THE ECONOMICS OF CANADIAN ANTI-DISCRIMINATION LAWS

REAGAN SEIDLER*

Prohibiting discrimination is a noble political statement. What does it mean as economic policy? Applying a neoclassical framework, the article examines how Canada's human rights laws affect society and marginalized groups from a welfare perspective. The article offers several practical reforms to improve the efficiency of current laws such as uncapping damage awards, removing criminal sanctions, and allowing non-profits to participate in remedies so as to compensate marginalized groups for systemic effects of discrimination. It also discusses bolder market-based options, including the taxing and licencing of discrimination for instances where our great project towards equality might be better served by redistribution than prohibition.

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I. INTRODUCTION

The country's first general human rights statute was in the form of *The Saskatchewan Bill of Rights Act, 1947*.[1] It promised the right to employment, property, accommodation, and education without discrimination. Provinces began establishing dedicated agencies in the early 1970s, with the Canadian Human Rights Commission following in 1978.[2] For 50 years now, Canada has carried on with essentially the same framework. Individuals bring complaints to commissions, who gatekeep internally or bring the matter to a court or tribunal for adjudication. Activities contrary to the law are forbidden and complainants compensated in some fashion.

* Schulich School of Law, Halifax, Nova Scotia. The author wishes to thank Stéphane Mechoulan at the Dalhousie School of Public Administration as well as the reviewers of this work for their constructive input.

1 SS 1947, c 35.

2 For a brief history, see Professor Ken Norman, "A Forecast for Human Rights Commissions and Tribunals: Overcast, with a Chance of Furies" in *Human Rights Challenges & Achievements* (Winnipeg: Law Society of Manitoba, 2013) VI-1. For a different view, see Maryse Potvin, "The Role of Statistics on Ethnic Origin and 'Race' in Canadian Anti-Discrimination Policy" (2005) 57:183 Intl Soc Science J 27.

Human rights advocates celebrate the approach as a means to end discrimination.[3] It is also a political statement of the noblest kind. That elected bodies should pass a law recognizing the equal worth and dignity of all peoples is proof our democratic tradition is worthy of the faith we place in it. For the sake of history, and of justice, it is a commitment Canada must never abandon.

As an academic exercise, however, it is interesting to consider what those from alternative disciplines would say about our equality promise — particularly economists. Economists have long put forward controversial takes to which polite society objects. Left to their own devices, a government run by the fabled "economist party" would legalize drugs,[4] harvest body organs from the poor,[5] and withdraw public medical coverage to boost employment.[6]

This article examines Canada's human rights laws through the same lens. It observes as an organizing principle a prohibition on acts deemed discriminatory. Using static neoclassical microeconomics as its analytical framework, it explains how a remedy system that internalizes the harms of discrimination in discriminators themselves would result in a system that is more efficient and a potential Pareto improvement over the status quo. From an economist's perspective, these reforms would seem to make society, including victims of discrimination, better off.

II. MOTIVATIONS MATTER

The economic significance of discrimination depends on its source. Whether the underlying motivation lies in intolerance or in a genuine market response matters when assessing efficiency.

There exists a consensus that discrimination motivated by prejudice is a cause for inefficiency. *Christie v. The York Corporation*, wherein restaurant staff refused service to a patron "for the sole reason that they had been instructed not to serve coloured persons," is a classic example.[7] We can analyze this refusal along lines set by Gary Becker in the work that originated economics' foray into rights discussions.[8] His take on "taste-based" discrimination models the refusal as a price the owner is willing to pay to avoid dealing with groups he dislikes. It is mathematically equivalent to a tax on serving black customers, the effect of which is deadweight losses.[9] The logic can be put more simply: by refusing black

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3 See Norman, *supra* note 2; Chief Commissioner David Arnot, "Four Pillars One Vision: A Best Practices Model for Human Rights Commissions" (Paper delivered at the Law Society of Saskatchewan, Saskatoon, 5 May 2014), online: <redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/HRC1.PDF>.

4 Jeffrey A Miron & Katherine Waldock, *The Budgetary Impact of Ending Drug Prohibition* (Washington, DC: CATO Institute, 2010); Gary S Becker, Kevin M Murphy & Michael Grossman, "The Market for Illegal Goods: The Case of Drugs" (2006) 114:1 J Political Economy 38.

5 Gary S Becker & Julio Jorge Elias, "Introducing Incentives in the Market for Live and Cadaveric Organ Donations" (2007) 21:3 J Economic Perspectives 3; Henry Hansmann, "The Economics and Ethics of Markets for Human Organs" (1989) 14:1 J Health Pol Pol'y & L 57.

6 Laura Dague, Thomas DeLeire & Lindsey Leininger, "The Effect of Public Insurance Coverage for Childless Adults on Labor Supply" (2014) National Bureau of Economic Research Working Paper No 20111.

7 (1939), [1940] SCR 139 at 141 [*Christie*].

8 Gary S Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957).

9 John J Donohue III, "The Law and Economics of Antidiscrimination Law" (2005) National Bureau of Economic Research Working Paper No 11631 at 9 [Donohue, "Law and Economics"].

customers, the bar loses business. Economists have applied Becker's model to most markets covered by human rights laws including employment,[10] housing,[11] and consumer goods.[12]

Related are situations where customer preferences incentivize discrimination. This was so in *Berry v. The Manor Inn*, where a waiter was fired because customers wanted female servers.[13] Customers are said to base their decisions on an adjusted price for minority sellers to the opposite effect of that above.[14] Responding to customer preferences brings in customers and grows surpluses, making it efficient to respond to their needs.

At times, people draw distinctions not because they harbour ill will but because they rely on stereotypes as a source of information. This category is thought to capture subtler forms of contemporary discrimination.[15] Such was the case in *Fancy v. J&M Apartments*, when a landlord refused to rent to an Indian family out of fear that curry odours would cause a nuisance.[16] Kenneth Arrow and Edmund Phelps originated the look into "statistical discrimination" in the 1970s.[17] Here, outcomes can be mixed. If group characterizations are an accurate indicator of behaviour, relying on stereotypes can be efficient.[18] Where characterizations are crude or amiss, however, relying on the poor information they convey leads to inefficiencies.[19]

The distinctions between these categories has long been a source of debate.[20] Yet whatever the motivation, all are potentially discriminatory and subject to the same set of laws.

III. WHAT THE LAW ALLOWS

Canada has highly uniform statutes active in each province, in each territory, and in federal jurisdiction. Regimes comprise a general prohibition[21] along with an enumerated set

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10 John J Donohue III, *Foundations of Employment Discrimination Law* (New York: Oxford University Press, 1997).

11 Alexandre Flage, "Ethnic and Gender Discrimination in the Rental Housing Market: Evidence from a Meta-Analysis of Correspondence Tests, 2006-2017" (2018) 41 J Housing Economics 251; Ali M Ahmed & Mats Hammarstedt, "Discrimination in the Rental Housing Market: A Field Experiment on the Internet" (2008) 64:2 J Urban Economics 362.

12 John Yinger, "Evidence on Discrimination in Consumer Markets" (1998) 12:2 J Economic Perspectives 23.

13 (1980), 1 CHRR D/152 (NS Bd Inq) [*Berry*].

14 Donohue, "Law and Economics," *supra* note 9 at 16.

15 Glenn C Loury, "Discrimination in the Post-Civil Rights Era: Beyond Market Interactions," (1998) 12:2 J Economic Perspectives 117; Deborah M Figart & Ellen Mutari, "Rereading Becker: Contextualizing the Development of Discrimination Theory" (2005) 39:2 J Economic Issues 475.

16 (1991), 14 CHRR D/389 (BCHRC) [*Fancy*].

17 Kenneth J Arrow, *Some Models of Racial Discrimination in the Labor Market* (Santa Monica: Rand, 1971); Edmund S Phelps, "The Statistical Theory of Racism and Sexism" (1972) 62:4 American Economic Rev 659; Kenneth J Arrow, "What Has Economics to Say about Racial Discrimination?" (1998) 12:2 J Economic Perspectives 91.

18 See Gary A Dymski, "Discrimination in the Credit and Housing Markets: Findings and Challenges" in William M Rodgers III, ed, *Handbook on the Economics of Discrimination* (Cheltenham, UK: Edward Elgar Publishing, 2006) (so-called "rational discrimination"); William W Lang & Leonard I Nakamura, "A Model of Redlining" (1993) 33:2 J Urban Economics 223.

19 David H Autor & David Scarborough, "Will Job Testing Harm Minority Workers?" (2004) National Bureau of Economic Research Working Paper No 10763.

20 Jonathan Guryan & Kerwin Kofi Charles, "Taste-Based or Statistical Discrimination: The Economics of Discrimination Returns to Its Roots" (2013) 123:572 Economic J F417.

21 See e.g. *Canadian Human Rights Act*, RSC 1985, c H-6, ss 5–14.1 [*CHRA*].

of grounds on which basis it is illegal for suppliers to discriminate.[22] While their rhetorical object is to eliminate discrimination, they do not in reality prohibit it in all corners of society. Some private places, like one's residence, are excluded under the adage that one's home is one's castle.[23] Likewise, while it is generally impermissible to display hate symbols, a person is free to do so in private.[24]

The most litigated defences refer to bona fide justifications. Employers may hire and fire in a discriminatory fashion so long as it is based on a bona fide occupational requirement.[25] Suppliers may differentiate among customers so long as they have a bona fide reason for doing so.[26] Three requirements are necessary for a bona fide justification: (1) there is a rational connection between the practice and the provision of the good or service, (2) there is a good faith belief in the necessity of the practice, and (3) accommodation of the group characteristic would impose undue hardship.[27]

This approach makes taste-based discrimination illegal. While in 1939, a tavernkeeper was "not governed by any specific law" and could exempt patrons as he wished,[28] times have changed such that "*Christie* now stands in sharp contrast to the present law in Canada."[29] Nor is it allowable to make distinctions based on customer preferences, as *Berry* makes clear:

> To say that the preference of an employer's customers or clients to have either males or females serving them, which preference results in economic differences for the employer, is a *bona fide* occupational qualification based on sex, would be tantamount to creating a "community standard" test.… It would be a minor extension of this principle to hold that if most customers in a restaurant held prejudices against Blacks or Jews or Scotsmen, the proprietor would be legally entitled to refuse to serve Blacks or Jews or Scotsmen. The long history of human rights struggles on this continent and elsewhere can leave no doubt that such an argument is totally without merit.[30]

Statistical discrimination is likewise forbidden. As noted by Chief Justice McLachlin, "impressionistic assumptions [are] generally suspect."[31] The landlords in *Fancy* did not find

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22 See e.g. *ibid*, s 3(1). The 13 grounds in the federal *Act* are "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered." The grounds are ever-expanding; see a proposal that weight should be added to the list: Emily Luther, "Justice for All Shapes and Sizes: Combatting Weight Discrimination in Canada" (2010) 48:1 Alta L Rev 167.

23 See e.g. *Human Rights Code*, RSO 1990, c H.19, s 21(1) [Ont *HRC*]; *Human Rights Code*, RSBC 1996, c 210, s 10(2) [BC *HRC*].

24 See e.g. BC *HRC*, *ibid*, s 7; *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3 [*AHRA*].

25 See e.g. *CHRA*, *supra* note 21, s 15(1)(a); BC *HRC*, *ibid*, s 11; *AHRA*, *ibid*, s 7(3).

26 See e.g. BC *HRC*, *ibid*, s 8(1); *CHRA*, *ibid*, s 15(1)(g).

27 *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54.

28 *Christie*, *supra* note 7 at 145.

29 *Giguere v Popeye Restaurant*, 2008 HRTO 2 at para 74. See also *Gilpin v Halifax Alehouse Ltd (No 1)* (2013), CHRR Doc 13-3085 (NS Bd Inq).

30 *Berry*, *supra* note 13 at para 1358. See also *Newfoundland and Labrador (Human Rights Commission v R*, 2009 NLCA 9 at para 26; *Qureshi v G4S Security Services*, 2009 HRTO 409 at para 35; *Kavanagh v Canada (Attorney General)* (2001), 41 CHRR D/119 (CHRT); *Duxbury v Gibsons Landing Slo-Pitch League*, 1997 BCHRT 7 at para 24. But see *Canada Safeway Limited v Steel*, [1984] 4 WWR 390 (Man QB).

31 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 at para 31. See also *ADGA Group Consultants Inc v Lane* (2008), 91 OR (3d) 649 at para 117 (Sup Ct J (Div Ct)).

the tribunal sympathetic to their fear for curry odours and lost the case.[32] Though the three motivations might look different to economists, to courts and tribunals they all look like prohibited acts.

IV. REMEDIES

When a person acts contrary to the law, prescribed remedies encompass damages backed with a prohibition to ensure ongoing compliance with the law. For instance, Nova Scotia's *Human Rights Act* provides: "A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor."[33]

Damages are the most common form of redress. Common heads of special damage include lost wages, lost opportunity for employment, loss of benefits, and job search expenses.[34] Special damages are uncapped and potentially unlimited. General damages are also common, the parameters for which *Willis v. David Anthony Phillips Properties* covers in an oft-cited passage:

> Awards of general damages under the *Human Rights Code* … should be high enough to provide real redress for the harm suffered, insofar as money can provide such redress, and high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society.… No award should be so low as to amount to a mere "licence fee" for continued discrimination.[35]

Unlike special damages, many statutes cap amounts for hurt to feelings and dignity at around $20,000.[36] Many awards are at or near the ceilings at present.[37] Punitive damages are also a possibility, though their availability differs across jurisdictions. They are expressly authorized in Quebec, Manitoba, and the territories.[38] Lacking a specific provision, however, courts generally hold that punitive damages are not available.[39] Overall, damage awards largely serve a compensatory role, constrained in small part by legislation.

"Public interest" remedies are also used, serving a function that is both remedial and preventative. Akin to restorative justice remedies, they mean to show discriminators the harm their actions cause and educate them in best practices going forward. Apologies, sensitivity training, public posting of human rights statutes, and even amendments to collective

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32 *Fancy*, *supra* note 16.

33 RSNS 1989, c 214, s 34(8) [NS *HRA*].

34 See The Honourable Justice Russel W Zinn, *The Law of Human Rights in Canada: Practice and Procedure* (Toronto: Thomson Reuters, 2019) (loose-leaf release 40) at 16:40.

35 (1987), 8 CHRR D/3847 at para 30460 (Ont Bd Inq). See also *MacTavish v Government of PEI*, 2009 PESC 18 at para 46; *Gilliard v Pictou (Town of)*, 2005 NSHRC 1 [*Gilliard*]; *Simpson v Oil City Hospitality Inc*, 2012 AHRC 8 at para 64.

36 See e.g. *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2, s 40 [Sask *HRC*]; *CHRA*, *supra* note 21, s 53(3).

37 Zinn, *supra* note 34 at 16:40.5.

38 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 49; *The Human Rights Code*, CCSM c H175, s 43(2)(d) [Man *HRC*]; *Human Rights Act*, RSY 2002, c 116, s 24(1)(e); *Human Rights Act*, SNWT 2002, c 18, s 62(3)(a)(vii), to a maximum of $10,000; *Human Rights Act*, SNu 2003, c 12, s 34(3)(a)(vii).

39 See *Nova Scotia Construction Safety Association v Nova Scotia Human Rights Commission*, 2006 NSCA 63 at 147; *Dupuis v British Columbia (Ministry of Forests)* (1993), 20 CHRR D/87 (BCCHR).

agreements are common.[40] Federally, the Canadian Human Rights Commission is required to involve itself in any remedial plan a complainant develops.[41] Interestingly, public interest remedies are almost always non-monetary. Charitable donations are seldom ordered, even when requested by complainants, with some expressing the view that donations are not a remedy permitted by statute.[42]

There are also prohibitive measures to put an end to discriminatory practices. Some provinces mandate cessation orders with any justified complaint.[43] Others make it possible to seek injunctions, enforceable in the same way as other orders of a superior court.[44] In any event, tribunals "quite readily" render cease-and-desist orders regardless of jurisdiction.[45] The resulting injunction is always final and non-transferable such that a complainant cannot give their permission for a discriminatory practice to resume. Those who defy human rights injunctions have been convicted of contempt of court and imprisoned.[46]

Some provinces go so far as to make discrimination an offence. The penalty is generally a fine, ranging from $1,000 to $25,000, in addition to a victim services fee.[47]

V. EVALUATING THE LAW

From our discussion earlier, it is clear that the efficiency of a law will depend upon the reasons people discriminate. It may be that legislating against taste-based discrimination improves efficiency. *Christie* was one of Canada's first cases that dealt with the tension between economic and human rights interests. That it was decided in favour of "complete freedom of commerce" would generally be celebrated by economists, given that maximum liberty is one normative tenet of the economics of property.[48] Yet as discussed, taste-based discrimination hampers efficiency. If the owner's animus is the only thing keeping out customers, society and the restaurant itself will do better by ending discrimination. A recent study indicates workers will sacrifice up to 8 percent of their pay to avoid working with those of another ethnicity; while they might feel better off in such an environment, this also represents a productivity loss to society many would see as unnecessary.[49]

What is not clear is whether a law is the best means to eliminate prejudice. Arguably, the most profound assertion of Becker's thesis is that the free market would end discrimination

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40 See Zinn, *supra* note 34 at 16:30. On systemic remedies, see also Gwen Brodsky, Shelagh Day & Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017) 6 Can J Human Rights 1.

41 See *Canada (Attorney-General) v Druken* (1988), 53 DLR (4th) 29 at 38 (FCA).

42 See *University of Prince Edward Island v Prince Edward Island (Human Rights Panel) (No 3)* (2010), CHRR Doc 10-1592 (PEIHRP) at para 48; *Gilliard*, *supra* note 35 at paras 73, 82; *Gough v CR Falkenham Backhoe Services Ltd* (2007), 61 CHRR D/208 at paras 87–88 (NS Bd Inq).

43 See e.g. BC *HRC*, *supra* note 23, s 37(2)(a).

44 See e.g. NS *HRA*, *supra* note 33, s 41; *Human Rights Code*, RSNB 2011, c 171, s 29.

45 Zinn, *supra* note 34 at 16:30.1.

46 See *Canada (Human Rights Commission) v Winnicki*, 2006 FC 873; *Canada (Human Rights Commission) v Heritage Front*, [1994] 3 FC 710 (TD).

47 See NS *HRA*, *supra* note 33, s 38; Man *HRC*, *supra* note 38, s 51(1); Ont *HRC*, *supra* note 23, s 46.2(1).

48 See Robert D Cooter, "Liberty, Efficiency, and Law" (1987) 50:4 L & Contemp Probs 141.

49 Morten Størling Hedegaard & Jean-Robert Tyran, "The Price of Prejudice" (2018) 10:1 American Economic J: Applied Economics 40. Study subjects were young people in Denmark. Discrimination went both ways; participants of Muslim heritage were just as unwilling to work with Danish partners as Danish participants were to work with Muslim partners.

on its own. Competition causes people to pay the cost of their prejudice,[50] and so it is held that those who arbitrarily refuse good-paying customers or skilled employees will find themselves eclipsed by non-discriminators.[51] Given this, economists have argued the costs of administering a law outweigh the gains it promises to produce.[52] Canadian taxpayers pay upwards of $75 million annually in the administration of human rights statutes.[53] Other economists have countered that laws drive prejudice from the market more quickly and so are helpful.[54] The weight of empirical evidence supports this latter view, showing measurable improvements to the economic well-being of minority groups with the passage of an anti-discrimination law.[55] Even temporary affirmative action regulations have shown to reduce discrimination, including after the regulations are lifted.[56] In the end, what can be said is that at least in *aim*, statutes' prevention of taste-based discrimination is the efficient choice.

The same is not true where discrimination relies on market-based factors. To prevent businesses from meeting customer preferences or using reliable group characteristic information is to impose deadweight losses on the market. Consider the scenario put forward by ethicist Peter Singer:

> A landlord discriminates against blacks in letting the accommodation he owns… He defends his policy along the following lines: If more than a very small proportion of my tenants get behind in their rent and disappear without paying their arrears, I will be out of business. Over the years, I have found that more blacks do this than whites.[57]

Such blanket categorizations are not preferable. Yet Singer points out that where the assertion *is* factual, a non-discrimination rule imposes costs on both landlords and tenants:

> [T]o legislate against the landlord's racially discriminatory practice is to impose a long-term disadvantage upon him. At the very least, he will have to take greater care in ascertaining the suitability of prospective tenants.… [I]f these methods are unavailable or unavailing, the landlord will have to take greater losses than he otherwise would have, and perhaps this will lead to increased rents or even to a reduction in the amount of rentable housing available.[58]

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50 See Robert Cooter, "Market Affirmative Action" (1994) 31:1 San Diego L Rev 133.

51 See Richard A Epstein, "Standing Firm, on Forbidden Grounds" (1994) 31:1 San Diego L Rev 1.

52 *Ibid*; Richard A Posner, "The Efficiency and the Efficacy of Title VII" (1987) 136:2 U Pa L Rev 513; Richard A Posner, "An Economic Analysis of Sex Discrimination Laws" (1989) 56:4 U Chicago L Rev 1311.

53 See Appendix A, below.

54 See John J Donohue III, "Is Title VII Efficient?" (1986) 134:6 U Pa L Rev 1411; John J Donohue III, "Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner" (1987) 136:2 U Pa L Rev 523.

55 While the empirical record is voluminous, see reviews of Charles Brown, "The Federal Attack On Labor Market Discrimination: The Mouse That Roared?" (1981) National Bureau of Economic Research Working Paper No 669; James J Heckman & Brook S Payner, "Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of North Carolina" (1989) 79:1 American Economic Rev 138.

56 Conrad Miller, "The Persistent Effect of Temporary Affirmative Action" (2017) 9:3 American Economic J: Applied Economics 152.

57 Peter Singer, "Is Racial Discrimination Arbitrary?" in Robert M Baird & Stuart E Rosenbaum, eds, *Hatred, Bigotry, and Prejudice* (Amherst, NY: Prometheus Books, 1999) 175 at 179–80.

58 *Ibid* at 183.

Accommodating those whose group characteristics make them poorly suited for particular activities is inefficient.[59] We expect the same market effects where landlords (per *Fancy*) are forced to accept tenants that their neighbours dislike: the reality of homebuyer prejudice, and its effect on the real estate market, is well known.[60] It all serves to illustrate that there *are* circumstances, regrettably, where discrimination makes good business sense despite the law's prohibition against acting on it.

Determining whether prohibitions are efficient requires a fuller analysis. Against the benefits from discrimination (which gives rise to the *demand* for discrimination), we must acknowledge and weigh the costs. Victims suffer harms not limited to embarrassment and lost opportunities. There are also externalities — essentially the cost of living in a prejudiced society. As put ably in *Grant v. Willcock*:

> [T]he very right to be free from unlawful discrimination has an intrinsic value.… It amounts to the Aristotelian concept that respect for rights creates a balance in our society. Infringement of such rights creates an imbalance which needs rectifying on behalf of the whole society and on behalf of the individual who suffers specific injuries from the infringement.[61]

A remedy system that provides for perfect compensation would keep these forces in balance. If the law obliges discriminators to internalize all harms they cause, the quantity of discrimination in society will be at its efficient level.[62] However this is not the system we have in place.

The key principles to observe in Canada's remedy framework are permanency and non-negotiability. No matter how much one might be willing to pay, the state will not allow the discrimination to continue. This has negative implications for efficiency. Examining the figure below, under a system of perfect compensation, the discriminator's cost curve is equal to the marginal harm discrimination produces. It yields the equilibrium quantity of Q*. When the state punishes statutory breaches with non-negotiable injunctions and criminal sanctions, it effectively makes the cost of exceeding the quantity set by statute (Q_{law}) infinite. Under Canadian law, the discriminator's effective cost curve is therefore the bold line as labelled. There is and will be *less discrimination* with laws in place as they are and *less total harm*. The downside, however, is that akin to quantity restrictions, it engenders deadweight losses (DWL).[63]

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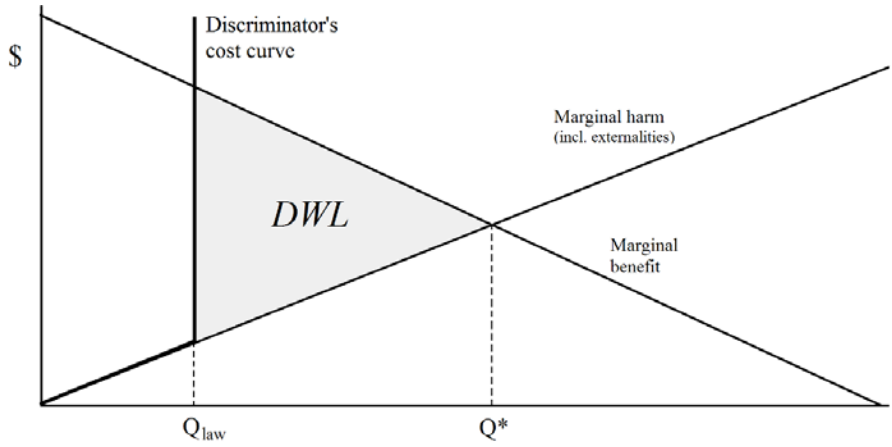
59 Cass R Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997) at 161; Andrew Kull, "The Discrimination Shibboleth" (1994) 31:1 San Diego L Rev 195; Lang & Nakamura, *supra* note 18.

60 Pierre-Phillippe Combes et al, "The Neighbor is King: Customer Discrimination in the Housing Market" (2012) Centre for Economic Policy Research Discussion Paper No 9160; Reynolds Farley et al, "Stereotypes and Segregation: Neighborhoods in the Detroit Area" (1994) 100:3 American J Sociology 750.

61 (1990), 13 CHRR D/22 at paras 34–35 (Ont Bd Inq).

62 On the efficiency of perfect compensation, see Robert Cooter & Thomas Ulen, *Law & Economics*, 6th ed (Boston: Addison-Wesley, 2012) at 190.

63 For more on quantity restrictions and deadweight losses, see David Colander, Sieuwerd Gaastra & Casey Rothschild, "The Welfare Costs of Market Restrictions" (2010) 77:1 Southern Economic J 213.



VI. REFORM OPPORTUNITIES

Achieving efficiency means a fundamental redesign in how the acts are enforced. It requires doing away with the organizing principle that conduct found to be discriminatory must be ended. Rather, an efficient norm would focus on ensuring those that discriminate internalize the harms they cause, leaving the quantity of discrimination to be determined by its net benefit rather than a state quota.

Practical reform requires, first, the repeal of remedies that are prohibitionist in nature. Criminal penalties are at the top of the list. While fines in the low thousands are unlikely to be an insurmountable barrier to a business model, the stigma of conviction may be.[64] Criminal sanctions have long been decried as ill fit to human rights legislation in any event, even by its champions.[65] Likewise, we must do away with those equitable remedies that absolutely enjoin action like cessation orders. At the least, provinces should specify that no person shall be imprisoned for default of payment of a fine imposed or for defiance of a cessation order.[66] These tools engage without concern for net benefit calculations and, once implemented, are invariable even in the face of potential Pareto improvements. Again, one looks for a system where quantity is set not by state enforcement but the informed choices of decision-makers.

In their place, statutes should enhance the tools available to award damages. Caps for general damages must be removed, as these damages play an important part to ensure discriminators internalize the non-pecuniary harms they impose on victims. As noted by Posner in the tort context: "No one likes pain and suffering and most people would pay a

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64 On the costs of stigmatization, see Eric Rasmusen, "Stigma and Self-Fulfilling Expectations of Criminality" (1996) 39:2 JL & Econ 519; Patricia Funk, "On the Effective Use of Stigma as a Crime-Deterrent" (2004) 48:4 European Economic Rev 715.

65 See Walter S Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 Can Bar Rev 565.

66 Saskatchewan has already done the former: Sask *HRC*, *supra* note 36, s 49.

good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs."[67] While awards must be commensurate to the actual harm realized, caps stand in the way of full internalization by making additional harm free past a certain threshold.[68]

Punitive damages must also be made available in all jurisdictions. Punitive damages play an important part in ensuring discriminators bear the full cost of the harms they produce. It is well-documented that many victims of discrimination do not bring complaints forward out of concern for social norms, retribution, relationship damage, or other considerations.[69] Statutory provisions forbidding reprisals to those who bring forward complaints are helpful in this regard and must be maintained, as they assist human rights agencies to become aware of harms that require compensation. Nonetheless, some proportion p of those with valid complaints will not come forward, impeding efforts to make discriminators pay for all the harm they cause. Setting a punitive multiplier equal to the reciprocal of p ensures discriminators still pay on behalf of those that do not bring forward complaints, keeping the quantity of discrimination at its optimum level.[70] In other words, if only 1/5 waiters complain about workplace discrimination, and the waiter in *Berry* was perfectly compensated at $1,200, he ought to have received five times that award, or $6,000, to make sure his employer internalizes the harm done to other servers as well. Conceptually, punitive damages capture the externalities that accrue to society, and especially members of a particular class, as a result of discriminatory acts.

Empowering human rights agencies to mandate charitable donations would be another, and arguably fairer, way of capturing externalities. Rather than have an employer pay five times an award to one complainant, they could compensate Mr. Berry with $1,200 and pay the remainder to a charity that assists male workers displaced by sexism. Discriminators are likely to see this option as more legitimate, making settlement easier.

In conjunction with a liability rule, statutes could create a "right to discriminate" regime. Where action is found to be discriminatory, the complainant is granted an injunction enjoining the discriminator from continuing their practice. Unlike today, however, the complainant would be free to withdraw the injunction at their discretion. Parties can be

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67 *Kwasny v US*, 823 F (2d) 194 at 197 (7th Cir 1987).

68 See also Audra Ranalli & Bruce Ryder, "Undercompensating for Discrimination: An Empirical Study of General Damages Awards Issued by the Human Rights Tribunal of Ontario, 2000-15" (2017) 13 JL & Equality 91. Their paper largely takes for granted that damage awards ought to be higher, though they cite compensation as a rationale; this paper fills the gap in their analytic framework by explaining when and why higher awards are appropriate.

69 See L Camille Hébert, "Why Don't 'Reasonable Women' Complain about Sexual Harassment?" (2007) 82:3 Ind LJ 711; Laura Good & Rae Cooper, "Voicing their Complaints? The Silence of Students Working in Retail and Hospitality and Sexual Harassment from Customers" (2014) 24:4 Labour & Industry 302; Donna M Garcia et al, "Women's Reactions to Ingroup Members Who Protest Discriminatory Treatment: The Importance of Beliefs about Inequality and Response Appropriateness" (2010) 40:5 European J Soc Psychology 733. Note while many studies focus on sexual harassment, this is a form of discrimination in Canada: *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252. See also Ivan F Ivankovich, "Sexual Harassment in the Workplace — Two Steps Backward: *Janzen & Govereau v. Platy Enterprises Ltd.*" (1988) 26:2 Alta L Rev 359.

70 For more, see Cooter & Ulen, *supra* note 62 at 261.

expected to negotiate until an efficient outcome is reached, per the Coase theorem.[71] This approach is only practical where a discriminatory act adversely affects one or a small number of people, keeping transaction costs low.[72] This is in part because the right must offer certainty once acquired. Mr. Berry and his employer will not reach an agreement if any number of other male waiters could injunct the business as well. Jurisdictions might solve this problem by implementing a *first complainant rule*, whereby a discriminator is indemnified from future claims once an agreement with the first complainant is reached.

What an entitlement regime fails to capture are externalities accruing to non-complainants. Berry may be willing to forego the injunction for $1,200, but this underestimates total harm by fivefold. A first complainant rule also lends itself to rent-seeking behaviour as potential claimants hurry to substantiate and settle complaints. Above all, it relies on parties transacting after an injunction. This rarely occurs in everyday cases,[73] so the likelihood of an agreement in a space as politicized as rights complaints is close to nil.[74]

For this reason, the state may find a licencing regime preferable. Human rights agencies could, on behalf of affected classes, negotiate a licence for discriminatory activities. Fees would be set so as to fully compensate for the harms such acts produce, including systemic effects and other externalities.[75] We know that discrimination based on prejudice, arguably the most vile form, is indeed price-sensitive. Once the cost of discriminating is too high, those with biases will overcome them in their own self-interest and behave as if they are not prejudiced.[76] The difficulty with licencing is that it is once again the state, and not the market, dictating prices. To solve this, governments might delegate the task of licencing to charitable organizations. Once a non-profit representative of the class of people harmed contracts with the discriminator, a human rights agency issues the licence. This limits the role of the state to ensuring the charity is legitimate. While there might be competition among legitimate charities to be the one to reach a settlement, stakeholder pressures will ensure licencing prices are not too low. Any charity that licences harm on its members at too low a price will risk backlash to donations and support. This framework addresses the internalization problem while allowing market actors to set prices and should be efficient as a result.

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71 See RH Coase, "The Problem of Social Cost" (2013) 56:4 JL & Econ 837. In truth, the Coase theorem would hold it does not matter which party holds the right to discriminate. An efficient outcome would also result if society granted discriminators the right and had victims/activists bargain it away from them.

72 On the appropriateness of damages versus injunctive relief, see Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089.

73 See Ward Farnsworth, "Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral" (1999) 66:2 U Chicago L Rev 373.

74 For instance, how would one bargain with activist "extremists" like Michael Thibodeau? See *Thibodeau v Air Canada*, 2014 SCC 67.

75 On pricing, see Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 J Political Economy 169. Note at 194–95 [emphasis in original], his response to those who would resist licencing on moral grounds:

> One argument made against fines [or monetary penalties generally] is that they are immoral because, in effect, they permit offenses to be bought for a price … A fine *can* be considered the price of an offense, but so too can any other form of punishment … The only difference is in the units of measurement: fines are prices measured in monetary units, imprisonments are prices measured in time units, etc. If anything, monetary units are to be preferred here as they are generally preferred in pricing and accounting.

See also Richard A Posner, "An Economic Theory of the Criminal Law" (1985) 85:6 Colum L Rev 1193.

76 Hedegaard & Tyran, *supra* note 49.

The final and most elegant solution may be to use the tax system. Participants in activities that are known to be discriminatory pay tax in accordance with the harm it produces; participants in activities that lessen discrimination receive tax rebates. This solves the market failure associated with externalities, yet adds others of free-riding and moral hazard. It also requires the state to calculate harms and benefits, which they are not best suited to do.[77]

VII. CONCLUSION

Forbidding discrimination is an undoubted humanitarian triumph. Like other rights and freedoms underpinning our democratic tradition — freedom of speech, freedom of worship, and so on — generations past have bequeathed us the lesson that equality of persons is necessary for a free and just society. It is on account of this commitment that we ought to ensure our policies are as roundly informed as possible. Our present exercise, for instance, suggests the current state of Canadian law seems to make everyone, including the disadvantaged, worse off from a welfare perspective.

Imagine a tall person wants to open a club for tall people. This appeals to tall customers and so the business thrives. The response of human rights agencies would be to shut down the club, awarding some damages to whoever complained first. It leaves tall people strictly worse off and others at best indifferent. But imagine the club could afford to set up scholarships for shorter people. There is some amount at which even the strongest advocate would admit that, notwithstanding the fun and networking shorter people miss out on, the scholarships make shorter people better off. The latter is Pareto-preferred yet is not allowed. This is the essence of the efficiency problem. Amending statutes to implement a liability and licencing regime, in concert, would allow the quantity of discrimination in society to be determined by cost/benefit considerations. The tall club could remain open with benefits accruing to those of all heights.

Of course — and to repeat again — welfare economics is but one point of view. It is not enough, to my mind, to warrant a wholesale change in our approach. What it should encourage us to consider is how policy choices affect the well-being of those whose rights are at stake. Are the remedies available to human rights agencies unduly constrained? Are there instances where our human project towards equality would be better served by redistribution than prohibition?

As Canada faces the twenty-first century, marked as it is with challenges of populism and identity politics, there is no doubt we will rely on our human rights statutes to counterbalance anti-democratic forces. Let us take this opportunity to ensure these tools, the swords and shields of democracy, will meet the challenge well-crafted.

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[77] Coasians would naturally oppose a tax-based solution, given Coase's longstanding skepticism of Pigouvian taxation. Whether that criticism is well-founded or particularly well-informed of the common law is a fascinating debate, though unnecessary to resolve here: see AW Brian Simpson, "Coase v. Pigou Reexamined" (1996) 25:1 J Leg Stud 53; Herbert Hovenkamp, "The Coase Theorem and Arthur Cecil Pigou" (2009) 51:3 Ariz L Rev 633.

APPENDIX A: ANNUAL COST OF HUMAN RIGHTS STATUTE ENFORCEMENT IN CANADA

	Expenses (CDN)	Fiscal Year
Canada[78]	$24,767,863	2018–2019
Alberta[79]	$8,079,000	2018–2019
British Columbia[80]	$3,120,344	2018–2019
Manitoba[81]	$1,721,000	2018–2019
New Brunswick[82]	$1,141,997	2017–2018
Newfoundland & Labrador[83]	$845,400	2018–2019
Northwest Territories[84]	$1,763,000	2018–2019
Nova Scotia[85]	$2,611,000	2018–2019
Nunavut[86]	$812,000	2018–2019
Ontario[87]	$10,974,900*	2018–2019

78 Canadian Human Rights Commission, *Quarterly Financial Report — For the Quarter Ended June 30, 2018* (Ottawa: CHRC, 2018), online: <chrc-ccdp.gc.ca/eng/content/canadian-human-rights-commission-quarterly-financial-report-quarter-ended-june-30-2018>.

79 Alberta, Justice and Solicitor General, *Annual Report 2018-19* (Edmonton: Justice and Solicitor General, 2019) at 56, online: <open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/ec0db507-2343-45ef-a39c-7d2fd62fc07c/download/justice-solicitor-general-annual-report-2018-2019-web.pdf>.

80 British Columbia Human Rights Tribunal, *Annual Report 2018–19* (Vancouver: BCHRT, 2019) at 23, online: <www.bchrt.bc.ca/shareddocs/annual_reports/2018-2019.pdf>.

81 Manitoba, *Budget 2019: Estimates of Expenditure* (Winnipeg: Minister of Finance, 2019) at 95, online: <gov.mb.ca/asset_library/en/budget2019/estimate-expenditures.pdf>.

82 New Brunswick Human Rights Commission, *Annual Report 2017–2018* (Fredericton: NBHRC, 2019) at 23, online: <www2.gnb.ca/content/dam/gnb/Departments/hrc-cdp/PDF/Annualreport-Rapportannuel/AnnualReportHRC2017-18.pdf>.

83 Newfoundland and Labrador, *Estimates of the Program Expenditure and Revenue of the Consolidated Revenue Fund 2019-20* (St. John's: Department of Finance, 2019) at 208, online: <www.gov.nl.ca/budget/2019/wp-content/uploads/sites/2/2019/04/estimates.pdf>.

84 This being the combined revised estimates of the Human Rights Adjudication Panel, Human Rights Commission, and Equal Pay Commissioner. Northwest Territories, *Main Estimates 2019-2020* (Yellowknife: Government of Northwest Territories, 2019) at 21, online: <www.fin.gov.nt.ca/sites/fin/files/resources/2019-2020_main_estimates.pdf>.

85 Nova Scotia, *Budget 2019–20: Estimates and Supplementary Detail* (Halifax: Finance and Treasury Board, 2019) at 20.2, online: <beta.novascotia.ca/sites/default/files/documents/7-1690/budget-2019-20-estimates-and-supplementary-detail.pdf>.

86 Nunavut, *Main Estimates 2019-20* (Iqaluit: Department of Finance, 2019) at E-10, online: <www.gov.nu.ca/sites/default/files/main_estimates_2019-2020_english.pdf>.

87 This being the expenditures/budgets only of the Ontario Human Rights Commission and Ontario Human Rights Legal Support Centre. Ontario Human Rights Commission, *Annual Report 2018-2019* (Toronto: OHRC, 2019) at 57, online: <ohrc.on.ca/sites/default/files/AnnualReport2019-Compiled%2006-07-2019FINAL%20%282%29.pdf> ($5,038,700); and regarding the Ontario Human Rights Legal Support Centre, *Expenditure Estimates for the Ministry of Attorney General (2018–19)* (Toronto: Ministry of the Attorney General, 2018), online: <ontario.ca/page/expenditure-estimates-ministry-attorney-general-2018-19> ($5,936,200). Disappointingly, the province does not disclose costs for the Ontario Human Rights Tribunal.

	Expenses (CDN)	Fiscal Year
Prince Edward Island[88]	$471,070	2018–2019
Quebec[89]	$15,492,000*	2018–2019
Saskatchewan[90]	$2,568,000	2018–2019
Yukon[91]	$901,000	2018–2019
TOTAL	**$75,268,574***	

*Does not include the Ontario or Quebec human rights tribunals, whose costs are undisclosed.

88 Prince Edward Island Human Rights Commission, *2018-19 Annual Report* (Charlottetown: PEIHRC, 2019), online: <gov.pe.ca/photos/original/2018-19rptengHR.pdf>.

89 This being only the expenditures of the Commission des droits de la personne et des droits de la jeunesse. Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2018–2019* (Montreal: CDPDJ, 2019) at 76, online: <cdpdj.qc.ca/Publications/RA_2018_2019.pdf>. Disappointingly, the province does not disclose costs for le Tribunal des droits de la personne.

90 Ministry of Corrections and Policing & Ministry of Justice and Attorney General, *Annual Report for 2018–19* (Regina: Saskatchewan, 2018) at 22, online: <publications.saskatchewan.ca/api/v1/products/101781/formats/112666/download>.

91 Yukon, *Justice* (Whitehorse: Department of Finance, 2019) at 15-14, online: <yukon.ca/sites/yukon.ca/files/fin/fin-budget-2019-20-main-estimates-justice.pdf>.