

## Book Section

# How NOT to Eliminate Discrimination

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I want to be a man on the same basis and level as any white citizen - I want to be as free as the whitest citizen. I want to exercise, and in full, the same rights as the white American. I want to be eligible for employment exclusively on the basis of my skills and employability, and for housing solely on my capacity to pay. I want to have the same privileges, the same treatment in public places as every other person...

Dr. Ralph Bunche (the first black American to serve as, among many other things, US Permanent Representative at the UN).

In his *Forbidden Grounds: The Case against Employment Discrimination Laws* (Cambridge, MA: Harvard UP, 1992), Richard Epstein has produced a second fundamental study as comprehensive, systematic and overwhelmingly compelling as his earlier *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard UP, 1985). In his Preface he tells us that he "came of age during the debates" on the passage of the Civil Rights Act of 1964. And at the time thought that the act was long overdue, that the patterns and practices of discrimination that existed in the South and around the United States were apt targets of legislative correction.

Epstein's present position is that "the entire apparatus of the anti-discrimination laws in Title VII should be repealed insofar as it applies to private employers - at least those who operate in ordinary competitive markets without legal protection against the entry of new rivals. My view is quite categorical: it is meant to apply to criteria of race, sex, religion, national origin, age and handicap" (9). The qualification "private" and the limitation to "those who operate in ordinary competitive markets" are, of course, absolutely indispensable. For "The temperaments, inclinations, and biases of those with monopoly power can exert an enormous influence over every person on the opposite side of the market. In this context some anti-discrimination norm becomes an integral part of the basic legal system, where its role is necessary, powerful - and problematic" (80).

Judged by the stated intentions of those who guided its passage through the Congress the introduction of the 1964 Act was a spectacular and immediate success. The barriers excluding blacks from supposedly public accommodations tumbled overnight, while all forms of open and systematic anti-black discrimination in employment seem to have been effectively abolished soon after.

But this success did not satisfy either the unofficial civil rights movement or the bureaucracy set up to supervise enforcement. The movement extended its ambitions beyond the elimination of merely negative discrimination against blacks,<sup>1</sup> while the activities of the Equal Employment Opportunities Commission (EEOC) have gone far to confirm the universal validity of Hastie's Law:<sup>2</sup> "For all societies the amount of perceived

racism varies directly with the number of those in that society generously paid and prominently positioned to discover racism." Hastie's Law thus constitutes a particular application of the wider sociological truth that, whenever a substantial bureaucracy owes its existence to a perceived problem, that problem rarely if ever goes away. Never ask the barber whether you need a haircut.

The other grounds of discrimination forbidden by the 1964 Act do not seem to have received much attention in any of the debates preceding its passage. But, once the general principle of legislating against particular grounds of discrimination in the making of hiring decisions had been accepted, age was quickly added to the list: 1967 saw the passage of the Age Discrimination in Employment Act (ADEA). It was, however, only in 1990 that this was followed by the Americans with Disabilities Act (ADA).

Because there were in 1964 such overwhelmingly strong reasons for applying that general principle to the particular case of institutionalized discrimination against blacks - even if only for a limited period and to that case alone - the general principle itself came to be accepted without the extensive and fundamental debate which its importance demands. For, as Epstein says, "So great were the abuses of political power before 1964 that, knowing what I know, if given all or nothing choice, I should still have voted in favor in order to allow federal power to break the stranglehold of local government on race relations. History often leaves us with only second-best devices to combat evils that are in principle better controlled by other means" (10).<sup>2</sup>

For similar reasons very little seems at the time to have been made of the difficulties and costs involved in extending the list of forbidden grounds beyond that of racial set membership. (By Cantor's Axiom for Sets the sole essential feature of a set is that its members have at least one common characteristic, any kind of characteristic.<sup>3</sup>) As Epstein says "The mischief worked by an anti-discrimination statute is not constant across all grounds for discrimination explicit age classifications are common in all segments of the unregulated labor market. My educated guess is that the statutes that render these classifications illegal are apt to be far more intrusive than those statutes that prohibit racial classifications, which most firms would find largely irrelevant" (160 and 159).

For instance: the fact that women on average live a year or two longer than men provides a compelling actuarial reason why equal pensions for women must cost more than equal pensions for men. So, if employers are to provide the same pension benefits for their male and their female employees, then they will have either to bear the extra costs themselves or else arrange that the men somehow subsidize the women. Again, Epstein exploits his own experience of universities to show the harm which will be done when "the ADEA removes the mandatory retirement clause from tenure contracts. Let us hope that Congress in its ignorance does not engage in the gratuitous crippling of American universities, one of our last few areas of competitive advantage in world markets" (473).

Although Epstein makes no explicit examination of possible alternative devices, it is obvious that for him the ideally proper means of controlling racially discriminatory employment practices is the operation of freely competitive markets. The crux is that firms which persist in preferring to hire workers for reasons which really are irrelevant to the

## Notes

1. "Every art and every investigation, and likewise every pursuit or undertaking, seem to aim at some good . . . It is true that a certain variety is to be observed among the ends at which the arts and sciences aim . . . But as there are numerous pursuits and arts and sciences, it following that their ends are correspondingly numerous: for instance, the end of the science of medicine is health, that of the art of ship-building a vessel, that of strategy victory, that of domestic economy wealth" (Aristotle, *Nicomachean Ethics*, H. Rackham, trans., [Cambridge, Mass: Harvard University Press, 1946,] Book One, Chapter One).

". . . if we acknowledge the function of an individual and of a good individual of the same class (for instance, a harper and a good harper, and so generally will all classes) to be generically the same, the qualification of the latter's superiority in excellence being added to the function in his case (I mean that if the function of a harper is to play the harp, that of a good harper is to play the harp well) . . ." (*Nicomachean Ethics*, Book One, Chapter VII).

2. It is important to be clear about Aristotle's position here. Aristotle was a teleologist. If we define a 'telos' in terms of the function of an object (the telos of a knife is to cut, and the better it cuts the better it is a knife), then we may use the term without difficulty. However, if we think of a telos in a more traditional way, such that the goal of cutting is a property of the knife, that the Final Cause of its cutting "pulls" the knife toward the cutting, then the metaphysical baggage of using the term 'telos' is too much. Aristotle was a teleologist in both of the above senses. I would only recommend as legitimate the first of the two.

3. However, it is not as though science does not make these determinations. Of course science does. To the point, the scientist need not make a priori decisions regarding relevancy and commonality. These decisions are based on less direct, less immediate empirical consideration, but empirical consideration nonetheless.

4. A colleague who proofread this paper pointed out that the majority of my examples have to do with knives. I assure you this is merely accidental!

5. This follows from my original avoidance of any metaphysical baggage not absolutely necessary to the discussion. I do not mean to be writing a paper on the ontological status of kinds; I mean to be writing only on how we determine kinds.

6. My goal in this paper is not to prove or disprove the reality of hard relativism or of absolute truth. My point is only to show that functional accounts of goodness, while necessarily involving soft relativism, or indexing, need not be hard-relativist.

7. I am indebted to those with whom I have had conversations about Aristotle's program and about non-artificiality: Kenton Harris, Ellen Klein, David Courtwright and John Maraldo.

performance of the work in question necessarily incur costs which their less prejudiced competitors avoid. So wherever, absent Jim Crow laws or other forcible racist interventions, firms are operating "in ordinary competitive markets without legal protection against the entry of new rivals" they will have a strong self-interest in eschewing occupationally irrelevant grounds of discrimination not only in their hiring and firing but also in their buying and selling and in all other business dealings.<sup>4</sup> In that case it is obvious that legislation becomes superfluous. But if and insofar as any of the grounds actually forbidden are not entirely irrelevant, and if for this or any other reason the enforcement of anti-discrimination laws imposes unrequited costs upon employers, then these laws will be arbitrarily oppressive rather than idly redundant.

Legislation which thus does good to some by imposing unrequited costs upon others - legislation of a kind of which rent-control laws or environmental and planning regulations probably constitute the most flagrant and widespread examples - has a very understandable appeal to members of elected legislatures. For it enables them to be seen to be doing good to (some of) their constituents but doing it without incurring unpopularity by taxing in order to compensate the unfortunates thus forced to bear the costs of this Congressional beneficence. The constitutionality of such uncompensated impositions was, of course, the topic of *Takings* - which Senator Biden famously brandished at the Judiciary Committee hearings, demanding that Clarence Thomas should repudiate its unacceptably strict constructionist teachings.

But in attacking what is now called civil rights legislation Epstein's appeal is to the fundamental principles of the Founding Fathers rather than to the actual words of the Constitution. His nearest approach to such strictly constitutional issues is in his assertion that "There is no question that the 1964 Civil Rights Act falls within the scope of the commerce power as it is currently understood, and none that it falls outside that power as it was originally written and understood." But "There is no turning back today. The Constitution is what the Supreme Court says it is, at least in cases of political moment" (140).

The key expression "civil rights" was originally used to refer to the "civil capacity to contract, to own property, to make wills, to give evidence, and to sue and be sued. These are rights all individuals can enjoy simultaneously against the state and against one another. Their accurate definition and faithful protection is indispensable for any regime of limited government and individual freedom, and for all persons regardless of race, creed, religion, sex or national origin" (499). But the development of what is now called civil rights legislation has progressively decreased the freedoms of all Americans to associate or to refuse to associate with whomsoever they may wish, and to make contracts upon whatever terms are mutually agreeable. In the name of diversity the drive is towards an enforced uniformity of personnel distribution across all firms and indeed all other associations and institutions.

This development was certainly not mandated by the 1964 Act. On the contrary: although much of what has since actually happened was foreseen by opponents, those steering the bill through the Senate insisted categorically and repeatedly, and in all sincerity and truth, that Title VII would prohibit rather than require, quotas in the name

of "racial balance" and various other outcomes feared by opponents. So critics of America's activist judges may find wry satisfaction in reacting, for instance, to the statement: "Title VII would not require, *and no court could read Title VII as requiring*, an employer to lower or change occupational qualifications because proportionately fewer Negroes than whites are able to meet them" (Quoted, 188; emphasis added).

Thanks however, to "The imperatives of bureaucratic expansion and majoritarian politics over the life of the Civil Rights Act the simple color-blind norm has yielded a massive, complex set of laws that has basically done two things: (1) made it permissible to discriminate at will against whites and men (especially white men), and (2) made it possible to charge race- or sex-neutral firms with discrimination on the strength of statistical techniques whose application is flawed at every crucial juncture" (78-9).

In terms of the crucial legal conceptions the development has been from disparate treatment, which was what and all that was explicitly forbidden by the 1964 Act, to disparate impact, the very different offence which has since become effectively outlawed. Disparate treatment cases, "which involve efforts to show that the defendant's conduct was actuated by some illegitimate motive, often raise very delicate questions of procedure and proof, but these difficulties are of a sort with which the legal system can ordinarily cope, at least at a price" (160). Disparate impact cases are an altogether different matter. These impose "intolerable and unnecessary demands on both the legal system and the affected employment markets." For they "allow courts to infer unlawful discrimination, wholly without evidence of improper motive, and solely from the (perceived) disparate consequences of certain hiring tests and procedures"(160).

Such was the success of that original 1964 Act in effectively eliminating anti-black discrimination that it very soon became impossible to prepare prosecution cases which would stand up in court. But, in obedience to Hastie's Law, the EEOC refused to entertain the for them uncomfortable idea that the difficulty of proving that discrimination was still widespread might arise from the fact that, insofar as this could reasonably be expected in an always necessarily imperfect world, it had in fact ceased. Instead, with the assistance both of an ever activist judiciary and the pressures of the equally expansionist civil rights movement, the EEOC met its difficulty by introducing the radically different conception of disparate impact.

Since this was introduced as an element of somewhat complicated case law rather than by (indeed flatly against) a clear-cut Act of the Congress it may be helpful to approach by way of a consideration of the offence of indirect discrimination introduced by the UK Race Relations Act 1976. Direct discrimination is there defined as consisting in "treating a person, on racial grounds, less favourably than others would be treated in the same or similar circumstances." Indirect racial discrimination is a more complex concept, consisting in "applying a requirement or condition which, although applied equally to all racial groups, is such that a considerably smaller proportion of a particular racial group can comply with it and it cannot be shown to be justifiable on other than racial grounds."

Obviously much must depend upon what is acceptable as adequate justification "on other than racial grounds."<sup>5</sup> But, quite apart from this, there are two most fundamental

objections to the statutory introduction of the offence of indirect discrimination. The first of these was put by a future Lord Chancellor in the original House of Lords debate. "It is a fundamental principle of English law, and one which is vital to the preservation of individual liberty, that a crime should consist of two elements: first there must be a prohibited act then there should be a state of mind quite deliberately the Government have created in this new Clause an indictable offence in which the mental element is removed altogether."<sup>6</sup>

The second of these two most fundamental objections is that, in order to secure convictions for the offence of indirect discrimination the prosecution is not required to prove the guilt of defendants "beyond reasonable doubt." Instead it is sufficient first to establish that the members of some racially defined set are less than proportionately represented in some enviable<sup>7</sup> sort of occupation, association or achievement. This done it is the defendants who now, if they are to escape conviction, have to prove their innocence; again, presumably, "beyond reasonable doubt."

This presumption of racially discriminatory guilt is obnoxious on two counts. In the first place, and generally, it is obnoxious for the same reason as any other presumption of criminal guilt must be. It is obnoxious, that is to say, in its abandonment of what has been one of the fundamental principles of British and American criminal law. As Epstein, who describes himself as originally "a common law lawyer" (xi), reasonably asks: "Why should the (assumed) importance of the anti-discrimination laws require us to slight the errors of over-enforcement? The consensus that murder is a grave wrong has never been regarded as a reason to make life easy for prosecutors: they do not get convictions on mere suspicion alone, or even on proof by a preponderance of the evidence. Quite the opposite" (225).

In the second place the same presumption is obnoxious, more particularly, in the inadequacy of the evidence actually required for it to be received as established. For it to become highly probable that defendants actually are guilty of hostile racist discrimination against members of a certain racial set, it has got to be the case that, absent such discrimination, it would be reasonable to expect members of that particular set to be more or less proportionately represented among those selected for appointments, promotions, awards or whatever else is the subject of litigation.

We should, however, in order to justify that expectation need to make an enormous assumption for which, as Thomas Sowell has so often insisted, evidence is rarely requested and never supplied. The assumption is that, as between the different racially or ethnically defined sets in question, and in respect of whatever are the relevant, whether hereditary or acquirable characteristics, there are *even on average* no significant differences across those entire sets.<sup>8</sup>

That emphatic qualification "on average" is crucially important, for two very different reasons. In the first place to say that something happens a certain way *on the average* is not to say that it happens that way *every time*. But discussion about affirmative action and litigation about disparate impact usually proceeds on the assumption that there is no such thing as statistical variance. "If Hispanics are 8% of the carpenters in a given town it does not follow that *every* employer of carpenters in that town would have 8% Hispanics if

there were no discrimination. Even if carpenters were assigned to employers by drawing lots there would be *variance* from one employer to another. To convict those employers with fewer Hispanics of discrimination in hiring would be to make statistical variance a federal offence."<sup>9</sup>

The second reason why the qualification "*on average*" is so vitally important is that it blocks certain inferences which might otherwise be legitimate. For if, and surely only if, it actually were the case that every member of some particular racial set was known to lack some characteristic essential to some kind of occupation or form of achievement, then membership of that particular racial set would for that reason become a properly relevant, indeed a properly decisive, ground of disqualification. But if, as surely is in fact the case, there is no or less than no good experiential reason for believing that there is any racial set all of the members of which both lack and lack the possibility of acquiring the characteristics essential to any kind of occupation or form of achievement, then no racial ground for disqualification can ever be legitimate.

The enormous and, as we have been urging, quite unwarranted assumption that, as between any different racially or ethnically defined sets, there are no significant differences *even on average* in respect of hereditary or acquirable employment- or achievement-relevant characteristics is not needed to justify Dr. Bunche's demand that the often very different claims of different individuals should be considered without regard to the racial set membership of those individuals.<sup>10</sup>

The question of the truth or falsity of that assumption becomes relevant only if and insofar as the very different ideal of racial equality which it is sought to realise is: not that of a color-blind society in which all individuals are judged on their own individual merits and irrespective of their racial and/or ethnic set membership; but instead that of an equality between racially and/or ethnically defined collectives, the members of which see themselves and are to be seen not as individuals achieving or failing to achieve on their own individual merits or demerits, but rather as the appointed representatives of the particular racially self-conscious and very far from color-blind sets of which they happen themselves to be members.

Because Epstein is concerned with *Forbidden Grounds* of employment discrimination in general, rather than with racist discrimination in particular, his emphasis throughout is upon how such laws and regulations restrict civil rights to freedom of contract, and in consequence burden the economy. It is both instructive and important to bring out also that and how measures originally intended to outlaw racist discrimination tend, it would seem inexorably and in the not very long run, to extend and institutionalize the very evil which they were introduced to outlaw.

It would seem that like the word "fascist" the word "racist" has come to be used, especially by those most eager to employ it, as a vehemently emotive term of abuse, but often one with precious little if any determinate descriptive meaning. Yet it only becomes properly a term of abuse insofar as it is construed to refer to a sort of behavior; namely, the advantaging or disadvantaging of individuals for no other and better reason than that they belong to this particular racial set and not that. Such behavior is (almost) always

wrong since it is (almost) always unjustly irrelevant to the making of the employment and other discriminations which are at issue.<sup>11</sup>

To all of us for whom the repudiation of racism, in this understanding,<sup>12</sup> is a matter of principle, rather than a question of whose ox it is which is being gored, it is immediately obvious that the criminalization of "disparate impact" and of "indirect discrimination" tends very strongly to promote paradigm cases of racism in the form of "positive discrimination," "race norming," and "racial quotas." For how else are employers and other appointers and awarders to secure themselves against conviction upon these counts?

The whole experience first of the US and then of the UK makes it absolutely clear that the way to reduce racist discrimination to insignificance is not the way of criminalization and quangos (quasi-autonomous non-government organizations such as the EEOC and the Commission for Racial Equality). On the contrary: that is the Royal Road not to a color-blind but to a "racially sensitive," indeed a racially obsessed, society.



## Notes

1. Calls for "preferential hiring" as the means to achieve proportionate representation can be found in *Testament of Hope: The Essential Writings of Martin Luther King, Jr.* (San Francisco: Harper and Row, 1986). Compare Llewelyn H. Rockwell "The Economics of Martin Luther King, Jr.," in *The Free Market*, February 1991.
2. The original formulation of this sociological law was provoked by the activities of the Commission for Racial Equality (CRE), established under the UK Race Relations Act 1976.
3. The reason for introducing the word "set" in the present context is, as will later become clear, that such alternatives as "class" or "community" may suggest that the people concerned both do and ought to see themselves as members of an exclusive collectivity; something seriously inconsistent with the ideal of an integrated, color-blind society.
4. That is why the Editors of the notorious National Socialist anti-semitic and anti-capitalist weekly *Der Stürmer* used in almost every issue to publish cartoons attacking the racial insensitivity of business persons for whom payments from any source were equally welcome.
5. A recent Commission for Racial Equality circular distributed to all tax-financed schools in the UK warned all concerned of the dangers of indirect discrimination in education. Since they offered no example of what would be acceptable in a requirement or condition which happened to have this forbidden effect, and since they specifically stated that knowledge of the language of instruction is not an acceptable ground of discrimination, they have to be interpreted as demanding "race norming" to ensure proportionate representation. Compare Antony Flew *A Future for Anti-Racism* (London: Social Affairs Unit, 1992).
6. House of Lords *Hansard*, 14 October 1976, Column 1045.
7. We have to insert the qualification "enviable" since the Act reads only "less favorably" not "either more or less favorably." Certainly the agencies of enforcement have always been and remain at least as concerned about disproportionate over-representation in unenviable as about disproportionate under-representation in enviable categories. Thus the CRE document mentioned in Note 7, above, expresses concern that black pupils in Birmingham "were four times more likely to be suspended than white pupils." (As usual no comparison is made with the always significantly different track record of our Asians.)
8. For abundant evidence showing that the assumption is not merely evidentially unwarranted but demonstrably false, compare, for instance, Thomas Sowell *Ethnic America: A History* (New York: Basic Books, 1981) and *Preferential Policies: An International Perspective* (New York: William Morrow, 1990).
9. Thomas Sowell *Civil Rights: Rhetoric or Reality?* (New York: William Morrow, 1984), 54: emphasis original.

10. Those of us, therefore, who wholeheartedly concur with that demand need feel no compulsion to accept the evidentially unsupported 1965 ruling of the US Department of Labor: "Intelligence potential is distributed among Negro infants in the same proportion and pattern as among Icelanders or Chinese, or any other group. There is absolutely no question of any genetic differential."

11. The parenthetical qualifications are needed in order to admit, for instance, the choice of a black actor to play the part of Othello and a white actress that of Desdemona.

12. It is in a very different understanding, in which the word "racism" is apparently taken to refer to a kind of would-be factual but scandalously heretical belief rather than of any kind of actual misbehaviour, that those daring to deploy evidence against the doctrine proclaimed by the US Department of Labor in 1965 (see Note 10, above), have been in recent years denounced as racist and fascist advocates of genocide; and victimized as such. Compare the accounts of such persecutions in Roger Pearson *Race, Intelligence and Bias in Academe* (Washington: Scott-Townsend, 1991). Compare also the same author's edition of *Shockley on Eugenics and Race* (Washington: Scott-Townsend, 1992). For more on the key and customarily unmade distinctions in this area, see the pamphlet listed in Note 5, above.