](#), 31 *Oxford J. Legal Stud.* 303 (2011), [Matthew Harding](#) presents arguments to eliminate the freedom to discriminate in the disposition of property, whether for charitable or private purposes. Harding's primarily-UK focus and philosophical arguments offer a wider and refreshing view of this public policy debate. The end result is a sharpened understanding of our own system.

Harding's thesis is that the common law can and should develop to eliminate the freedom to discriminate in the disposition of property by gift or trust, whether for charitable or private purposes. He rejects the counterargument of a donor's personal autonomy. Harding divides his article into two equal parts: Can the common law prohibit discriminatory gifts and, should the common law do so?

## Can the common law prohibit discriminatory gifts?

Harding begins his argument with the traditional cases upholding the right of the donor to impose discriminatory provisions, even if the consequence is a forfeiture. Most of the cases are from the 1800s, with the notable exception of the 1976 case of *Blathwayt v. Baron Cawley*, which upheld a forfeiture clause if one became a Roman Catholic. Against this background, he traces a line of mid-to-late-20th century cases in which judges showed reluctance in enforcing discriminatory clauses. These cases involved charitable gifts where the donees (all related to education) are themselves reluctant to enforce the religious or national origin discriminatory conditions. Harding acknowledges that the charitable purpose of these gifts provides the intellectual moment for the shift away from a donor's unrestricted freedom to discriminate. By specifically making a disposition for the public benefit, a donor can fairly be held to a public norm of non-discrimination.

The typical technique used in striking the discriminatory clause is declaring the requirement void for vagueness. As a rule of construction requiring strict certainty in the application of any condition, it is conceptually neutral as to the content, motivation, or impact of the condition. The law is essentially baffled by the donor's condition and finds it administratively inefficient to enforce it. This easy-out allows the common law to evolve, but it is not a technique that will end such clauses. Lawyers will merely adapt their drafting to meet the strict certainty standard.

These half measures – charitable gifts and strict certainty – are unworthy alternatives to a direct public policy analysis of discriminatory gifts. Harding issues a call for a robust discussion that must directly confront the argument of personal autonomy. Is the time ripe for such a discussion in England? Clearly a country's social and political currents are important in public policy discussions. EU membership may have added a new factor that provides a nudge toward an anti-discrimination norm in the English common law of gifts and trusts.

England's [Human Rights Act of 1998](#) brought the [European Convention on Human Rights](#) into English domestic law. Its impact on the development of the common law has been described in human rights literature as "weak indirect horizontal effect." Whether and to what extent English common law judges will import the anti-discrimination norm into private gifts remains an open question. There are sufficient differences between succession law in civil law and common law jurisdictions to cause pause, but the mere idea of this harmonizing externality in English common law jurisprudence is fascinating on its own. It is a softly significant point.

### **Should the common law prohibit discriminatory gifts?**

Having disposed of the descriptive portion, Harding moves to the prescriptive analysis, and to the central argument of personal autonomy in private transactions. He rejects the historic strength of personal autonomy in private gifts and believes the anti-discrimination norm must prevail.

The traditional distinction between public/charitable gifts and purely private does not persuade him that a court as a public institution should not itself have access to public norms in resolving private disputes. On the other hand, he also does not believe there is judicial duty to intervene, or if intervening, that the court must necessarily value anti-discrimination over personal autonomy. Basically, the anti-discrimination norm should be part of the court's deliberation, not necessarily its conclusion. Quoting from the 1976 *Blathwayt* decision, "discrimination is not the same thing as choice."

Harding challenges the personal autonomy argument. Choice is not valuable in and of itself; rather, choice is only valuable if it is in pursuit of the good. Discriminatory gifts in support of group identity or religion, *i.e.*, those motivated by "good" discrimination, can also be seen as motivated by an intolerance of difference. Therefore, such gifts create divisions and undermine pluralism. Consequently, any gift that makes reference to elements of identity, such as race, sex, and religion, would be struck. Does this just move the goal post? That is, could lawyers draft around the discrimination prohibition, as they do or try to do in the strict certainty standard? My suspicion is that for short-term trusts, the answer is probably yes, but that as trust terms lengthen, a restriction will be harder to achieve. Would lawyers begin including arbitration clauses in their documents in an attempt to avoid adverse judicial determinations? This is already happening.

These questions reveal the main reason that I liked the article: it was a good intellectual stretch, comparative, philosophical, and free ranging, with some practical sensibilities. It is a nice warm up for the upcoming semester. Welcome back.

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