

# The Paradox of Civil Rights

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## I. *Modern Civil Rights: Moral Certainty and Economic Doubt*

There is a curious duality in the status of civil rights in the United States: massive political support for antidiscrimination legislation but little economic evidence to show how or why it does any good.

Initially, there is well nigh unanimous political support for the proposition that the antidiscrimination law as it applies to employment relations and elsewhere is an essential part of the legal firmament. The debates within legal and political circles only go to the question of implementation. The proposed Civil Rights Act of 1990,<sup>1</sup> for example, takes it as a given that civil rights enforcement will and should remain at the top of the American political agenda. It then seeks to tighten the noose around those employers who wish to resist its commands by amending the Civil Rights Act of 1964 in order "to restore and strengthen" the civil rights laws.<sup>2</sup>

Both halves of this general injunction require special attention: in every area in which the bill seeks to "restore" the status quo ante by undoing the effects of several recent and more restrictive Supreme Court decisions,<sup>3</sup> it also seeks to extend the reach of the Civil Rights Act beyond the prior Supreme Court case law. For example, section 4 of the proposed bill appears to extend the rules of proof in disparate impact cases, recently cut back in *Wards Cove Packing Co. v. Atonio*,<sup>4</sup> far beyond their original scope in *Griggs v. Duke Power Co.*<sup>5</sup> The bill not only restores the original business necessity test, but it

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1. H.R. 4000 and S. 2104, 101st Cong., 2d Sess. (1990). See 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990). This article was finished in mid-June 1990, and reflects only developments up to that date.

2. *Id.* Preamble.

3. The list is by now familiar. *Lorance v. AT&T Technologies, Inc.*, 109 S.Ct. 2261 (1989)(statute of limitations); *Martin v. Wilks*, 109 S.Ct. 2180 (1989); *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989)(scope of 1866 Civil Rights Act); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989)(disparate impact).

4. 109 S.Ct. 2115 (1989).

5. 401 U.S. 424 (1971).

also envisions applying disparate impact theories to a "group of employment practices," broadly defined under the bill.<sup>6</sup> In addition, the bill moves far beyond existing law by allowing for the first time jury trials in all employment discrimination cases, and by making it permissible to recover both actual and punitive damages as at common law, in lieu of the present, more restrictive, back pay awards.<sup>7</sup> This is seemingly a one way political ratchet, for in the current environment few politicians are willing to speak out forthrightly against any modern civil rights proposal, or to raise any principled objections to the inexorable expansion of this body of law.

In dealing with the economic issues, however, caution and doubt displaces, and should displace, political certainty. In their review article for this issue,<sup>8</sup> Professor James Heckman, who has contributed so much to the literature on Title VII, and Mr. J. Hoult Verkerke, have provided a balanced assessment of the economic effects of the Civil Rights Act which does little to bolster our faith in the stricter enforcement of the basic antidiscrimination norm in private employment. They note that most of the major advances in the employment position under the Act were bunched between 1965 and 1975, immediately after the passage of the Civil Rights Act, where they followed on (and accelerated) the improvement in Black economic opportunities that had developed since 1940, long before the onset of the federal effort in this area. By every measure, however, the rate of progress of black workers post-1975 has been far more erratic and uncertain, so that it becomes almost impossible to tease out the relevant effect of Title VII from other critical influences—educational levels, minimum wage laws, safety regulations, affirmative action, technological shifts, population shifts—that have helped to shape employment relations across diverse geographical territories and industry groupings.

Beneath all this confusion lie at least two disconcerting signs. First, the figure on employment progress takes into account only those black and white individuals who are fortunate enough to make it into the labor force. There are many who fall by the wayside, and by every aggregate measure the black unemployment situation is

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6. "(n) The term 'group of employment practices' means a combination of employment practices or an overall employment process."

7. See Section 8, amending section 706(g) of the Civil Rights Act of 1964 Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1982)).

8. Heckman & Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (hereinafter *Employment Discrimination Law*).

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worse today than it had been prior to the passage of the Civil Rights Act of 1964. Thus, the black youth unemployment levels in 1955 were far lower than they were in 1965.<sup>9</sup> But the passage of the Civil Rights Act did not reverse the trend, for the unemployment rates increased rapidly again after 1965. Similarly the ratio of black/white unemployment did not remain constant over the period between 1955 and 1975.<sup>10</sup> In 1955 the unemployment rate for black male teenagers (16-17) was nearly identical to the unemployment rate for white teenagers of the same age. By 1975 that ratio had risen to nearly 2:1. And black males aged 18-19 and 20-24 had rising unemployment rates relative to Whites after 1975; the gap increased post-1975 when civil rights enforcement reached its mature form. Doubtless the black wage rate in the earlier years was lower than that for Whites, for otherwise the employment rates would not have been equal. It would be a mistake to attribute all, and perhaps even most, of the increasing gap to civil rights enforcement when minimum wage increases or changes in the business cycle probably explain large portions of the shift. But it is also most unlikely that Title VII has done anything to *shrink* the gap in unemployment rates between Blacks and Whites. The evidence taken as a whole shows a greater dispersion of income among black workers, and potential workers, so that any global judgment about the impact on black workers requires one to net out winners and losers in the *same* racial class in order to see whether the class of black employees as a whole has profited from the statute.

Second, the rate of progress for black workers does not appear to correlate well with the expansion of civil rights enforcement. Most of the progress was made in the early years after the passage of the statute, when the efforts of the federal government were devoted to rooting out the last vestiges of Jim Crow in the South. The budgets

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9. See C. MURRAY, *LOSING GROUND* (1984), figure 5.2 at page 73. His figures, rounded off below, show a steady increase in unemployment rates for each age range.

	16-17	18-19	20-24
1955	11	11	10
1965	26	22	9
1975	39	30	19

10. See MURRAY, *supra*, note 9 at 74, figure 3. Some of his findings, rounded off, can be summarized as follows:

	16-17	18-19	20-24
1955	1.2:1 (B/W)	1.35:1	1.80:1
1965	1.8:1	2.0:1	1.80:1
1975	2.3:1	2.4:1	2.00:1

available to the federal government were then relatively small, and the EEOC was limited by the conscious design of the 1964 Act to the general task of reconciliation and mediation, with no specific enforcement powers of its own. The great push in civil rights enforcement came only after 1970. In 1972, the EEOC was given the judicial enforcement powers that had been denied to it in the earlier 1964 Act.<sup>11</sup> Only after 1970 did the Courts begin in earnest to fashion the panoply of theories that led to the modern synthesis on civil rights: disparate impact was adopted with a rush in 1971<sup>12</sup>; the disparate treatment tests were fine-tuned starting in the mid-1970s<sup>13</sup>; voluntary affirmative action for Blacks and other protected groups received official Supreme Court sanction in 1979,<sup>14</sup> and a well nigh universal consensus developed to make civil rights enforcement a number one national priority. At that time, the progress of Black workers slowed-down, and perhaps stopped. Why?

It is a characteristic of Heckman's work that he is more concerned with the interpretation of statistical measures of progress than with outlining a basic descriptive theory of how the Civil Rights Act might achieve its chosen end. Nonetheless it seems fair to ask two questions, the first normative and the second empirical, about the role of the Civil Rights Act of 1964 in the employment context. First, is the proper measure for a civil rights statute the measure of black (or minority) welfare, or is it some standard of social welfare, whereby social welfare I mean only some collective measure of the welfare of *all* individuals, rich and poor, black and white. I will argue in Part II that a social welfare, not a partial and ultimately partisan welfare, standard should guide statutory policy in the area. Second, is there any reason to expect to see in practice any improvement in either black or social welfare through the enforcement of Title VII, either as it was interpreted before the recent Supreme Court decisions, or as it is likely to be applied if the proposed Civil Rights Act of 1990 becomes law in anything like its present form? If there is no reason to think that the civil rights laws are good in their chosen domain, then (politics aside) they should be repealed, and not extended. Yet the proposed civil rights bill moves sharply in the

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11. These powers were conferred upon the EEOC by the Equal Employment Opportunity Act of 1972, section 707.

12. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. *See, e.g., McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

14. *U.S. Steelworkers v. Weber*, 443 U.S. 193 (1979).

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opposite direction, without developing any case—theoretical or empirical—to justify its position. These issues will be analyzed in Part III.

Finally, it seems that theories of civil rights enforcement have expanded to the point where advocates such as Professor Blumrosen can mischievously urge<sup>15</sup> the expansion of civil rights law into contexts (mergers and acquisitions, foreign trade) where they have traditionally been irrelevant. In Part IV I argue that these novel extensions seek only to expand a failed policy into other areas, and should for that reason be rejected.

### II. *Whose Welfare? What Measure?*

In dealing with the various civil rights proposals, it is important to distinguish between black and social welfare. In order to make any *social* calculation of welfare, the usual academic practice is universalistic, that is, to take into account the utilities (or wealth or happiness) that *all persons* within the relevant group, community, state or nation, receive in various states of the world. Within classical economic theory there are two basic ways in which theorists try to determine social welfare by summing of individual welfare.<sup>16</sup> The first is the hypothetical or Kaldor-Hicks compensation program, which asks this question: do the winners from some social program obtain enough in benefits that they could (if transaction costs were zero) wholly compensate the losers from that program and still come out ahead? In essence, if the winners could make the losers indifferent between having the program and not having the program, then the program will be regarded as a good whether or not the compensation is actually paid. The Kaldor-Hicks formulation is willing to tolerate troublesome distributional consequences, with perhaps big winners and big losers, so long as the size of the losses are smaller in aggregate than the gains that are generated, as measured by the hypothetical compensation test.

One useful way to approach this question resorts to the Rawlsian veil of ignorance by asking what rules would one person favor if he did not know the race that he would have in society. Thus if the society were seven-eighths white and one-eighth black, what rules

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15. Blumrosen, *Society in Transition I: A Broader Congressional Agenda for Equal Employment—The Peace Dividend, Leap Frogging and Other Matters*, 8 *YALE L. & POL'Y REV.* 257 (1990) (hereinafter *Society in Transition*).

16. For a good account of the basic tests, see Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509 (1980).

would the hypothetical person choose if his odds of being white or black corresponded with that of the overall population? What rules would that person favor, and why?<sup>17</sup>

The second test for social welfare is more stringent, for it insists not only that compensation necessary to leave all parties at least as well off as before be not only payable, but also paid. This Pareto criterion of social welfare in effect seeks to avoid the difficulty of making interpersonal comparisons of utility by demanding that all persons be left better off with the change than without it. Placed in the language of social contract theory, the test assumes that even though extensive holdout problems might block voluntary transfers in any concrete social setting, the state can overcome those barriers by taking from some and giving to others, so long as it provides compensation, in cash or in kind, to those persons whose property has been taken or whose legal rights have been altered.<sup>18</sup> By this standard there must be some overall social improvement (as under Kaldor-Hicks) *plus* no one can be cut out of the improvement, even though some persons may be left indifferent between the two states of the world.

It seems evident that neither of these generally accepted tests is relied upon with any rigor in evaluating the Civil Rights Acts and their social effects. Heckman and Verkerke, in line with a large literature on the subject, treat as the best measure of black welfare the improvement of black wages relative to white wages over some specific period of time. In general, this is a better measure of black welfare than alternative measures relied upon by Blumrosen in this issue,<sup>19</sup> who seeks to show that for various categories of work (professional, management, sales, unskilled labor, etc.) the percentage of black workers within the more desirable occupational groups, relative to Whites, have shifted upward after the passage of the Civil Rights Act of 1964.<sup>20</sup> The problem with Blumrosen's measure is

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17. The obligatory citation is to J. RAWLS, *A THEORY OF JUSTICE* (1971). Note Rawls himself would *not* put the question in this fashion because his own maximin strategy tolerates very large losses for the most fortunate in society if they would generate even small gains for the least fortunate. Indeed, one criticism of Rawls's position starts with the assertion that behind the veil of ignorance technology does not generate the maximin position, even with the strong assumption of risk aversion. The productivity losses are apt to be very substantial, and the political stability of extensive transfer systems (witness Eastern Europe) are always in doubt. For my views on this question, see Epstein, *Luck*, 6 Soc. PHIL. & POL'Y 17 (1988).

18. For a discussion of this theory, see R. A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND POWER OF EMINENT DOMAIN* (1985).

19. See, *Society in Transition* *supra* note 16; Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 IND. REL. L.J. 313 (1984).

20. *Society in Transition*, *supra* note 16 at 261.

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that it does not capture the substantial variation in individual wages within any of the various crude classifications, and therefore may well misstate (and perhaps to overstate) black economic advancement by assuming that distribution of black wages within any given occupational classification is identical in its key properties (median, mean and variance) as the white population in the same occupational group.<sup>21</sup> Heckman's wage figures disaggregate individual workers from these general categories, and hence give a more accurate overall profile of the general state of affairs.

My major concern, however, is not with the choice of measures for black welfare, but why black (or for that matter white) welfare becomes the social standard by which the success of a given program should be measured at all. In some cases the reduction in wage differences is consistent with a Pareto improvement. Black wages may move from \$70 to \$80 while white wages remain constant, or even increase by the same \$10 amount. But in many instances a reduction in the black/white ratio does not generate any such improvement. Thus, one can always improve the *relative* position of black workers by systematically reducing the position of white workers. That move should count as a socially unacceptable step under *either* the Kaldor-Hicks or the Pareto criterion. Nonetheless, it would show up as a favorable development under the general measure of black wages relative to white wages that Heckman and others employ. If the convergence of black and white rates took place with rising absolute wage levels for both groups, it would still not constitute evidence that the Civil Rights Act of 1964 generated on balance a social benefit—unless it could also be shown that the overall rate of increase was as large as it could have been without incurring the administrative costs and allocative dislocations associated with the statute. If white wages could have gone up even further and black wages had kept their current levels (with relative employment levels constant), then that outcome would be better, again under *either* the Kaldor-Hicks or Pareto tests, than the improvements generated under the current civil rights law. Thus a move from \$70 for Blacks and \$100 for Whites, to \$100 for Blacks and \$120 for Whites is inferior to a move to \$100 for Blacks and \$130 to Whites. The evidence of compression in the wage levels is therefore consistent with too many different stories about social welfare to be an accurate measure of social progress. What is needed is

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21. As noted by Heckman and Verkerke, *Employment Discrimination Law*, *supra* note 8 at 279.

some direct evidence on the question of overall shifts in social welfare attributable to the Civil Rights Acts. The relative wage data (while perhaps the best available in present circumstances) do not support any strong global assessments of social improvement.

This same cautious assessment is appropriate even if one adopted a *mixed* standard that required all increases in white welfare to meet the Pareto standard (so that no black losses took place), while simultaneously allowing all black advances to be justified under Kaldor-Hicks (so that black gains exceed white losses under the compensation criterion). With this skewed criterion, there would still be no evidence of a social improvement if overall levels of welfare were reduced by the Civil Rights Act. It is only by looking solely at the status of "protected" black workers that some gains might be detected. But this standard adopts a dangerous maximin strategy, for by it a move of average black welfare from 10 to 11 would possibly offset any decline in white welfare, be it from 20 to 15, or from 100 to 11.<sup>22</sup> Even here, the maximin requirements may *not* be satisfied if the increase in black average wages is concentrated in the upper end of the black spectrum, which may well be the case given the high and persistent levels of black unemployment. The minimum condition for acceptable social reform is some assurance that any overall gain for Blacks is not accompanied by any losses to Whites (if one thinks Pareto) or is not accompanied by losses to Whites that are larger than the gains achieved by Blacks (if one thinks Kaldor-Hicks). Neither test for social welfare is captured by the using relative wage measures.

Defenders of the current civil rights statute could try to find ways to avoid these conclusions by appealing to the *indirect* effects of the civil rights argument. They could argue that increased reliance on the antidiscrimination laws reduces the costs of running a welfare system or staffing a police department. But if the direct consequences of civil rights enforcement prove harmful, it is doubtful that the indirect ones will offset them, even in part. Thus if the civil rights laws do contribute to black unemployment, and do increase the costs of running businesses, then they will lead to a need for more extensive welfare programs that must be funded out of higher

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22. In principle, there should be some restriction on redistribution under maximin. Thus, if the vulnerable group is reduced below the starting level of the preferred group, then presumably it is entitled under the maximin principle to a second round of distribution. Thus if black welfare goes from 10 to 11 and white from 20 to 9, then the proposed change should be rejected. Clearly, more extreme shifts, e.g. driving white income to 0, should be rejected as well.

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taxes from a smaller rate base. There are no classical externalities (e.g. violence, monopoly) that justify the limitation on freedom of contract in the employment context. The indirect consequences therefore are likely to move in the same direction as the direct ones, and might compound the basic problems if increased unemployment leads, for example, to increased criminal activities.

The only way to escape this somber conclusion, I believe, is to insist that a unit of utility is worth more to a black person than it is to a white person, wholly without regard to income or wealth levels. But that assumption contains an implicit judgment of greater personal dignity of black persons over white. Belief in the principle of diminishing marginal utility of money may lead some to favor a policy of mandatory redistribution of wealth from rich to poor, notwithstanding the many practical pitfalls that make it difficult for any program of redistribution to succeed. But this assumption about the differential subject benefit of additional units of wealth offers no support for a program of redistribution between races, wholly independent of wealth, or within races where it seems likely that the poor are hurt for the benefit of the rich.

All too often, however, loose justifications are advanced for the Civil Rights Act as if these statutes were a form of welfare relief: "The right to vote . . . does not have much meaning on an empty stomach."<sup>23</sup> But an antidiscrimination statute does not begin to touch persons who are left hungry because they are wholly unqualified to do the work, or cut out of the employment market altogether. Stated as a theory of social welfare, it is difficult to defend any measure that gives greater weight to black welfare than to white for reasons of race alone. Both the Kaldor-Hicks and Pareto tests seek to avoid the entire problem of attaching differential importance to different persons. A maximin test (however unwise) also points in the same direction. Finally, the aggregate utilitarian standards, such as, "each person should count for one and only for one," are formulated to avoid building favoritism for any group in at the ground

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23. Quoted by Heckman and Verkerke *Employment Discrimination Law*, *supra* note 8, at 276 n.4. Note that this frequent sentiment of the supporters of the Civil Rights Act would be regarded as an outrage if it were ever used to justify depriving poor people of the vote on the ground that it was meaningless to them. Indeed, if it were meaningless, then the deprivation of votes would be a Pareto move, for there would be no losses to those deprived, and gains to the remaining voters, each of whom would have greater influence over the process.

floor. We should be loath to erect a principle of civil rights "exceptionalism" that deviates from this basic principle of the equality of all persons in the social calculus.

The standard social measures, then, are unkind to the civil rights statutes. At this juncture, the best strategy for avoiding the uneasy distributional implications of the Civil Rights Act of 1964 is to abandon any appeal to general measures of social welfare and to claim that the transfer rectifies some other loss wrongfully imposed by Whites upon Blacks.<sup>24</sup> Under the present regime, the argument goes, Whites are now wrongfully allowed to prosper at the expense of Blacks from whom they wrongfully took large stores of wealth. There are certainly too many prominent elements of institutional wrongdoing in the history of American race relations to dismiss this argument, because many Whites did prosper off the backs of Blacks through Jim Crow laws or through simple naked force and violence.<sup>25</sup> Legal actions for damages or restitution are without question appropriate between wrongdoer and victim.

Yet here again matters are far more complicated because time and circumstance ravage any simple conception of legal relief between two immediate parties. Many of those who did prosper spent or dissipated their ill-gotten wealth and died; others in the next generation, black and white alike, have been burdened by past segregationist practices that reduce their overall productivity and freedom *and* the present, expensive efforts to ameliorate such practices. It is not as though the population at large (old settler and new immigrant, black civil rights supporter and white Klan member) has received huge gains from past segregation that can now be disgorged to its original owners or their descendants. There is no fund of specific assets descended from one generation to the next from which restitution or compensation can be made. Many people today are not descendants of past wrongdoers, who in any event had little if anything to leave at their death. Many people today have worked long and hard to remove the stains of segregation and racial bigotry from our society, and all persons suffer from the overall loss in social wealth brought about by the indefensible restrictive practices of an earlier generation. These corrective justice arguments thus fail, and since they do fail, any redistribution of wealth that flunks both

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24. The most notable attempt in this direction is B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

25. For my critique, see Epstein, *Race and the Police Power: 1890 to 1937*, 46 *WASH. & LEE L. REV.* 741 (1989).

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the Kaldor-Hicks and the Pareto tests must remain a genuine source of social concern.

### III. *Where are the Gains?*

The weakness of the available empirical data on black progress under the Civil Rights Act of 1964 forces analysis back to the rarified level of theory. Why is there any reason to expect that the statute will help improve the status of Blacks? Initially, it is clear that we have to distinguish between two separate roles of the Civil Rights Act of 1964: its pro- and its anti-market components.<sup>26</sup> Historically, the early post-1965 Act enforcement had a pro-market bias. There were many restrictive statutes on the books that hampered the ability of Blacks to enter businesses of their own, and that made it difficult, if not impossible, for white firms to hire and promote them in the ordinary course of business. Those firms that stepped out of line were subject to systematic acts of violence from private persons, which were either ignored or abetted by white state officials responsive only to the demands of a white electorate. Firms were also subject to systematic social pressures that made it difficult or impossible for them to function. These laws and these aggressive practices fostered a general social climate of oppression and caste that still leaves its mark on American society today.

The great positive effect of the 1964 Act was to cast these evil laws and the private violence outside the pale of respectable society, outside the pale of local law enforcement, and to inject the much needed, heavy hand of federal enforcement to break down the formal institutions that sanctioned and supported the segregated South. It is not surprising that in the immediate aftermath of the 1964 Civil Rights Act, black incomes in the South surged more rapidly than before.<sup>27</sup> Segregation retained its tenacity because it was a set of big government practices that exhibited all the excesses that only government monopolies can work. In 1964 the Civil Rights Act was needed to break that local monopoly. But it is important to understand that state power was the evil that the statute combatted. What no one should fear is a set of social practices against any group that are not propped up by state power and domination. Within markets, a single person can deviate from the norm and garner enormous profits by catering to that section of a market that is

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26. I address this point in greater detail in Epstein, *id.*

27. See *Employment Discrimination Law*, *supra* note 8, at 283-4.

left unexploited by others. The social pressures and cultural patterns become a major impediment to social change only when they are backed by the use of force, whether formal or informal. One should be wary of conflating social prejudice with legal coercion, or assuming that the prejudice could prosper when the coercion is removed. The history of state domination in the South before 1964 should caution anyone against having the federal government in the 1990s assume any massive role in dictating the structure of private employment markets.

If the pro-market impulses dominated the early enforcement of the Civil Rights Act of 1964, then the emphasis surely shifted after 1975. By that time the explicit systems of race segregation had been eviscerated in the South. Now the focus of the Civil Rights Act was the more subtle forms of discrimination that were said to impede black progress in the marketplace. The disparate treatment and the disparate impact theories, however, were directed against ordinary market practices of private employers, none of whom occupied anything close to a monopoly position in any relevant labor market. At this point the question arises, how does the enforcement (any enforcement) of the Civil Rights Act improve the world over the state of affairs that would exist in an unregulated competitive market? Good question. My argument is not that regulation by government is always inappropriate. It is that for employment markets, the gains from regulation are achieved by the effective elimination of force and fraud. The rest of it — the minimum wage laws, the collective bargaining laws, and the antidiscrimination laws — only make matters worse.

The basic argument is simplicity itself. The key to any prospective employee's success is not the attitude of the employer who hates her the most, but who likes her the best. That is the employer who will offer the job. The field is clear because majorities do not rule, and because other prospective employers drop out of the picture. So long as some employers gravitate for the familiar and the safe, others will find that they can do better by seeking talented workers in other segments of the market. The competitive forces will therefore in time (and in a relatively short time) allow each worker to earn a competitive wage. There may well be some workers that specialize in hiring black workers, and others that specializing in hiring various ethnics, or Whites. But the overall wage levels should be higher if

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voluntary sorting takes place within the market.<sup>28</sup> To force each employer to hire in accordance with some preconceived racial plan will reduce the level of segregation in the workforce, but only at the expense of the income of workers in all the relevant classes. It is not possible to have it both ways, since mandated integration will reduce income levels on all sides. The point is descriptive, but it has clear normative implications.

Recall the logic of and importance of the principle of freedom of association, which applies to employment contracts as much as to other voluntary organizations. The basic logic of free association is that when persons come together voluntarily, both expect to obtain gains from their interaction. Over the long haul these voluntary relations tend to be stable, because both parties have good reasons to keep the arrangement afloat, wholly without regard to external legal compulsion. Sometimes these deals will inevitably go astray, as when there is a sharp shift in the external environment—a takeover, a rapid change in technology—but in most cases voluntary relations are stable ones, because both sides want them.

Not so once the Civil Rights Act of 1964 steps in. Even in its most restricted form of disparate treatment cases, the Act itself declares certain motives to be unacceptable, and then disregards as “illegitimate” any preferences formed on account of them. It is no longer possible to take preferences as determined by social forces, and then observe how people who have these preferences sort themselves out in the market. It now becomes necessary to argue that where objective criteria are met, then the costs to an employer shall be treated as being lower than the gains from hiring the employee. The contract is made to go forward even if the employer’s subjective view is that the cost of the contract exceeds its benefits. Here it matters not whether one speaks of “irrational” prejudices, but also of accurate overall assessments of overall rates of productivity, whether judged by output, injury rates, longevity, matters going to “competence” that are in the abstract regarded as “rational” in anyone’s book.

This gap between subjective and public estimations of a worker’s worth has important resource consequences. The employer will try within the limits of the law to take steps to avoid these relationships,

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28. See G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 57-58 (2d ed. 1971) for a clear articulation of the basic distinction between market segregation and market discrimination. The former measures the separation of black and white workers within the workforce; the latter measures any income differential. It is possible to have total market segregation in workforce organization and no market discrimination in wages.

or at least reduce the frequency of their occurrence. In part the actions will be taken at the hiring stage, but efforts at this level will be limited because of the fear of legal sanctions. Now the evasions will take place at earlier in time. Decisions that may have once been made without reference to the antidiscrimination laws will now take them surreptitiously into account. A firm that might have been willing to locate its new plant in the inner city if it could control its hiring policies may now decide to build it in the suburbs precisely because it need worry less about being saddled with an unwanted labor pool. But it will not record its decision where they can become the subject of a Congressional investigation. Sensible decisions that would have helped minority workers are thus nullified at an early stage in the process beyond the reach of Title VII. Black workers who are lucky to get positions in the new regime are better off. But black workers who are left behind are worse off. The data fits well with the basic theory. Recall the conclusion of Heckman and Verkerke: "In contrast to the optimistic picture of wage and occupational advance for employed blacks, the black unemployment rate has remained approximately twice the level for Whites, and the black-white relative labor force participation has fallen since the mid-1960s."<sup>29</sup>

The basic point must be stressed again. My objection to the anti-discrimination laws is on two levels. First, they do not seek to achieve any result defensible under any standard social welfare criterion. Second, there is failure to show any connection between the end desired, here black advancement, and the means chosen to achieve it. The defenders of the laws do not understand how any antidiscrimination law has to operate in practice. These laws work a strong redistribution from poor to rich within the class of black workers. These laws tend to favor blacks who have good credentials and extensive track records, because those workers present less of a risk to an employer than untested workers. Since the power to fire has become compromised under the statute, employers have an incentive to cream the work force, leaving those at the bottom to fend for themselves in the welfare system and the unemployment rolls. The argument is really no different from that used to condemn a minimum wage or a usury law. If a certain wage must be paid, then firms will hire those workers who are worth it, and ignore the rest. If the rate of interest is kept low, then banks will issue home mortgages to persons with excellent credit ratings and no default risk.

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29. *Employment Discrimination Law*, *supra* note 8, at 282.

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So Title VII functions as a wedge that hurts some Blacks (the relative poor) while it helps others (the relative affluent). But those who are hurt may be in the ranks of the unemployed and are thus not recorded in the records that show that black wages have improved relative to white wages.

These consequences occur when the enforcement of Title VII is error free. But it is wholly unrealistic to assume that practical difficulties never hamper enforcement efforts, which are bound to rise when issues of motive or statistical inference are critical to determining liability, as with Title VII. Start with the simplest of cases: the employer claims that dismissal is based upon incompetence on the job. The worker claims that it is based upon a covert form of racial hostility. There may have been an epithet or a harsh word spoken in haste. The employer's behavior may have been more insistent and more ugly—or it all could be an unhappy fabrication by a troubled employee. But someone has to assemble the evidence, decide its credibility, and draw the inferences when the testimony cuts in both directions, as it so often does. With a contract of employment at will, the employee looks for another job in a labor market relatively free of external restraints.<sup>30</sup> By contrast, with Title VII there is an expensive lawsuit over the reason for dismissal, while alternative job opportunities are harder to come by as reluctant employers tighten their qualifications.

Why then impose even the disparate treatment tests? The answer, one must suppose, is that otherwise some forms of discrimination will go unchecked. But how much? Today the popular sentiment is generally so strong that employers could not survive in an unregulated marketplace if they announced their own determination to discriminate on the grounds of race (except, of course, under an affirmative action program). What does an employer have to gain from firing the competent worker, given the costs of finding a replacement and training her to fill the earlier position? Here there has to be some clear allocative improvement to justify the costs that even this modest theory of liability imposes. But I know of no close examination of caseloads or EEOC complaints that gives any reason to believe that these forms of liability are worth imposing. The same holds true as well for the far more intrusive forms of liability under the disparate impact test, where it is difficult to control for the multiple variables, including preferences of employees for various

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30. For my defense of these against the modern preference for unjust dismissal actions, see Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

kinds of jobs, that suggest that any market imperfection worthy of the name is corrected by the massive litigation of this form.

Nonetheless the proposed Civil Rights Act of 1990 is implacable on all important questions of liability and damages. In Section 5, the 1990 bill skillfully skirts all the difficult issues of joint causation that arise in dual motive cases by allowing a violation of Title VII to be established so long as "the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though such practice was motivated by other factors." There seems no requirement to show any form of "cause in fact," that is, that the employment practice differed because of the illicit motive. It is quite enough that some trace of evidence be found before imposing the heavy liability for actual damages. Similarly, in Section 4 the bill reaffirms the old business necessity test in disparate impact cases, and then extends it to cover *groups* of employment practices, defined to include the entire process of employment. The definitions are so broad that it is doubtful that any firm could ever be in compliance with the Civil Rights Act unless each factor taken into account in employment is a precise carbon copy of all the others. Thus, if one factor favors Blacks over Hispanics, and a second Hispanics over Blacks, there could well be disparate impact against both groups simultaneously.

But the proposed Act does not stop with the expansion of liability. It also to seeks to turn the screw by increasing the payout after liability is established by authorizing actual damages, and punitive damages in some select class of cases.<sup>31</sup>

The justifications for these expansions of liability cannot rest on the ground that they will improve the lot of any protected groups. All of the unfortunate side effects of the Civil Rights Act of 1964 will remain if the expected liability is multiplied beyond its previous levels. So why then do it? Here I can think of only one answer: the

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31. Section 8 provides "(A) compensatory damages may be awarded; and (B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the Federally protected rights of others, punitive damages may be awarded against such a defendant." Note that the exception of government agencies from the punitive damage provisions marks a politically necessary but intellectually dubious distinction, even within the framework of the statute. And the whole provision on punitive damages is rife with uncertainty. All employers must make conscious decisions about hiring qualifications, which they may well know expose them to risk of liability under the disparate impact tests. Are they then "callous" and "reckless" by definition, or must the plaintiff introduce evidence of explicit race hatred and abuse for the section to apply? The "callous" standard could be read to be little more than ordinary negligence with knowledge.

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horror of discrimination, a theme which runs through the anonymous document ostensibly prepared by the supporters of the 1990 Act, which speaks of the present toleration in the law for “the most blatant and offensive examples of racial and ethnic discrimination.”<sup>32</sup> There is still the common fear that some irrational and invidious form of discrimination will escape detection and punishment. I am not one to argue blithely that prejudice plays no role in employment markets. But the bigots and racists will not be allowed to run the world, or any small fraction of it, even if Title VII were repealed tomorrow. To track the words of the 1964 Act, these miscreants are only allowed to fail or refuse to deal with other persons, or to offer them lower wages or otherwise discriminate against them in the terms of employment. Given the frequent atrocities of the twentieth century, it is grotesque to think that any person can oppress a population by failing to deal, or in refusing to have anything to do with them. Ignoring people for bad motive, or for horrible motive, is not resorting to mayhem, torture, and lynching.

Matters must be kept in perspective. Let the worse bigot abide by the libertarian prohibitions of force and fraud, and the rest will take care of itself. Title VII, or any antidiscrimination statute, does little to solve problems of prejudice and bad motive: what black worker would seek employment with an overt racist, even on favorable financial terms? The fundamental libertarian distinction is between the threat and use of force on the one hand, and refusal to deal for whatever reason on the other.

There is yet another irony. In the relentless quest to root out bad motive, the antidiscrimination laws have been construed to foster discrimination—the discrimination that they seek to suppress. To see the point, recognize that there are two halves to the modern discrimination law that are generally regarded as occupying two distinct doctrinal domains, and are treated separately. On the one hand, there are the rules that are designed to ferret out discrimination against protected groups. Before the recent round of Supreme Court cases, these rules had been applied with uncompromising rigor under the combination of disparate treatment and disparate

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32. See Summary of the Civil Rights Act of 1990, *supra* note 1 (no date, no author). The statement is a one-sided political manifesto that ignores all the aggregate effects of civil rights enforcement, and acts as though the defeats of any individual plaintiff in civil rights actions is itself proof of the injustice of the Supreme Court decisions that it deplores. No systematic theories or evidence are mentioned, let alone refuted—par today for what comes out of the Washington political mills.

impact tests. That level of enforcement activity will rise exponentially if the proposed 1990 Civil Rights Act becomes law. Yet on the other hand there is the question of 'reverse discrimination' or 'voluntary affirmative action.' After the decision in *Steelworkers v. Weber*,<sup>33</sup> private, voluntary discrimination in favor of protected groups now receive an automatic pass from the United States Supreme Court.

The common tendency in judicial opinions and in academic circles is to discuss *Griggs* and *Weber* as though they govern separate domains. But for any employer faced with a hiring decision, both the disparate impact and the affirmative action rules are operative at the same time, and it is their joint effect that determines the total payoff structure for any given personnel decision. To hire the white male (for example) exposes the employer to serious risks of liability under disparate impact, or, for that matter, disparate treatment. To hire the woman or the black employee is to protect oneself against all liability. It is an impressive payoff matrix, with the stick in the one hand, and the carrot in the other. The same Supreme Court justices who are always concerned about inequality of bargaining power do not see that the threat of liability under Title VII goes a long way to limit the "voluntariness" of affirmative action programs. Yet even the classical common law conceptions expanded coercion to cover cases where persons were forced to surrender one legal entitlement in order to protect another, as with the robber who says "your money or your life," or the merchant who says that he will pay either one lawful debt or another.<sup>34</sup> Why, then, regard affirmative action as wholly voluntary even though it often arises as part of determined effort to minimize the risk of exposure to liability under *Griggs*?

I do not wish to suggest that affirmative action would disappear if *Griggs* were no longer law, or even if Title VII were repealed. The political forces gathered in its favor, often under the banner of diversity, are far too strong for it to disappear with the change in legal environment. But its frequency should diminish, although it is difficult to say by how much. Nor should one condemn affirmative action as a matter of legal principle. I have no legal objection if any

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33. 443 U.S. 193 (1979).

34. See generally Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947), noting the restrictions in the common law to the so-called "duress of goods" cases, an urging an expansion to cover cases of inequality of bargaining power. For a defense of the narrower common law view, sufficient to call the voluntariness of affirmative action into question, see Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293, 295-298 (1975).

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private institution seeks to adopt an affirmative action program on its own hook, without the *Griggs* threat. The rules of freedom of association apply, and my tastes and dislikes are in principle as irrelevant to their hiring decisions, as I (forlornly) hope that their tastes and dislikes were to mine. But once all the decisions are skewed by the threat of liability, then the existing patterns of affirmative action do become suspect as a form of coerced race and sex conscious practices.

We have travelled far from the naive optimism of 1964 when it was thought that legislation could prick the moral conscience of a nation and guide us to a color-blind society. Unfortunately, we are moving to a nation where the system of race and sex conscious patterns are beginning to resemble the once discarded legacy of Jim Crow. While many will say that the strong affirmative action programs are justified by compelling social circumstances, some of us take little comfort in the bland declarations that the policies in question are not "invidious," are not meant to hurt the persons who are systematically excluded, but only to advance the laudable social objectives. The very knowledge that persons are hurt by certain systematic policies will harden people to their pain, as a way to reduce the psychological costs of their decisions. In *Weber*, Justice Brennan stressed that it would be "ironic" indeed if a statute designed to advance the conditions of Blacks were construed to place obstacles in their path. But the irony is otherwise: it is ironic that a statute that was designed (dare one say it) and drafted to remove race and sex from employment decisions has had the effect of placing them in center stage.

### *IV. Extending Failure*

Viewed as a whole, there seems to be little if any case for keeping Title VII on the books. Yet the present politics of civil rights reform goes in quite the opposite direction. All setbacks are treated as a function of the hidden forms of racism that pervade society. The remedy that is proposed is still a further extension of the civil rights principle to other areas in which it has not be applied. Professor Blumrosen places before us a heady agenda. Having proclaimed the success of the civil rights movement, he is now determined to move it into new areas where it had never been before.<sup>35</sup> All decisions, it

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35. *Society in Transition*, *supra* note 16.

seems, should now be race conscious, whether the closing of military bases, the location of public housing, or the approval of mergers and acquisitions. Every private and regulatory action is said to be fair game for the same explosive politics that now govern ordinary employment relationships.

His analysis is superficial at the descriptive level, and hence wholly uninformative at the normative level. It is easy to assert that mergers and acquisitions hurt women and minorities because of the debt loads that firms are required to carry.<sup>36</sup> But Blumrosen offers no empirical evidence in support of this proposition, and only weak reasons to think that they should be true as a matter of economic theory. His first point is that once mergers and acquisitions take place, layoffs are often done by seniority, and thus will hurt Blacks and women at the bottom of the ranks. But there are many acquired firms that do not have union structures. One common gain from a corporate takeover is the freedom of the new owner to pick selectively those workers from the old firm who are adjudged productive, wholly without considering their seniority. Mergers and acquisitions upset the old order; they do not reinforce it. Similarly, corporate takeovers ensure that additional opportunities are opened up for new workers of the acquiring firm who may be of either sex or of any race. Mergers and acquisitions stir up the pot, and presumptively that gives any outsider the opportunity to become an insider: women, for example, have fared well in new industries (computers, for example) precisely because there has been no established hierarchy and patterns of fixed social behavior to impede their advancement. To look at only one possible effect of the mergers and acquisition picture (and to misunderstand that part as well) is hardly the basis for intelligent policies, either on employment or on mergers. Some aggregate accounts are required, and Blumrosen offers none.

The mischievous consequences of his approach are easy to see. There are many important issues of merger policy that have to be considered: do we keep the Williams Act or repeal it? Do we allow management to resist tender offers, and if so by starting an auction, by selling off assets, or introducing a poison pill? Whatever the correct answers to these and other issues, it is hardly likely that any effort to permit or require regulators to approve mergers on race- or sex- conscious grounds will improve the decisionmaking process in these delicate areas. Attractive business transactions that expand

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36. *Id.* at 267-8.

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opportunities for all will be frittered away in heated controversies about the employment practices (or lending practices or subcontracting practices) of both firms. Many useful mergers will be deterred and others will be rendered more costly. Professor Blumrosen thinks he can win the sucker's game: to insist he can identify a set of distributional gains that will justify the allocative losses that he inflicts upon the system as a whole. In so doing he repeats and extends the major intellectual blunders of the civil rights movement into new areas: the distributional gains will be nullified, as many mergers that might open up new opportunities for all workers will not take place, or will take place on terms that produce smaller benefits on net for all participants to the transactions in question. And political bitterness will often occur as protestors now assail the hiring, contracting, or lending records of ordinary businesses in minority communities in an effort to get a piece of the action from the merger in question. The short term gains in the particular case will be offset by an increased reluctance on the part of new and established institutions to do business in a hostile political environment. There is little reason to court political turmoil in order to retard economic development, which is what these statutes and proposals achieve. President Kennedy had it right long ago when he said "a rising tide raises all boats." It is a pity that the modern enthusiasts of the civil rights movement are so wedded to a brand of factional politics that brings economic hardship and emotional turmoil to their friends and foes alike.