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FORUM

A FALSE SENSE OF SOCIAL REALITY: A RESPONSE TO ERWIN CHEMERINSKY

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Professor Chemerinsky's and my original remarks are like two ships passing in the night.[1] I advanced a series of theoretical and empirical arguments to indicate that all people would be better off with competitive markets and the repeal of the antidiscrimination laws. He in turn bypasses my initial points and develops independently the reasons why he believes that the enforcement of the employment discrimination laws remains necessary. The course he charts is one commonly traveled, so I will risk collision by responding to his points in the order he has made them.

The first step in his argument is to claim that without the antidiscrimination laws harmful employment discrimination would exist in the American market system.[2] Historically, he notes there were illustrations of discrimination against women and Jews in the years before 1964. And I dare say that such forms of discrimination still exist today. But he does not explain how it is that antidiscrimination laws change these deep-seated attitudes (if they are deep-seated) for the better. Nor does he give any account of the economic significance of the discrimination that he observed. The refusal of many mainline firms to hire Jewish lawyers led to the rise of predominantly Jewish firms. And the continued persistence of Jewish and non-Jewish firms today suggests that there are some organizational gains from a system which has both free entry and some levels of religious separation,

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1. *See* Richard A. Epstein & Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 Be Repealed?*, 2 S. CAL. INTERDISC. L.J. 349 (1993).

2. *Id.* at 357.

even in commercial settings. In order for Chemerinsky's indictment to be credible, he would have to show that the wages of Jewish lawyers were lower than that of their rivals; or that their scope of opportunity was smaller; or that firms that cross cultural and national and religious lines have not been formed. He presents no evidence on any of these points.

The treatment of women in the legal profession raises somewhat different issues. For a whole variety of cultural reasons, women did not participate in the legal profession in large numbers before 1964, and there was doubtless some very considerable reluctance on the part of firms to hire the few women who were on the market. But here too it is evident that cultural attitudes were changing very rapidly through the 1950s and 1960s. I can recall that while women in law school were rare when I was a law student at Yale Law School from 1966 to 1968, the entire set of attitudes changed by 1970. I can recall, for example, in a discussion of the issue at USC in 1970 or 1971 that the late Judge Robert Kingsley mused aloud in a speech to USC law students that he would not hire any woman as his law clerk. Eyebrows were raised, but nothing was said. That attitude has largely disappeared, and I know of no litigation that spurred on the fundamental change outlook. Here is a case where the social expectations moved in parallel with the statutes. I doubt that the basic situation would be much different today even if the statute were never on the books. And I am quite sure that any effort to place a sex discrimination statute on the books when Sandra Day O'Connor graduated from Stanford Law School would have been a complete failure. The great advantage of the market is that it allows a minority to experiment when the majority is reluctant to do so—a point of great practical and theoretical importance. Title VII has had little if anything to do with the changes in the role of women in the legal marketplace. The basic economic forces and technological changes have pushed aside all resistance.

Professor Chemerinsky's second point is that "prejudice distorts employers' evaluation of employees."[3] To his mind employers are a unitary class of individuals who cannot appreciate the skills that blacks, women, Jews, gays and lesbians bring to society. But again one asks for evidence to support the position. Jews and Asians have the highest income levels of any racial group. The income of gays and

3. *Id.*

lesbians, and their educational level, are well above the national averages. The income of blacks, while lower than that of whites, shows a very different picture when adjusted for education and experience. If one looked at blacks and whites of equal income, I would be stunned if they had equal education and experiential qualifications, so strong is the influence of affirmative action, which Professor Chemerinsky seems to regard as unrelated to the basic operation of employment markets. In *Forbidden Grounds*, I did say that all the *institutional* discrimination that I have witnessed has been in favor of members of protected groups.[4] Professor Chemerinsky says this is "obviously not true."[5] Apparently, he has never read the affirmative action guidelines for federal contractors or for accredited law schools, or the advertisements in the *Chronicle of Higher Education.*

In addition, Professor Chemerinsky fails to note how the aggressive use of Title VII makes it more difficult for employers to make meritocratic decisions. When standardized tests were first introduced, they were thought to serve as an antidote to the subjective impressions that employers might form of employees, and teachers of their students. But now these tests must meet often-impossible standards of verification before they can be used to screen prospective employees or evaluate existing ones. The reduced availability of tests forces employers to return again to their background estimates of the productive abilities of various groups. Thus Title VII deprives the market of the information that is needed to counter prejudice, and encourages covert reliance on the very stereotypes that Professor Chemerinsky deplores.

Professor Chemerinsky believes that markets also fail because *perceived* customer preferences will lead employers to ignore the abilities of their employees. His first mistake is to assume that all these customer preferences line up in the same fashion. Yet if men prefer male urologists, today women increasingly prefer to have female obstetricians. And in huge markets, such as health care generally, women are the dominant purchasers of services for the entire family. Matters of race are scarcely different. His vision of a monolithic set of employment preferences treats the diversity movement as though it had no influence on the patterns of employment, when it is not only

4. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 503 (1992).

5. *See* Epstein & Chemerinsky, *supra* note 1, at 358.

the Clinton Administration that has imposed rigid racial and sex preferences in employment. While these practices are perfectly permissible for a private employer, they are wholly inappropriate for any government body. And in the midst of his lament, he might have taken note of the fact that for blue-collar workers male wages have dipped during the last decade, without there being any increase in female or minority wages over the same time period. The data support my general conclusion that the civil rights movement produces allocative losses, without generating any distributional gain to the current roster of protected classes.

Fourth, Professor Chemerinsky thinks that labor markets are so rigidly separated that Koreans will have to look to Koreans for jobs; blacks to blacks and so on. I do not know where he has obtained this vision of American labor markets as a form of South African apartheid or whether he has again failed to understand the powerful role that diversity plays as a business issue in businesses across the land. His own statement of "pervasive discrimination by the white community against these [minority] groups"[6] is not an empirical observation, but a false declaration of faith.

Fifth, Professor Chemerinsky argues that the problem of sexual harassment is proof positive that employers do not care about sexual harassment.[7] But here too his position is not credible when measured against the evidence. The obvious point is that an employer does not wish to be held vicariously liable for the losses when one employee harasses another. Who can blame them for that? The enormous cottage industry that has arisen in the past half-dozen years in fashioning firm guidelines should not be taken as a sign of employer indifference on the issue. It is rather the hope that other devices less divisive and less expensive than litigation can be used to deal with the problem.

Professor Chemerinsky's other arguments fare no better than his initial salvo. In particular he thinks that I am wholly insensitive to the costs that discrimination places on employees who are subject to it. No one wants to deny that these costs exist (just as they exist with affirmative action programs as well). But again it is important to note the consequences of any individual rejection. Chemerinsky acts as though the disappointed applicant is shut out of the labor market altogether. He never asks whether the overall effect of the antidiscrimination law is to reduce the total number of opportunities; reduce

6. *Id.*
7. *Id.*

the level of real wages; reduce the levels of employee mobility; and reduce the total number of jobs that the economy is able to generate. It is his policy on race that has been in effect for the past thirty years. Whey then attribute the massive malaise that has led to the Rodney King riots to a set of policies that would increase the overall job opportunities for blacks? When he laments the large number of uncounted people who have given up the search for jobs, he should remember that the antidiscrimination laws, like the minimum wage laws, constitute a legal barrier to entry that hurts the very persons he wants to help.

If his economic arguments will not wash, neither will Professor Chemerinsky's appeal to intuitive sense of fairness. To the extent that appeals of this sort have merit, they can be made to individual employers, many of whom will respond to their intrinsic force by altering their own hiring policies. But even if they do not, where is the offense against equality? This is not a situation where women and minorities are barred by law from entering the labor market. They can offer their services to anyone just the same as white men; they can seek to become employers just the same as white men. The issue is not equality, which open markets have in abundance. The question is whether an antidiscrimination law is worth the enormous systematic costs that it imposes on a market. Perhaps Professor Chemerinsky thinks that he can beat a competitive labor market with an expanded version of the *Federal Register*. But if so, he gives us no sense as to how.

Professor Chemerinsky is not only wrong in his assessment of the antidiscrimination laws but he woefully misunderstands the economic logic behind the principle of freedom of contract. The reason that the social presumption is set in its favor is that voluntary trade generates mutual gains for the parties. But this presumption is only a presumption, not a mindless absolute. The reason we do not allow the free sale of lead gasoline is because of its negative effects on third parties, effects that are not taken into account by either the firm that sells or the ordinary citizen who buys gasoline. There is no freedom of contract to commit a tort. But there are no similar third-party effects that an antidiscrimination law must address. To the contrary, even though the statute places its legal obligations *solely* on the employer, the restrictions that the statute requires are felt both by employers *and* employees. If the employer cannot pay the black worker a lower wage than the white worker, then the black worker cannot offer to

work for that lower wage in order to gain the first needed step in the labor market. To assert that I would "expand the protection of freedom of contract for businesses at the expense of decreasing freedom of contract for individuals"[8] is to treat freedom of contract as a negative or zero-sum game for the parties—employers will only prosper if employees lose. But that misconception overlooks the basic point that whatever its form, the employment discrimination laws restrict freedom for all parties. And that restriction is only justifiable by showing some social gain that markets could not achieve. Professor Chemerinsky identifies none.

Professor Chemerinsky writes as though he can show that gain by showing the success of the antidiscrimination laws. Success there surely is in one sense. There are lots of *changes* that can be attributed to the antidiscrimination laws. But there are not lots of *improvements* that can be attributable to them. Thus it is quite true that the Age Discrimination in Employment Act[9] works a chilling end to mandatory retirement. Here the ability of the Congress to implement this statute was never in doubt, for it is a simple matter to expunge all contractual provisions that require employers to retire at seventy or any other age. But what reasons are there to believe that this massive change helps employment markets. It has created major problems in dealing with employee pensions. It will reduce the mobility of labor. It will prevent the advancement of younger persons through the ranks. It will make businesses less able to compete in international markets. It will give over-seventy people full salary and full pension while those far younger than them must get along on far less when their family needs are far greater. In our own line of business—universities—it will lead to increased costs, curricular ossification and reduced educational innovation, points to which Congress and the civil rights movement are wholly oblivious. The costs of this misguided bit of Congressional mischief are evident to those who care to inquire. The net social benefits of overriding contracts that all persons, rich and poor, in all occupations have agreed to is nowhere demonstrated by Professor Chemerinsky or anyone else.

Nor does Professor Chemerinsky solve matters by referring to the flawed studies of Professor Blumrosen on the impact of the civil rights

8. *Id.* at 360.

9. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

acts.[10] Initially it is a mistake to assume that all the shifts in occupational patterns post-1964 are attributable to the Civil Rights Act, given the persistent increases in black wages during the 1946-1964 period. And in any event the Blumrosen study has rightly been faulted by Professor James Heckman on the ground that it looks only at gross occupational categories and ignores the variations in wage data for individual workers within categories.[11] When that closer examination is made, then there is no evidence that the wage gap between black and white has narrowed after 1975, notwithstanding the enormous public resources that have been devoted to the enforcement of the employment discrimination laws. Since black unemployment levels have risen as well, why then celebrate the good intentions of the civil rights laws when they do not have consequences to match?

The same can be said about sex discrimination as well. Why is there some great social advance in prohibiting airlines from choosing employees who meet the demands of their passengers? The stewardesses who are able to keep their jobs after they reach age thirty-two, or after they become pregnant, might rejoice in the decision. But what of the younger women who want these positions but are unable to obtain them? Likewise when airlines are forced to hire men as stewards, some women will miss out on jobs as well. At best it appears that Professor Chemerinsky favors a set of costly administrative changes that give one person a job when the employer prefers to hire someone else. In truth, it is unlikely that there will be a one-for-one trade-off. If the airlines had been left to their own devices, then the total number of positions would have increased as well. Here too Professor Chemerinsky has shown that there has been coerced change, but he has not shown any improvement.

But what if we look at the broader wage data. It again shows how little good has come of the antidiscrimination laws. Ironically the wage differential between men and women in 1984 was just the same as it had been in 1955, before the civil rights acts went on the books: 63.9% in 1955 and 63.7% in 1984.[12] White women did not regain their 1955 wage levels with white men until 1987. A lot of explanations

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

11. *See* James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Laws: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276 (1990).

12. CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 60-61 (1990).

may be offered for this finding. The increased number of women entering into the market may have reduced the productivity of the average worker, so that the decline in average wages could be a reflection of changes in the composition of the workforce. Or there could have been a shift in the kinds of work demanded, with greater demand for some technical skills possessed in greater abundance by men. I am not committed to any of these explanations, and have offered various observations on the issue myself.[13] But whatever the precise explanation, no one can find in Title VII an engine of social progress. The statute has imposed a regulatory drag which has probably hurt men more than women in the relative wage derby, but which has helped neither group at all.

Professor Chemerinsky's final remarks leave the realm of the economic to enter the realm of the symbolic. He foresees a disaster from the total repeal of the social antidiscrimination laws. He believes that the government, by allowing people to be free to hire and fire by contract, is "implicitly saying racism, sexism, and homophobia are acceptable in this society."[14] But the government says nothing of the sort, expressly or impliedly. What it says with repeal is that all persons have the right to pick the persons with whom they associate in private transactions, and that they alone are responsible for the choices that they make. This freedom of choice is allowed to all citizens, not just to a preferred few, and the only message that is stated impliedly is that we think that all citizens are able enough to fend for themselves so that we do not have to rely on an employment policy that explicitly protects some individuals while prejudicing others. I fail to see the social disaster that would follow once the true information about the effects of these statutes was made evident to the general public. Our civil rights policies have been no more successful than other programs of government central planning and control. It is time that we took government out of labor markets, where it has caused so much economic mischief and has done so little symbolic good.

13. Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 GEO. L.J. 75 (1993).

14. *See* Epstein & Chemerinsky, *supra* note 1, at 361.