Justice Centre for Constitutional Freedoms
2016 Essay Contest:

Freedom of Association and the Right to Discriminate

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Introduction

Many Canadians protested after the Ontario Superior Court of Justice ruled to uphold the Law Society of Upper Canada's (LSUC) decision to refuse to recognize the law program of Trinity Western University (TWU). The reason for the ruling came from TWU's "Community Covenant" that forbids any sexual intimacy outside of a heterosexual marriage (including homosexual intimacy)[1]. After the court ruling it did not take long before dueling editorials were penned; partisan pundits pontificated, and lawyers across the country either praised the discretion of the court, or questioned the moral and legal judgment of the Ontario Superior Court. By many, the argument was framed as a question of religious intolerance, or the competing freedoms between the religious community versus the freedoms of the LGTBQ community. However, is this legal case just another skirmish between Christian and secular society? Is it an ideological war between opposing factions whose different views may never be reconciled? The TWU ruling posed a momentous threat to all Canadians and their rights and freedoms. Implicit within the Ontario Court ruling is the message that voluntary associations like TWU are not free to choose their members how they see fit. The ruling opens the door for government legislators to regulate voluntary organizations' freedom of association. The government through law and policy should not force inclusion on voluntary associations, even if voluntary associations are participating in activities that are seen by some as discriminatory. If the government were to force inclusion it would be harmful to Canadians in the following ways:

1. Forced inclusion would violate the fundamental right of freedom of association.
2. Government mandated inclusion leads to the opinion of the majority to be legislated into law.
3. Such force would have the opposite outcome that it intends, negatively affecting social cohesion.

[1] Chiose, Simona. "Ontario Law Society's Decision to Refuse Trinity Western Accreditation Upheld." *The Globe and Mail*. 2015. Accessed October 13, 2016. http://www.theglobeandmail.com/news/national/ontario-law-societys-decision-to-refuse-trinity-western-accreditation-upheld/article25230491/.

The fundamental Right of Freedom of Association

The freedom of association is a fundamental freedom according to the Canadian Charter of Rights and Freedoms[2]. Discrimination is a fundamental facet of freedom of association. Hannah Arendt was a German born Jew who fled her home country during World War 2. She became known as one of the most influential political theorists of the twentieth century[3]. Among her many writings, Arendt fiercely advocated for fundamental human freedoms. In a controversial essay published in 1959, Hannah Arendt referred to discrimination as an indispensable social right[4]. She insisted that "without discrimination of some sort, society would simply cease to exist and very important possibilities of free association and group formation would disappear"[5]. Discrimination is not always done nefariously. In her essay, Ardent defined a less invidious type of discrimination as social discrimination. For example, it is by nature socially discriminatory when individuals decide whom to befriend, date or see a movie with. Without individuals being free to discriminate, it would mean that the government could dictate who people could and could not have voluntary meetings with. The government can not force a free individual to associate with anyone that individual does not wish to associate with. Furthermore, if that same individual wishes to associate with someone, the state can not usurp that individual's own volition and prohibit the association by law.

Social discrimination is fundamental to associations who wish to have their own unique identities. Author and Chicago law school lecturer Richard A. Epstein wrote extensively about freedom of association as a human right. He recognized the importance for voluntary associations to have the ability to choose its members according to their collective values. Epstein wrote that "...any change in membership can lead to changes in the governance structures and internal norms that current members

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[2] "Constitution Acts, 1867 to 1982." *Justice Laws Website*. 2016. Accessed October 13, 2016. http://laws-lois.justice.gc.ca/eng/Const/page-15.html.
[3] D'Entreves, Maurizio Passerin. "Hannah Arendt." *Stanford University*. 2006. Accessed October 14, 2016. http://plato.stanford.edu/entries/arendt/.
[4] Arendt, Hanah. "Confessions on Little Rock" 1957. Accessed October 13, 2016. http://learningspaces.org/forgotten/little_rock1.pdf.
[5] Ibid

prize"[6]. When voluntary associations are no longer able to choose who to grant membership, the group is unable to maintain their internal values, diversity and governance. Furthermore, Epstein stated that if people joined these associations with fundamentally different values it would be difficult to reach group consensus on important issues. As a result, the original members who may have invested much of their time and money into their association are "left with the choice between running an operation in ways that compromise their principles, leaving the organization, or shutting it down altogether"[7]. Imagine the National Association for the Advancement of Colored People having to accept the membership of a Ku Klux Klan member, or a church being forced to let an atheist be an associate pastor. These examples absurdly illustrate the importance for voluntary associations to maintain their internal values by exercising their constitutional right to social discrimination.

Although Arendt argued that any association has the right to discriminate based on their freedom of association, she also stated that discrimination becomes destructive, when the government intervenes through law and policy. Ardent wrote "The moment social discrimination is legally enforced, it becomes persecution...The moment social discrimination is legally abolished, the freedom of society is violated…"[8]. A historic example of the legal enforcement of social discrimination would be the Jim Crow laws in the American South. These laws forced businesses and voluntary associations alike to bar their doors to black Americans[9].This was a clear persecution of black Americans and was an invidious violation of their own freedom of association rights. However, when the state orders voluntary associations to be inclusive to people who they do not wish to associate, this is the same type of persecution, only leveled on the members of the association. The common denominator for persecution in this case is government coercion by policy and law.

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[6] Epstein, Richard "Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right," 2014 66 *Stanford Law Review* 1241.
[7] Ibid
[8] Ibid
[9] Costly, Andrew. "A Brief History of Jim Crow." *Constitutional Rights Foundation*. Accessed October 16, 2016. http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow.

Government imposing the will of the majority on the minority

This raises a legitimate question: Will government inaction open the door for voluntary associations to freely exercise their own prejudices? Many would argue that a university outlawing homosexual relationships is the moral equivalent of a community volunteer group banning black Canadians from membership. Some would insist that both cases are morally reprehensible. However, does popular moral sentiment justify the heavy hand of the law? Ardent does not think so. She wrote "social standards are not legal standards and if legislature follows social prejudice, society has become tyrannical"[10]. In other words, if the government exists to merely enforce popular opinion on what is socially acceptable, it will become a vehicle for the majority to impose their will on the minority. Political and legal scholar Robert Bork, wrote a controversial essay condemning state sanctioned anti-discrimination laws in the height of the civil rights movement. Bork abhorred the racial discrimination of the south and the Jim Crow laws that violated African-Americans' freedoms of association. However, he saw the possibility that newly proposed anti-discrimination legislation would move to the other extreme, allowing state powers to force association on unwilling citizens. He wrote "the principle of such (anti-discrimination) legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths"[11]. The point Bork made is that even in extreme circumstances where the discriminatory behavior in question is seen as immoral by a majority of others, this does not justify state force. Robert Levy, the chairman of the CATO Institute also argued that the right to discriminate is implicit in the right to association. Levy stated that "from an ethical perspective ...religious, racial, and ethnic discrimination is sometimes reprehensible. We should condemn people who practice such discrimination, even as we insist on their legal right to do so"[12]. If government legislators have the power

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[10] Ibid
[11] Bork, Robert "Civil Rights". August 1963 *The New Republic*.
http://homepage.westmont.edu/hoeckley/readings/symposium/pdf/201_300/270.pdf
[12] Levy, Robert. "Policy Report: Libertarianism and the Right to Discriminate." *Cato Institute*. April 11, 2016. Accessed October 15, 2016. http://www.cato.org/policy-report/marchapril-2016/libertarianism-right-discriminate.

to choose what level of association is morally acceptable and what level is not, they will be tempted to follow their own subjective sense of morality over the rule of law.

The Paradox of Forced Inclusion

In 1978 Nobel prize winning economist Milton Friedman presented a series of lectures in the halls of prestigious colleges across America. His message was simple but provocative: much of government intervention in society had produced the opposite effects of what was originally intended by policy makers. For example, he argued that higher minimum wage laws hurt the poor, the regulation of natural resources lead to more environmental waste and equal pay laws for women lead to more employment discrimination. During the question and answer period of one of these lectures, a disgruntled female University of Chicago student challenged Friedman's ideas. Friedman answered her by restating his argument and then smiled and said to the well-intentioned student, "I'm on your side, but you're not!"[13].

Good intentions do not always lead to good outcomes. In the social sciences, this phenomenon is called the law of unintended consequences. Often when a policy maker imposes a law or regulation, it can have the opposite effect that it originally intended[14]. There is evidence that suggests that government policies that force inclusion could result in more exclusion, discrimination, and prejudice. Two sociologists wrote an article in *Harvard Business Review (HBR)* on the findings of an analysis of mandatory diversity training programs and policies. 800 U.S firms were analyzed and hundreds of executives and managers were interviewed. The study found that companies that employ "control tactics" like involuntary diversity and inclusion training and strict codes of conduct had *lower* levels of diversity and inclusion of minority groups. The study found that five years after instituting mandatory classes around diversity and inclusion "companies saw no improvement in the proportion of white women, black men, and Hispanics in management, and the share of black women actually decreased."

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[13] Freidman, Milton. "What is America". October 3 1977 *University of Chicago*. https://www.youtube.com/watch?v=QN1sdZX9bbY.
[14] Brander, James A. *Government Policy toward Business*. Durban: Butterworths, 2014. 15-16.

According to the two authors' research, the compulsory courses were met with anger and resistance from individuals who were forced to participate. Many participants in these courses reported more animosity and bias towards other groups after taking the course. However, when companies offered voluntary courses, responses were far more positive and as a result, the proportion of minority representation in those companies increased[15].

Assuming that government lawmakers want to enact laws that coerce individuals into acceptance and inclusion of others, would the results of such laws be any different than *HBR*'s findings of businesses that fail to improve diversity and inclusion through similar force? Even if the lawmakers' intentions were noble, the inadvertent consequences of laws that forced association and inclusion would be to reduce genuine inclusion and acceptance. These government policies would be met with the same animosity as with company's policies, only at a larger scale. A policy does not change the hearts and minds of anyone, and if a law is levied on individuals that have prejudice towards an individual or group, it would only exacerbate such prejudice.

Conclusion

Excluding Ontario and Nova Scotia, the rest of the provincial superior court rulings on Trinity Western's case ruled to recognize the faith based law school. After the British Columbia Superior Court ruled to recognize TWU's law school, John Carpay, the president of the Justice Centre for Constitutional Freedoms, wrote an editorial in *The Globe and Mail*. Carpay wrote:

> "This is a great precedent for the fundamental freedoms of all Canadians. A free society does not allow hurt feelings or majority opinion to deny individuals their right to create, maintain, and belong to the voluntary associations of their own choosing. The freedom to express offensive opinions, practice minority religious beliefs, and create unpopular organizations form the

[15] Dobbin, Frank, and Alexander Kalev. "Why Diversity Programs Fail." Harvard Business Review. July 21, 2016. Accessed October 14, 2016. https://hbr.org/2016/07/why-diversity-programs-fail.

cornerstone of Canada's free and democratic society. These fundamental freedoms benefit all Canadians, including gays, lesbians, and evangelical Christians.[16]"

The Canadian government has a duty to protect the rights of all Canadians. To give the government the power to regulate these fundamental rights allows majority opinion to rule over the freedoms of the minority. Furthermore, enacting such laws would be ineffective in causing any positive social change. Racial prejudices were not eroded in the old American South by simply legislating racial bias away. The free expression of black leaders like Dr. Martin Luther King did more to sway the hearts and minds of Americans than a government policy maker ever did. Free association remains paramount in a free society and Canadians and high courts should boldly defend it.

[16] Carpay, John. "Trinity Western Ruling Protects the Freedoms of All Canadians." The Globe and Mail. January 30, 2015. Accessed October 15, 2016. http://www.theglobeandmail.com/opinion/trinity-western-ruling-protects-the-freedoms-of-all-canadians/article22716743/.