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Epstein's Premises

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I. EPSTEIN'S PREMISES

Richard Epstein's book *Forbidden Grounds* covers the waterfront of antidiscrimination law. As with many books of comprehensive scope, it works better with respect to some topics than others. For example, Epstein's critiques of antidiscrimination law as it applies to disability and age seem far more plausible than his critique of Title VII as it applies to race. His critique of disparate impact analysis is considerably more persuasive than his critique of disparate treatment doctrine. I say this at the outset because from this point on I will ignore these less provocative arguments, which (pagewise, at least) occupy much of Epstein's attention. I will restrict my discussion to the theoretically central argument of the book, which is that American society would be better off today if Congress were to repeal Title VII, even as it applies to intentional discrimination on the basis of race.

The premises of Epstein's argument stem principally from libertarianism. His analytical methodology comes principally from microeconomics. My criticisms of Epstein's argument are the product of (1) disagreement with some of the premises (including certain empirical suppositions); and (2) disagreement with some of Epstein's choices about where to stop his analyses.

Epstein's main premise is that governmental intervention into otherwise accessible markets is justifiable only in cases of force or fraud. Epstein draws these two exceptions from Hobbes' *Leviathan*[1]; perhaps that is why he thinks them uncontroversial. None of the great social contractarians — by Epstein's reckoning, Hobbes,

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1. THOMAS HOBBES, LEVIATHAN 86-90 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

Locke, Hume, Blackstone — ever thought that the "private refusal to deal . . . was any threat to the social order."[2] Certainly, Epstein asserts, race or gender discrimination is not as serious a threat to accessible markets as force or fraud. "Potential victims can adopt strategies of evasion to escape the sting of discrimination, no matter how irrational and prejudiced," he states. "It is far harder to outrun a bullet."[3]

Force and fraud is an odd place for Epstein's acceptance of market intervention to come to rest. It seems both overinclusive and underinclusive. Surely Epstein would not condemn a governmental prohibition on harboring known felons for compensation, even though that consensual activity does not necessarily involve either force or fraud. Nor, I take it, would he stop government from regulating consensual agreements to drag race on public streets. Many consensual activities creating serious externalities would fall in this category. Thus, Epstein's exceptions for force or fraud are seriously underinclusive. At the same time, they might be overinclusive. Why ought government intervene to protect against fraud? Ultimately, fraud is merely a problem of imperfect information. It is distinguishable only in degree from all types of situations that (presumably) Epstein would allow to go free of regulation, such as usurious loan practices.

My point is simply that Epstein's force-or-fraud premise draws an arbitrary line. There is nothing qualitatively distinctive about force and fraud. They are but two examples of behavior that creates externalities. Epstein would respond to this charge of arbitrariness as follows:

> The standard prohibition against force and fraud does not depend on a simple assertion that killing or murder is just illegitimate. Rather, it rests on the powerful, albeit empirical, judgment that all people value their right to be free from coercion far more than they value their right to coerce others in a Hobbesian war of all against all. The prohibition ex ante is therefore thought to work to a (well-nigh) universal advantage. It is hard to think of any person who derives systematic advantage from the law of the jungle. But there are no similar universal gains from a rule that says people who have distinct and distasteful preferences cannot go their own way by working and associating only with people of similar views.[4]

The ideas expressed in this passage, though, are problematical. First, it is unclear whether Epstein's underlying philosophy is social contractarian or utilitarian. Does Epstein find it significant that people *perceive* governmental intervention against force and fraud to be to their advantage? Or is it significant that people are *in fact* better

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2. RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 16 (1992) [hereinafter FORBIDDEN GROUNDS].
3. *Id.* at 79.
4. *Id.* at 75.

off with such intervention? The difference might be considerable. There are probably large numbers of have-nots in American society who *think* they would be better off if the police suddenly disappeared. This group would include those who presently engage in violent crime; a large segment of the most desperate poor; and the most aggressive risk-takers in society.[5] Not all these people would think that anarchy offers them a higher standard of living than at present. For most of them, the frame of reference is not their present standard of living, but the standard of living enjoyed by others in society. Thus, although they might not perceive themselves as being "better off" relative to their present standard of living, they would perceive themselves as "better off" relative to how others would fare in an anarchy.

I have no way of knowing how large this segment of society is, but let us assume for the sake of argument that it is about six or seven percent. What percentage of society would perceive itself better off if antidiscrimination laws in employment were repealed? I think it unlikely that this percentage would exceed fifteen or twenty. Even some racists will view the abolition of such laws with suspicion, fearing that it would open the floodgates to affirmative action quotas. Where does all of this leave us? It leaves us with an arbitrary line between six or seven percent on the one hand and fifteen or twenty percent on the other. By what principle do we determine that ninety-three percent in favor of government intervention is sufficient, but eighty percent is insufficient?

The arbitrariness of the force-and-fraud exceptions is a critical point for Epstein's principal argument. If one is not convinced that force and fraud are categorically distinguishable from other forms of externality-creating behavior, then why should not intentional race discrimination in employment be considered another exception? At this point, the only move left for Epstein would be to renounce even force and fraud as exceptions — to retreat to an absolute libertarian position. If nothing justifies governmental intervention under any circumstances, then Title VII is certainly wrong. Indeed, for the absolute libertarian, Title VII must be among the least of the world's problems. But few people capable of rational discourse hew to an absolute libertarian line, and Richard Epstein does not seem to be one of them.

Ultimately, we choose to have laws against murder and theft and

5. I suppose a few members of the National Rifle Association might also fall in this group.

fraud because we believe the benefits from enforcing such laws outweigh the costs. The costs range from funding police forces, through the expenditure of fiscal and personnel resources on the criminal justice system, all the way to incursions on our civil liberties by police officers run amok. The principal benefit is that most of us are not constantly paralyzed by the prospect of physical harm and can function on a reasonably high level. We choose to have laws against race discrimination in employment for somewhat similar reasons. The costs include (out of fear of litigation) the hiring and promotion of some slightly less qualified members of protected groups; opportunity costs from foregoing the hiring of better qualified members of nonprotected groups; and the costs of defending much spurious litigation. The principal benefit is that most members of protected groups have sufficient incentive to develop themselves through formal education or vocational training. They have some reason to believe that race will not pose an insuperable obstacle to being hired. This is a huge societal benefit because it greatly enlarges the pool of educated and skilled workers. Another large benefit of antidiscrimination law in employment is destruction of the more outrageous racial stereotypes. It is true, as Epstein asserts, that many firms will voluntarily maintain color blindness in hiring if they see no disadvantage in it. But inaccurate stereotyping can cause firms to perceive disadvantage in hiring where it does not really exist. These firms will continue not to hire members of the stereotyped group, which will perpetuate the inaccurate stereotyping. Some intervention is needed to break the cycle.

The arbitrariness of Epstein's force-and-fraud doctrine is enough to undermine his argument, but there are other problems, too. Some of his empirical suppositions are highly debatable. For example, he assumes that law never alters people's preferences.[6] This is true in a trivial sense; the mere fact of a law's enactment works no spontaneous change in anyone's world view. Positive law, however, can and does bring about profound changes in social and cultural conditions that, over time, alter preferences. Clearly the racial preferences of many white people in, say, Atlanta are far different today than they would have been if the antidiscrimination laws had never been passed. This is not because people conform their preferences to the legislative mandate. People have no control over their preferences. Many whites in the South today prefer to associate with both whites and blacks because the mostly desegregated world in which they were raised exposed them to many likable and sociable black people as well as many likable and sociable white people. They came up in

6. FORBIDDEN GROUNDS, *supra* note 1, at 74 ("law does not change what people do or do not desire").

social conditions that made it entirely possible that they would prefer racial diversity in their social lives. Their parents and grandparents spent their formative years in social conditions that made it quite unlikely that they would develop multi-racial social preferences. Much inaccurate stereotyping has gone by the boards simply because actual experience under legally-mandated desegregation has proven the stereotypes wrong. The probable truth is that the preferences of people whose racial views had hardened by the 1960s were not much affected by the civil rights movement. The preferences of people born in the 1970s and 1980s, though, are doubtless different than they would have been if the anti-discrimination laws had never been enacted.

Some of Epstein's empirical suppositions are inconsistent with one another. One of his key assumptions is that only *state-sponsored* discrimination — not private discrimination — is a threat to the individuals discriminated against.[7] According to Epstein, informal social arrangements, such as tacit agreements not to deal with certain racial groups or to exclude them from certain professions, constitute a relatively weak force. "[P]rivate discrimination holds little risk of social or private peril," he states.[8] When individual employers see that hiring from the prohibited groups will make them more competitive in the market, these informal exclusionary agreements will crumble before the majestic power of self-interest. Therefore, beyond the special problems presented by force and fraud, intervention into private markets is justified only when some form of systematic barrier to entry exists, such as monopoly.[9]

But elsewhere, Epstein insists that informal private agreements are a powerful force. While railing against the emerging tort of wrongful termination, he argues that legal enforcement of employer promises is unnecessary. Just because an employer's internal manual represents that workers will be dismissed only for certain types of cause does not mean that courts ought to find breach of such promise actionable. After all, there are extralegal constraints on the employer's ability to dismiss the worker. If an employer acts capriciously in exercising the dismissal power, the morale of remaining workers will decline. The employer must take this cost into account before it acts. "An employer who treats its informal promises

7. *Id.* at 91-94. Here Epstein asserts that the problem with Jim Crow was not racial hatred or animus, but state interference with private ordering.
8. *Id.* at 79.
9. *Id.* at 79-87.

as though they had no social force just because they have no legal force runs the risk of ruining his own business," Epstein asserts.[10] This assertion strikes me as perfectly plausible. But why does Epstein find informal private agreements to be such a strong force here, yet such a weak force when employers form cartels to exclude certain races from certain areas of endeavor? Suppose all the law firms in a town had a tacit agreement not to hire any lawyers of Arabic extraction. The market analysis would predict that this cartel would soon break down, as long as the best Arab lawyers in the applicant pool were superior to the worst non-Arab lawyers currently being hired, and as long as the law firms were generally in competition with one another. Each firm would perceive a competitive advantage in hiring these superior lawyers, who happen to be Arab. The problem with this analysis is that it stops too soon. What happened to the "reputational constraints" that Epstein was so quick to point out in the wrongful termination context? If one renegade law firm breaks ranks and hires an Arab lawyer, it might be subject to all kinds of informal sanctions by the other firms. The other firms could agree never to grant any courtesy extensions of time on pleadings to the renegade firm. They could agree never to refer clients to the renegade firm, even when they could not take the case themselves due to conflicts in representation. They could agree never to recommend partners in the renegade firm for any influential positions in the bar or on law reform commissions. They could agree to blackball any of the renegade firm's partners for judicial appointments. Every member of the renegade firm would be treated both socially and professionally as a pariah. Thus, in order for the renegade firm to derive net benefit from breaking the cartel, the Arab lawyer or lawyers hired would have to be *considerably* better than the non-Arab lawyers who would otherwise be hired. In this hypothetical, private discrimination has most certainly harmed the individuals discriminated against.

One of the most interesting things about this book is seeing Epstein's philosophical values play out. As I read the introductory section of the chapter on sex discrimination,[11] it struck me that two philosophical values lie at the center of Epstein's world view: individual autonomy and some sort of sociobiological determinism. Epstein is deeply suspicious of any mode of analysis that views people in the aggregate. For Epstein, the world is profoundly atomistic, and any link between individuals not premised on self-interest is inherently weak. Not only is the world atomistic as a descriptive matter, but it *ought* to be atomistic; we should almost never force associations onto

10. *Id.* at 155.
11. *Id.* at 269-78.

one another. I suspect this is the true source of Epstein's disgust with Title VII. It is governmental interference with our associational freedom. It is Big Brother telling us with whom we must spend time. It is philosophically indistinguishable from Big Brother telling us with whom we may *not* associate. It is totalitarianism.

I do not know how to respond to this except to say that I do not share that view, and I know virtually no one who does. It is true that one of the traits of totalitarianism is the substitution of central planning for voluntaristic action, in the realm of interpersonal association, as elsewhere. It is also true that Title VII represents centralized restrictions on associational freedom. And yet the law that requires me to drive on the right side of the road represents a centralized restriction on my freedom to associate with those on the left side of the road in the exact manner I may wish. The law that empowers health authorities to quarantine those with extremely communicable diseases represents a centralized restriction on associational freedom. If this is "totalitarianism," then the concept has been trivialized beyond the point of usefulness.

I cannot prove it, but I suspect Epstein's antitotalitarian revulsion for Title VII has unduly colored his cost-benefit analyses. I think we ought to debate the net benefits or losses of antidiscrimination law without worrying about whether it represents creeping totalitarianism. Perhaps there is a logical limit on how much individuals can be asked to sacrifice for the good of society, including their associational freedoms. But the sacrifices in associational freedom called for by Title VII fall far short of any such limit.

Epstein also appears to subscribe to a kind of sociobiological determinism. He thinks it is both undesirable and futile to attempt to alter "natural" preferences. In his discussion of gender discrimination, he states:

> The hard problem is to disentangle the relative effects of social and biological influences. But often it seems best to make peace with natural differences instead of railing against them. No program of weightlifting or socialization will ever make women equal in strength with men, and there is no reason to try. Nor is there any possibility that a set of adroit exercises will allow men to dance on pointe, and no reason why ballet should forfeit its charm by forbidding women to do so as well. And there is no reason to ban boxing or football for women, because women on the whole do not choose to participate in those sports.[12]

12. *Id.* at 275.

I am curious to know how many of these ostensibly descriptive statements veil controversial normative positions. Granted that no program of weightlifting will ever make women equal in strength with men, but suppose pharmaceutical science created a steroid with no side effects that made women as strong as men. Or say geneticists could alter genes in a way to make women as strong as men. Would Epstein concede that gender discrimination under such circumstances would be more comparable to race discrimination than at present? Or would he argue that the law ought not encourage the use of such biotechnology on the ground that gender relations would lose much of their "charm" if men were no longer stronger than women?

I do not know how Epstein would answer these questions. I do suspect that he has rather strong beliefs about natural gender roles, and that these beliefs skew his views about the comparability of race and gender discrimination. I suspect he has strong beliefs about the absolute atomism and incorrigible self-interest of all human beings, and that these beliefs skew his empirical suppositions about what would happen under a regime that contained no legal sanction against race discrimination in employment. I suspect he has an unusually low tolerance for any whiff of centralized planning, and that this revulsion affects both his empirical hunches and his decisions about where to stop utilitarian and efficiency analyses. This, ultimately, is the problem with *Forbidden Grounds*. It starts from premises not shared by most of his audience and pushes those premises up to, and sometimes beyond, their limits. If Epstein had started from less extreme premises, or if he had pushed those premises a bit less aggressively, the core argument of the book might have been more persuasive. But, then, it would not have been Epstein.