Compelling Inclusion and the Public-Private Divide:
Object Lessons in Pragmatic Liberty

Canada's Charter of Rights and Freedoms enumerates a number of categories of identity (race, religion, gender, etc.) which constitute illegitimate grounds for discrimination, but it does not outlaw the act of discrimination in and of itself. Though the term, for obvious reasons, tends to conjure its application as shaped by racial and other bigotries, it bears keeping in mind that, at root, it simply means an act of distinguishing between things[1]. All of us engage in discrimination on a consistent basis, when choosing which stores to shop at, which circle of friends to have and, indeed, what the criteria for a private club or society we are a part of should be. The inherent nature of an organization of any kind is that it has some set of criteria which distinguishes between members and non-members. This can be as minor as paying a yearly membership fee, but can also be more elaborate, such as the IQ score requirements to become a member of Mensa[2]. Some of the criteria we use in making this discrimination may fall under those prohibited categories within the Charter and other anti-discrimination law (on a conscious or unconscious level), but, as individual citizens, we are generally free to do so, lacking the compelling force of government. A decision to discriminate on the basis of race or sex (or any other criterion) as one individual citizen in one's choice of friends and colleagues does not have nearly the same impact as the decision of a powerful institution to discriminate on a systematic basis. The discriminated individual may suffer hurt feelings, but insofar as there is no law mandating good will towards others, it cannot be said that they have suffered a legal wrong or that they can have redress for that. Indeed, it would seem strange that an individual discriminated against by a group would seek a legal redress in order to force that group to open its doors. The legal opening would not change the underlying attitudes of the people doing the discriminating, and it would seem, at the very least, to be an unpleasant group to be a part of for the person seeking entry.[3]

Groups which have been historically denied full participation in democratic societies are entirely right to seek the striking down of laws or policies from government which continue to perpetuate this denial. The question of "inclusion" when it comes to privately-held bodies, therefore, turns on a question of whether these bodies are most analogous to a government sanctioned body with widespread social implications or to an exclusive club. Though this might seem a straightforward distinction to make, the fact that so many ostensibly private bodies are in the business of providing public goods and services renders the dividing far from clear. Recent cases, such as that involving Trinity Western's Law School, are about testing the limits of where the line between public and private can be found. It is true that TWU is a private educational institute and therefore can set admission and conduct standards beyond what would be allowed by a publically-funded university. At the same time, before entirely coming down on Trinity's side, we should first ask where there might be a relevant public interest in inclusion. Furthermore, we should ask how far afield we are willing to take the notion of free association and what implications that may have for notions of social fairness. Unfortunately, in a

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[1] From Merriam-Webster: "the ability to understand that one thing is different from another thing"

[2] Incidentally, given the evidence linking a significant amount of general intelligence to genetic factors, it is curious that this is not yet thought of in the same terms as discrimination on the basis of other immutable characteristics such as race and biological sex

[3] One is here reminded of Groucho Marx's famous maxim that he would not want to be a part of any club which would have him as a member

previous case regarding TWU's teacher training program, the Supreme Court essentially punted on the core legal question by relying on a legal work-around with regards to Catholic and other religiously-based schools[4]. With that option unavailable in the case of the law school, a more rigorous and essential standard by which inclusion can be compelled becomes more necessary to articulate.

The "Immutable and Irrelevant" Standard for Anti-Discrimination Statutes

In theory, there should be no reason why the principle of government non-interference should not apply to all privately-held entities and associations. The point has been made in regard to the case of Trinity Western that it should be thought of as primarily a private club with certain rules of conduct which bind its members. In this view, the controversial clauses regarding sexual conduct should be seen as exclusionary only to persons who would not have wanted to attend the school in any instance and therefore not constituting discrimination in a meaningful sense. In this particular instance, that may be a tenable view, but, writ-large, its implications would be much more socially suspect and perhaps lead to larger violations of freedom than they would uphold.

A brief point should be made on the grounds which are generally prohibited for discrimination, and thereby constitute what "discrimination" is typically seen to refer to, versus those which are generally tolerated. As an overall rule, it can be said that discrimination is typically considered a matter of public interest when it is based on factors which are both *immutable* (meaning a factor which cannot be changed realistically) and *irrelevant* (meaning that it has no particular bearing for the express purpose of the association or organization). Ethnicity, for instance, is both a characteristic that a person has no control over and, except with respect to specific social organizations based on shared heritage, irrelevant to most factors of interest. "Immutable and irrelevant" is not necessarily a cut-and-dry standard, though, and there are hard cases which confound it. Religion is generally one of the enumerated categories in non-discrimination legislation, but, though usually a product of upbringing, it is not immutable. Gender-based non-discrimination clauses also have exceptions for *bona fide* job requirements (for instance, working in a women's shelter). Furthermore, some categories of identity are protected in some instances but not others. A person of Jewish faith would have grounds to complain if they were excluded by reason of religion from a job with an auto parts company, but not with a Catholic Archdiocese. Mandating total inclusion on all possible grounds for all possible entities would have the effect of undermining the raison d'être of many organizations. Though it might make for more interesting meetings, no one would argue that a libertarian economics society must make room for an avowed Marxist. The problem is less discrimination and exclusion *per se* than it is discrimination which is seen by the general society as being unjust. It is then that the government is more eager to become involved and where the public will be more accepting of this intervention.

Of course, a decision to discriminate is not without consequences beyond the legal. A private club which included a specific provision barring, for example, the membership of persons with African heritage, would likely find itself the object of protest, boycott, and social disapproval and be strongly compelled on these grounds to change this practice. Society has a variety of ways to reprimand bigoted attitudes and behaviours beyond the blunt instrument of the law and these should be the first line of defense against such actions. Civil society is a powerful and increasingly underutilized force which has been neglected as an instrument of social change by recourse to the courts and those seeking to fight

[4] Trinity Western University v British Columbia College of Teachers, [2001] 1 S.C.R. 772, 2001 SCC 31

bigoted attitudes would do well to remember the lessons of the past in applying economic and social pressure to institutions they perceive as unfair. Indeed, a similar case to Trinity Western in the United States involved the private, Christian Bob Jones University's policy toward interracial dating. In brief, the university banned students from having interracial relationships on avowed religious grounds until the year 2000, when it dropped them due to a public pressure campaign[5].

Public and Private: Blurred Lines

At the same time, it is doubtless true that both the government and the public at large would be more than willing to shut down a university in Canada which practiced a similar policy to Bob Jones on anti-racist grounds. If one views sexual orientation as constituting an immutable and biologically-determined characteristic in the same way as skin colour, which is increasingly the social consensus, it makes little sense to not share a standard between the two. The division between what constitutes a public versus a private body is far from a clear-cut one, and much of the debate on the matter of inclusion comes in those areas where the lines between public and private are blurred. Privately-owned businesses, for instance, have their ability to discriminate in both hiring practices and serving of the public curtailed by anti-discrimination statutes. Of course, most businesses reserve the right to refuse service in owner-determined instances, but these policies are subject to legal scrutiny as applied[6]. A hardline libertarian would likely say that non-discrimination laws governing public accommodations and services in themselves violate the principle of free association, and this is, in a sense, true. By this logic, the only thing the government should do is repeal any laws which specifically *mandate* discrimination between groups on immutable/irrelevant grounds by private or government actors[7] and allow businesses or other corporate entities to make their own decisions about whom to serve and not serve. The protection against undue discrimination would come in the form of public and economic pressure against those businesses which refused service on socially offensive grounds. Above all, business owners want to turn a profit and it therefore makes little sense to specifically exclude a particular ethnic group, for instance, from one's pool of potential employees and customers. We can imagine a society without an existing social history of racism, sexism or homophobia wherein this standard could be agreed upon by all, where forms of prejudice were solely matters of outlying individual bigotry. If ever we were to arrive at this place, one suspects the grounds for repealing anti-discrimination statutes would be very compelling on freedom of association grounds.

That fact is, however, that governments do not act *solely* in the interest of preserving an absolute conception of individual freedom. Political theorists ranging from John Locke to David Hume whose thought forms the essential basis of the liberal order to which we aspire have long recognized that, in the act of forming a society, we each give up an absolute sense of freedom in the service of a degree of social protection from a sovereign power. At the most basic level, this protection is in the force of law to prosecute individuals who use their freedom to trespass the rights of others[8]. Though governments have expanded their purview of regulation far beyond this basic standard over time, one can still be concerned about state overreach and recognize where further protection is necessary. The

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[5] http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html

[6] e.g. a "disruptive customer" policy could be *de jure* neutral in terms of application by race but *de facto* racially-biased if the owner were solely removing members of one particular group

[7] For instance, the "Jim Crow" racial segregation laws in the Southern United States or the Indian Act in Canada

[8] The "where your nose begins" standard

prohibition on discrimination for historically marginalized groups grows out of this same, reasoned, standard of where the application of liberal principle ends and the pragmatic reality of how we will live together in a society begins. Simply put, when persons are unjustly denied access to the fruits of a society on the basis of a personal characteristic over which they have no control, this constitutes a harm over which the state has legitimate grounds to intervene. Though the harm may not be as direct as a theft or assault, the ability to discriminate on these grounds may be said to constitute, in certain instances, the same kind freedom to harm that one sacrifices for the sake of social order and measure of justice.[9] Indeed, the Canadian Charter of Rights and Freedoms explicitly recognizes these pragmatic limitations to principle through the mechanisms provided by the "reasonable limits" clause in Section 1.

Systemic social discrimination of the kind which defined, for example, apartheid South Africa or the southern US in the pre-Civil Rights era may have its origins in government actions, but it would be foolish to deny that the law and social attitudes are a two way street and that discrimination written into law can take on a life of its own beyond that. Public opinion informs which laws are passed, but it is equally true that laws enforce social standards and behaviours which then are seen as a kind of naturally-occurring order of things, making the underlying public opinion more in accordance with the law[10]. This is not always the case, as indeed there are some existing laws which do not meet with majority public support, but it is true in the main that the two follow each other. In the case of longstanding legal or quasi-legal traditions mandating discrimination, it can become necessary for government action to be used to break the circuit of social attitudes and thereby create greater *meaningful* freedom for more of the population, even as these actions may violate a strict standard of free association.

Conclusion

At the same time, we must be careful not to overextend these principles. To the extent that notionally voluntary associations are either involved in the provision of public goods or occupy some quasi-state function in civil society, they have implications which extend beyond the strict confines of a private association. In those instances, which would include, for example, professional licensing bodies, public accommodations, and the like, it is permissible for a limited non-discrimination mandate (in the sense of the "both immutable and irrelevant" standard) to be imposed, though we should continually be striving as a society towards a world where bigotry would be so rare that it would not have to be so. In instances where it would serve no relevant public interest or where an organization is not attempting to reach beyond the role of a strictly private club, however, the general principle of freedom of association should hold, however noxious its results may seem.

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[9] And, it should be noted, that one may benefit from as well. For instance, a person of a particular religious background may not be allowed in his business activities to discriminate on the basis of sexual orientation, but, he would also benefit from not being discriminated against on his faith if interacting in another instance.

[10] A good example of this is the rapid shift in Canadian attitudes toward same-sex marriage following its legalization in 2005. See: http://www.ipsos-na.com/download/pr.aspx?id=12795