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Biology, Difference, and Gender Discrimination

David A. Strauss

BIOLOGY, DIFFERENCE, AND GENDER DISCRIMINATION

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INTRODUCTION

In the current political climate, we can expect broad-based attacks on the antidiscrimination laws to enjoy a warm reception in many influential quarters. It is therefore worth trying to be clear about what we think of arguments like that made by my colleague Richard Epstein.[1] In this response I will discuss what seem to me the central points in Professor Epstein's article.

In Part I, I will address the suggestion that the discrimination laws—and the notion that male-female differences are a matter of "gender" or "social construction"—are fatally flawed because many differences between women and men are "biological" or "genetic" rather than "social." In Part II, I discuss Professor Epstein's more general and implicit premise that gender discrimination laws are necessarily unjustified because there are relevant differences between men and women. Part III is the conclusion.

I. THE GENETIC OR ENVIRONMENTAL ORIGIN OF GENDER DIFFERENCES

Much of Professor Epstein's article is devoted to speculations in sociobiology and neurophysiology. He seems to have two reasons for this. One is that he believes, apparently, that the principal defense of the gender discrimination laws, and more generally the defense of the notion that differences in gender roles are "socially constructed," rests on the premise that there are no significant biological differences between men and women. The other is that he apparently believes that if he can establish that differences in labor market performance between men and women are genetically or biologically based, instead of socially based, then he has shown that

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1. Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981 (1992).

the antidiscrimination project will be prohibitively costly. The first of these reasons is outdated; the second rests on a non sequitur. I will address them in reverse order.[2]

A. Biological and Social Influences and the Costs of Change

I want to address this point first because Professor Epstein's view rests on a mistaken premise that is widely held, and not just by opponents of antidiscrimination laws. It is worth trying to get this error cleared up before we proceed any further. The premise is, in Professor Epstein's words: "If features of human behavior are regarded as biological, then the cost of change becomes higher . . . . If, however, these differences are socially constructed, then they could be socially *re*constructed as well, at a lower cost. This lower cost is one that society itself can bear."[3] Professor Epstein does not try to justify this statement, and in fact it cannot be justified. There is no reason whatever to believe that it is true. I know of no evidence that there is a systematic relationship between the costs of changing or overcoming a characteristic and its genetic or social origin. Many genetic characteristics are easily modified or overcome, in the sense that their effects are reduced or eliminated. Many characteristics that are the product of the environment are impossible to overcome.[4]

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2. I do not address Professor Epstein's claims about sociobiology and neurophysiology, other than to note that the sociobiological models he relies upon, at least, have been tellingly criticized. *See* PHILIP KITCHER, VAULTING AMBITION 166-76 (1985).

3. Epstein, *supra* note 1, at 994. I take it the words "regarded as" should be omitted. The claim is that costs are a function of the actual origin of the characteristics, not the perceived origin. The claim about perceived origin would also be interesting, but I am certain it is not what Professor Epstein intends, since it impugns his position. It suggests the side that can claim to be acting in accordance with the dictates of biology gains an unjustifiable rhetorical advantage. I think that is true, and it explains Professor Epstein's rhetorical strategy, but it is obviously not what he is saying here.

As I discuss below (see *infra* Part I.B), Professor Epstein's use of the term "socially constructed" to mean something like "environmental in origin" rests on a misunderstanding; but for purposes of the present discussion, I accept that use of the term.

4. It is worth trying to define "genetic" and "environmental" with some care. In a sense, no human attribute is caused solely by the environment. *All* "environmental" characteristics are the result of an interaction of environmental and genetic influences. That is because all environmental influences on humans act on beings with a certain genetic endowment. (In fact, that seems to be true by definition.)

Consider the clearest examples of characteristics that we would want to say are the result of the environment—perhaps the paper cut I just inflicted on my finger. It is only because of my genetic endowments that the paper cut my finger; if my genes caused me to grow armadillo skin there, I would be fine. And if my genes caused my cells to grow back instantly, I would be fine.

Of course, one could define a characteristic as "genetic" whenever a different genetic makeup (coupled with the same environmental influences) would have produced a different characteristic.

Consider a few common human conditions. Nearsightedness is unquestionably genetic in origin. But it can be overcome with a cheap pair of glasses. Many serious diseases and injuries, on the other hand, have environmental causes,[5] but often no expenditure of resources can overcome their effects. Every day we cheaply overcome many of our genetic tendencies, when we get haircuts, wear warm clothes, or exercise. And every day we find we must live with environmentally induced traits, from injuries to ignorance, because the cost of overcoming them is prohibitive or even infinite. There is simply no obvious correlation between the genetic or environmental origin of a characteristic and the ease of changing it or overcoming it.

Let us assume that there are systematic differences in the relevant desires and behavior of women and men, even along the lines that Professor Epstein describes. Suppose we learn that women are more risk averse and do prefer cooperative to confrontational jobs. We now must decide what to do about that. Do we accept it as a given? Or do we try to overcome it? If the latter, to what extent, and at what cost?

Those are important questions, if the factual assumption is correct. But learning whether the origin of the difference is genetic, even assuming we could learn that, does not help us at all. Suppose it is: All the important questions remain, and learning that it is a genetic characteristic does not help us solve them. Is it a characteristic we want to live with, or one we want to overcome at least in part? Learning whether it is genetic or environmental does not help with that. If we want to overcome it, what is the cost?[6] That will

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That is not necessarily an objectionable definition. But what it means is that the category of "environmental" characteristics is empty, and the nature-nurture debate would be even more obviously pointless.

5. Environmental causes, in turn, may or may not be related to human behavior. But again, there is no systematic relationship between the source of the environmental cause and the ease of preventing it or overcoming it. In particular, environmental causes with their roots in human behavior are not more easily controlled than causes attributable solely to nature. Both the unmediated rays of the sun and a nuclear power program in a foreign country can harm me; it is much easier to put on sunscreen and avert the danger from the former than to influence the human behavior that makes the latter dangerous.

6. We might try to overcome the differences either by trying to modify the behavior or by requiring that the differences be ignored. Roughly speaking, the antidiscrimination project calls for the latter, in the first instance. That has costs of the kind Professor Epstein identifies. (It may also have countervailing benefits, but that is not my point at the moment.) The question is whether those costs are worth it, a question that is not answered simply by asserting the existence of the differences.

not vary systematically with whether the difference is genetic or environmental. Some genetic characteristics will be impossible to overcome; the same is true of some environmental characteristics. If the cost is finite, is it worth it? There again the nature-nurture issue is irrelevant.

The reason people engage in the nature-nurture debate, I believe, has nothing to do with the costs of changing or overcoming attributes. Rather it is a debate that reflects attitudes. The view that "it's genetic" goes hand in hand with an attitude that we cannot fight the status quo. The connection is fallacious, as I have said. We fight the genetic status quo daily, sometimes at low cost and sometimes at high cost. The view that "it's society" goes hand in hand with the idea that we can change it. That, too, is fallacious. There are many intractable conditions that are caused by the environment. The real issue is one of attitudes toward certain kinds of programs. That issue should be resolved by a careful and comprehensive weighing of the advantages and disadvantages of various proposals, not by trying to enlist biology on one's side.

B. Feminism and "Real Differences"

The second problem with Professor Epstein's account is this: Not only does the nature-nurture issue have nothing to do with the costs of the antidiscrimination project; it has nothing to do with the question of "sex" versus "gender" that preoccupies Professor Epstein. Professor Epstein assumes that there is an opposition between the "biological" and the "socially constructed," so that something that is genetic or biological in origin cannot be "socially constructed," and vice versa.[7] Therefore, if he can demonstrate that there are genetic differences between men and women, he can (he apparently believes) put to rest the idea that these differences are "socially constructed."

This view rests on a misunderstanding of the term "socially constructed." To some extent the misunderstanding is not Professor Epstein's fault. I am not a fan of the widespread use of the term "so-

7. *See, e.g.*, Epstein, *supra* note 1, at 982 ("[T]he term *gender* carries with it the implication that we are exploring the relationship between males and females as a social phenomenon, and not as a biological one."); *id.* at 987 ("[My] analysis . . . is utterly *in*consistent with the program that seeks to make social influences dominant to the exclusion of biological ones."); *id.* at 987-88 ("One set of differences clearly has to do with the structure and function of the brain, where the evidence of sex differences in structure and function seems to multiply, notwithstanding the drumbeat that insists that all relevant sex differences are socially constructed." (footnote omitted)).

cially constructed." I think it is vague and usually unhelpful; the idea that most of its users want to convey can be stated more directly and less confusingly.

The term "socially constructed," as I understand it, means not that the characteristics in question are literally created by society but that the decision what to do about them is one that society can make. To say that the difference between men and women is socially constructed (and therefore should be labelled "gender" not "sex") is not to deny that there are biological differences (really, now, who denies that?). Rather, it is to assert that the social significance of those differences is something that is ultimately subject to collective decision.[8]

So, for example, there are real biological differences between physically strong people and physically weak people. But society has constructed various notions in a way that sometimes value physical strength, sometimes regard it as irrelevant, and sometimes regard it unfavorably. (A physically strong male is, in some settings, more threatening and therefore less valued than a physically weak male; a physically strong female is sometimes considered less attractive and therefore less valued.) This is the sense in which the differences between women and men are socially constructed. Professor Epstein's biological excursions are therefore again essentially irrelevant.[9]

As I said, I do not think Professor Epstein should be blamed entirely for this misunderstanding; much of the problem lies in the loose use of the term "socially constructed." But Professor Epstein

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8. As I discuss in the text below, Professor Epstein recognizes this notion, although he does not associate it with the term "socially constructed" when he says: "The judgment of whether certain acts are, or should be, allowable is in the end always social, no matter what one's view of human nature." *Id.* at 994.

9. There is another possible sense of the term "socially constructed" that makes biology more relevant, although still secondary. One reason to question certain attitudes or characteristics is that they have their origin in unjust circumstances. So, for example, it might be argued that although there are genuine differences in the abilities of two groups, the differences are the result of past discrimination, and therefore those differences should not be allowed to influence the groups' respective opportunities. Or it might be argued that attitudes that have developed in response to deprivation or injustice—a freed slave's expressed desire to remain in slavery, or freed hostages' expressions of solidarity with their former captors—should not be regarded as genuine.

These arguments, which rest on relatively complex moral or psychological premises, would be answered by showing that the characteristics in question have an *exclusively* biological (or untainted environmental) origin. But Professor Epstein does not claim to make such a showing, and no such claim would be plausible. The most he asserts is that there are biological tendencies. That is compatible with the position that society has heightened those tendencies in illegitimate ways. Indeed to some degree it reinforces that position, as some feminists have argued. *See, e.g.*, ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 106-13 (1983).

should be blamed for ignoring, or being unaware of, a substantial literature that would have tipped him off. One of the most conspicuous developments in feminist literature in the last decade is the argument, made by many feminists, that there are "real differences" between women and men that are the product either of biology or of similar, deeply rooted factors. Some of this literature, such as Carol Gilligan's *In a Different Voice,*[10] has made it into semi-popular culture. Other work, like Nancy Chodorow's *The Reproduction of Mothering,*[11] is almost as well known. There is an important radical feminist literature that insists on the biological origin of differences between men and women.[12] And in any event this development has been a conspicuous feature of the legal literature.[13]

This is not a unanimous view; many proponents of antidiscrimination laws argue that it is at least tactically unwise to emphasize the differences between men and women.[14] (Professor Epstein's paper is evidence in support of that view, at least.) But the notion that gender is a social construct is common ground among a wide range of feminists, including many who believe in biological or otherwise deep-seated differences.[15] Of course, the fact that a position is common ground among feminists does not make it right. Perhaps the notion of social construction is, as I suggested earlier, unhelpful. Perhaps the existence of deep-seated differences between women and men makes it false to say that gender is a social category. (Even then, the important point would be how resistant the differences

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10. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1978).

11. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978).

12. *See, e.g.*, MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978); SUSAN GRIFFIN, WOMAN AND NATURE: THE ROARING INSIDE HER (1978); JAGGAR, *supra* note 9; ADRIENNE RICH, OF WOMAN BORN (1976).

13. A leading article is Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); *see also id.* at 14-28 (discussing, among others, MARILYN FRENCH, BEYOND POWER 482-83 (1985); NEL NODDINGS, CARING (1984); ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 260-63 (1979)); sources cited in FEMINIST LEGAL THEORY 156-58 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

14. Cynthia Fuchs Epstein, quoted by Richard Epstein, is in this category. *See* CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER (1988) (cited in Epstein, *supra* note 1, at 983 n.5). Gilligan's prominent work, in particular, has been criticized by many. *See, e.g.*, Ellen C. DuBois et al., *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 802-22 (1989).

15. *See* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 6-7 (1989) (discussing the social construction of gender).

were to being changed or overcome, not their biological character.)

The problem with Professor Epstein's account, however, is that he simply assumes the crucial premise in his own favor—that to the extent there are biological differences, gender cannot be socially constructed—and goes on to make his biological arguments. That makes his argument on this issue, too, beside the point. The fact that so many advocates of antidiscrimination measures have uncoupled the nature-nurture question from the question of social construction should have alerted him that he had this problem.

II. DISCRIMINATION AND RELEVANT DIFFERENCES

Professor Epstein also, of course, has views on what I say the real question is: what society should do about gender. One of his views is that it should not enact antidiscrimination laws. The part of his paper where he defends this proposition directly (that is, other than by arguing the irrelevant nature-nurture issue) is much less prominent and explicit. But Professor Epstein seems to be making four arguments, which I consider in turn.

A. There Is No Discrimination

First, Professor Epstein asserts that any differences in the jobs that women and men hold are the result of differences in their characteristics or preferences. "The disparate employment patterns so commonplace today are consistent with the proposition of the preferences of workers. They offer no evidence of discrimination, much less invidious discrimination."[16] Professor Epstein cites no source for this observation.

Well, of course, there is plenty of evidence. There is an abundant literature suggesting that employment disparities between women and men result from discrimination in various forms. Some of this relies on aggregate studies of wages and salaries;[17] some systematically studies workplace conditions.[18] Some suggest that employers pay less to women, or afford them different employment opportuni-

16. Epstein, *supra* note 1, at 998.

17. *See, e.g.*, Barry A. Gerhart & George T. Milkovich, *Salaries, Salary Growth, and Promotions of Men and Women in Large, Private Firms, in* PAY EQUITY: EMPIRICAL INQUIRIES 23, 23-43 (Robert T. Michael et al., eds., 1989).

18. *See, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 250-67 (1977); CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS (1989) (studying men in nursing and women in the Marines).

ties, because they themselves are discriminatory (or are responding to discriminatory preferences by their customers or employees);[19] others suggest that discriminatory treatment of various kinds affects women's attitudes and capacities in ways that employers then rationally take into account.[20] Some of these studies may be mistaken. Maybe even all are, although that seems unlikely. But simply to assert that workplace disparities are not the result of discrimination does not, to put it mildly, advance the debate.

B. The Antidiscrimination Laws Assume that All Differences in Outcome Are the Result of Discrimination

Perhaps the reason Professor Epstein asserts the absence of discrimination so casually is that he misunderstands what the proponents of antidiscrimination laws are claiming. At one point he characterizes their argument in this way: "Illicit discrimination is the source of the difference in occupational patterns, for which there is no alternative explanation."[21] That idea—that the employment patterns of women and men would be identical were it not for discrimination—really *is* implausible. So far as I am concerned, assertion alone would be enough to dismiss that notion.

But I know of no one who believes this. (Professor Epstein cites no one.) In any event, even if there is someone who believes this, the important point is that the antidiscrimination laws do not in any way rest on this premise. They do not remotely require identity of outcome.

The disparate treatment standard only requires that employers not sort employees on the basis of gender.[22] If women's and men's preferences and capacities differ systematically, the disparate treatment standard permits those differences to be reflected in outcomes,

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19. *See, e.g.*, SARA M. EVANS & BARBARA J. NELSON, WAGE JUSTICE: COMPARABLE WORTH AND THE PARADOX OF TECHNOCRATIC REFORM (1989); JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS (1989); Randall K. Filer, *Occupational Segregation, Compensating Differentials, and Comparable Worth*, *in* PAY EQUITY: EMPIRICAL INQUIRIES, *supra* note 17, at 153, 155-56; Morley Gunderson, *Male-Female Wage Differentials and Policy Responses*, 27 J. ECON. LIT. 46 (1989).

20. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

21. Epstein, *supra* note 1, at 997.

22. *See* 42 U.S.C. § 2000e-2(a)(1) (1988); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

so long as gender was not in any way the basis of the employer's actions. The disparate impact standard does impose some limits on outcomes, but subject to a business necessity defense; that is, the employer need not equalize outcomes if it would be too costly to do so.[23] So even under the disparate impact standard, differences that would be too costly to ignore need not be ignored.

So the question remains: Are the antidiscrimination laws justified? Professor Epstein cannot rest his negative answer either on the assertion that there is no discrimination, or on the proposition that those laws require complete equalization of result and therefore are not to be taken seriously.

C. The Antidiscrimination Laws Are Too Costly

Professor Epstein states this conclusion clearly enough, but his argument for it suffers from a number of problems: His normative framework is never made explicit; he once again relies crucially on assertion; and he ignores counterarguments.

I begin with the normative framework. It would be helpful to know whether Professor Epstein is using some form of utilitarian argument, or a social contract theory, or a rights-based libertarian account, or just what he is using. It appears he is using none of these but instead a criterion from welfare economics known as Kaldor-Hicks efficiency, or potential Pareto optimality.[24]

The evidence is that Professor Epstein simply assumes that the problem is one of "social gains" and "costs" or "losses." For example, the reason we forbid "murder, rape, [and] theft" is that "the net social losses . . . far exceed the total gains."[25] He adds: "Where differences in taste and temperaments lead to a specialization in family and workplace roles by sex, the gains from trade stand in sharp contrast to the losses attributable to the use of force."[26] So the relevant "gains" and "losses" are of the kind produced by ex-

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23. *See* 42 U.S.C. § 2000e-2(a)(2); Griggs v. Duke Power Co., 401 U.S. 424 (1971). After Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), Congress explicitly adopted the disparate impact and business necessity standards announced in *Griggs*. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k) (1988 & Supp. III 1991)).

24. J.R. HICKS, VALUE AND CAPITAL: AN INQUIRY INTO SOME FUNDAMENTAL PRINCIPLES OF ECONOMIC THEORY (2d ed. 1946); Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549 (1939).

25. Epstein, *supra* note 1, at 994.

26. *Id.* at 995.

changes. Similarly, in his final assertion about the harm that antidiscrimination laws will do, Professor Epstein refers to "reductions in output" that will be "substantial."[27]

The well-known problem with the Kaldor-Hicks criterion is that it is not plausible as a standard for evaluating the justice of social institutions generally. The principal reason is that it ignores distributional concerns. Also, it is at least arguable that the satisfaction of certain desires (such as misogynist desires not to associate with women) should not count in the social welfare function.[28] If Professor Epstein's condemnation of the antidiscrimination laws rests on such a controversial (indeed, implausible) moral foundation—and it evidently does—the foundation at least needs to be made explicit, and the obvious objections to it acknowledged. One cannot simply assume that any institution that causes "reductions in output" is ipso facto unjustified.

The second problem is that Professor Epstein makes no effort to give a systematic account of the costs of the antidiscrimination laws, even within the Kaldor-Hicks framework. He just asserts that they are "substantial," without any argument or justification.[29] There is an argument in the literature, again unaddressed by Professor Epstein, that laws forbidding gender discrimination will have a tendency to *increase* social wealth.[30]

Finally, there are what might loosely be called distributional gains: not necessarily a redistribution of income or wealth downward, but gains in terms of women's self-respect, social status, and freedom from dependency. It is impossible to deny that such gains exist. A recurrent theme of American history—shaped by the experience with slavery—has been that people's status depends on their ability to sell their labor in employment markets.[31] On a more con-

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27. *Id.* at 1000.

28. The point that the Kaldor-Hicks standard is an implausible moral criterion is widely made. *See, e.g.*, AMARTYA SEN, ON ETHICS AND ECONOMICS 33 n.4 (1987). Even the leading proponent of the use of the Kaldor-Hicks criterion as an ethical norm appears to acknowledge its implausibility in a category of cases that would, I believe, include discrimination laws. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 101 (1981) (acknowledging that when a policy of wealth maximization has a "substantial and nonrandom" distributional impact, then consent cannot be imputed to those adversely affected, and moral support for the policy is undermined).

29. Epstein, *supra* note 1, at 1000.

30. *See* John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1348-55 (1989).

31. *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1970); JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991).

crete level, women are often in a vulnerable position, as a result of mistreatment by men, that can be alleviated if they have independent income or employment opportunities.[32] There are many other possible justifications for the antidiscrimination regime as well.[33] In any plausible moral theory, including any utilitarian theory, these benefits of antidiscrimination laws, as well as their costs, must be taken into account.

Whether these possible gains from the antidiscrimination laws are worth it is another matter. That is a question that requires serious case-by-case consideration, taking into account the costs on which Professor Epstein concentrates. It is of course true that questions of resource allocation "do[] not disappear by diverting the discussion to fine-spun issues of caste or similar issues."[34] But issues of caste do not disappear by focusing exclusively on resource allocation (or by calling them fine-spun, or defining them solely in terms of formal legal barriers). It is not enough to condemn the antidiscrimination laws by announcing (perhaps correctly) that they impose certain costs on society and then ignoring any case made in their defense. That is the intellectual equivalent of condemning markets on the ground that they are "alienating" and simply ignoring the benefits they bring.

D. Statistical Discrimination and the Cost-Justification Defense

The fourth element of Professor Epstein's argument is more explicit. It is his claim that there should be a "cost-justification" defense under the antidiscrimination laws. My principal objection to this argument is the same I have made before: It establishes that the antidiscrimination laws have certain costs, without engaging those who think the costs are worth it. But Professor Epstein's argument on this particular point is actually quite helpful to the debate over discrimination laws, although in a different way from what, I

32. It is not clear that Professor Epstein would acknowledge this. In his discussion of the disparity in wage levels between men and women, he says that the disparity in measured market wages "has to be corrected to take into account the higher imputed income of women resulting from the greater value of their services around the home." Epstein, *supra* note 1, at 996. But this is correct only if the arrangement whereby families allocate household labor is a fully voluntary contract. To the extent there are elements of coercion, the income can no more be imputed to women than it could be to domestic slaves. On the contrary; women's household labor would represent wealth expropriated from them.

33. *See, e.g.*, OKIN, *supra* note 15, at 134-69.

34. Epstein, *supra* note 1, at 1002.

suspect, he intended.

A dominant feature of the current debate in antidiscrimination law is the sharp division between "nondiscrimination"—which virtually everyone seems to favor, at least in principle—and "affirmative action" or (as its opponents call it) "reverse discrimination," which some favor and some revile as just another form of discrimination.[35] Suitably generalized, Professor Epstein's cost justification argument shows, correctly, that this distinction is illusory.

First, Professor Epstein's suggestion that there should be a cost-justification defense is really a broader argument for what might be called a statistical discrimination defense. Roughly speaking, statistical discrimination is the use of a characteristic, like gender or race, as a proxy for other characteristics that are related to an employee's productivity.[36] It can be rational for an employer to engage in statistical discrimination when it has imperfect information about each employee's specific productivity-related characteristics and the proxy (gender or race) is correlated to those characteristics. The idea is that it is impossible, or too costly, to find out how productive each employee will be, so it is worthwhile to use the crude but roughly accurate (and cheaply ascertained) proxy characteristic. Employers who have no animus toward a group can rationally engage in statistical discrimination against that group.

I believe this is what Professor Epstein is describing in his account of how an employer might pay less to women because they are more accident prone.[37] There is no reason to distinguish the cost of being more accident prone from any other cost, including the "cost" of simply being a less productive employee. So Professor Epstein's argument would apply equally well if an employer discovered that, for whatever reason, women on the whole were just "less good" employees. The "cost-justification defense" is really a statistical discrimination defense.

Professor Epstein says, correctly, that the employment discrimina-

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35. *See, e.g.*, Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085 (1992); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992); Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117 (1992).

36. The principal early works on statistical discrimination are Kenneth J. Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3 (Orley Ashenfelter & Albert Rees eds., 1973), and Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

37. Epstein, *supra* note 1, at 1001-02.

tion laws would not allow the employer to engage in statistical discrimination, including the kind of cost-justified discrimination he describes. He also says, correctly, that the laws realistically could not allow a statistical discrimination defense without completely unravelling in practice (and maybe in theory). And he concludes—in a sense correctly—that the employment discrimination laws therefore operate as an "in-kind subsidy that like all subsidies distorts employment decisions."[38] That is, the antidiscrimination laws amount to a form of affirmative action: They aid the protected group at the expense of society as a whole.

I am going beyond Professor Epstein's explicit argument, which is limited—arbitrarily, it seems to me—to one particular cost. But something like this seems to be his point. And it seems to me to be correct.[39] If the antidiscrimination laws reach statistical discrimination, and for both practical and theoretical reasons they really must, then there is no significant difference between nondiscrimination, on the one hand, and "subsidies" to protected groups—that is, affirmative action—on the other. The conclusion Professor Epstein draws is that both nondiscrimination and affirmative action should go. The conclusion I would draw is that both are good ideas, and equally so. We will not settle that issue here. But it is good to see Professor Epstein agree (implicitly and in principle, anyway) that the single most prominent and divisive element of the current political debate about discrimination law—the supposedly sharp distinction between nondiscrimination and affirmative action—should be put aside.

Professor Epstein's argument on this point does, however, have the same defects as his other arguments. He identifies a cost of the antidiscrimination regime and does not mention the possible benefits. In this instance it is again not even clear that the antidiscrimination regime has net costs in Kaldor-Hicks terms: There is a well-known argument that statistical discrimination, although rational for an employer, is not efficient for society as a whole because it produces nonoptimal levels of investment in human capital.[40] And the various arguments I made earlier about the benefits of the an-

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38. *Id.* at 1002.

39. *See* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

40. *See* Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340 (1983); Donohue, *supra* note 30, at 1356-58.

tidiscrimination laws apply, at least to a degree, to statistical discrimination as well.

III. CONCLUSION

The laws forbidding gender discrimination (and the race discrimination laws as well) raise important and difficult issues. In criticizing Professor Epstein I do not want to suggest that I think those laws as they stand are optimal, or even close to optimal.[41] It is worth thinking about those laws from the ground up. In the area of gender discrimination, it is worth trying to identify exactly what we are trying to accomplish—how, for example, the mission of the gender discrimination laws differs from that of the race discrimination laws. It is also worth considering the questions of cost on which Professor Epstein places so much emphasis.

But this debate, like all debates, is advanced by engaging the other side, by making one's own premises explicit, and by acknowledging, to the extent possible, the ways in which one's own position is vulnerable. An argument that does not do these things fails to contribute to the debate in the way that it should. Such an argument risks becoming either undisciplined self-expression, comparable to cheering and booing, or, worse, intellectually high-sounding cover for people who want to advance a cause for their own reasons. There is a time for cheering and booing, and perhaps there is a time for intellectual cover. And these failings are not, I should emphasize, a monopoly of one side of the discrimination debate. Professor Epstein's argument should force proponents of the antidiscrimination laws to think through their own premises again. But his argument is too much the prisoner of its own undefended or implausible premises, and too unmindful of the counterarguments, to pose a genuine challenge to those who believe gender discrimination should be unlawful.

41. I suggested a new approach to race discrimination laws in David A. Strauss, *The Law and Economics of Race Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619 (1991).