1983

The Ontario Human Rights Code - An Economic Perspective

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ECONOMICS AND LAW WORKSHOP

83-03

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4:00 p.m. Thurs. Jan. 27, 1983 205 LAW

Major funding for the Centre for Economic Analysis of Property Rights has been provided by the Academic Development Fund, The University of Western Ontario. Additional support has come from The Bureau of Policy Coordination, Consumer and Corporate Affairs. The views expressed by individuals associated with the Centre do not reflect official views of the Centre, The Bureau of Policy Coordination, or The University of Western Ontario.

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I. INTRODUCTION

This paper seeks to explore the problem of discrimination from the point of view of several different "aggregative" models — that is, models seeking to maximize a particular sum, whether it be dollars or "utils". At this early stage in the exploration I have sought to outline in a very general sort of way the sorts of public policy prescriptions that these aggregative models yield, and problems in designing machinery to accomplish these aggregations. I have as well taken a brief look at the Ontario Human Rights Code and adjudications thereunder to determine whether these are consistent with any of the models explored.

But first — what is discrimination?

II. WHAT IS DISCRIMINATION?

In its broadest sense, discrimination is essential to all cognitive functioning. Rationality assumes an ability to discriminate; that is, to objectively perceive differences between stimuli presenting themselves for one's scrutiny. Seen in this light it is clear that the act of discrimination is a pure datum of cognitive functioning. The process itself is devoid of economic significance, although it might be said to be a necessary (though not sufficient) condition of any moral or economic system.

This hardly concludes the inquiry. It does, however, point us in the right direction. An inquiry into the economic (or moral) significance of discrimination focuses not on process but on motive, source, and consequence. A few simple examples will illustrate. Consider a connoisseur of fine brandies. In a blind test, the connoisseur will be able to distinguish cognac from a run-of-the-mill brandy. If he is a bit more discriminating he will be able to tell the difference between a "V.S." and "V.S.O.P." cognac, and perhaps between a "Grande Champagne" cognac and a "Fine Champagne" or a "Grande Fine Champagne" cognac. If his discriminatory facility is particularly acute, he might even be able to tell from which vineyard the wine which was distilled into the brandy came. Some might consider such discrimination unavailing, but few would consider it invidious. Indeed, many would applaude it. The purpose or motive of such discrimination is to refine one's ability to appreciate a certain product — in this case, brandy. The consequence of such discrimination is a refined appreciation of brandies, and perhaps appreciatory comments from one's friends. It is probably fair

to say that this type of discrimination fails to attract moral opprobrium. Nor would the economist attach a great deal of importance to this type of discrimination; of course, this cognitive functioning lies at the bottom of all product differentiation and the finer it is the more imperfect markets will tend to be. But this type of discrimination is not that with which we are here concerned.

Consider however the following examples which are related by motive and in a significant way by consequences. An employer may refuse to hire any black applicants for a position because he entertains an honest belief that such workers are lazy, unmotivated, and less skilled than white applicants. In a similar way an insurance company will discriminate in setting premiums for auto insurance on the basis of age, sex and marital status. In each case the motive behind such "discrimination" (defined now not merely as cognitive functioning, but cognitive discrimination plus choice) is the pursuit of profits. Whether the consequences of such discrimination are similarly related is more problematic. Both are variants of what has been called "statistical discrimination" or what I call "information proxy discrimination." In a world where information is never perfect, it is only rational to use as a proxy for information which is either unobtainable or only obtainable at great cost information concerning characteristics which are closely correlated with whatever information one is ultimately seeking. The difference between the two above examples is only one of reliability; the actuarial experience of an insurance company or many insurance companies will isolate proxies of great reliability, while that of a single employer, especially a small one, is likely to be based on

a statistically insignificant sampling. This effect will be magnified when the basis of such discrimination is not a statistical sampling at all, but a bias (by assumption an honest one) garnered from hearsay, innuendo, and pure myth. As a consequence, the functional efficiency of the different proxies is likely to be very different, and while there will be "rating errors" associated with both, the insurance company's rating error will be far smaller. While the insurance company will likely reduce its costs through such information proxy discrimination, the individual employer may actually increase his costs if the information available to him is quite inaccurate. The reliability of the information is thus the key in elucidating the economic consequences. There may be additional consequences, both economic and non-economic which are more similar in the two cases. If the use of such proxies — whether reliable or not — is widespread, persons discriminated against may form a rather dim view of themselves. They may withdraw from the labour market entirely, or considerably lower their aspirations and, more than likely, fail to fully exploit what inate ability they may possess. The result will be an impoverishment of "human capital" — an unacceptable result given <u>any</u> of the models considered below. Consider a further example. An employer may refuse to hire an applicant for a position — even though that applicant is the best qualified — because that person has freckles, and a number of employees have informed the employer that they would sooner quit than work alongside anyone with freckles. While the employer may be able to replace these employees, he will incur transactions costs in so doing. As well, it may be that in order to attract replacements he will have to

offer these replacements a premium to associate with the freckled worker. A similar phenomenon might occur if consumers expressed their distaste for products manufactured by freckled workers. In both these situations, the employer, in order to reduce costs (and maximize profits) will hire a less able non-freckled applicant as long as his loss in so doing is not exceeded by the market imposed costs of hiring the freckled applicant. This type of behavior will be prevalent in communities with relatively homogeneous discriminatory preferences. For want of a better term, it might be denominated "market constraint" discrimination. Market constraint discrimination has as its motive the same motive characterizing information proxy discrimination — cost reduction, or profit maximization. The economic consequences will be explored more fully below

Notice that in order to describe this type of discrimination we need to introduce an additional variable — source. In the earlier examples, the source of the anticipated cost reduction was the reduction in information costs. In this case, the source of the cost reduction comes from either a cost reduction in labour costs or in non-reduction in sales volume. This will be important below.

Both information proxy discrimination and market constraint discrimination are thus allied by a common motive — profit maximization. Both are variants of what might thus be called "profit-motive discrimination". A further variant of discrimination which arises from non-profit-oriented motives may be characterized as "non-profit-motive discrimination". Broadly defined, this type of discrimination focuses on purely

psychic states. An individual's utility function may be such that he experiences disutility from associating with people with freckles. Such a person will not be impressed by an argument that the fact that a person has freckles is uncorrelated with any other characteristics of interest and hence useless as a proxy. He simply doesn't like people with freckles.

The economist's definition of discrimination — used by Becker and Posner — will be discussed in the context of the wealth maximization model below.

III. A WEALTH MAXIMIZATION MODEL OF DISCRIMINATION

A. Income Maximization and Posner's Wealth Maximization Distinguished

Maximization of income and maximization of wealth are distinct if related ideas. If we seek to maximize income, then we want simply to maximize the value of all goods and services produced in the economy. This assumes production efficiency. If we seek to maximize wealth, however, we seek to maximize not income, but "value", which is registered in the market by "willingness to pay." The difference between the two is illustrated by the following simple example developed by Becker. Imagine that there are two countries or "societies", one inhabited by, say, whites, the other by non-whites. There are two homogeneous factors of production, labour and capital, found in both countries. Assume that there is a trade in these factors of production, with the white society exporting capital and the non-white society labour.

Absent discrimination, payments to each factor will be independent of whether it is employed by whites or non-whites, and prices

of goods produced will be independant of whether they are produced by whites or non-whites.

If suddenly, however, whites develop a tase for discrimination against non-whites, and are willing to forsake a certain quantity of money income to avoid using non-white labour and capital, the flow of trade will be reduced.

Becker demonstrates that the money income of both groups will be reduced. However, while white capitalists lose, white wage-earners will gain from higher wages; overall, the former effect outweighs the latter. Non-white capitalists and wage-earners both lose.

However, wealth may actually have increased, if we use a Posnerian framework. If we conceive of discrimination as a good — an intangible property like a patent — then it would appear that, as long as whites are "willing to pay" for discrimination, "value" has increased (absent externalities and other market breakdowns; see below). Wealth maximization is thus a hybrid of income maximization and utilitarianism. But while a utilitarian counts all preferences, the wealth maximizer only counts those preferences which are backed up by dollar votes. As Posner takes great pains to point out, wealth maximization does not insure utility maximization; differential levels of individual wealth will allow some people to register their preferences with great force in the market place, while others — whose utility may be far more greatly increased by a distribution of good in their favour — will not, because of impecuniosity. As we have seen, neither does it insure productive efficiency or income maximization. Posner neverthe-

less claims that the wealth maximization criterion avoids the damaging criticisms that have been levelled against utilitarianism; boundary problems (whose preferences count?), the problem of making interpersonal utility comparisons, the problem of choosing as a maximand average or total utility, and the problem of what he calls "moral monstrousness". In respect of the latter, Posner claims that wealth maximization yields results which are in keeping with our ethical intuitions, while utilitarianism does not.

B. The Analytics of a Wealth Maximization Model of Discrimination.

(i) "What is discrimination?" revisited. Gary Becker in his seminal work on discrimination has defined discrimination in the following fashion. "Money, commonly used as a measuring rod, will also serve as a measure of discrimination. If an individual has a "taste for discrimination", he must act as if he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others. When actual discrimination occurs, he must, in fact, either pay or forfeit income for this privilege. This simply way of looking at the matter gets at the essence of prejudice and discrimination."

Becker thus uses a definition in accordance with Posner's wealth maximization criterion. Posner, in fact, adopts this definition in his own discussion of discrimination.

(ii) Human capital. Within the wealth maximization model, human beings may be viewed as "human capital" and a resource like any other. Given a certain set of functional characteristics (intelligence, strength,

agility, skill, etc.) the object then is to match the individual to the job which will best exploit these attributes, within the context of a market full of competitors for a limited set of jobs. The market, in registering preferences backed up by dollar votes, will determine what skills are required.

(iii) Information proxy discrimination. Posner endorses information proxy or "statistical" discrimination as economizing on information costs. If the information proxy is reliably correlated with the underlying phenomenon that one seeks to measure, and if the costs resulting from "rating error" is exceeded by the cost reduction of using the proxy, then indeed wealth will tend to be increased by the use of the proxy. However, as indicated above, the statistical basis for the use of such proxies may be extremely inadequate, and indeed such proxies may not have a statistical basis at all, and may result from the uncritical acceptance of inaccurate "stereotypes". Where this is so, the proxies will lack reliability and hence will increase costs and diminish wealth. Will the forces of competition operate to weed out unreliable proxies and leave only the reliable ones? This question is addressed below.

Even if such proxies are accurate, there are reasons to believe that a wealth maximizing result will not be achieved. If we assume that the individuals of a particular minority have a statistically normal (i.e. Gaussian) distribution of job skills, then the use of proxies of an exclusionary character will not affect the ultimate job placement of persons at the low end of the distribution; they would have ended up with the jobs they did get in any case. However, those at the high end of

the distribution will now find it more difficult to get jobs that fully utilize their human resources. Repeated rejections of such people will result in a growing sense of frustration and worthlessness on their part, resulting in many cases in a lowering of aspirations and in many cases withdrawal from the labour force entirely. This phenomenon will accompany the use of accurate as well as inaccurate proxies, because of the asymmetrical impact of the rating error. And, to the extent that the aspirations and achievement of those with the greatest ability amongst any particular minority tend to define the aspirations and achievements of the entire class of persons, over the long run we will probably witness an impoverishment of the human capital of the entire class of persons, and the resulting under-utilization of their abilities, and consequent wealth loss. In other words, the mean level of skills will tend to diminish over time and continue diminishing until some level of hopelessness is reached below which the aspirations of the group cannot fall any further. This long-run cost may well overwhelm the short-run benefits, resulting in a net wealth loss.

There may as well be unaccounted for externalities; this problem is considered below.

(iv) Market Constraint Discrimination. Market constraint discrimination is ultimately a problem of non-profit-motive discrimination, and will be dealt with as such below.

(v) Non-Profit-Motive Discrimination. The groundwork for a discussion of this phenomenon has already been laid in distinguishing

between income maximization and wealth maximization, above. It was indicated that, although such discrimination may reduce the income of society, it may increase its wealth, as defined by Posner. However, let us now relax our unrealistic assumption that everyone in a particular group (let us say whites once again) has a "taste for discrimination." Some whites will, and some whites won't. The focus will now be on individual acts of discrimination in a single economy and their wealth effects.

An individual act of discrimination, such as an employer refusing to hire the most qualified applicant for the job, because he is black, will reduce the money income of both. But what is the wealth effect? Above it was speculated that wealth increased, as evidenced by the discriminator's willingness to pay. But doesn't this leave out of account the wealth effect on the discriminatee, and his willingness to pay?

A wealth maximizer might make an argument that the loss to the discriminatee is fully accounted for in the following fashion. A discriminatee can "bargain" if he chooses with the discriminator to achieve a wealth maximizing solution. He can — and presumably will — register his own preferences by offering the disciminator a "bribe" to, say, hire him into a job he would not otherwise have gotten. This bribe may take the form of reduced wages or salary — a form of "bargaining" that has been particularly prevalent in the past. Thus, all willingnesses to pay — to discriminate and to not be discriminated against are accounted for. However, a number of objections may be

raised. Firstly, those who are discriminated against tend also to be, from the very fact of past discrimination, poor. The wealth maximization criterion is systematically biased against those who are poor. This systematic bias not only defeats Posner's claim that there is a concordance between the results of a wealth maximization model and our ethical intuitions, it also, as Bebchuk demonstrates, vitiates the force of Posner's claim that wealth maximization as a normative criterion can be founded on the Kahtian principle of consent.

Indeed, other factors are likely to conspire to impede the bargaining process, such as the transactions costs of negotiating with an individual employer who, because of these costs, may be just as happy to exclude minorities than bother to bargain with and hire some into his work force. And particularly in large bureaucratic organizations discrimination may become an institutional habit. Further, unions and professional bodies may interfere with the bargaining mechanism by using sex, race, etc. as convenient criteria of exclusion in the interests of restricting supply. Minimum wage legislation and even "equal pay for equal work" legislation will prevent the sort of market adjustment that wealth maximizers envision from occuring (this last argument, when generalized, is the foundation of libertarian opposition to intrusive government regulation of the market).

The existence of "external diseconomies" (not considered by Becker or Posner) may affect the outcome as well. Just as when an industrial polluter fouls the air in the vicinity of his factory, generating disutilities to nearby residents, so an instance

of discrimination may cause distress to third parties not privy to the transaction and in no position to directly influence the outcome. In Dworkin's phraseology, "external preferences" are engaged. Given that this is a setting of high transactions costs, and a hypothetical market can be constructed (wherein people would be willing to pay in order that others discriminate, or not discriminate) in terms of Posner's wealth maximization model this may be an additional source of wealth loss. These preferences, backed up by willingness to pay, are simply unaccounted for.

Thus the "efficiency" of discrimination in the Becker/Posner scenario is unclear. What sort of policy prescription this yields will be considered below.

C. Will competition operate to eliminate discrimination?

(i) Information proxy discrimination. The appropriate question here is not whether competition will operate to eliminate discrimination, but whether or not it will ensure that only reliable proxies are used. In a perfectly competitive market, the forces of competition will penalize those who use erroneous proxies, by increasing costs over those using accurate proxies, or no proxies at all. There will be incentive to generate information about the reliability of proxies used. However, market forces are likely to be deficient in several respects. Firstly, we do not in fact live in a perfectly competitive economy. Indeed, if competition were perfect, there would be no need to use information proxies at all. And the more we depart from perfect competition, the less the impact of competitive forces. Secondly, there are very likely to be considerable economies of scale in generating the required information. To develop a truly reliable

set of data to generate accurate proxies probably requires a greater capital investment than most employers and others using information proxies are able to make. Of course, this may only lead to specialization in the amassing of such information, and subsequent sale to those who desire to use the information. This however, may not occur for at least two reasons. Although one may point to credit agencies as currently performing a similar function, the type of information which would be sold by the type of information purveyor under consideration would be much more appropriable. And the probability of appropriation diminishes or destroys the incentive to collect such information. Secondly, the collection and dissemination of such information may be politically unacceptable; Ontario's Consumer Reporting Act, for instance, forbids the dissemination of information as to race, creed, colour, sex, ancestry, ethic origin, political affiliation, and certain financial events after an expiration of a period of time. Similarly, insurance companies appear to refrain from using certain actuarily significant proxies because of a belief in their political unacceptability. Thus, although American blacks tend to live in inner city cores where automobile accidents are much more frequent, and therefore, as a group, tend to have more automobile accidents than whites, insurance companies refrain from using race as a proxy even though it would reduce costs as compared to gathering information on geographical location. This very political unacceptability may cast some doubt on Posner's wealth maximization criterion as a moral principle, defensible (according to Posner) on the ground of community consent.

For these reasons, the forces of competition are likely to operate only very imperfectly in weeding out bad proxies from good. In many cases, employers and others will continue to use proxies generated by hearsay, innuendo, and just plain myth, with wealth losses resulting. And even if the forces of competition ultimately ensured the survival of only reliable proxies, I have argued that the use of such proxies — especially in the long run — will result in an impoverishment of human capital with consequent wealth (and other human) losses.

(ii) Profit-Motive Discrimination. Posner, Becker, and others have again asserted that the forces of competition will operate to reduce this discrimination. The argument is very simply that those employers who do not discriminate will reduce their costs, and hence increase their profits, which will tend to drive discriminating firms out of the marketplace. However, while competition may tend to put pressure on employers not to discriminate, these forces will operate so imperfectly in most markets as to leave a great deal of slack. This may be particularly so in markets where manager controlled firms dominate, as the separation of ownership and control may permit managers to depart from pure profit maximization and pursue the satisfaction of their own preference functions, which may be rather discriminatory. And of course, if we remove the forces of competition — as in the case of monopoly or government — the argument fails entirely. Posner argues that this will not be the case where a monopoly is transferrable, because someone who can increase profits by not discriminating will purchase the monopoly and do so. But the transferrable monopoly is likely to be the exception rather than the rule; and even when

we find one, the transactions costs of purchasing the monopoly may outweigh the gains from eliminating discrimination. The problem (as Posner notes) is exacerbated by the effects of regulation. Since in any regulated industry rates of return are set by public fiat, there is a lot of room to indulge non-profit preferences.

In summary, the forces of competition will operate in some cases not at all, and at best imperfectly in eliminating discriminatory behaviour from the market.

(iii) Market constraint discrimination. Earlier I classified market constraint discrimination as "profit-motive discrimination". In truth, this type of discrimination straddles the line between profit-motive discrimination and non-profit-motive discrimination. Considered from an employer's perspective, the discrimination is profit-motivated. Considered from the perspective of a labourer demanding a premium to offer his services to work beside minority workers, or the consumer who attaches a higher subjective price to a product produced by minority workers, the discrimination is not profit-motivated. With respect to labourers offering their services in the market, it is again arguable that the forces of competition will tend to reduce the premium demanded, since non-discriminatory workers will be less expensive to hire, and more capable of functioning in managerial positions where they will have to supervise both blacks and whites. But this argument is subject to all the problems noted above. In addition, in a community with relatively homogeneous discriminatory preferences, these forces of competition will be considerably vitiated (as they will be in all cases of not-profit-motivative discrimination). If most employers or employees exhibit discriminatory preferences

then the market pressure to be nondiscriminatory will be minimal. Finally, there are no forces of competition operating to "correct" consumer judgments in the product markets, (unless perhaps utility functions are interdependant) and this is a source of market constraint discrimination. Again, if community preferences are homogeneously discriminatory, it won't pay any employer to reduce his costs in the labour markets by hiring black workers, because this will effectively raise the price of his product in the product markets and reduce his competitiveness. The relative strengths of these effects at the margin will dictate a cost function to this employer in respect of hiring practices.

Thus it would seem to be rather quixotic (in the Chicago style) to rely on markets and the forces of competition to eliminate discrimination.

D. The wealth maximization criterion and human rights legislation.

What sort of prescription would the wealth maximization doctor write for public policy in view of the above analysis?

(i) Information proxy discrimination. The Posnerian scenario — that information proxy discrimination is acceptable, even desirable — leaves a very limited role for human rights legislation in this area. In Posner's world, there is no room for legislation such as the Consumer Reporting Act (see above) forbidding the use of particular information proxies. There may however be a role for government in generating and disseminating information about the reliability of the various proxies. Above, I suggested that the private market would not produce this information. Additionally, constituencies which might conceivably benefit from the improved accuracy of such information would be

widely spread, noncohesive and difficult to organize, and in any case free-rider problems would impede such organization. However, if private collection and dissemination of this information is politically unacceptable, certainly performance of this function by government is likely to be even less acceptable.

If, as I surmise, information proxy discrimination — even when accurate proxies are used — is likely to have negative wealth effects in the long run due to the impoverishment of human capital, then a very different role for public policy is suggested. Far from condoning such discrimination, we would want to forbid it in most contexts, excluding perhaps the use of information proxies by insurance companies where the costs imposed by abandoning the information proxy system would exceed the expected benefits. In the insurance context, some proxies appear to be politically acceptable and not likely to result in impoverishment of human capital.

(ii) Non-profit-motive discrimination. Posner's wealth maximization criterion appears to be the same as so-called "Kaldor-Hicks" efficiency. The public policy ramifications of this concept for non-profit-motive discrimination will be explored in part IV below.

IV. UTILITARIANISM, PARETO SUPERIORITY, AND KALDOR-HICKS EFFICIENCY: A STATIC MODEL

Posner's claim is that wealth maximization is a superior normative criterion to utilitarianism (see above). It is perhaps interesting to explore a utilitarian view of discrimination.

One of the most important criticisms of utilitarian theory is that it is probably impossible to construct a common metric by which we can measure and compare the utilities of different individuals; this is the problem of "interpersonal comparisons of utility". Nevertheless, taking a utilitarian perspective is useful in the identification of the human "costs" and "benefits" of discrimination. Additionally, some of the tools developed by welfare economists to deal with the interpersonal comparison problem may advance our inquiry. Interestingly, one of these — the Kaldor-Hicks criterion — appears to be identical with Posner's wealth maximization.

A. A Utilitarian accounting of preferences.

(i) Information proxy discrimination. In the discussion of the wealth maximization model, the relevant utilities and disutilities have already been identified. The only difference of note is that the utilitarian would probably attach greater importance to the disutility suffered by those discriminated against; as noted, these are likely to be poor, and a wealth maximization model will not weight their preferences very heavily.

(ii) Non-economic discrimination. If our goal is only to ensure that the aggregate of all personal preferences in society is maximized, then all that remains is to insist that an adequate and complete accounting of preferences occurs. The competing costs will be the following (all, of course, translated into some metric of utility like "utils"):

Costs of the discriminatory act

(i) The trading loss incurred by both parties;

(ii) the injury to feelings and dignity suffered by the discriminatee;

(iii) the costs to third parties who suffer offence and injury merely by knowing of the disciminatory act;

(iv) the monetary costs to third parties in the diminuation of national income.

Costs of forbidding discrimination

(i) all utility losses realized by the employer/discriminator, arising from all sources (i.e. by the frustration of both profit and non-profit motives for discrimination);

(ii) the costs to third parties who prefer a racist, sexist, etc. society, and who will suffer if the act of discrimination is enjoined.

The function of the State in such a regime is simple; to set up machinery to account for such preferences, and to enjoin only those discriminatory acts which result in a net loss of utility. The function of human rights legislation is then only to insure that the cost calculus is properly applied. Since the market will not fully perform this function, legislative intervention is essential.

The only "right" generated by this utilitarian approach is to guarantee the individual that his preferences will be weighed along with everyone else's. Other than this, the utilitarian calculus of aggregation accords all wants and preferences equal validity, and singles out none as especially worthy of protection. An affront to human dignity is accorded no special status, and is simply valued and weighed on the same scale as trading losses.

The mechanics of counting preferences. A quantitative enumeration of preferences is impossible, both because we don't know how to count "utils" and because of the difficulty of making interpersonal comparisons of utility. However, by using the concepts of Pareto superiority and Kaldor-Hicks efficiency we may be able to summount these problems. The distribution effected by a public policy (or "move") is Pareto superior to an alternative distribution if at least one person is made better off, and no one is made worse off. If this is the case, then although we cannot measure total utility we know that it has been increased. An interesting consequence of applying the Pareto superiority criterion is that, once the various costs of the act of discrimination have been identified, it is permissible to allow the discriminator to continue to discriminate, provided that he offers suitable compensation to his victims to indulge his taste. Since there is nothing inherently "reprehensible" in this theory about an act of discrimination, except perhaps to the extent that the act creates a net loss of aggregate community utility, there is no reason to enjoin discriminatory acts where the discriminator, by compensating his victims (probably with money) ensures that their utility is not diminished. By forcing the discriminator into the position of paying compensation which exactly makes up for the victim's loss of utility, we force him to weigh his gains against what are now his losses, and he will, as a rational maximizer, taking into account all gains and losses, behave in a way that turns out to be "efficient" in a global sense. A number of problems arise, however.

Firstly, if, as has been suggested, external preferences of third parties are engaged by the act of discrimination, not only must the magnitude of the net gain or loss to such parties be calculated, but these parties must be compensated as well; they too are "victims" of the discriminatory conduct. That such external preferences exist cannot be doubted; world reaction to South African apartheid would be one example. Clearly, from a public policy perspective, it may be mere puffery to imagine that we can identify all "losers", and in any case the transactions costs of determining adequate compensation to each would be prohibitive. Thus the Pareto superiority criterion poses what seem to be insurmountable problems for the modern legislator.

Can the concept of Kaldor-Hicks efficiency help us out? A move is Kaldor-Hicks efficient if the winners could have compensated all losers, and still come out ahead. Under the Kaldor-Hicks approach, no compensation actually flows. If compensation were paid then the move would be transformed into a Pareto superior one. The advantage of the Kaldor-Hicks criterion over the Pareto superiority criterion is the elimination of transactions costs in effecting compensation. However, problems remain. We still need to identify losers, and determine some aggregate monetary sum which would adequately compensate all of them. This would appear to require a cardinal

interpersonal comparison of utilities. What sort of a counting process might we construct to weigh both public and private costs?

Given the economist's somewhat Pavlovian predilection to use the market wherever possible, it may be thought desirable to determine the private costs of the parties through this mechanism. The market is more likely to accurately reflect the utilities of the actors involved than is a seat-of-pants guess by an administrative tribunal. The method would be to issue an injunction to a party sustaining his claim of discrimination. This sort of "property rule" might, even in a setting of low transactions costs be preferred to a "liability rule" in that it would tend to redress the inequality of bargaining power between an employee and an employer. A legal entitlement would now exist around which the parties can bargain and make a "trade" if desired. Thus, the discriminatee would weigh how much the service, accommodation, employment, etc. was worth to him, and demand at least this much compensation to "sell" his injunctive right to the discriminator. The discriminator would similarly weigh his own costs of the act of discrimination, and calculate his maximum offer price to "buy" the right to injunctive relief. Three possible results may occur:

(i) The maximum sum that the discriminator is willing to offer purchase the discriminatee's entitlement is less than the minimum that the discriminatee will accept as compensation to allow the act of discrimination to occur. As a result, the act of discrimination will not occur, and this will be an efficient outcome (subject to third party costs being accounted for, as indicated above).

(ii) The maximum sum that the discriminator is willing to offer exactly equals that which the discriminatee is willing to accept. In this case, the latter will be willing to sell his legal entitlement to the former for precisely this amount, but each party will be indifferent as to whether this exchange actually occurs, since, ex hypothesi, the costs of discriminating and not discriminating are now equal. Whether the act of discrimination occurs or not, the result will be efficient, since there are two equal maxima of aggregate utility which correspond with each of these outcomes.

(iii) The maximum sum that the discriminator is willing to offer exceeds the minimum that the discriminatee will accept as compensation. In this case, a sale of the legal entitlement will occur, and this solution will be efficient. The exact amount of compensation will fall within the bargaining range between the discriminator's maximum and the discriminatee's minimum, and will be determined largely by the relative bargaining skill of the parties.

How are external preferences registered? Having determined some monetary sum which would represent a net of third party utilities and disutilities from acts of discrimination, this sum will be levied as a fine against the discriminator. This fine would be assessed in advance of any bargaining between the parties, in order to allow the discriminator to make his private calculations of whether to discriminate or not based on the complete costs his act of discrimination generates and which he now faces should be choose to buy the discriminatee's entitlement.

However, a further problem arises in that it is not every case of discrimination which will be brought to the attention of the tribunal. It is always the case that some individuals are ignorant of avenues of redress, or for other reasons unwilling to seek a remedy for an act of discrimination. Orders made by an administrative tribunal may achieve an efficient outcome for the case under consideration, but will not, in the great mass of cases which are never brought before the authorities, offer a sufficient deterrent impact to achieve a long run, overall efficient state. Potential discriminators, in assessing the likely cost of an act of discrimination, will weigh the likely cost of the fine and injunction levied against them multiplied by the probability of actually facing the cost. The more the probability deviates from unity, the less efficient the system becomes. Thus, the tribunal may have to scale up the fine imposed upon the discriminator to reflect this less than unitary probability. The outcome of the case under scrutiny will no longer be efficient, but the overall outcome, including those cases which will never be heard, is more likely to be efficient.

Transactions Costs. The above may strike the reader as perhaps venturing a bit too far from observable reality. In the emotion laden context of discriminatory acts, individuals do not sit down and bargain amicably about how much the act of discrimination costs, or its worth to them. Does this mean that there would be high "transactions costs" to such bargaining? Not, I would argue, unless we assume irrationality. To the extent that emotions run high, this will be reflected in the minimum ask price of the discriminatee, and the maximum offer price of

the discriminator. To count this as a transactions cost would be double counting. The transactions costs of bargaining for each party will include the administrative costs of organizing the bargaining, the costs of any paid professional assistance, the cost of transporting oneself to the bargaining site, and the opportunity cost of the time devoted to bargaining.

However, in this context, the assumption of rationality may be a weak one. One would expect such bargaining sessions to be characterized not by rational discourse, but by intransigence and irrationality. If so, then this factor is properly recorded as a transactions cost.

Whether transactions costs would be large or small is not a trivial question. The minimum sum that the discriminatee will accept to sell his legal entitlement will be increased by his expected transactions costs, as will the maximum amount offered by the discriminator be correspondingly reduced. The bargaining range will shrink in every case, and the effect may be so pronounced that we will almost never see a sale of legal entitlement, which will of course generate inefficiencies.

Thus the transactions costs problem, perhaps to the great relief of some, may cast grave doubt on the workability of the system of private negotiation, and suggests that in fact the more efficient solution is for the administrative tribunal to simply assess the extent of damages suffered by <u>all</u> parties concerned (and not just the public) and inflict these on the discriminator.

(iv) <u>Market constraint discrimination</u>. The problem of counting preferences (in the above hybridized Pareto/Kaldor-Hicks fashion) is made more difficult in case of market constraint discrimination. With respect

to this type of discrimination, we assume that the employer (or other) has himself no "taste for discrimination". His discriminatory behaviour occurs because the market — either the labour or product market — makes the preferences of others part of his profit function. Will the bargaining cum fine technique function in this situation? Obviously, bargaining cannot take place with each and every labourer or consumer — the transactions costs are simply too high. It might be argued that these worker and consumer preferences are registered in the employer's cost function, and bargaining between the discriminatee and the discriminator (the employer) will thus account for these preferences. An employer would be willing to pay up to the market cost of hiring a minority group member to not hire him. But although this does register certain preferences, whether the outcome will be "efficient" is problematic. How do we now set the fine to reflect the net of all external preferences? It will be costly to avoid double counting of certain preferences which are already registered in the labour and consumer markets. It is difficult to know in this context how one could design appropriate machinery to account for all preferences, without incurring enormous transactions costs.

(v) Additional problems with the Kaldor-Hicks approach.

(a) Problems of proof. When an employer advertises a job position, and fails to hire a black applicant, he has — in the broadest sense of the word — "discriminated" against him. However, as indicated above, in designing responses to acts of discrimination the factor of motive is all important. Discriminating against a black applicant because he is not qualified for a job is not likely to be objectionable from either a utilitarian or wealth maximization perspective (unless "affirm-

ative action" is a community value). Other motives for discriminating may however make such discrimination unacceptable. How is one to go about determining motive? An employer may be presented with fifty black applicants for a position, and one white applicant, and select the one white applicant on the basis of qualifications alone. In a society in which discrimination has been an imbedded phenomenon, with resulting impoverishment of black human capital, such outcomes are likely. Adducing proof to distinguish acceptable from unacceptable discrimination could be very costly for a complainant. It would thus seem appropriate in a case where an employer claims an acceptable motive, to cast the burden of proof on him to prove this.

(b) Problems of efficacy. Further institutional problems exist in the design and enforcement of anti-discrimination laws. It has been found, for instance that the separate administration of laws designed to prevent discrimination in employment, and laws designed to give equal pay for equal work, may result in these laws cancelling each other out. Co-ordinated and simultaneous enforcement of such provisions is therefore required.

V. DYNAMIC UTILITARIANISM: THE INVESTMENT MODEL

The essential premise of the investment model is that discrimination is an engine of disutility, not only to injured individuals and society, but ultimately to the discriminator himself. In a sense it assumes one of two things, or both:

(i) The Information Element. Discrimination is the product of mistaken beliefs; the genesis of discrimination is in the misapprehension

of objective facts about a group or groups of people which results in a stereotyped attitude about the nature or capabilities of that group. This misinformation is then used as a screen to assess individuals of that group. This is, of course, information proxy discrimination — and the use of inaccurate proxies.

(ii) The Irrational Hatred Element. The above element may be the product of dispassionate assessment of the capabilities of a group, but this element identifies a slightly different motivation to discriminate — the irrational hatred of a group simply because they are "different". This form of discrimination has an echo effect; not only does it demean and rob of dignity those who bear its brunt, but it redounds to the discredit, debasement and ultimately the disutility of the discriminator.

The investment model suggests that discrimination is an aberration which only subtracts from the realizable utility of society. It posits that through re-education, and the process of bringing information to discriminators both about the nature of their victims and the costs that discrimination inflicts on such victims, the aberration may be eliminated, and aggregate community utility raised.

It is an interesting question whether this can actually be subsumed under the rubric of utilitarianism. The problem stems from the fact that we now seek to maximize, not a static sum of utilities, but a dynamic sum measured over time. An analogy is an economist's model of capital formation in an underdeveloped country, where current consumption is sacrificed in order to free up resources to be turned into capital

(productive capacity) in order that the aggregate sum of consumption over time (possibly to infinity) can be maximized. The time frame under scrutiny may be important. Even in a relatively small community, the character of the population is constantly in flux, so that the longer one allows the motion picture camera to run, the more change one observes. But the distinction between a static and dynamic model blurs at the edges. At one extreme, it is virtually impossible to imagine a perfect static model, for if every minute of every day brings change to the community (in the form of births/deaths, changing attitudes, lifestyles, etc.) then the static utilitarian model must constantly be revised to keep up with the pace of change, and has no validity longer than the instant at which the aggregation of preferences is measured. And if we try to argue that change is in fact incremental, in the form of discrete jumps, and not by continuous process, then already we have a sort of attenuated dynamic model. At the other extreme, not even the most ardent futurist would suggest that it is possible to predict the course society will take with any degree of accuracy, even over relatively short intervals of time, and it is impossible therefore to maximize a quantity whose constraints and bounds are unknown. I would submit that these difficulties are surmountable. If we can, with confidence, assert that human nature is such that, whatever else might befall mankind, the total sum of utility will be raised by breeding out discrimination, then we have a sufficient basis upon which to rest our policty decision to do so. We needn't, strictly speaking, maximize the aggregate level of utility in a global sense. We need only be assured that the policy followed will lead to a higher sustained level

of aggregate utility. Thus, unless the time frame is so short that these benefits will not materialize within the given frame, the true questions becomes whether we can assert with confidence that by the use of coercion to not only eliminate the trappings of discrimination, but the "errant" thoughts which produced it as well, we will in fact ultimately increase aggregate utility? This is ultimately a question to be answered by psychologists and sociologists.

To return to the question posed, is it permissible to consider subsequent generations in our attempt to maximize aggregate utility? For the reasons outlined above — the blurred and perhaps somewhat misleading distinction between "present" and "future" generations — the difficulty in drawing a line between the static and dynamic model — and the freedom to choose policies on the basis of ordinal rather than cardinal rankings — I believe that it is thoroughly legitimate to do so. What stands between present and future generations is only time. Surely if we choose to invest the aggregation and maximization of preferences with moral significance then the preferences of future generations — whose environment is significantly shaped by choices made today — have an equal claim to our attention.

The policy implications of this model may be indistinguishable from those which we intuitively feel a model grounded in concerns of "morality" and individual rights would create. Present costs — as they will be dwarfed by future benefits — will be virtually irrelevant except insofar as we seek to compensate losses suffered by the discriminatee. But even that concern is subsidiary to, or merely an adjunct of, our concern to "re-educate" discriminators and the public. The role

of the administering tribunal would then be a very active one, seeking not to penalize discriminators, but to educate them by judicious use of both the carrot and the stick. We would expect a relatively small percentage of cases to proceed beyond the settlement stage to more adversarial proceedings. which might be reserved for the more intractable problems. The whole thrust of the legislation and its enforcement would be to bring discrimination to an end.

VI. THE ONTARIO HUMAN RIGHTS CODE

What is the function of Ontario's anti-discrimination legislation, and how does the Human Rights Commission view its role? It is my aim to show that, at the very least, inconsistent views have been advanced both by commentators and by cases decided under the OHRC, that this inconsistency and lack of a clear purpose extends to the Code itself. Further, these views seem to be generally unsympathetic to any of the aggregative models presented — with some interesting exceptions.

The old Code was replaced by a new Code on June 15th of last year. However, as yet there have been no cases decided under the new Code. Thus, in order to take advantage of the rich case law under the old Code, I will focus on the old Code noting where the results might be different under the new Code.

The Supreme Court of Canada in 1940 declared that "any merchant is free to deal as he may choose with any individual member of the public."

Thus Ian Hunter comments that "by 1940, it was clear that Canadian courts regarded racial discrimination as neither immoral or illegal ...

The judiciary had not lacked opportunities to advance equality but preferred to advance commerce; judgements had adumbrated a code of mercantile privilege rather than a code of human rights".

A contrary view of whether or not this mercantile privilege advanced commerce has been expressed by the Commission:

> "Contrary to arguments that are sometimes heard, anti-discrimination legislation is consistent with the imperatives of modern industrial society which require that people be hired for jobs on the basis of merit. Equality of employment opportunity is both a social and economic necessity."

If advancing commerce, i.e. income maximization, is our only aim, then the latter view is likely to be the correct one. However, as we have seen, advancing commerce may not be the "efficient" outcome from a wealth maximization point of view if people prefer to pay for the privilege of discriminating through reduced income (as long as externalities are accounted for).

Daniel Hill, former Director of the Commission, earlier expressed a view which is more consistent with the investment model approach to anti-discrimination legislation.

> "Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people ... human rights on this continent is a skillful blending of educational and legal techniques in pursuit of social justice."

A similar view has been expressed by Walter Tarnopolsky, under

whose hand many of the significant cases under the Code have been decided:

> "As far as possible, these people [discriminators] should be given an opportunity to re-assess their attitudes and to reform themselves, after being given the opportunity of seeing how much more severe is the injury to the dignity and economic well-being of others, than their own loss of comfort or convenience ..."

Tarnopolsky adopted a similar view in the leading Ontario case of Amber v. Leder which seems representative of the philosophy of human rights legislation in Canada:

> "The substitution of the administrative approach in modern human rights legislation for the penal approach is predicated upon the assumption that acts of discrimination are committed by people with the wrong sense of values with respect to matters of race, creed, colour, nationality, ancestry and place of origin. The change has been from one of punishment to one of re-education."

Further, this view finds ample support in the OHRC itself. Section 9 of the old Code defined the duties of the Human Rights Commission as follows:

> "The Commission shall administer this Act, and without limiting the generality of the foregoing, the Commission shall,
>
> (a) forward the principle that every person is free and equal in dignity and rights without regard to race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin;
>
> (b) promote an understanding and acceptance of and compliance with this Act;
>
> (c) develop and conduct research and educational

> programs designed to eliminate discriminatory practices related to race, creed, colour, age sex, marital status, nationality, ancestry or place of origin;
>
> (d) investigate complaints in contravention of and enforce this Act."

The new Code makes this preference molding function even more explicit, by allowing for formally unequal treatment in the interests of substantive equality — i.e. affirmative action programs. Under the new Code employers may discriminate, for instance, on the basis of race if this is designed to assist a particular group of disadvantaged persons.

Thus the legislation itself recognizes the value of molding tastes and preferences to eliminate discrimination, a value which is inconsistent with any of the aggregative models save the income maximization model (perhaps the least supportable on normative grounds) and the investment model.

However, neither the old nor the new Code is a model of consistency in this respect. The first two paragraphs of the Preamble of the new Code read as follows:

> "Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community

> and able to contribute fully to the development and well-being of the community and Province."

The Preamble tells us that the OHRC was designed to protect the "inherent dignity" and "inalienable rights of all members of the human family". These words seem somewhat inconclusive so far as the philosophical base of the Code is concerned, although the reference to "rights" seems to belie the suggestion that the document is nothing more than a utilitarian accounting device. But both utilitarians and wealth maximizers have been heard to claim that their theories generate rights; utilitarianism generates the right to have one's preferences counted with everyone else's, and wealth maximization generates property rights.

The second paragraph of the Preamble seems to recognize the value in enriching human capital. But the insertion of the phrase "that is contrary to law" renders the first part of the second paragraph logically meaningless, at least so far as a statement of general principles is concerned. It is always public policy to discourage the doing of that which is illegal. And if the Code purports to be a document whose basis rests in moral theory — a moral theory other than utilitarianism or wealth maximization — then there are some curious distinctions made. Throughout, a distinction between public and private acts of discrimination recurs. For instance, section 20 allows a landlord to discriminate on otherwise prohibited grounds if he will have to share a bathroom or kitchen with the tenant. Landlords of small buildings may additionally discriminate on the basis of marital status. Similarly, one may discriminate in employment on the basis of any otherwise prohibited ground, where

the employment relates to the medical or personal needs of the employer or a relative of the employer. However, the new Code considerably restricts the instances where a private club or association may discriminate. A limited protection of such organizations remains in the employment area where the qualification imposed is a bona fide job qualification.

Another matter of interest arises in connection with the age discrimination provisions in the Code, the old Code curiously limited the protection of the age discrimination provisions to those between the ages of forty and sixty-five years of age. The new Code remedies this to some extent, by specifying that "age" means eighteen years or more, except in the case of employment discrimination where one is only protected if one is between the ages of eighteen and sixty-five. Did the drafters of the Code imagine that persons outside of this age range do not have an equal claim to protection, whatever the theory on which the Code is based?

The view of the Code as educative and conciliatory is forwarded by section 32 of the new Code, which instructs the Human Rights Commission to endeavour to effect a settlement of the complaint. This is a continuation of the Commission's role under the old Code. This seems to confirm Tanopolsky's views in Amber v. Leder (supra), that the Code is indeed designed to re-shape discriminatory preferences. Nor does the fact that the potential fines under the Code have been increased dramatically — from $1,000.00 in the case of an individual and $5,000.00 in the case of a corporation under the old Code, to $25,000.00 under

the new Code — stamp the Code as primarily penal. Before these penalties are invoked, consent must be had in writing from the Attorney General. It is worth noting that under the old Code, no consents were sought.

Thus, although the Code seems to evince a certain schizophrenia, one is led to believe that the drafters of the Code had in mind a statute which would seek to re-form discriminatory preferences, in line with some investment-type model or moral theory; it hardly seems designed as a mere accounting device, apropos of a utilitarian or wealth maximization theory.

Cases decided under the old Code also seem to reject a strict Posnerian wealth maximization theory. One adjudicator, for instance, seems to have squarely rejected the propriety of information proxy discrimination. In Bone v. Hamilton Tiger Cats, John McCamus, constituting the Board of Inquiry, defined "direct" or "primary" discrimination as just such a use of conceived stereotypes to judge individual job applicants. Further, "it is simply not relevant that the generalization may be one which is reached in good faith, or, indeed, on the basis of statistical evidence".

However, a more ambiguous result is reached in the decisions of Peter Cumming, constituting a Board of Inquiry in the two cases Colfer v. Ottawa Board of Commissioners of Police (1979), and Adler v. Metropolitan Board of Commissioners of Police (1979) (these two cases being heard and tried together). Both of these cases involved applications

of the individuals concerned for employment as police officers. Colfer, a woman, was refused employment because she did not meet the 5' 10" height requirement set for all police officers by the Ottawa Police Force. Adler, a man, was refused employment because, at 5' 6" and 120 lbs. he failed to meet the height and weight qualifications set for males by the Toronto Police Force, even though the latter hired women who were only 5' 5" and 110 lbs. Both were arguing that this discrimination — which I have identified as information proxy discrimination — violated the OHRC.

Cumming arrived at the result that an employment qualification which has the effect of discriminating against (i.e. disproportionately excluding) a group of persons is prima facie void, unless established in good faith and shown to be reasonably necessary to the employer's business operations. This approach evidently commended itself to the drafters of the new Code who have inserted a provision to this effect — calling such discrimination "construction discrimination." Cumming elaborated on the meaning of "reasonably necessary" in Ishar Singh v. Security Investigation Services Limited (1977) (see below), borrowing from the 1972 Amendment to The U.S. Civil Rights Act, which makes it a defence to a charge of discriminatory conduct that the hiring of the employee would cause "undue hardship on the conduct of the employer's business" and puts an onus on the employer to show that he cannot "reasonably accommodate" an employee. He suggested that the appropriate method to gauge whether the employer has met this standard is to calculate the costs to the employer and to the employee of hiring or not hiring, and to weigh them one against the other.

This approach seems remarkably similar to the Kaldor-Hicks (or wealth maximization) approach outlined above. However, the meaning of the term "costs" is rather unclear, as Cumming rejects the evaluation of employer costs arising from market constraint discrimination (see below).

In any case, the results of the Colfer/Adler cases are rather interesting. Cumming found as a fact that the evidence disclosed that there is a correlation between height and weight and performance as a police officer, but concluded that there is "no rational basis for minimum height and weight requirements greater than national averages [my emphasis] ... the size requirements cannot have a disproportionate effect upon one gender." This conclusion was reached even though there was no indication in the evidence that men and women police officers perform largely different work. Nor did the evidence establish any link between the particular proxy chosen — national size averages — and job performance.

The result lends the imprimatur of the OHRC to information proxy discrimination. But there are several difficult problems. Firstly, the proxy chosen is not a rational one given the evidence; if men and women police officers do in fact perform the same functions, then the inevitable conclusion is that the only bona fide proxy which could be reasonably necessary to the employer's operations would be a uniform height/weight regulation for men and women. Further, the purpose of the proxy is to reduce information costs of identifying acceptable candidates. But there is no indication that national averages are the

most cost effective proxies. It could be that only unusually large persons make effective police officers, or that only unusually small persons make ineffective officers.

Secondly, the logic of the result protects the rights of a group of persons (each sex), not the rights of individuals. This seems to be inconsistent with the Preamble and with any moral theory founded upon individual rights; with this result, many male applicants whose physical attributes better qualify them for a job than many female applicants who will be accepted, will be excluded by the proxy of the national average. Cumming seems to have at once eviscerated the idea of a good faith employment qualification reasonably necessary to the employer's operations, and set up the OHRC as a vehicle of discrimination.

Finally, if the logic of the judgement is to be vigorously applied, then separate height and weight, if not intelligence, schooling and other requirements must now be formulated for every group of persons who we might qualify as a "minority" group. If women are deserving of this special protection, then why not blacks, Eskimos, Indians, or other such groups? Although Cumming expressly confines his judgements to sex-based qualifications, it is difficult to know why the logic should not be extended to these other groups.

As noted above, the new Code embraces the Cumming formulation — though not necessarily the way it was interpreted and applied — and prohibits "constructive discrimination." The new Code also gives the Human Rights Commission authority to approve affirmative action plans — for instance, discriminatory hiring policies designed to benefit particular disadvantaged groups. Cumming may well have aimed

at effecting an affirmative action solution to the problem confronting him in the above case.

Thus, although Cumming's standard in the abstract seems to conform to some sort of aggregative model — utilitarianism or wealth maximization — it fails to do so as applied by Cumming to the Adler/Colfer cases. It can be seen however as conforming to the investment model theory of dynamic utilitarianism which aims at eradicating discrimination based both on profit and non-profit motives in the interests of improving human capital and flushing discriminatory irrationalities from the social fabric.

The Singh case (mentioned above) also raises the issue of market constraint discrimination.

In the Singh case, a practicing member of the Sikh faith was denied employment as a security guard solely because he would not, as it would violate his religious beliefs, shave off his beard or remove his turban, in order that he might comply with the company policy requiring all guards to be clean shaven and to wear the company hat. Cumming reduced the scope of inquiry to 3 questions:

(1) Is it necessary to have an intent to discriminate against a religious group, or is it sufficient to find a violation of the Code if an apparently neutral job qualification has the effect of discriminating against a group?

(2) Are there any circumstances in which an employment qualification of the type found above would be valid?

The third question concerned onus of proof and is unimportant

for our purposes.

Following The United States Supreme Court in Griggs v. Duke Power Co., Cumming answered these questions by articulating the same standard seen in the Colfer/Adler cases above. Interestingly enough, although we are instructed under this approach to weigh relative costs, Cumming dismisses as "irrelevant" costs arising from market constraint discrimination. Thus, in his view, it is appropriate to penalize employers for the discriminatory tastes of employees and consumers. One wonders why some costs may be taken into account but not others; surely if moral culpability is the issue then the employer is just as innocent when a forced hiring increases his market costs as when it increases his production costs. And whatever the theory upon which Cumming proceeds, penalizing the employer in the case of market constraint discrimination is likely to lack remedial efficacy, as the remedy fails to affect the source of the discrimination.

VII. CONCLUSION

I have attempted to explore the approach of various aggregative models — income maximization, wealth maximization, and utilitarianism — to the problem of discrimination. A common problem with all these aggregative models is the problem of designing effective machinery to count preferences. If the externalities of discrimination are as large as I suspect they might be, then Posner's defence of wealth maximization as supplying the common metric to measure preferences, which utilitarianism lacks, may fall to the ground. It is difficult, probably impossible, to construct "hypothetical markets" to register these external preferences to complete the wealth maximization calculus.

A brief look at the Human Rights Code discloses a schizophrenia, or perhaps a multiphrenia, in respect of the theory upon which the Code is drafted. There are inconsistencies in the cases applying the Code. The protection of human rights under the Code strikes one as a rather hit-and-miss affair. On balance though, it would appear that the Code and adjudicators under the Code have rejected in most cases interpretations of the Code which would derive from the aggregative models presented. The one aggregative model which may be consistent with these adjudications under the Code is the "investment" model, or what I have also called dynamic utilitarianism. Here, of course, measurement of preferences breaks down entirely. However, support may be had for this model in the sociological literature. The United States Supreme Court, in the watershed case Brown v. Board of Education, cited work by the black sociologist Kenneth Clark to the effect that discrimination results in a psychic harm

to those who practice it as well as to those who are its more direct victims. If so, discrimination is a phenomenon of systematic irrationality, and a very broad sort of prescription may be written in favour of paternalistic state intervention to prevent discrimination.