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## Liberty vs. Equality: In Defense of Privileged White Males

Nancy E. Dowd

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## ***BOOK REVIEW***

### **LIBERTY VS. EQUALITY IN DEFENSE OF PRIVILEGED WHITE MALES**

**FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS**, by Richard A. Epstein.\* Harvard University Press, 1992. Pp. 530. \$39.95

NANCY E. DOWD\*\*

#### **I. INTRODUCTION**

This book is disturbing in more ways than I can count. Grounded in libertarianism and law-and-economics, its thesis is that the principles of choice and freedom of association outweigh equality and justice, justifying the abolition of private employment discrimination law and the imposition of severe limitations on public employment discrimination law.<sup>1</sup> In brief, it is a thesis that could best be used to defend privileged white males and the privileged white male community Epstein accepts, indeed defends, as “rational discrimination” the perpetuation of the disadvantaged status of minorities and women by ignoring the realities of power and defending the right to include or exclude from one’s community on the basis of conscious or unconscious prejudice.<sup>2</sup> The justification is the powerful rhetoric of “choice,” supplemented by explicit and implicit stereotypes of race and gender.<sup>3</sup>

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\* James Parker Hall Distinguished Service Professor of Law, University of Chicago. A.B., Columbia, 1964; B.A., Oxford University, 1966; LL.B., Yale Law School, 1968.

\*\* Professor of Law, University of Florida College of Law. Lynette Williams, J.D. 1993, provided invaluable research assistance for this Article. I am indebted to Walter Weyrauch, Patricia Bradford, Elizabeth McCulloch, Martha Peters, Sharon Rush, Kenneth Nunn, and John Chambers for their insights and comments.

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

2. *Id.* at 3, 59-78.

3. *Id.* at 26, 29-43.

This book is disturbing because I strongly disagree with its value judgments. I think equality<sup>4</sup> and justice are more important than choice and freedom of association. I would defend that position on utilitarian as well as moral grounds. I am a feminist, in methodology and perspective. At the very least, that means I look to see how those groups historically and currently disadvantaged, including women and minorities, and especially minority women, are affected by particular analyses; I look to see who benefits, given our current context, and what voice or interests are attributed to those who have historically been silent or ignored. I see gender as a powerful social construct deeply embedded in the employment structure that limits, in ways we have not yet effectively described, the way we experience both family and work. I see race just as deeply embedded in our employment structure. We have done far too little, rather than too much, about race. Employment discrimination law largely represents a conservative structure that has hindered a more progressive view of civil rights which would require government to play a significant role as a civil rights leader. I see law as both ideology and as practical tool, protecting people and changing the way people operate, even if it does not change the way people think. Yet law can, at its best, change the way people think, because it is persuasive and powerful rhetoric. I do not have a singular position as to whether keeping government out or letting government in is better. It depends on the context, the distribution of power, and the articulated principles or values at stake. I am also a

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4. I do not intend to define equality or argue at length for a particular construction of the term in this Article. My views on equality are set forth in Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 *FORDHAM L. REV.* 699 (1986). I agree with the view that equality means more than formal equality, or color blindness; it also means an antisubjugation rule and the promise of meaningful political, social, and economic participation. See Ruth Colker, *Anti-Subordination Above All*, 61 *N.Y.U. L. REV.* 1003 (1986) (arguing that subordination of groups in society is inappropriate and that legal action is appropriate to eliminate power disparities); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment*, 101 *HARV. L. REV.* 1331 (1988) (asserting that the black community must actively develop and maintain a distinct political consciousness to overcome the subordination created by neutral laws); Richard Delgado, *Recasting the American Race Problem*, 79 *CAL. L. REV.* 1389 (1991) (concluding that neutral principles are incoherent and will not remedy racial power disparities); Christine A. Littleton, *Reconstructing Sexual Equality*, 35 *CAL. L. REV.* 1279 (1987) (asserting that acceptance of women's biological or racially based differences from men will lead to equality of the sexes).

teacher of employment discrimination law, which perhaps gives me a vested interest in maintaining the existence of this body of law.

So if I start from what I believe are valued principles and political positions, I simply disagree with what Epstein has to say "Simply disagree" is perhaps not strong enough; his intent seems to be to insult and to get under the skin of individuals with whom he disagrees. He succeeds in that. But if it is solely a question of arguing opposing values, then whoever has the stronger, more persuasive argument should prevail; that is what the marketplace of ideas is about. Indeed, both the libertarian and the law-and-economics perspectives pose useful challenges to the underlying principles and assumptions of employment discrimination law.

Law-and-economics analysis forces supporters of civil rights to evaluate the costs and benefits of discrimination law. The critics of law-and-economics, in turn, challenge its proponents to defend their definitions of "costs" and "benefits" and state why cost-benefit analysis should be the relevant inquiry. The libertarian perspective questions why government regulation or intervention is preferable to private decisionmaking, and focuses attention on the costs of government intervention—whether it is the cost of increased paperwork and bureaucracy, or the cost of direct or indirect coercion on flexible, creative decisionmaking. The critics of libertarianism challenge its proponents in turn to demonstrate how power can be reallocated in an unequal society without government-supported or mandated reallocation.

But Epstein does not merely claim that libertarianism, law-and-economics analysis, and the principles of choice and freedom of association should be valued. He goes beyond valuing, claiming that they trump equality and justice, which he calls by the less powerful name of "the antidiscrimination principle."<sup>5</sup> Epstein says his argument for this conclusion is not grounded in values or morality, but in principle: he claims his assault on the antidiscrimination principle is an intellectual one.<sup>6</sup>

Yet this book is not an intellectual argument; it is political polemic with little intellectual credibility.<sup>7</sup> The book is riddled with

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5. EPSTEIN, *supra* note 1, at 1-4.

6. *Id.* at 6.

7. For a definition of good scholarship, see *infra* notes 213-14 and accompanying text.

statements of fact that have no visible means of support other than the unsubstantiated and uninformed views of the author.<sup>8</sup> Epstein's opinion is often the basis or initial presumption from which a line of argument proceeds.<sup>9</sup> Following any particular line of argument is difficult, however, as opinions and conclusions are often stated with no argument or data to support them, and Epstein then simply skips to another observation.<sup>10</sup> As Epstein is an outsider to the employment discrimination field, not a specialist, some of his methods might be rationalized as the price paid for a fresh perspective, particularly when the focus is so broad. But Epstein hardly comes to the field without some well-defined positions, which figure prominently in the book, particularly as a critic of changes in the traditional "employment at will" doctrine and as an advocate of the abolition of the National Labor Relations Act.<sup>11</sup> In areas that Epstein explores for the first time, his arguments are even more clearly in need of rigorous support, unless he really means to say, "I haven't read much in this area, but based on a limited read and just letting my mind work, this is what I think." Such a perspective may be useful, but its intellectual weight may justifiably be questioned.

The uneven depth of his arguments, however, is not the book's most serious flaw. Rather, Epstein's biggest failure is his refusal to confront and analyze scholarly work that undermines or challenges the fundamental basis of his position. Opposing positions are dis-

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8. See EPSTEIN, *supra* note 1, at 32, 65, 66, 147, 270, 377, 483.

9. See *id.* at 59, 65, 67, 75, 181, 271, 481.

10. See *id.* at 61, 73, 147, 160, 254, 276, 340, 504.

11. See *id.* at 138, 147-56; LABOR LAW AND THE EMPLOYMENT MARKET (Richard A. Epstein & Jeffrey Paul eds., 1985) (discussing the legal, historical, philosophical, and economic aspects of labor relations); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (arguing that labor law should not be governed by New Deal-type rules but by basic principles of torts and contracts); Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983) (asserting that the New Deal legislation is contradictory to public welfare); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (stating that efforts to undermine or abolish the contract at will disadvantage both employers and employees); Richard A. Epstein, *Sorry: We Don't Need the NLRB - or its Enabling Legislation*, L.A. DAILY J., July 24, 1985, at 4 (arguing that the National Labor Relations Act should be abolished, as it benefits some workers at the expense of both other workers and society at large).

missed with a sentence or simply ignored.<sup>12</sup> Epstein's paean to

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12. In the conclusion, Epstein gives a bare paragraph to the concept that racial and sexual difference is socially constructed.

This constant attack on statistical methods and insurance rests on a larger view of culture that is doubtless false as well. We are constantly instructed that differences between the sexes and among the various races are always *socially constructed*. The use of the term *gender* instead of *sex* is an effort to make it appear as though the differences between the sexes were mere accidents of biology that have no social relevance in employment settings and no long-term consequences for the welfare of either men or women. Similarly, differences along racial, ethnic, or religious lines are regarded as superficial and transient, so persons are to be treated as perfectly fungible with one another—unless, of course, the appeal to these same differences is made on behalf of, if not by, persons who fall into the appropriate protected categories. Then the differences are always relevant if not decisive.

EPSTEIN, *supra* note 1, at 504.

On the social construction of gender, there is a rich literature of feminist jurisprudence. See, e.g., TOVE S. DAHL, *WOMEN'S LAW: AN INTRODUCTION TO FEMINIST JURISPRUDENCE* (1987); MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* (1991) [hereinafter FINEMAN, *ILLUSION*]; CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990); SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* (1989); CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) [hereinafter Law, *Rethinking Sex*]; Littleton, *supra* note 4; Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) [hereinafter Minow, *Justice Engendered*]; Katherine O'Donovan, *Engendering Justice: Women's Perspectives and the Rule of Law*, 39 U. TORONTO L.J. 127 (1987); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775 (1992); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) [hereinafter Williams, *Deconstructing Gender*]; Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

In addition, the conclusion is the only place that Epstein confronts the concept of unconscious racism:

The drive for institutional conformity is further buttressed by pointing to practices of unconscious racism or sexism, which it is said must be rooted out at all costs. But there is scant recognition that much of today's underground resentment of the civil rights movement arises from the conscious racism and sexism that is so visible, powerful, and formalized in modern institutions. Freudian sophistication and Freudian naiveté go hand in hand. People who are

feminism in the introduction<sup>13</sup> rings hollow when he largely ignores feminist scholarship,<sup>14</sup> with its range of differences and rich complexity on many of the issues he discusses.<sup>15</sup> Indeed, Epstein dis-

quick to impugn the motives and the integrity of others, to find racial or sexual innuendo in innocent and everyday actions and speech, find it all too easy to make race and sex the dominant if not the sole determinants of their institutional decisions. It is as though unconscious racism and sexism were said to justify the formal, explicit, and conscious racism and sexism that so often run the other way. Anyone who works in academic circles, and I dare say elsewhere, knows full well that *all* the overt and institutional discrimination comes from those who claim to be the victims of discrimination imposed by others.

EPSTEIN, *supra* note 1, at 503.

The concept of unconscious racism seriously challenges and potentially undermines Epstein's point of view. Yet he fails to address this challenge and instead simply switches to another topic—that of affirmative action. His point is that conscious racism and sexism permitted in the name of civil rights is much more of a problem than unconscious racism. *Id.* Although affirmative action merits close attention, it does not excuse confronting the claims of unconscious racism and sexism. Indeed, if unconscious racism and sexism are conceded, then a strong justification exists for paying attention to race and sex to ensure that they are not used to deny employment opportunities.

On unconscious racism, see Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). See also *infra* notes 114-18 and accompanying text (discussing disparate-impact analysis).

13. EPSTEIN, *supra* note 1, at 2.

14. Catharine MacKinnon, whom Epstein cites in his chapter on sexual harassment, is the sole exception. See *id.* at 353, 358.

15. For example, Epstein discusses pregnancy, pensions, and sexual harassment in chapters 15-17. Each of these topics has generated rich feminist scholarship. On pregnancy, see NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); Clare Dalton, *Perspectives on Childbirth*, 14 J. HEALTH POL. POL'Y & L. 634 (1989); Dowd, *supra* note 4; Nancy S. Erickson, *Pregnancy Discrimination: An Analytical Approach*, 5 WOMEN'S RTS. L. REP. 83 (1979); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Herma H. Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Littleton, *supra* note 4; Mary F. Radford, *Wimberly and Beyond: Analyzing the Refusal to Award Unemployment Compensation to Women Who Terminate Prior Employment Due to Pregnancy*, 63 N.Y.U. L. REV. 532 (1988); Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-1985); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985).

On pensions, see George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982); Lea Brilmayer et al., *Sex Discrimination in Employer-sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Michael E. Gold, *Of Giving and Taking: Applications and Implications of City of Los Angeles, Department of Water and Power v. Manhart*, 65 VA. L. REV. 663 (1979); Sydney J. Key, *Sex-based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. WOMEN'S L.J. 1 (1979); Frances Leonard, *Older Women and Pensions: Catch 22*, 10 GOLDEN GATE U. L. REV. 1191 (1980); Frances Leonard, *The Three Legged Stool: Women and Retirement (In)Security*, 32

misses some of feminism's core insights with an offhand remark in the conclusion.<sup>16</sup> Race scholarship, whether from the group loosely

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HASTINGS L.J. 1195 (1981); Joseph R. Rackman, *Sex Discrimination Standards Under Title VII and Employee Benefit Plans*, in 37 N.Y.U. INST. FED. TAX §§ 4.01-.036 (Nicholas Liakos ed., 1979) (ERISA Supp.); T. Timothy Ryan, Jr. & Paula A. Rock, *Post-Norris Ambiguities: Unanswered Questions for Women and the Pension Industry*, 17 AKRON L. REV. 171 (1983); Camilla E. Watson, *The Pension Game: Age- and Gender-Based Inequities in the Retirement System*, 25 GA. L. REV. 1 (1990); Wendy A. Wolf, *Sex Discrimination in Pension Plans: The Problem of Incomplete Relief*, 9 HARV. WOMEN'S L.J. 83 (1986); Pamela S. Anderson, Note, *Gender-based Determination of Retirement Benefits*, 19 TULSA L.J. 755 (1984).

On sexual harassment, see Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Terry M. Dworkin et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988); Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433 (1986); Martha R. Mahoney, *EXIT: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283 (1992); Jane P. Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651 (1986); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299 (1991); Donald Maypole, *Sexual Harassment at Work: A Review of Research and Theory*, 2 AFFILA 24 (1987); Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333 (1990); Deborah L. Rhode, *Sexual Harassment*, 65 S. CAL. L. REV. 1459 (1992); Sarah E. Wald, *Alternatives to Title VII: State Statutory and Common-Law Remedies for Employment Discrimination*, 5 HARV. WOMEN'S L.J. 35 (1982); Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258 (1987); Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611 (1990); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991); Christine D. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83 (1984-1985); Krista J. Schoenheider, Note, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986); Mary J. Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109 (1986).

16. See EPSTEIN, *supra* note 1, at 504 ("The use of the term *gender* instead of *sex* is an effort to make it appear as though the differences between the sexes were mere accidents of biology that have no social relevance in employment settings and no long-term consequences for the welfare of either men or women."). Epstein's treatment of feminist scholarship suggests that his remark in the introduction is simply one of recognition, not one of praise. See *supra* notes 13-14 and accompanying text.

On the concept of gender, see CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); GERDA LERNER, *THE CREATION OF PATRIARCHY* (1986); Editorial, 13 SIGNS 399 (1988); Isabel Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); sources cited *supra* note 15.



identified as the Critical Race scholars<sup>17</sup> or other intellectual traditions of race scholarship,<sup>18</sup> is similarly ignored.

Epstein is not a worthy adversary, but rather an intellectual bully.<sup>19</sup> He harms the contribution of the libertarian and law-and-economics perspectives by trying to shield them from meaningful criticism. He has attempted to foreclose any criticism by preemptively labeling any critique a "campaign for political conformity,"<sup>20</sup> and refusing to acknowledge or discuss other points of view respectfully, much less with intellectual rigor. There is no evidence here of an ability or a willingness to listen.

In this review, I set forth the thesis and arguments of Epstein's book and explore these general criticisms in more detail. I then explore Epstein's core argument pitting liberty against equality from two perspectives: that of the privileged white male and that of minorities and women. I argue that this book makes sense from the perspective of the empowered white male in a privileged position in a privileged occupation. Indeed, the book is a defense of that position and the community of privileged white males, using

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17. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL. THE PERMANENCE OF RACISM* (1992) [hereinafter BELL, *BOTTOM OF THE WELL*]; Crenshaw, *supra* note 4; Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); D. Marvin Jones, *Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349 (1992); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) [hereinafter Matsuda, *First Quail*]; Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988).

18. See, e.g., ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978); Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Linda S. Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707 (1985); Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

19. For a recent example of a challenging conservative argument, see Justice Scalia's opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2873-85 (1992) (Scalia, J., concurring in part and dissenting in part).

20. EPSTEIN, *supra* note 1, at 501-03.

one of the most powerful one-word arguments of our time: "choice." And so liberty becomes a weapon with which to defeat equality. I argue that Epstein's position cannot be viewed as an argument that most minorities or women would make, as it fails to take account of their stories. Nor can it be viewed as an argument that many men, even some empowered men, would make.

## II. EPSTEIN'S THESIS AND ARGUMENTS: A GENERAL CRITIQUE

Epstein's self-described radical proposal is that all private employment discrimination law should be repealed.<sup>21</sup> He advocates a position that he admits is "well outside the mainstream of American political thought [and is] a defense of the traditional common law approach to the regulation of labor markets."<sup>22</sup> In part, his position rests on familiar law-and-economics arguments, using particular aspects of the discrimination statutes that are the best (or worst, depending on one's perspective) examples of gross imbalances between costs and benefits.<sup>23</sup> His argument is also based on statutory construction and the legislative history of Title VII of the 1964 Civil Rights Act.<sup>24</sup> Epstein essentially complains that the statute has been radically construed far beyond its language or intent, and that Congress failed to engage in sufficient analysis when drafting the statute and subsequent amendments.<sup>25</sup> He further claims that history—specifically the history of Jim Crow laws—supports the libertarian argument for limited government and the

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21. *Id.* at 9. He proposes a repeal of employment discrimination laws as they apply to *private* employers while permitting those employers to practice affirmative action without limit. See *id.* Under Epstein's plan, *public* employers would have some limits on their ability to engage in affirmative action. *Id.* My focus in this review is on his argument for a complete repeal of private discrimination law, rather than his position on public discrimination law. I also primarily discuss his arguments regarding race and sex discrimination, and only comment to a limited extent on his views on age and disability discrimination.

22. *Id.* at 6.

23. See *id.* at 178-80, 213-16.

24. 42 U.S.C. § 2000e (1988). Epstein's analysis does not include the most recent amendment to this statute, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.). For his views on the new statute, see Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981 (1992) [hereinafter Epstein, *Gender*]. Epstein does comment in the book on an earlier amendment that President Bush vetoed in 1990. See EPSTEIN, *supra* note 1, at 3.

25. See EPSTEIN, *supra* note 1, at 183-92.

primacy of private decisionmaking in employment decisions.<sup>26</sup> His most intriguing, radical, and distinctive argument, however, is that the discrimination laws ought to be repealed because the antidiscrimination principle is wrong.<sup>27</sup> His argument against the antidiscrimination principle is most clearly laid out in the introduction and the conclusion of the book. In his introduction, Epstein begins from the position that the broad-based social and political consensus in favor of the antidiscrimination principle "focuses too heavily on historical injustices, for which there is no adequate remedy, and too little on the economic and social consequences that are generated by the antidiscrimination laws. The future and present are being slighted in favor of the past."<sup>28</sup> This acknowledgment of the historical record of discrimination, particularly racism, nevertheless dismisses the availability of a remedy for such discrimination on the basis that no remedy can be sufficient. Implicit in this reasoning is the notion that no such reality of discrimination remains in the present, and that the economic and social costs of current laws, oriented toward past injustice, outweigh the benefits of remedying historic or present racism. The appeal here is to fairness and cost-benefit analysis; it is not fair for present generations to pay a price impossible to calculate for something for which they were not responsible. The cost-benefit implication is that costs of compliance with antidiscrimination laws outweigh benefits, given the contemporary scope of the problem.

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26. See *id.* at 93-94.

27. See *id.* at 495-98. It strikes me that what this book represents is second-stage law-and-economics, attempting to add an additional argument to the basic theory of that analysis. Law-and-economics analysis suggests that even when the motive or goal of legislation or a common law rule is agreed upon as desirable, we nevertheless should consider the consequences of the rule, in terms of costs and benefits. While law-and-economics analysis claims to be neutral as to goals, at least one critique of this approach exposes how the definitions of costs and benefits dramatically affect the outcome of the analysis. Even if the definitional issues can be resolved, the balancing of cost and benefit can be challenged as a superior measure of the value of legal rules. We may be willing to accept significant costs in some areas for social or political ends, for example, the costs of the consequences of poverty for children, because our political goal is not to assist their parents.

What Epstein does in this book is to appeal not to the "neutrality" or superiority of the economic approach, but rather to champion the values implicit in that approach. They are the values of autonomy, freedom of association, and choice. He argues these values are better than those underlying the antidiscrimination principle, which he characterizes as a principle of government intervention to dictate decisions, thoughts, and conduct. See *id.* at 2-4.

28. *Id.* at 2.

But much more than economic costs are at issue; it is the social and political costs that are most troubling for Epstein. According to Epstein, those costs are high; the antidiscrimination principle threatens the very foundations of the political order. "At stake is the basic choice of legal regimes under which social life is ordered."<sup>29</sup> His preferred legal regime is one based on choice and freedom of association.<sup>30</sup> The connection between choice and association is cast as a right of exclusion in private settings: the "right to be left alone with the people of one's *choice*."<sup>31</sup> It is a right exercised by the majority and the minority, by friends and enemies (read: by white and black, by men and women) which "allows both groups to go their separate ways side by side."<sup>32</sup> This is in contrast to the antidiscrimination laws, which "force them into constant undesired interaction."<sup>33</sup> In short, Epstein's legal regime permits voluntary segregation, instead of forced integration. Liberty is pitted against equality. The consequences of which principles govern, and their priority, is stated even more strongly in the conclusion:

More than I had anticipated, my study of the employment discrimination laws has persuaded me of the bedrock social importance of the principles of *individual autonomy and freedom of association*. Their negation through the modern civil rights law has led to a dangerous form of government coercion that in the end threatens to do more than strangle the operation of labor and employment markets. The modern civil rights laws are a new form of imperialism that *threatens the political liberty and intellectual freedom of us all*.<sup>34</sup>

Claiming as his methodology a "frontal intellectual assault on [the antidiscrimination] consensus,"<sup>35</sup> Epstein marshals his arguments in six parts. In Part I, he lays out his principles: libertarianism, freedom of contract, choice, and "rational" discrimination.<sup>36</sup> In Part II, he examines the history of Jim Crow and the evolution

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29. *Id.* at 3.

30. *Id.* at 3-4.

31. *Id.* at 497 (emphasis added).

32. *Id.*

33. *Id.*

34. *Id.* at 505 (emphasis added).

35. *Id.* at 6.

36. *Id.* at 15-87.

of civil rights law.<sup>37</sup> In Parts III and IV, his focus is on race<sup>38</sup> and sex discrimination.<sup>39</sup> In the race discrimination segment he primarily critiques current disparate treatment and disparate impact doctrine.<sup>40</sup> In the sex discrimination segment he distinguishes sex discrimination from race discrimination, arguing it should be dealt with under a "separate but equal" principle, and explores other doctrinal issues under current case law.<sup>41</sup> In Part V, Epstein articulates his critiques of affirmative action under the antidiscrimination principle but voices his support of unrestricted private affirmative action.<sup>42</sup> Finally, in Part VI, he discusses age and disability discrimination.<sup>43</sup>

The first part of the book is critical to Epstein's thesis, because there he lays out what he believes ought to be the first principles of the Rule of Law: libertarianism<sup>44</sup> and freedom of contract.<sup>45</sup> He describes these principles in the abstract, at least at the beginning of the Rule of Law. Epstein goes on to describe a world in which the workplace is characterized by free entry and multiple employers who, under the principles of freedom of contract and libertarianism, may make any employment decisions that they choose for whatever reason.<sup>46</sup> He claims that even if those decisions are discriminatory, they "offer[] little peril to the isolated minority. Unconstrained by external force, members of minority groups are free to search for jobs with those firms that do want to hire them."<sup>47</sup>

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37. *Id.* at 91-143.

38. *Id.* at 147-266.

39. *Id.* at 269-391.

40. *See id.* at 205-41.

41. *See id.* at 269-391.

42. *See id.* at 393-437.

43. *Id.* at 441-94.

44. *See id.* at 19 ("[T]he function of government is to control the use of force and fraud against the person and property of others.").

45. *See id.* at 24-25.

The antidiscrimination laws should be understood as an assault on the completeness of these common law rules and the intellectual foundations on which they rest. As I will demonstrate in subsequent chapters, there is no reason to believe that this antidiscrimination system generates additional benefits that exceed its costs, social or economic.

*Id.* at 27.

46. *See id.* at 24-26.

47. *Id.* at 32.

Epstein argues that employers who choose to reject or not to consider minorities or women may be engaging in "rational discrimination."<sup>48</sup> By "rational" he means in accord with cost-benefit economic analysis principles.<sup>49</sup> He disputes the common wisdom that if employers acted rationally—without regard to race, sex, ethnicity, etc.—the workplace would roughly reflect the proportionate distribution of groups in the population and in the available workforce.<sup>50</sup> Epstein argues, to the contrary, that some race and sex discrimination is rational, and therefore permissible, when discrimination reduces governance costs of the employer and reflects voluntary choices of employees.<sup>51</sup>

Epstein views this radical perspective as a "benign conclusion . . . that private discrimination holds little risk of social or private peril."<sup>52</sup> He rates the individual consequences of discrimination as insignificant compared to the results of the use of force: "Potential victims can adopt strategies of evasion to escape the sting of discrimination, no matter how irrational and prejudiced. It is far harder to outrun a bullet."<sup>53</sup> In a final brief chapter, he dismisses the need for the antidiscrimination principle in a market that he admits does not universally ensure unrestricted entry, on the grounds that "no private employer in any industry has anything close to the level of monopoly power that justifies the use of the antidiscrimination principle."<sup>54</sup>

The "rational discrimination" concept merits close scrutiny because it is a frank apology or justification for discrimination. Epstein's argument is that most employment contracts are long-term, relational contracts.<sup>55</sup> In contrast to spot contracts, or one-time transactions, where he agrees that discrimination is irrational, he finds that in long-term contracts discrimination may be rational in view of the essential role of workplace norms and culture in gov-

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48. *See id.* at 59.

49. *See id.* at 66-67.

50. *See id.* at 76-77.

51. *See id.* at 61-69.

52. *Id.* at 79.

53. *Id.*

54. *Id.* at 87.

55. *Id.* at 60.

erning the workplace.<sup>56</sup> He describes the role of discrimination here as "useful."<sup>57</sup>

Discrimination is "useful," according to Epstein, because the more an employer can minimize differences, or "tastes," the easier it is to govern the workplace and keep workers happy.<sup>58</sup> Discrimination minimizes these governance costs and is therefore rational.<sup>59</sup> "To the extent, therefore, that individual tastes are grouped by race, by sex, by age, by national origin—and to some extent they are—then there is a necessary conflict between the commands of any antidiscrimination law and the smooth operation of the firm."<sup>60</sup> Epstein proceeds to argue that enforcement of firm culture is easier when "members of a firm are all drawn from the same ethnic or racial group," because these groups also associate in social and residential settings, and therefore reputational and social constraints support informal workplace norms.<sup>61</sup> Social and residential segregation is thus cast as voluntary association which helps justify workplace segregation.

Because of these voluntary associations of employees and governance concerns of employers, Epstein argues that a certain amount of voluntary discrimination will always remain and is rational.<sup>62</sup> Differences in firm profiles are not only rational, he says, but are "natural."<sup>63</sup> That this voluntary discrimination would then vary considerably the opportunities available to some on the basis of race, sex, etc. is something that Epstein also finds rational, because the costs of equal opportunity outweigh the benefits.<sup>64</sup>

These are outrageous statements, filled with stereotypes and race and gender essentialism reduced to implicit biological "natural" preference, amounting to an outright justification for skin and gender privilege.<sup>65</sup> Epstein is saying that the costs of diversity

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56. *See id.* at 60-61.

57. *Id.* at 61.

58. *See id.* at 60-61.

59. *See id.* at 67-68.

60. *Id.* at 66-67 (emphasis added).

61. *Id.* at 70.

62. *See id.* at 72.

63. *Id.*

64. *See id.* at 73-76.

65. Epstein presents as a reasonable, desirable reality what Derrick Bell has cast as a cynical story of American racism and radical critique of the limited reach of discrimination

make discrimination reasonable and logical. He assumes that the characteristics he names are related to differences that affect governing the workplace<sup>66</sup> with no other authority than his own perception that "[i]t is harder to do business as social distance between persons increases."<sup>67</sup> What we also know, and what Epstein ignores, is that in most firms of any size women and minorities are present, but in positions of inferiority.<sup>68</sup> That evidence suggests that it is not that privileged white males do not like to associate with women or minorities; rather, they like to associate with them, but only as long as it is in unequal ways.

Group stereotyping replaces individual characteristics in Epstein's scheme. Furthermore, group-identified differences (stereotypes with a basis in fact, he would call these) are presumed to have employment consequences.<sup>69</sup> There is little consideration of the possibility that other characteristics—such as education, class background, socioeconomic status, marital or parental status—may be more predictive of workplace-related governance costs than those he cites.

There also is little examination of whether diversity has any benefits—after all, aren't we looking at both costs and benefits?<sup>70</sup> For example, employers would benefit from the price competition resulting from an increased supply of workers due to the removal of discriminatory barriers. In addition, the costs of discrimination are not adequately considered: why should employers be permitted to externalize the social costs of discrimination on the rest of society?

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law. See BELL, *BOTTOM OF THE WELL*, *supra* note 17. In his book Bell proposes a "Racial Preference Licensing Act," which would permit discrimination and segregation *at a price*—a racial license. *Id.* at 47-48. One would be severely punished for failure to discriminate without a license. *Id.* at 48. In a recent interview, Bell characterized the mock statute as "my effort to show that the civil rights laws on which we rely so much have come to mirror the old segregation laws in that they permit discrimination. And yet they are worse than those laws because they provide a kind of surface legitimacy." Stephanie B. Goldberg, *Who's Afraid of Derrick Bell?*, A.B.A. J., Sept. 1992, at 56, 57.

66. See EPSTEIN, *supra* note 1, at 66-69.

67. *Id.* at 66.

68. See *infra* notes 228, 280-82 and accompanying text.

69. See EPSTEIN, *supra* note 1, at 503-04.

70. See *id.* at 69.



Epstein bolsters his argument by pointing to voluntary segregation, or voluntary association,<sup>71</sup> but shows no recognition of the different bases for association.<sup>72</sup> No distinction is drawn between the choices of the privileged and the choices of the disadvantaged.<sup>73</sup> Nor is there a distinction between association for self-preservation of the powerful and that for empowerment of outsiders. He would permit privileged white males to preserve their position and power. He sees no great disadvantage to allowing voluntary segregation on the basis of the most extreme forms of prejudice; after all, he says, then those folks will be concentrated in those places where they choose to associate, leaving the rest to seek employment in nondiscriminatory workplaces.<sup>74</sup>

This defense of voluntary sorting is essentially a justification for apartheid—as long as it is a “chosen” course of conduct. For Epstein, if people engage in certain associations, presumably they are expressing their desires within a full universe of choices, and their ability to do so free of government intervention is to be preserved at all costs. Even if there are unequal choices, Epstein believes choice is still justified by the greater good that each person is in control. What Epstein justifies here is a “minorities and women need not apply” policy. For him, the benefit of such discrimination is that it permits recruitment of a uniform workforce that is easy to govern, as compared with a diverse workforce that is more difficult to please and control.<sup>75</sup> He seems to justify this position by theorizing that exclusionary signs would be posted outside only a few doors.<sup>76</sup>

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71. *See id.* at 66-69.

72. This is Epstein's version of “you can't have your cake and eat it, too”: if you want and value these groups, then you have to accept privileged white male associations as well. On the differences, based in context, power, and empowerment, between groups of privileged white males and groups of the historically and/or presently culturally disadvantaged, see Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171 (1986); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986); Note, *Inner-City Single-Sex Schools*, 105 HARV. L. REV. 1741 (1992).

73. *See infra* discussion in part III.B.

74. *See* EPSTEIN, *supra* note 1, at 68.

75. *See id.* at 61-65.

76. *See id.* at 45-47. The evidence that such discrimination would be widespread is evident from our contemporary context. *See infra* part III.B.

To the extent Part I of the book can be criticized, among other things, for being divorced from reality, Epstein might reply that it was intended to be drawn on a blank slate, not a reality slate.<sup>77</sup> If that is the case, then the prejudice he permits is a part of the world before the Rule of Law. That makes sense only from a perspective of race and gender biological essentialism that presumes that likes want to be with likes, and that likeness is perceived largely in terms of skin color and sex.<sup>78</sup>

If Part I of the book is an abstract argument of first principles that should define the Rule of Law, then Part II is where Epstein attempts to situate his argument in the real world of inequality. He embarks on a historical argument regarding the role of government with respect to race relations, focusing on state government in the South in the Jim Crow era<sup>79</sup> with the purpose of demonstrating the dark side of government intervention.<sup>80</sup> In order to do this, he takes issue with the conventional view of the evil of Jim Crow as gross injustice.<sup>81</sup> Epstein claims that the conventional view

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77. See EPSTEIN, *supra* note 1, at 91.

78. It is clear that Epstein's perspective is that the consequences of race and sex are clearly determined: "With race or sex everyone knows his or her role at the outset. With age, one knows that although he is young today, he will (if he lives) be old tomorrow. With disabled persons, however, some people know that they are handicapped today; but we all know that through misfortune or ill health we could become handicapped tomorrow." *Id.* at 481.

Nowhere in this deterministic scheme does Epstein take into account the combination of race and sex, or other intersections of disadvantaged, disempowered status. On status intersections, see ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) [hereinafter WILLIAMS, *ALCHEMY*]; Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539; Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30 (1981) [hereinafter Ellis, *Sexual Harassment*]; Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Matsuda, *First Quail*, *supra* note 17; Judy Scales-Trent, *Black Women and the Constitution*, 24 HARV. C.R.-C.L. L. REV. 9 (1989) [hereinafter Scales-Trent, *Black Women*]; Pat Williams, *On Being Invisible*, 4 HARV. BLACK-LETTER J. 16 (1987) [hereinafter Williams, *On Being Invisible*].

79. EPSTEIN, *supra* note 1, at 91-115.

80. See *id.* at 93-94.

81. See *id.* at 93.

The question of civil rights was perceived first and foremost as a moral issue, as a question of simple justice, which admitted only one categorical answer: any form of discrimination on the grounds of race is morally wrong and ought

fails to see what was really wrong—that government intervention in private matters was the true evil of segregation. “It was excessive state power and the pattern of private violence, intimidation, and lynching, of which there is a painful record but against which there was no effective federal remedy”<sup>82</sup> The lesson, he claims, is not to make the same mistake today of permitting abuse of power through government intervention,<sup>83</sup> even if for a “good” goal. Epstein then shifts to a discussion of the period from 1937 to 1964.<sup>84</sup> He views the removal of constraints on government regulation of economic affairs and the emergence of significant government intervention in labor markets as a dangerous shift in the law,<sup>85</sup> repeating his previously published attacks on the National Labor Relations Act<sup>86</sup> and minimum wage laws.<sup>87</sup> Epstein finishes this section with a collection of constitutional arguments against the legitimacy of Title VII under the Commerce Clause.<sup>88</sup>

The next two parts of the book examine race and sex discrimination.<sup>89</sup> The focus is largely doctrinal; there is little examination of contemporary context or consequences. In Part III, Epstein compares the relative merits of a legal regime premised on the traditional employment-at-will doctrine with a regime based on the antidiscrimination principle.<sup>90</sup> Epstein argues that freedom of contract and employment-at-will principles are valuable and useful because they support a contract of choice, with no external authority dictating the choices of the parties.<sup>91</sup> Informal norms work as well, he claims, with as much complexity as legal rules or more, and are to be preferred over legal intervention.<sup>92</sup> “The basic case

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to be illegal. It was the practice of discrimination that mattered. What was wholly irrelevant was its source, public or private.

*Id.*

82. *Id.*

83. *Id.* at 94.

84. *See id.* at 116-29.

85. *See id.* at 116.

86. *See id.* at 118-25; *supra* note 11.

87. EPSTEIN, *supra* note 1, at 125-26.

88. *Id.* at 135-40.

89. *Id.* at 147-391.

90. *See id.* at 147-58. Epstein's arguments here are restatements of the position he has staked out in his earlier writings. *See supra* note 11.

91. *See EPSTEIN, supra* note 1, at 149.

92. *See id.* at 155-56.

against Title VII rests on the superiority of private contracting over government regulation."<sup>93</sup> Epstein dismisses with little discussion the wealth of commentators who have argued in favor of modifying the traditional employment-at-will rule.<sup>94</sup>

In contrast to this preferred regime are the legal rules of the antidiscrimination principle.<sup>95</sup> At the beginning of his chapter on disparate treatment analysis, Epstein discusses the concept of merit, contrasting the civil rights perspective with the market perspective.<sup>96</sup> This is critical both to his critique of the antidiscrimination principle and his case for freedom of contract:

The market model assumes that all elements of gain and loss are subjective, and that explicit measurement by external parties is not possible but is obtainable only by indirect inference. There is no objective test of merit on which any external observer can rely. There is only the subjective test of desire manifested in consent. Those things that tend to make a worker more desirable to the employer (and the employer more desirable to the worker) count as meritorious, while those that do not are not meritorious.<sup>97</sup>

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93. *Id.* at 159.

94. *See id.* at 156-58. In the process he seems to ignore his own criticism that academic lawyers oversimplify things: "It is a constant weakness of academic lawyers to think that the world is divided into two domains, one of absolute liberty and the other of binding legal rules." *Id.* at 155.

Epstein gives short shrift to the extensive academic debate on the changing employment-at-will doctrine. See the following recent articles and references therein for the scholarship in this area dating from the 1960s: PAUL C. WEILER, *GOVERNING THE WORKPLACE* (1990); Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733 (1991); William B. Gould, IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28 (1988); David J. Jung & Richard Harkness, *Life After Foley: The Future of Wrongful Discharge Litigation*, 41 HASTINGS L.J. 131 (1989); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510 (1989).

95. Epstein's preference would be the repeal of Title VII for private employers. *See EPSTEIN, supra* note 1, at 266. His implicit fallback position is that if the structure remains, it should be limited to disparate treatment theory and, if possible, to a far more limited disparate treatment cause of action for plaintiffs. *See id.* at 174-75, 241.

96. *See id.* at 163-67.

97. *Id.* at 163.

In most cases, Epstein claims, "an employer will value intelligence, initiative, honesty, reliability, and the like, so the conventional accounts of merit carry substantial weight in individual personnel decisions."<sup>98</sup> This view suggests that the civil rights statutes do not limit in the slightest the ability to discriminate on the basis of "universally desirable (because universally desired) characteristics."<sup>99</sup>

But Epstein does not see it that way. Rather, because of the subjectivity and contextuality of markets, he rejects a legal analysis that requires inquiry into and determination of subjective motivation.<sup>100</sup> Epstein's rejection of such analysis is based on the argument that determining motive for employment decisions is too difficult; that it forces discrimination underground,<sup>101</sup> rather than eliminating prejudice; and that it is an incentive to adopt costly employment strategies to avoid legal liability.<sup>102</sup> He also presumes that market judgments, where merit equals those abilities and characteristics which employers subjectively desire, usually result in choices that reflect practical abilities and characteristics, rather than "whim or caprice."<sup>103</sup> This seems to contradict Epstein's "rational discrimination" argument,<sup>104</sup> although he would probably respond that desired employees include those who associate with those of like kind and generate low governance costs for the employer.

Although he would reject a Title VII disparate treatment analysis as costlier for "both sides" than employment-at-will (most of his costs are for the employer), he concedes that this theory of discrimination will probably continue to be recognized.<sup>105</sup> Therefore, he argues for a far more limited version of disparate treatment analysis.<sup>106</sup> He devotes much more of his energy to a critique of disparate impact analysis.<sup>107</sup>

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98. *Id.*

99. *Id.*

100. *See id.* at 164-65.

101. *See id.* at 165.

102. *See id.* at 180.

103. *Id.* at 164.

104. *See supra* notes 48-51 and accompanying text.

105. *See* EPSTEIN, *supra* note 1, at 181.

106. *See id.* at 169-80.

107. *See id.* 182-241.

In chapter ten, Epstein critiques *Griggs v. Duke Power Co.*,<sup>108</sup> the landmark case articulating impact analysis, as unsupported by the language or legislative history of Title VII.<sup>109</sup> However persuasive Epstein's claim of judicial misinterpretation might be with respect to the Civil Rights Act as passed in 1964, his argument is enormously weakened, as even he concedes, by subsequent clear legislative history that, by 1972, Congress supported the judicial development of disparate impact analysis.<sup>110</sup>

The chapter seems wasted, therefore, on a classic straw man (person?) argument. Whether *Griggs* was rightly or wrongly decided is now largely irrelevant. Epstein's real purpose here, it seems, is to contrast the public consensus in 1964, which condemned disparate treatment discrimination, with the public consensus in 1972 and 1991, which had shifted to dealing with the much more complex phenomenon of disparate impact discrimination. By claiming judicial error in *Griggs*,<sup>111</sup> perhaps he means to argue that the judiciary imposed this consensus on Congress and the public. The public record simply refutes him.

In chapter eleven, Epstein moves from text and legislative history to a critique of the doctrine of disparate impact.<sup>112</sup> His critique of impact analysis begins with polemic which grossly mischaracterizes the doctrine:

Until *Ward's Cove* the case law under Title VII revealed this irony. Where a plaintiff can show that he has been passed over when he meets the relevant qualifications, then the defendant's burden of justification is low: any nondiscriminatory reason will do. But let a plaintiff be passed over because he does *not* meet the defendant's stated qualifications—that is, because he cannot pass the test—and the burden of justification becomes quite high: “The touchstone is business necessity.” The weaker the plaintiff's *prima facie* case, the more obstacles are placed in the

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108. 401 U.S. 424 (1971).

109. See EPSTEIN, *supra* note 1, at 192.

110. See *id.* at 201-04. Under the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (to be codified at 42 U.S.C. § 2000e-2), both text and legislative history now support the doctrine. See Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1057, 1068-72, 1081-83 (1991).

111. See EPSTEIN, *supra* note 1, at 192.

112. *Id.* at 205-41.

path of a defendant who seeks to rebut it—exactly the opposite of what any sensible system of law should require.<sup>113</sup>

At best this characterization is disingenuous. Disparate impact analysis forces an employer to prove that she has made a good choice, and requires that the choice be legitimate—job related and efficient in measuring job-related qualifications—but *only if there is evidence that suggests the employer's criteria are discriminatory*<sup>114</sup> The plaintiff must demonstrate, usually by the use of statistics, that the criteria have a disproportionate impact on a protected group of which he or she is a member.<sup>115</sup> Impact analysis is radical in its acknowledgment of the pervasive reach of discrimination in the structure of the workplace and its focus on exclusion of groups. Impact analysis does not, however, aim to eliminate all discrimination from the workplace; *it permits discrimination to continue if the employer can justify his criteria as job related*.<sup>116</sup> The employer need not demonstrate that he has chosen the best method, or one which discriminates the least; rather, he must show only that the attribute or characteristic measured is one that is needed for the job.<sup>117</sup> Furthermore, subjective criteria, which

113. *Id.* at 200.

114. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1992). For recent scholarship on disparate impact analysis that refers to the significant body of scholarship on the theory, see Michael K. Braswell et al., *Disparate Impact Theory in the Aftermath of Wards Cove Packing Co. v. Atonio: Burdens of Proof, Statistical Evidence, and Affirmative Action*, 54 ALB. L. REV. 1 (1989); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523 (1991).

115. See Braswell et al., *supra* note 114, at 4. On statistical proof, see DAVID C. BALDUS & JAMES W.L. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980); DAVID W. BARNES, *STATISTICS AS PROOF* (1983); Ramona L. Paetzold, *Problems with Statistical Significance in Employment Discrimination Litigation*, 26 NEW ENG. L. REV. 395 (1991) (calling for a reevaluation of the purposes and goals of statistical inference); D. Don Welch, *Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals*, 63 N.C. L. REV. 849, 874-75 (1985) (regarding statistics as one means of unmasking purposeful discrimination in light of the "dual reality that few employers openly express their discriminatory intentions and that much discrimination takes institutionalized forms"); Marcel C. Garaud, Comment, *Legal Standards and Statistical Proof in Title VII Litigation: In Search of a Coherent Disparate Impact Model*, 139 U. PA. L. REV. 455 (1990) (pointing out that statistical proof is frequently the only proof available).

116. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988).

117. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 584-87 (1979).

predominate particularly in upper-level jobs, remain perfectly permissible and are given enormous deference.<sup>118</sup> Epstein's misstatement of impact analysis reflects a lack of intellectual rigor.<sup>119</sup> His depiction of the workplace is not a challenging metaphor, but a cheap shot.<sup>120</sup>

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118. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982) (criticizing the failure of the courts to enforce Title VII vigorously in situations involving upper-tier positions); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990) (arguing that the "glass ceiling" excludes women from upper-level jobs, not because of ability, but because they lack personal attributes that the decisionmakers regard as necessary for success).

119. He likewise mischaracterizes the legal standard for establishing business necessity:

Although there is some variation in the level of rigor found in various cases, one common formulation of the concept provides that "the practice must be essential, the purpose compelling." On this view it is not enough that a test is perfectly reasonable and plausible, in the sense of cost effective: virtually any test in common use meets this standard.

EPSTEIN, *supra* note 1, at 212-13 (quoting *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 442 (9th Cir. 1987), *rev'd*, 490 U.S. 642 (1989)). This is the strongest articulation of the business necessity standard and one not regularly followed; rather, a looser standard is more common. See, e.g., *Watson*, 487 U.S. at 999 (articulating the business necessity burden as one of producing evidence of a "manifest relationship to the employment in question"). In fact, the Court in *Watson* held that the ultimate burden of proof does not shift to the defendant. *Id.* at 997. The standard has also been more relaxed when safety concerns can be articulated. See, e.g., *Beazer*, 440 U.S. at 584-87 (upholding an employer's prohibition of narcotic drug use, despite its disproportionate impact on minorities, because the policy furthered legitimate goals of safety and efficiency). The Supreme Court's articulation of the standard in *Wards Cove* was "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove*, 490 U.S. at 659. As authority, the Court cited to language in *Watson* and *Beazer*, articulations markedly more relaxed than the standard in *Griggs*. See *id.* The Court in *Wards Cove* also placed the burden of proof on the employee on this element of the case, in a stunning reversal of the understanding of the federal courts since *Griggs*. See *id.* Both the business necessity standard and the burden of proof on this issue were, therefore, very favorable to employers at the time Epstein wrote.

Under the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (to be codified in scattered sections of 42 U.S.C.), business necessity is defined, but not in a way that clarifies the range of possible standards or shows that there is a single standard. The statute indicates that the terms "business necessity" and "job related" are to be construed pursuant to a single interpretive memorandum in the legislative history, *id.* § 105(b) (to be codified at 42 U.S.C. § 2000e-2), which says only: "The terms business necessity and job related are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

120. Epstein could have raised cost-benefit issues just as easily even with a fair characterization of the doctrine. A challenge can be made, for example, to whether employers should



Epstein's assumptions in this description of impact analysis, moreover, rely on questionable premises. He assumes that any qualifications set by an employer are legitimate and nondiscriminatory, and that the hypothetical employee is unqualified (and because we are talking about race, the implicit unqualified applicant is black).<sup>121</sup> The logic, perhaps, is that the employer's criteria have merit because they reflect the employer's desires. That, in Epstein's view, should insulate the employer's choice of a mechanism or basis for employment decisions.<sup>122</sup>

Epstein continues his analysis of disparate impact doctrine from a cost-benefit perspective by focusing on the controversial area of general intelligence testing.<sup>123</sup> He combines case analysis of *Connecticut v. Teal*,<sup>124</sup> *Watson v. Fort Worth Bank & Trust*,<sup>125</sup> and *Ward's Cove Packing Co. v. Atonio*<sup>126</sup> with data on the difficulty of

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bear the cost of eliminating societal discrimination over which they have no control with no support from government. If impact analysis required the elimination of all discriminatory devices, this would be an even more powerful argument. This schema presumes that elimination of discrimination is essential; whatever that cost is, the issue becomes how to allocate the cost equitably. Epstein would allocate the cost solely to victims, not to eliminate discrimination, but simply to preserve the status quo, and would expect individuals to pay the price. See EPSTEIN, *supra* note 1, at 225 (positing that a civil rights defendant, like a criminal defendant, should be afforded high levels of protection and that the optimal level of antidiscrimination enforcement is not necessarily the maximum level).

121. Epstein's erroneous supposition is that an employer's criteria will have objective value in measuring job performance and that firms behave rationally. See *id.* at 241 (suggesting that if tests accurately measure ability, employers will keep them, but if they are inadequate, employers will abandon them).

122. See *id.* (arguing that government should not make decisions on matters best left to an employer's choice).

123. *Id.* at 206-26.

124. 457 U.S. 440 (1982).

125. 487 U.S. 977 (1988).

126. 490 U.S. 642 (1989). As Epstein expends considerable effort discussing these cases, it is interesting that he devotes no analysis to *Hishon v. King & Spalding*, 467 U.S. 69 (1984), the Supreme Court case that directly confronts the argument that free association claims should outweigh equality claims. See *id.* at 78. In that case, which involved the alleged discriminatory denial of partnership by a law firm, one of the firm's arguments was that the application of Title VII to partnership decisions would infringe constitutional rights of expression or association. *Id.* The Court rejected the claim with little discussion, stating that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

Although Epstein may disagree with the Court's rationale, it seems a significant omission that the case is neither discussed nor cited anywhere in his book. Similarly, Epstein does not cite the work of other scholars who have considered the liberty-versus-equality confron-

constructing a test that meets Equal Employment Opportunity Commission (EEOC) test guidelines. He also points to the cost of erroneously finding practices discriminatory. Epstein argues that the plaintiff's case is too easy to make under impact analysis<sup>127</sup> because statistical analysis facilitates demonstrating disproportionate impact and because the business necessity defense is too demanding.<sup>128</sup> Epstein never considers that the reason for this result is that so many tests are discriminatory.<sup>129</sup>

Epstein explicitly talks about race only in the final chapter of his section on race discrimination.<sup>130</sup> In that section his intent is to focus on the "effects of the antidiscrimination laws on workers, black and white, in the workplace."<sup>131</sup> He concludes that any evidence of gains by black workers is probably illusory; the dislocations since the 1964 Act must be balanced against pre-Act dislocations.<sup>132</sup> Although he acknowledges the literature examining the effects of Title VII,<sup>133</sup> he focuses most of the chapter on a single

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tation. See, e.g., Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. PITT. L. REV. 143 (1987) (analyzing philosopher Hannah Arendt's preference of associational rights over the equality principle); Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914 (1987) (reviewing DAVID L. KIRP ET AL., *GENDER JUSTICE* (1986)) (rejecting the argument that free choice promotes justice, asserting that first one must question the meaning and value of "choice" as currently defined).

127. EPSTEIN, *supra* note 1, at 216-36. This is the only time Epstein talks about race and, again, does so only indirectly.

128. See *id.* at 212-13 (stating that requiring an employer to show more than that the test is reasonable and plausible does not further any sensible social objective).

129. Much of the analysis of general intelligence tests has indicated that they are hopelessly discriminatory. See ROBERT SADACCA, *THE VALIDITY AND DISCRIMINATORY IMPACT OF THE FEDERAL SERVICE ENTRANCE EXAMINATION* (1971); U.S. GEN. ACCOUNTING OFFICE, *FEDERAL EMPLOYMENT EXAMINATIONS: DO THEY ACHIEVE EQUAL OPPORTUNITY AND MERIT PRINCIPLE GOALS?: A REPORT TO THE CONGRESS* (1979). Epstein's position seems to be that if rooting out discrimination is too difficult or impossible, and if the tests have any benefit, their benefits outweigh their costs and should be permitted, regardless of their impact on protected groups. See EPSTEIN, *supra* note 1, at 212-13. On testing, see generally Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158 (1991). The Civil Rights Act of 1991 prohibits race-norming as a way of correcting for test discrimination. Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071, 1075 (to be codified at 42 U.S.C. § 2000e-2).

130. See EPSTEIN, *supra* note 1, at 242-66.

131. *Id.* at 242.

132. *Id.* at 243.

133. *Id.* at 243-44 (explaining that analysis of each study is not possible).

study of the textile industry in South Carolina.<sup>134</sup> He recasts the conclusion of the authors of that study<sup>135</sup> as one that supports his libertarian principles and his historical argument in Part II: the gains by blacks were largely due to the removal of Jim Crow, therefore the record supports the value of less government intervention rather than more government intervention<sup>136</sup> (although government intervention was necessary to remove Jim Crow and to prevent private reinstitutionalization without state support).

Epstein further argues that not only did antidiscrimination laws do little or nothing to help blacks, they also "hurt *some* blacks while benefiting others."<sup>137</sup> One group he identifies as hurt are blacks who benefitted from segregation by providing the businesses and opportunities for the black community when the white community refused to deal with blacks or was legally prohibited from doing so.<sup>138</sup> According to Epstein, low-income, unskilled blacks comprise a second group that has been hurt; their position has worsened, compared to upper-income, skilled black workers.<sup>139</sup> Epstein links this worsening position to antidiscrimination laws and minimum wage laws which make it too costly for many employers to hire unskilled black labor.<sup>140</sup> His solution is to permit contracts to be governed under freedom-of-contract principles even if they are discriminatory.<sup>141</sup> Finally, at the end of this section he returns to advocating "rational discrimination".

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134. See *id.* at 244-54 (referring to James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989)).

135. He notes that their conclusion was that vigorous civil rights enforcement was the key to the improvement of black lives. *Id.* at 245.

136. See *id.* at 254.

137. *Id.* at 260.

138. *Id.* at 260-61.

139. *Id.* at 261-62.

140. *Id.* at 263-65.

141. *Id.* at 263. In markets where no discrimination laws exist, such as many third world countries, one can hardly argue that more people benefit because more people work. What seems equally clear from the evidence, however, is that there is a strong, unspoken willingness to accept class inequality as a means to perpetuate race inequality. Roy Brooks would agree that the antidiscrimination laws mainly benefit middle- and upper-class blacks, because they do not deal with how we subordinate lower class blacks due to our limited concepts of equality. Brooks, *supra* note 18, at 3-4, 9-22. His suggestions for change would not, however, include eliminating the statute. *Id.* at 153 (recommending reformation, not repeal,

There are good reasons to believe, moreover, that some (not all, but some) firms may be better able to operate if they select their workers by race rather than by some race-neutral criterion. *We should not expect race to be irrelevant in markets, and neither whites nor blacks should desire it to be so.* Yet there is a vast difference between segregation by choice and segregation by public command<sup>142</sup>

Epstein is arguing that not only is discrimination rational, but it is also desirable. How much closer can you get to an expression of racial apartheid?<sup>143</sup> Why we should not desire the elimination of race-based criteria, or the irrelevancy of race, goes unexplained. His point of view makes sense only when one examines who benefits from that point of view.<sup>144</sup>

In contrast to his virtual nondiscussion of race in his analysis of race discrimination, Epstein talks very explicitly about sex, age, and disability.<sup>145</sup> He sees crucial distinctions between these various forms of discrimination:

[R]ace, sex, and age cases often present very different issues. Thus, explicit age classifications are common in all segments of the unregulated labor market. My educated guess is that the statutes that render these classifications illegal are apt to be far more intrusive than those statutes that prohibit racial classifications, which most firms would find largely irrelevant. Sex classifications form an intermediate case; these are desirable in many occupations (nursing, heavy labor) but are usually regarded as far less relevant in others (academics, for example). The mischief worked by an antidiscrimination statute is not constant across all occupations and all grounds for discrimination.<sup>146</sup>

He develops these positions in Part IV, concerning sex discrimination, and Part V, discussing age and disability discrimination.

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of Title VII). Epstein's analysis seems to suggest only a certain place can be occupied by blacks, and only the best qualified win.

142. EPSTEIN, *supra* note 1, at 266 (emphasis added).

143. The term is drawn from ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

144. See *infra* part III (discussing point of view).

145. See, e.g., EPSTEIN, *supra* note 1, at 452 (discussing age in terms of its impact on present and future ability).

146. *Id.* at 159-60.

Epstein's position on sex discrimination rests on his justification for different treatment encapsulated in the phrase "separate but equal."<sup>147</sup> Despite the pejorative connotation of this legal shorthand used to justify segregation,<sup>148</sup> Epstein nevertheless claims it perfectly describes the difference between sex and race discrimination.<sup>149</sup> He ignores, or is insensitive to, the negative connotations of the phrase.

Epstein's position is that sex-based differences in the workplace are explained by differences in sex roles that he believes are biologically determined.<sup>150</sup> One has to wonder about his mention of feminism in his introduction,<sup>151</sup> given that his description of work and family roles of men and women, his bald stereotyping, and his biological determinism defy the wealth of feminist scholarship on women and work.<sup>152</sup> He goes so far as to suggest that "any diminution of men's prospects in the workplace reduces for many women their total expected income and welfare."<sup>153</sup> One would have thought such absurd defenses of men's position and power were long gone. But Epstein believes women are responsible for preserving men's preeminence in the market, and if they fail to do so, they also threaten marriage and family: "The pervasive importance of sex roles can be stated even more strongly: durable marriages often depend on a conscious division of labor within the family"<sup>154</sup>

147. See *id.* at 274.

148. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

149. See EPSTEIN, *supra* note 1, at 275.

150. See *id.* at 271-72.

151. See *id.* at 2 ("In my judgment, feminism is the single most powerful social movement of our time, one that addresses every aspect of human and social life.").

152. See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990); Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies*, 53 U. CHI. L. REV. 934 (1986); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. CR.-CL. L. REV. 79 (1989) [hereinafter Dowd, *Gender Paradox*]; Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431 (1990) [hereinafter Dowd, *Restructuring the Workplace*]; Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); Kay, *supra* note 15; Littleton, *supra* note 4; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Taub, *supra* note 15; Williams, *Deconstructing Gender*, *supra* note 12; Williams, *supra* note 15.

153. EPSTEIN, *supra* note 1, at 270.

154. *Id.* It is hardly an equitable division of labor. On the structure of the household economy, see FAMILIES AND WORK (Naomi Gerstel & Harriet E. Gross eds., 1987); Joan

Not surprisingly, then, the workplace reflects different opportunities for men and women, and Epstein thus concludes: "The differences between the sexes do matter."<sup>155</sup> He rejects the notion that the workplace should fight against these differences; rather, it should be permitted to structure itself according to difference, and allow men and women to gravitate to the work at which their sex determines they would be best employed.<sup>156</sup> He sees no reason to ban members of a particular sex from a particular job, "*as long as an employer is willing to offer a job.*"<sup>157</sup> And finally, he suggests that no single vision of the proper distribution of men and women in the workplace is workable because there is too much that we do not understand about men and women<sup>158</sup>—a mystery theory. Nevertheless, Epstein states that the patterns that exist can be accounted for without concluding that they are due to domination and exploitation.<sup>159</sup>

If you ascribe to biological determinism, then this physiological fact of sex is the cause of any manifest disparities. If you view sex role conditioning as fixed and unchanging, created by society, not contributed to by employers and their construction of the workplace culture, then you may conclude it is not the fault of employ-

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Acker, *Class, Gender, and the Relations of Distribution*, 13 SIGNS 473 (1988); Myra M. Ferree, *Between Two Worlds: German Feminist Approaches to Working-Class Women and Work*, 10 SIGNS 517 (1985); Heidi I. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS 366 (1981). On the consequences of that structure upon dissolution of marriage, see FINEMAN, ILLUSION, *supra* note 12.

155. EPSTEIN, *supra* note 1, at 271.

156. *See id.* at 272.

157. *Id.* at 273 (emphasis added).

158. *See id.*

159. *Id.* Epstein further distinguishes race and sex by their histories. *Id.* at 278-79. On that proposition, he would not have much disagreement; that is, their histories are different. On the significance of the difference, there would be a good deal of disagreement. I view the historical differences as critical to understanding existing structures and culture, and the differences in the manifestations of racism and sexism. It has never struck me as particularly persuasive that because one history can be presented as less brutal, the discrimination is any less real. That is like saying physical harassment is worse than psychological harassment, and constant beatings are worse than being hit once. What difference does that make to one harmed? It still hurts.

ers.<sup>160</sup> To do so, though, you must ignore or reject the vast body of research to the contrary.<sup>161</sup>

Epstein concludes that the basic issue in sex discrimination is whether differences are justifiable.<sup>162</sup> He divides sex discrimination cases into three categories, which he discusses separately. First, there are facial discrimination cases, which generate his discussion of the bona fide occupational qualification (BFOQ) doctrine under Title VII.<sup>163</sup> Second, there are cases that he describes as asking whether there is any discrimination at all. He places pension and pregnancy cases in this category and discusses each in turn.<sup>164</sup> Finally, he has a miscellaneous category of key cases, which includes claims of sexual harassment<sup>165</sup> as well as challenges to job-selection criteria and sex-based wage differentials.<sup>166</sup>

In his discussion of BFOQ, Epstein criticizes strict scrutiny of facially discriminatory policies<sup>167</sup> and argues that cost justifications and customer and coworker preferences should be considered legitimate bases for a BFOQ.<sup>168</sup> He condemns the failure to allow sex-specific health regulation for the benefit of workers, especially without resolving potential tort liability issues.<sup>169</sup> Nothing here is

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160. See Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749 (1990), for a contrary view on the way we actually construct our gender roles and work roles. It is an ongoing process, which justifies holding employers accountable for a workplace culture that constructs jobs as male or female. There is also considerable literature on comparable worth, sex segregation, and job evaluation. See, e.g., COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH (Heidi I. Hartmann ed., 1985); GENDER IN THE WORKPLACE (Clair Brown & Joseph A. Pechman eds., 1987); WOMEN, WORK, AND WAGES (Donald J. Treiman & Heidi I. Hartmann eds., 1981); Mary E. Becker, *Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby*, 51 U. CHI. L. REV. 1112 (1984); Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207. For a good basic summary of opposing views, see MICHAEL E. GOLD, A DIALOGUE ON COMPARABLE WORTH (1983).

161. See sources cited *supra* note 160. There also is considerable research outside legal academics on the subject of workplace culture. See, e.g., ROSABETH M. KANTER, THE CHANGE MASTERS: INNOVATION FOR PRODUCTIVITY IN THE AMERICAN CORPORATION (1983); ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

162. EPSTEIN, *supra* note 1, at 280.

163. *Id.* at 283-312. The doctrine permits discrimination when the nature of the work requires it. See 42 U.S.C. § 2000e-2(e) (1988).

164. EPSTEIN, *supra* note 1, at 313-49.

165. *Id.* at 350-66.

166. *Id.* at 367-91.

167. See *id.* at 289.

168. See *id.* at 296, 300.

169. See *id.* at 311-12.

particularly new or startling, except for the customer *and* coworker preference argument,<sup>170</sup> which is a means of translating his “rational” discrimination argument into legal doctrine. His chapter on Title VII pension decisions reworks ground that numerous commentators have tilled,<sup>171</sup> adding only biological and social determinism to the arguments:

The ostensible goal of the antidiscrimination laws is to make sex irrelevant in employment relations. But the goal is incoherent and mischievous as a universal proposition. The differences between men and women do matter to both men and women. To speak of these undeniable differences as stereotypes is to use Title VII to reject information not because it is false but because it does not meet an ideological preconception of what is desirable in human relations or true in human affairs.<sup>172</sup>

What Epstein has missed here is the feminists’ rich debate on difference;<sup>173</sup> he has only selectively taken advantage of difference as a means to justify *inequality*.

Epstein’s chapter on pregnancy reviews constitutional and statutory cases, adding nothing new to that analysis.<sup>174</sup> How you see those cases turns, ultimately, on how you define equality or how you frame the issue.<sup>175</sup> Epstein neither acknowledges nor discusses

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170. *See id.* at 299.

171. *See supra* note 15.

172. EPSTEIN, *supra* note 1, at 328.

173. *See supra* notes 12, 15. Very influential in the debate in terms of seeing the critical issue as domination, not difference, is the work of Catharine MacKinnon. *See, e.g.,* MACKINNON, *supra* note 12; CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). On the critique of the difference debate’s failing to take into account intersections of race and class that create differences among and between women, see sources cited *supra* note 78. For the complex issues and positions regarding difference in the context of maternity leave, see sources cited in Dowd, *supra* note 4. In the toxic and hazardous substances area, see Hannah Furnish, *Beyond Protection: Relevant Difference and Equality in the Toxic Work Environment*, 21 U.C. DAVIS L. REV. 1 (1987). Most feminists would distinguish between sex and gender; however, Epstein does not. *See* EPSTEIN, *supra* note 1, at 504.

174. *See* EPSTEIN, *supra* note 1, at 329-49. There has been considerable discussion of the Court’s pregnancy cases. *See supra* notes 15, 152. *Geduldig v. Aiello*, 417 U.S. 484 (1974), in particular, generated enormous commentary, so much so that one scholar called it a virtual “cottage industry” of critical analysis. Law, *Rethinking Sex*, *supra* note 12, at 983 nn. 107-09.

175. For example, Epstein critiques MacKinnon, but she is talking about employment security, while he is talking about insurance protection. *See* EPSTEIN, *supra* note 1, at 342-43. All he ends up saying is that his argument is more persuasive. *See id.* at 343.



other points of view; as with most other things, his is the only correct view.

His most interesting sex discrimination chapter is on sexual harassment. He distinguishes sexual harassment from other forms of discrimination because a common law remedy *is* available, compared to the general unavailability of common law remedies for other forms of discrimination.<sup>176</sup> The language of sexual harassment, he argues, is the language of tort.<sup>177</sup> One obviously could argue, however, that the more remedies, the better.<sup>178</sup> His argument against a cause of action under Title VII verges on the absurd. Epstein again bases his analysis on the kind of mischaracterization that discredits the value of his arguments. He claims that a hypothetical bisexual harasser could not be enjoined from misconduct because the harasser treats men and women the same.<sup>179</sup> He claims this is a major flaw in the antidiscrimination principle: it permits "unpardonable excesses of antisocial behavior"<sup>180</sup> (his synonym for discrimination?), in contrast to the common law, which would con-

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176. See *id.* at 351-52. His general defense of a common law approach to this area is another example that suggests he needs a reality check:

Where there is solely a failure or refusal to deal, there should be no remedy in contract or tort. So, too, when contractual terms differ by race or sex it is a private matter, best handled by individual choice and consent. Those who believe, for example, that they are worth more than they have been offered can search elsewhere. Those who regard taking lower wages as an opportunity to break into a market can accept the offer tendered. No uniform rule need determine which offers may be made or accepted.

*Id.* at 351. For a contrasting view of reality, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (rejecting the notion that competitive market forces eliminate racial and gender discrimination). See also *infra* part III (providing a reality check).

177. EPSTEIN, *supra* note 1, at 353.

178. Indeed, permitting multiple avenues of litigation, including federal remedies and relief via state and local civil rights laws as well as arbitral relief, has been an express philosophy of civil rights law. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Of course, there has been some limitation of this policy under the more conservative philosophy of the more recent Court. See *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

Epstein focuses on Title VII; he does not explicitly deal with parallel federal or state law, although presumably he would apply the same analysis. I assume he would be horrified at multiple causes of action as constituting excessive state interference, violating the libertarian principle. He also does not address Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965); the contract theory of the executive order would seem to support his freedom of contract model.

179. See EPSTEIN, *supra* note 1, at 358.

180. *Id.*

demn the behavior regardless of the motive.<sup>181</sup> But while it is theoretically possible to define equality this way, it is neither required nor rational to do so. Equal treatment need not be bent to mean equal discrimination is okay; that would be like saying one cannot discriminate in a job held only by members of one sex because there is no member of the opposite sex for comparison.<sup>182</sup>

Epstein completes his discussion of sex discrimination with a chapter considering disparate impact theory in the sex discrimination context, including a discussion and defense of the decision in the infamous *EEOC v. Sears, Roebuck & Co.*<sup>183</sup> case.<sup>184</sup> He returns here to his view of sex differences—physical as well as social and cultural—as biologically determined. His bottom line is that “biological, sociological, and historical evidence of sex differences can be used to explain or justify whatever disparities in impact are found.”<sup>185</sup> Or more simply, choice is the explanation for patterns that appear discriminatory, and choice is enough of an explanation.<sup>186</sup>

There is no consideration of structural or cultural constraints on choice, or of who has the power to make choices in the employment setting,<sup>187</sup> except, of course, to make absurd arguments:

181. *Id.* at 353-54.

182. Beyond absurd hypotheticals, sometimes Epstein is just insensitive and offensive, as when he describes the supervisor's behavior in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), as a “frolic and detour” which should negate corporate liability under *respondeat superior*. EPSTEIN, *supra* note 1, at 363. This is a case that included several allegations of forcible rape. See *Meritor Savings Bank*, 477 U.S. at 60.

183. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

184. See EPSTEIN, *supra* note 1, at 385-91. For another point of view, see Eileen Boris, *Looking at Women's Historians Looking at "Difference,"* 3 WIS. WOMEN'S L.J. 213 (1987); Williams, *Deconstructing Gender*, *supra* note 12.

185. EPSTEIN, *supra* note 1, at 368.

186. See *id.* at 373.

187. On the dangers of the choice argument, see Dowd, *Restructuring the Workplace*, *supra* note 152; Schultz, *supra* note 160; Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1599 (1991). By the last chapter, Epstein's determinism extends beyond biology to social differences as well: “Given basic sexual differences, both biological and social, one should expect that there would be some differences that might influence the propensity of men and women to take the relatively riskier commissioned sales jobs.” EPSTEIN, *supra* note 1, at 387. Later in the same paragraph, he asserts that “the social patterns of behavior are more or less consistent with what the biological model predicts.” *Id.* For a more extensive discussion of his latest views on gender, difference, and biological determinism, see Epstein, *Gender*, *supra* note 24. For different views in the same volume, see Kathryn Abrams, *Social Construction, Roving Biologism, and Reason-*

[O]nly by *mandating* a system of proportionate representation can the law eliminate the profound influence of sex differences on employment status. Yet in order to do that, it must radically recast Title VII to place an obligation on *employees* to accept positions they do not want to take, and thereby to complete the coercive reorientation of employment law begun on the employer side by Title VII itself.<sup>188</sup>

This nightmare of forced cross-sex employment is contrasted to the market system:

Of course, within a market system the preferences of workers not to have female or male co-workers would be respected, and one should not (even at this late date) dismiss them solely as irrational forms of bigotry. It is very clear that these attitudes are far stronger in some lines of business—say, blue-collar trades involving heavy physical labor—than in others, including teaching, medicine, law, and many areas of business.<sup>189</sup>

This respect for discriminatory attitudes is justified by the argument of choice.<sup>190</sup> It is choice only, however, for the powerful, who may choose to maintain their power and segregated communities of power, or to associate with women only when they can do so in unequal ways.

Epstein moves on in Part V to address affirmative action. The placement of this discussion seems designed to avoid wrestling with the concept of unconscious discrimination by shifting the focus to conscious, explicit discrimination.<sup>191</sup> Epstein condemns reading Title VII so as to permit affirmative action, other than in remedial contexts, as a violation of the color- and sex-blind goal of the statute.<sup>192</sup> Without the statute, he would permit voluntary af-

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able Women: A Response to Professor Epstein, 41 DEPAUL L. REV. 1021 (1992); David Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007 (1992).

188. EPSTEIN, *supra* note 1, at 374.

189. *Id.* On the continuing prevalence of discrimination in law, see, e.g., *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990) (discussing gender bias in the legal system, from law school to courtrooms to firms).

190. See EPSTEIN, *supra* note 1, at 375 (attributing disparate employment patterns to the desires of both employees and employers).

191. *Id.* at 377 (" 'Unconscious discrimination' by whites and by men is used as a benchmark for analysis in a world that often contains pervasive conscious discrimination ").

192. *Id.* at 396; see *id.* at 395-411.

firmative action without limitation in the private sector, but would place some limitations on the public sector.<sup>193</sup> It is critical to note, however, that his support for affirmative action is based on a fundamental change in the definition of the term. He equates affirmative action in the private sector with choice—so affirmative action means affirmative action for all, not affirmative measures to assist only disadvantaged groups.<sup>194</sup> “The central issue here is not whether quotas are a good or a bad thing but who decides whether they should be used.”<sup>195</sup> He sees the harm of permitting unrestricted affirmative action in the public sector as allowing “the adoption of both an affirmative action program and the reversion to an employment system of Jim Crow, if that could be implemented by a political majority.”<sup>196</sup> He would, therefore, impose limits on governmental affirmative action.<sup>197</sup> Interestingly, Epstein does not see the maintenance or reinstitutionalization of prejudice

193. *Id.* at 396; *see id.* at 412-37.

194. *See id.* at 412 (“[T]hose who want to practice affirmative action should be free to do so, for the benefit of whichever groups they choose.”).

195. *Id.* at 414. This is not explicit in Epstein’s argument, but seems implicit:

It should be evident that the rhetoric on both sides is necessarily inflamed by one common need: to justify a position for or against affirmative action on the basis of some comprehensive social theory of right and wrong. But once we recognize that freedom of contract should be the basic social norm, then the need for inflamed public rhetoric is reduced, since there are no longer any collective decisions to tear at and sear our collective conscience. Some firms may well decide to engage in an affirmative action program anyway: it is only a matter of following the internal decision-making procedures adopted by the firm. Any organization can opt for a little bit of affirmative action or a lot. It can decide to hire only women or blacks or anyone else.

*Id.* at 418.

A clearer indication that Epstein’s view of affirmative action is not limited to its common definition of being for the benefit of disadvantaged groups, i.e., that it could include whites and males, as well, is evident in the following statement:

Were discrimination allowed as a matter of course, the greatest victory for the civil rights movement would be to see its own position prevail in an atmosphere wholly free from any threat of government coercion. Why should anyone be uneasy about winning 90 percent of the battles? Why in the name of diversity must we exclude a few all-male or all-white enclaves for those who want them, for whatever reason? Once the question of affirmative action is privatized, we will all enjoy some modest gain from the relative lack of tension and from the cost savings as litigation ceases.

*Id.* at 419.

196. *Id.* at 421.

197. *Id.* at 421-37.

and segregation through the utilization of private power as a potential harm in the private sector.<sup>198</sup>

In the last section of the book Epstein applies his principles to age and disability discrimination, arguing for repeal of the Age Discrimination in Employment Act<sup>199</sup> (ADEA) and the recently enacted Americans with Disabilities Act<sup>200</sup> (ADA).<sup>201</sup> After his more extensive treatment of race and sex discrimination, his treatment here is relatively brief. However, as with his treatment of race and sex discrimination, he avoids any discussion of the context or of the reality of inequality, and selectively discusses only a few aspects of these two complex areas of discrimination law.<sup>202</sup>

Epstein sees age discrimination as particularly rational because it is cost justified and because the practice of discrimination on the basis of age is widespread.<sup>203</sup> Even if Title VII is not repealed, he argues the ADEA must be repealed because it is "peculiarly destructive to the health of employment markets."<sup>204</sup> Epstein supports his arguments by examining hiring practices and mandatory retirement programs.<sup>205</sup> This seems particularly inapposite since the paradigm age discrimination case is a discharge case.<sup>206</sup> Furthermore, the workplace example he uses to argue for the necessity of mandatory retirement is the peculiar institution of tenure utilized by colleges and universities.<sup>207</sup> Thus, he picks a quirky part of the employment market to make his case. Not surprisingly, he justifies the institution of tenure through a cost-benefit analysis.<sup>208</sup>

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198. Epstein argues, rather, that in a system of choice "there is no prima facie legal wrong in taking race and sex into account      Formal equality and substantive soundness thus work in perfect harmony." *Id.* at 414.

199. 29 U.S.C. §§ 621-634 (1988).

200. 42 U.S.C. §§ 12,101-12,213 (Supp. II 1990).

201. EPSTEIN, *supra* note 1, at 441-94.

202. *See id.*

203. *Id.* at 447-48.

204. *Id.* at 447.

205. *See id.* at 450-59.

206. On patterns of Title VII litigation, see generally John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); John J. Donohue, III & James J. Heckman, *Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L.J. 1713 (1991).

207. *See* EPSTEIN, *supra* note 1, at 459-73.

208. *Id.* at 462.

Epstein's final chapter, which discusses disability discrimination, condemns the newest discrimination law as no better than the others.<sup>209</sup> His position does not seem so sharply defined here as in other sections, nor so well thought out. He argues that the concerns of disabled individuals might be more efficiently satisfied through subsidies or direct living grants, rather than through required structural changes that make the workplace accessible and jobs manageable.<sup>210</sup> This position ignores much of the data on the cost of reasonable accommodation for disabilities, which shows that the costs of reasonable accommodation are far less than providing income support for disabled persons who cannot work.<sup>211</sup>

Insensitivity to disabled workers also surfaces in this chapter, as when Epstein comments that many of the problems of disabled workers could be remedied easily by solicitous expressions of sympathy and support: "A helping hand or a kind word can go a long way in many contexts. It is false, therefore, to assume that disabled people will routinely meet uniform and stony hostility in all workplace situations."<sup>212</sup> However, the statute presumes that ignorance, rather than hostility, is the problem. Ignorance can include, I think, the failure to empathize or understand the insult implicit in his statement.

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209. *Id.* at 484.

210. *Id.* at 493-94.

211. According to a 1982 study of accommodations under the Rehabilitation Act, 51% of disabled workers were accommodated at no cost, and 30% at a cost of under \$500 per worker. *Executive Summary of Report on Accommodating Handicapped Employees*, Daily Labor Rep. (BNA) No. 157, at F-1 (Aug. 13, 1982). These costs must be compared to the costs of income support under Social Security and other private or public support systems.

It is interesting to note the broad political and social consensus for the bill. See, e.g., *Disability; Bipartisan Support Evident as House Debate Opens on Americans with Disabilities Act*, Daily Rep. Exec. (BNA) No. 98, at A-3 (May 21, 1990); William J. Eaton, *House Oks Disabled Rights Bill; Senate May Act Today*, L.A. TIMES, July 13, 1990, at A1. Its passage was assured while the precursors of the Civil Rights Act of 1991 headed for certain presidential veto. See Richard L. Alfred & Thomas A. Knowlton, *Civil Rights Act Will Encourage Federal Claims; The Civil Rights Act of 1991*, MASS. L. WKLY., Dec. 9, 1991, at 5; Sharen S. Johnson, *Capital Line: Hiring Quota Issue Snags Civil Rights Bill*, U.S.A. TODAY, June 25, 1990, at 4A.

Epstein's point about financial burden on employers is well taken. It is the same argument that is made against family leave, regarding who should bear the costs of a measure deemed necessary from an equality and social welfare perspective.

212. EPSTEIN, *supra* note 1, at 483.

This overview of the book reveals its intellectual poverty. It may be difficult to agree on a definition of good scholarship, but I think the following is a good start. It is a definition chosen by Geoffrey R. Stone, Dean of the University of Chicago Law School, in a short essay written in a recent symposium on "The Voices of Women" in legal education;<sup>213</sup> he borrowed it from a recent piece by Stephen Carter:

[T]he quality of a piece of scholarly work turns on a demonstrated mastery of the relevant material and the ability to contribute to a dialogue, or to spark a new one. It turns on saying something that not only is not *in* the prior literature, but is not *obvious* in light of the prior literature. It turns, further, on making a logical argument—not a correct one, necessarily, or even a non-controversial one, but certainly one that is coherent. And it turns on setting out fairly the possible objections and dealing with them, or even noting, when appropriate, the extent to which they successfully limit one's own position.<sup>214</sup>

By the terms of this definition, Epstein's book is not good scholarship. There is no demonstrated mastery of the wealth of scholarship on employment discrimination law, much less the historical and sociological literature that Epstein claims as additional bases for his argument. Stating a position to provoke discussion is clearly his goal, so, to that extent, he may fit the definition of good scholarship. The arguments in support of his view, however, are significantly weakened by his failure to consider much of the existing scholarship. The book fails most clearly as good scholarship in that Epstein does not *fairly* address objections to his perspective; indeed, Epstein hardly notes any opposing points of view at all, and when he does, he shrugs them off with little discussion or gives them an intellectual slam-dunk.<sup>215</sup> He does not concede any limitations or difficulties with his position. He displays all the attributes of a bad listener and none of the attributes of a careful scholar who marshals his case while considering its weaknesses and the benefits

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213. Geoffrey R. Stone, *Controversial Scholarship and Faculty Appointments*, 77 IOWA L. REV. 73 (1991).

214. Stephen L. Carter, *The Best Black, and Other Tales*, RECONSTRUCTION, Winter 1990, at 6, 29.

215. See *supra* notes 12-20 and accompanying text (providing a limited discussion of unconscious racism and the social construction of race and gender).

to be gained by considering other perspectives. The book certainly would not meet Epstein's own definition of academic excellence—"the ability to marshal facts and defend positions against probing inquiry."<sup>216</sup>

### III. POINT OF VIEW CRITIQUE: DEFENDING THE PRIVILEGED WHITE MALE COMMUNITY AND NEEDING A REALITY CHECK

Much more could be written about the criticisms I have raised, as well as about parts of the book that I have not discussed in detail.<sup>217</sup> However, I would like to return to Epstein's core thesis that choice and freedom of association are more important than the antidiscrimination principle, and that the failure to recognize this threatens political liberty and intellectual freedom.<sup>218</sup>

Who benefits from this thesis? For whom does it make sense? Epstein's thesis rings true for privileged white males intent on preserving their power and community of privileged white males. On the other hand, it neither benefits nor speaks for most minorities and women. To the contrary, it preserves their disadvantaged posi-

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216. Richard A. Epstein, *Rule of Law: Diversity Yes—but Without Coercion*, WALL ST. J., Apr. 22, 1992, at A19. The full paragraph from which Epstein's definition is drawn states:

It is often said that we want both "excellence and diversity" but that formulation too easily conceals the inescapable trade-offs that have to be made to implement diversity. All too often the modern concern with diversity acts as though the ability to marshal facts and defend positions against probing inquiry represented some narrow class bias instead of the general rules of academic exchange. We should be willing to depart only grudgingly from this conception of merit and scholarly debate.

My fear is that the present zeal for diversity blinds us to the damage the departure from traditional academic standards does to the advancement and dissemination of human knowledge.

*Id.*

217. For other reviews of Epstein's book, see Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219 (1992) (book review) (focusing on first principles, race discrimination, and economic arguments); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080 (1992) (book review) (focusing on libertarian and historical arguments); Ian Ayres, *Pride and Prejudice*, NEW REPUBLIC, July 6, 1992, at 30; Clarence Page, *Bias Against Bias Law*, CHI. TRIB., May 31, 1992, at 5; William Peterson, *Imperial Rights Regimen*, WASH. TIMES, July 16, 1992, at E3; Thomas Sowell, *The Civil Rights Tax*, FORBES, Apr. 13, 1992, at 94; Calvin Woodard, *In Defense of Discrimination*, N.Y. TIMES, May 3, 1992, § 7, at 36.

218. See EPSTEIN, *supra* note 1, at 505.



tion and invites retrenchment and backlash. In this section, I explore each of these points of view in turn.

### *A. Defending the Privileged White Male and His Community*

There is a clear perspective that dominates and explains Epstein's book. Much of what is written in this book strikes me as racist or sexist. Certainly if one wished to discriminate not merely in spite of, but because of, race and sex, this book would provide an argument to do so. But I will give Epstein the benefit of the doubt (why, I'm not sure; it's probably a weakness of feminists). One cannot escape, however, that the book is most effective as a defense of the position of privileged white males who value a community of privileged white males. This is not to say that Epstein is the spokesperson for privileged white males, or that they all think or act alike. It is simply to say that for privileged white males who want to defend their position, as opposed to sharing, ceding, or giving up power, and who want to justify that position by merit, not by privilege, then Epstein provides a principled argument that attempts to trump equality and justice with freedom, liberty, and choice.<sup>219</sup>

The power of the antidiscrimination principle lies in its moral appeal to justice and equality. Assaulting that citadel is a daunting task; doing so in a way that does not invite criticism that the assault is evidence of prejudice is tricky. Epstein's argument attempts to deflect the criticism of prejudice in two ways. First, he appeals to neutral principles and ignores both context and consequences. Second, he uses the shield of political correctness: if you accuse me of being racist or sexist, it is only because you are overly sensitive or are trying to impose your political views on me.<sup>220</sup>

Epstein's most appealing neutral principle is choice.<sup>221</sup> What he ignores, however, is the power to make choices and the context

219. By the same token, if one were an admitted racist or sexist, and wanted arguments to support that position, Epstein's book would be helpful. This assumes that one wants to persuade those who would be put off by direct appeals to racial or gender solidarity.

220. Interestingly, he ignores utilitarian arguments. On utilitarian grounds, Epstein's ideals of choice and freedom of association do not generate the most benefit for all, since privileged white males are a numerical minority.

221. The "neutrality" of Epstein's principle of choice, however, is questionable. One has only to compare his views on choice in the context of employment discrimination to his view

within which choices are made. Power and context favor the privileged white male. In a sense, though, he does not ignore power or context at all: his bonding of choice and freedom of association, together with his argument for "rational discrimination," permits power and context to dictate and justify any choice. Epstein's argument provides justification for choices based on conscious or unconscious prejudice. But those are choices that only the powerful can make.

The only power he explicitly acknowledges is the power of government, which he views as a force to be strictly circumscribed.<sup>222</sup> He embraces the notion that power corrupts, and absolute power corrupts absolutely.<sup>223</sup> He neither acknowledges nor discusses pri-

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of choice in the context of abortion. See generally Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (opposing the Supreme Court decision making abortion a fundamental constitutional right); Richard A. Epstein, *The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 90 n.249 (1988) (opposing the use of tax dollars to fund abortions). Indeed, Epstein's rhetoric in this book, and its parallels to abortion dialogue, is striking. The power of the pro-choice position in the abortion context is its appeal to individual autonomy in making decisions about matters that its advocates argue the government should not decide. Those who oppose the pro-choice position use the rhetoric of life and death, and the stigma of being pro-abortion, pro-death, and anti-child. Epstein uses the same rhetoric to argue for the repeal of discrimination law: choice and individual decision-making, instead of government intervention, are so highly valued that they defeat equality and justice. Consistency, it can be argued, links the pro-choice view of abortion and the choice critique of the antidiscrimination principle.

Although Epstein would like us to believe his libertarian and marketplace analyses are applicable in all contexts, he concedes that there are limitations to his own rhetoric. In Epstein's article *Rights and "Rights Talk,"* he discusses the implication of rights talks in the context of abortion and admits: "I confess my inability to solve all these value disputes, and I know of no one else who can solve them either." Richard A. Epstein, *Rights and "Rights Talk,"* 105 HARV. L. REV. 1106, 1123 (1992). He concedes that "[t]he abortion issue is vastly different from many questions of property and economic liberties because there is, quite literally, no way to divide the baby." *Id.* at 1122. After considerable discussion of the utility of marketplace ideology and required limitations on government intervention, he concludes:

Yet if instead we develop some grand division of turf by individuals, by private agreement all parties can exchange and use entitlements in ways that work to their mutual advantage. The first concern on any political agenda is *who* shall make the decision, and not *what* should be decided. Much useful work can be done in this direction in property, contract, and torts. *But abortion, yes abortion, remains the toughest nut to crack.*

*Id.* at 1123 (emphasis added).

222. EPSTEIN, *supra* note 1, at 91-143.

223. *Id.* at 94.

vate power, whether economically, socially, or politically based. For example, his discussion of the workplace and governance issues is without reference to the employer's right to dictate the workplace culture; he seems to suggest that workers have equal power to determine that culture.<sup>224</sup> His discussion of race and sex discrimination has no reference to power, which is particularly puzzling in view of his acknowledgment of feminism; the theory of dominance and power is at the core of the work of Catharine MacKinnon, the one feminist whose work he discusses in the book.<sup>225</sup> The absence of any mention of power in his discussion of sex roles is particularly disingenuous,<sup>226</sup> and his nearly total lack of discussion of race (as opposed to legal doctrine concerning race) is the only way he can avoid issues of power in that context.

Epstein's thesis may reflect a privileged white male perspective, consciously or unconsciously, because of his life experience. Certainly, Epstein's resume suggests that he enjoys the status of a privileged white male within his chosen profession, legal academics. His race and his gender confer privilege to some degree, regardless of his class, status, occupation, position, or reputation.<sup>227</sup> But those factors also are indicators of privilege.<sup>228</sup> Epstein's privi-

224. See *id.* at 60-76.

225. *Id.* at 275-76, 342-43, 345, 351, 353, 358. The theory of dominance and power is discussed by many other scholars as well. See sources cited *supra* note 15.

226. EPSTEIN, *supra* note 1, at 270-73.

227. It is by now well established that we accord value to things male and white, and the combination of the two. On valuing things male in academe, see, e.g., ROBERTA M. HALL & BERNICE R. SANDLER, *OUT OF THE CLASSROOM: A CHILLY CAMPUS CLIMATE FOR WOMEN?* (1982); WELLESLEY COLLEGE CTR. FOR RESEARCH ON WOMEN, AAUW EDUC. FOUND., *HOW SCHOOLS SHORTCHANGE GIRLS: A STUDY OF MAJOR FINDINGS ON GIRLS AND EDUCATION* (1992). A number of studies have documented the negative self-image of black children, based on clear messages conveyed about the consequences of skin color. Robert J. Taylor et al., *Developments in Research on Black Families: A Decade Review*, 52 J. MARRIAGE & FAM. 993, 994-95 (1990).

228. One could take two perspectives on the definition of privilege. One is to look at who controls positions of power and leadership, both in the private and public sectors. In THOMAS R. DYE, *WHO RULES AMERICA?* (5th ed. 1990), Dye looks at the positions of power, status, and leadership in America, evaluating 7,314 positions. In 1980, Dye found that only 318 of those positions were held by women and 20 by African Americans. *Id.* at 197, 202. Dye defines power and elite status as follows:

[P]ower is not so much the *act* of control as the *potential to act*—the social *expectation* that such control is possible and legitimate—that defines power.

Power is simply the capacity or potential of persons in certain roles to make decisions that affect the conduct of others in the social system.

lege derives from his education, his profession, his position at and within an elite law school, and his stature within legal academics and related academic fields, particularly economics. According to his Association of American Law Schools biography, Epstein was educated at Columbia, Oxford, and Yale and then entered legal academics immediately after his graduation from Yale Law School.<sup>229</sup> After teaching for two years at the University of Southern California, he moved to the University of Chicago in 1972, where he has remained and currently holds the title of James Parker Hall Distinguished Service Professor.<sup>230</sup> A leading scholar of the law-and-economics movement, he is the editor of the *Jour-*

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Thus, elites are people who occupy power roles in society. In a modern, complex society, these roles are institutionalized; the elite are the individuals who occupy positions of authority in large institutions.

*Id.* at 4-5.

His latest tabulation indicates:

On the whole, those at the top are well-educated, older, affluent, urban, WASP, and male. Although a few blacks have recently been appointed to top corporate boards, in 1980 there were hardly more than 20 blacks among the more than 7,000 top position-holders in our study.

Blacks are noticeably absent from corporate boardrooms, and there are few blacks in government, although they represent 12 percent of U.S. population. Likewise, there are very few women at the top of the nation's institutional structure. Overall, less than 5 percent of top leaders are women. Only recently have women gained entrance into the boardrooms of large corporations. Even in government, despite a vice-presidential nomination and a Supreme Court seat, women still occupy only about 8 percent of the key posts. Women are more likely to be found as trustees of universities, foundations, and cultural organizations, but even in these sectors women leaders are far outnumbered by men. Top women leaders are upper and upper-middle class in origin, like their male counterparts. However, women leaders tend to have more education and they are younger. Women leaders are more likely to have been recruited from education, the mass media, or law, than from the (mostly male) ranks of corporate management.

*Id.* at 221.

Another way of looking at privilege is from the perspective of the social scientists, who define it by their view of class. They split between "soft" definitions of socioeconomic status and Marxist definitions separating capitalist and noncapitalist classes. The Marxist tradition further divides by looking to power or status. Dye is from the status perspective. See JOE R. FEAGIN & CLAIRECE B. FEAGIN, *SOCIAL PROBLEMS: A CRITICAL POWER-CONFLICT PERSPECTIVE* ch. 2 (1990).

229. ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS* 1989-90, at 335 (1989-90).

230. *Id.*

*nal of Law and Economics*.<sup>231</sup> He is a prolific scholar with wide-ranging interests.<sup>232</sup>

Epstein has worked in a dominantly white male workplace for the past twenty years. The University of Chicago Law School faculty during that period has had no tenure-track black or minority faculty members.<sup>233</sup> There have been only a few women in tenure-track faculty positions for most of that time as well. During Epstein's first nine years, there was no more than one woman on the faculty. Since the early 1980s, only three women have been on the faculty and only since 1989 have there been four women in tenure-track positions, three of whom are now tenured.<sup>234</sup> Chicago's record in comparison with legal education in general, according to Richard Chused's study, is below average.<sup>235</sup> It conforms to one of the more notable patterns Chused found, that the elite, top-ranked law schools were not keeping pace in adding women and minorities to their faculties.<sup>236</sup> The proportion of women and minorities in legal academics has changed dramatically in the past twenty or even ten years, although the record is still abysmal in both hiring and retention.<sup>237</sup> Legal academics in general, as with

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231. *Id.*

232. Epstein is the author of numerous books and dozens of articles.

233. There is only one black faculty member with the title of Professor, but he is not in a tenure-track position and is not tenured. In fact, only one black candidate has been interviewed on campus for a full day interview during the last 10 years. One black woman was hired as a visiting professor at the law school without being interviewed on campus and she was offered a tenure-track position at the end of her visit, but she did not accept the position.

234. During the 20 years Epstein has been at Chicago, the law school has hired, on average, one person in a tenure-track position annually.

235. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 549-50 & n.65 (1988). In 1986-1987, females accounted for 20% of full-time faculty at 149 schools which participated in a study by the Society of American Law Teachers cited by Chused; 3.7% of full-time faculty were black, 0.7% were Hispanic, and 1.0% were other minorities. *Id.* at 538. Using the typical law school, Chused describes the standard faculty as having 31 members—27 teaching in the classroom, two in clinics, one dean, one running the library—of whom 30 are white and one is black, Hispanic, or another minority, and 26 are men and five are women. *Id.*

236. *Id.* at 539.

237. There is an extensive collection of scholarship on the experiences of minorities and women in law. On women in legal academics, and the legal profession, see the sources gathered in Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991). On minorities in legal academics, see Regina Austin, *Resistance Tactics for Tokens*, 3 HARV. BLACKLETTER J. 52 (1986); Derrick Bell, *The Final*

other areas of the profession, has not been hospitable to women and minorities.<sup>238</sup>

What I am suggesting is that Epstein's life experience, particularly his employment experience, consciously or unconsciously may have affected his view of employment relations. Even if that is not the case, and even if Epstein himself has no motive to defend his own position and the positions and associations of other privileged white males, his thesis clearly could best be used for their benefit. The broader professional world in which Epstein operates has resisted accepting women and minorities, using the rhetoric of qualifications. Epstein would accept the rhetoric as reality—he fumes at the inability of the civil rights movement to recognize real merit: "In the civil rights literature there is but scant, passing reference to intellectual excellence, personal dedication, effort, entrepreneurial zeal. [No benefits are] the result of intelligence, initiative, creativity, or plain hard work."<sup>239</sup>

Epstein's thesis, however, would provide a far more radical basis to deny minorities and women entry into the academy. He would permit refusing to hire minorities and women on the grounds that the faculty did not choose to associate with minorities and women. His thesis would encourage unconscious discrimination to become conscious prejudice, and conscious prejudice to become a permissible basis to deny employment opportunity.

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*Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Richard Delgado, *Approach-Avoidance in Law School Hiring: Is the Law a Wasp?*, 34 ST. LOUIS U. L.J. 631 (1990); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Charles R. Lawrence, III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 503 (1986).

238. See, e.g., Sharon E. Rush, *Understanding Diversity*, 42 FLA. L. REV. 1 (1989) (discussing diversity and tenure battles). Discrimination against women and minorities has not been limited to legal academics; it is evident in the legal profession as well, in both access to employment and promotion. Cf. *supra* note 228 (discussing the plight of women and minorities in professions generally); *infra* notes 280-82 and accompanying text (same). But of course women and racial minorities have not, historically, been the only disadvantaged minorities in the legal profession. See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 102-29 (1976) (examining the response of elite lawyers to social change in the twentieth century); Note, *The Jewish Law Student and New York Jobs—Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L.J. 625, 626, 630 (1964) (discussing unequal hiring practices as between gentiles and Jews).

239. EPSTEIN, *supra* note 1, at 504.

Epstein also tries to deflect the criticism that his thesis benefits privileged white males by making a preemptive strike at critics as allegedly promoting "political correctness."<sup>240</sup> This is most evident in his conclusion, where his thesis is most stridently stated. For example, he critiques the civil rights movement's appropriation and misuse of symbolic language, citing "diversity" as

yet another buzzword in the campaign for political conformity to a state-imposed ideal. Unpacked, diversity today amounts to little more than a call for race-conscious and sex-conscious hiring, and in some circumstances even the more extreme position of proportionate representation by race and by sex. In the name of diversity all institutions have to follow the same policies or face the wrath of the state.<sup>241</sup>

Epstein, however, reserves his most biting criticism for affirmative action academic hiring:

People who are quick to impugn the motives and the integrity of others, to find racial or sexual innuendo in innocent and everyday actions and speech, find it all too easy to make race and sex the dominant if not the sole determinants of their institutional decisions. It is as though unconscious racism and sexism were said to justify the formal, explicit, and conscious racism and sexism that so often run the other way. *Anyone who works in academic circles, and I dare say elsewhere, knows full well that all the overt and institutional discrimination comes from those who claim to be the victims of discrimination imposed by others. It is a sad day when any effort to defend the traditional norms of a discipline, profession, trade, or craft exposes the defender to withering political attack for a covert form of discrimination under the guise of excellence and neutral standards. In all too many cases honorable people are attacked as racist or sexist when the charges often apply with far greater truth to the persons who make these charges than to the persons about whom they are made.*<sup>242</sup>

This is a not-so-subtle attempt to stigmatize anyone who criticizes his thesis as a doctrine that promotes and protects the position of

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240. *Id.* at 502-04.

241. *Id.* at 502.

242. *Id.* at 503 (emphasis added).

privileged white males at the expense of minorities and women. It is a preemptive strike to discourage criticism of method as well as substance. It is anti-intellectualism at its worst.

*B. The Perspectives of Women and Minorities: Reality Check and Stories*

As much as Epstein's thesis most strongly benefits privileged white males, it quite clearly does not advance the position of minorities and women. It makes no sense from their points of view. Although minorities and women have no single perspective, what links them together points to the irrelevancy of Epstein's thesis. Those common factors are a reality check about the current status of women and minorities against which Epstein's thesis must be measured.

For blacks, particularly black men, the employment picture is bleak. Most disturbing is the persistence of unemployment: workers willing to work—participating in the workforce, in the lingo of labor economists—but unable to find work. The unemployment rate for blacks is twice that for whites.<sup>243</sup> In 1988 the white rate was 4.7%, for blacks it was 11.7%.<sup>244</sup> Nearly one-third of the black youths in the civilian labor force in 1988 looked for work without success, as did one-fifth of Hispanic youths.<sup>245</sup> Among all racial and ethnic groups except whites, the percentage of discouraged workers exceeded the corresponding percentage in the total civilian labor force.<sup>246</sup> The proportion of discouraged black workers, about one in three in 1988, was more than twice as large as the proportion of blacks in the labor force, one in ten<sup>247</sup>—and it is easy to see why, given the high rate of unemployment of those trying to find work. Black men are particularly disadvantaged. Beginning in the 1970s, two patterns emerged in the employment of adult black males. Those with some college or more education earned eighty to eighty-five percent of the income of their white counterparts and

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243. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, INDICATORS OF EQUAL EMPLOYMENT OPPORTUNITY - STATUS AND TRENDS 31 (1990).

244. *Id.* at 30.

245. *Id.* at 31.

246. *Id.* at 33.

247. *Id.*



entered some white collar occupations.<sup>248</sup> This group constituted roughly the top third of the group aged twenty-five to thirty-four.<sup>249</sup> This is not to suggest that occupational differences by race disappeared: to the contrary, significant occupational differences remained, with blacks still very overrepresented in low-wage, low-skill jobs.<sup>250</sup> In addition, one-quarter of the same age group had not finished high school and an increasing number of these men had dropped out of the labor force, unable to find jobs in the stagnant 1970s economy.<sup>251</sup> The economic inequality characteristic of black men is strongly tied to the inability of a significant proportion of black men to earn a decent wage.<sup>252</sup> Black women, in contrast, have shifted from race and gender disadvantage to primarily gender disadvantage. Black women have closed the racial gap with white women but, like white women, they have not been able to close the gender gap in occupation and earnings.<sup>253</sup>

The economic disadvantages of many black men and women have some important implications for family structure and family earnings. Dual-income families and single-mother families, both increasingly common among whites,<sup>254</sup> have been characteristic of black families for a much longer period of time.<sup>255</sup> The significant economic disadvantage of black men has translated into family poverty even for a large number of dual-income families.<sup>256</sup> In single-income families, the gender disadvantage of black women has meant poverty for a significant proportion of black children.<sup>257</sup>

The labor participation rate for women, in contrast to blacks, has changed dramatically since the 1950s, with the average rate now at about 60%.<sup>258</sup> The rate of participation increases to 70%

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248. A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 275 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter COMMON DESTINY]. For a discussion of black class structure, see BROOKS, *supra* note 18.

249. COMMON DESTINY, *supra* note 248, at 275.

250. *Id.* at 312.

251. *Id.* at 275.

252. *Id.* In 1984, the lowest earning 40% of black men earned but 5% of the total earnings of black men while the top 20% earned 60% of the total earnings. *Id.*

253. Dowd, *Restructuring the Workplace*, *supra* note 152, at 466-67.

254. *Id.* at 444-45 n.84.

255. *See id.* at 461-68.

256. *See* COMMON DESTINY, *supra* note 248, at 281-82.

257. *See id.* at 279-80; Dowd, *Restructuring the Workplace*, *supra* note 152, at 462-64.

258. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 12 (1989).

for divorced and separated women; single women are close behind with a 65% participation rate; the average rate for married women is 56%;<sup>259</sup> and 65% of women with minor children are in the workforce.<sup>260</sup> The most dramatic growth in labor force participation in the past decade has been among women with children of school age.<sup>261</sup> The dominant workforce pattern for women is now very similar to that of men, sharply differing from that of men only in terms of occupational opportunities, earnings, and extent of part-time work.<sup>262</sup>

Despite increasing participation in the workforce, women still face stark occupational segregation and wage inequality.<sup>263</sup> The wage gap has been stubborn; women on average continue to earn roughly 60% of what men earn.<sup>264</sup> The gap remains substantial even when one closely examines particular job classifications or occupations.<sup>265</sup> Furthermore, there is substantial evidence of segregation within offices, not just within occupations.<sup>266</sup>

Some of the earnings differential can be attributed to the fact that more women than men are employed part-time rather than full-time, although a gap remains even with this factor taken into account.<sup>267</sup> Of greater significance is the reason many women work only part-time. In most instances, it is connected to child care responsibilities;<sup>268</sup> many women work part-time because they cannot otherwise care for their children.<sup>269</sup> They may prefer to work full-time, but the structure of the workplace simply does not permit

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259. *Id.* at 235-39.

260. *Id.* at 240.

261. *Id.* at 240-41.

262. *Id.* at 451-56.

263. Rhode, *supra* note 160, at 1207-11.

264. *Id.* at 1208.

265. For example, full time women workers in state and local government in 1990 had a median annual salary of \$22,000, whereas their male counterparts' median annual salary was around \$27,000. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 243, at 41. In federal civilian white collar jobs in 1990, women on average earned \$26,000 and men earned \$38,000. *Id.* at 43.

266. See Dowd, *Restructuring the Workplace*, *supra* note 152, at 453 (citing sources supporting this point).

267. Martha Chamallas, *Women and Part-time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 715-22 (1986).

268. *Id.* at 710-11.

269. *Id.* at 715; VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 44-45 (1988).

combination of work and family,<sup>270</sup> or they may prefer to be at home full-time, but are unable to do without the needed income from a part-time job.<sup>271</sup>

The impact of children points to an additional critical characteristic of women's participation in the workforce. The fact that women typically bear the primary responsibility for the care of children translates into a significantly greater workload than that for men.<sup>272</sup> Despite greater participation of women in the workforce, family work has been redistributed only slightly, if at all.<sup>273</sup> Furthermore, the presumption and reality that women typically care for children has significant implications for the ability of women to support their children financially after divorce or if they never marry.<sup>274</sup> As a result of the diminished income stream that mothers can generate, even if working full-time, caused by continuing pervasive sex discrimination in the workplace,<sup>275</sup> one-fifth of children live below the poverty line.<sup>276</sup> That figure is quickly moving toward one-fourth,<sup>277</sup> and is even higher for black children.<sup>278</sup>

Finally, even for the small number of blacks and women who enter elite professions or corporate ladders, most never reach the upper levels of privilege and power.<sup>279</sup> The so-called "glass ceiling" places artificial barriers based on attitudinal and organizational bias which prevent qualified minorities and women from advancing into mid- and senior-level management positions.<sup>280</sup> Minorities have plateaued in the corporate hierarchy at even lower levels than women.<sup>281</sup> Barriers include recruitment practices, as well as developmental and credential-building experiences.<sup>282</sup>

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270. See Dowd, *Gender Paradox*, *supra* note 152, at 84-100.

271. See *id.*

272. Chamallas, *supra* note 267, at 729.

273. *Id.* at 731-33.

274. FINEMAN, *ILLUSION*, *supra* note 12, at 36-38.

275. Dowd, *Restructuring the Workplace*, *supra* note 152, at 451-56.

276. COMMON DESTINY, *supra* note 248, at 8.

277. See *id.*

278. *Id.*

279. See *supra* note 228.

280. U.S. Dep't of Labor, *A Report on the Glass Ceiling Initiative*, [1989-1991 Transfer Binder] Empl. Prac. Guide (CCH) ¶ 5316, at 6999-187 (Aug. 8, 1991).

281. *Id.* at 6999-189.

282. *Id.* The Department of Labor's pilot project "revealed several general findings that applied to all nine companies, despite the vast differences that existed between them in

In short, although from a historic perspective employment opportunities for women and minorities have improved, the contemporary context is one of persisting, dramatic sex and race segregation, both between and within occupations; severe entry-level barriers for significant numbers of minorities; considerable income differentials by sex and race, with great significance for the families of those workers; and apparent informal barriers to promotion of women and minorities in high places and positions of power. In this context, equality and justice, and the intervention of the state to insure some employment opportunity and commitment to these values, is critical. Rights, even if limited, are essential.<sup>283</sup> The values of choice and freedom of association as defined by Epstein are

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terms of organizational structure, corporate culture, business sector and personnel policies." *Id.* The study found that "[i]f there is not a glass ceiling, there certainly is a point beyond which minorities and women have not advanced in some companies." *Id.* Among the attitudinal and organizational barriers identified were:

Recruitment practices involving reliance on word-of-mouth and employee referral networking; the use of executive search and referral firms in which affirmative action/EEO requirements were not made known.

Developmental practices and credential building experiences, including advanced education, as well as career enhancing assignments such as to corporate committees and task forces and special projects—which are traditional precursors to advancement—were often not as available to minorities and women.

*Id.*

The Department analyzed data from a random sample consisting of 94 reviews conducted of corporate headquarters of Fortune 1000 companies over the past three years. *Id.* Four major Department of Labor regions were included in the sample. *Id.* The data indicated that:

Of 147,179 employees at these companies, women represent 37.2 percent of all employees and minorities represent 15.5 percent. Of the 147,179 employees, 31,184 were in all levels of management, from the supervisor of a clerical pool to the CEOs and Chairmen. Of this number, 5,278 or 16.9 percent are women and 1,885 or 6.0 percent are minorities.

Of 4,491 managers at the executive-level (defined as assistant vice president and higher rank or their equivalent), 6.6 percent are women and 2.6 percent are minorities.

*Id.* at 6999-189 to -190.

See also KORN/FERRY INTERNATIONAL & UCLA'S JOHN E. ANDERSON GRADUATE SCHOOL OF MANAGEMENT, KORN/FERRY INTERNATIONAL'S EXECUTIVE PROFILE: A DECADE OF CHANGE IN CORPORATE LEADERSHIP (1990).

283. On the rights critique, and criticism of the critique, see Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Robert A. Williams, Jr., *Taking Rights Aggressively:*

luxuries only to be afforded once the basic rights of access and opportunity and the right to work free of harassment and under an equal standard of evaluation are afforded. They are principles that can have meaning only within a marketplace where power is not defined by race and gender.<sup>284</sup>

Minorities and women seek the associations and choices that can break the glass ceiling.<sup>285</sup> But many minorities and women are still trying just to get in the door. There is nothing in the market model, and Epstein's concept of "rational discrimination," to suggest that the door would open wider, or that the ceiling would disappear, under a regime of freedom of contract. Why would blacks or women argue in favor of "rational discrimination," or see it as beneficial to them? This is the most absurd suggestion of all. On a purely utilitarian basis, it fails; it certainly fails on principles of justice and equality.

The failure of Epstein's thesis for minorities and women seems self-evident. If this reality check fails to persuade Epstein, what will? What seems best to me is stories. The stories that men and women of color, and women of all colors and orientations tell, enable us to walk in their shoes.<sup>286</sup>

Stories are a particularly good way to get at power and context. One of many contributions that Critical Race scholars and feminists have made is telling us to pay attention to those factors.<sup>287</sup> Critical Race Theory also instructs us to pay attention to class and

*The Perils and Promise of Critical Legal Theory For Peoples of Color*, 5 LAW & INEQUALITY 103 (1987).

284. And perhaps where power is redistributed. On views of the law's role in the progressive workplace, see Katherine Van Wezel Stone, *The Future of Collective Bargaining*, 58 CINN. L. REV. 477 (1989) (reviewing SAMUEL ESTREICHER & DANIEL COLLINS, *LABOR LAW AND BUSINESS CHANGE—THEORETICAL AND TRANSACTIONAL PERSPECTIVES* (1988)).

285. See Glass Ceiling Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Title II of the Civil Rights Act of 1991).

286. To hear a story, however, one must listen. It may seem ironic that I am suggesting that Epstein read stories when I have also pointed out that Epstein's analysis suggests a lack of ability or willingness to listen. See *supra* notes 12-20 and accompanying text.

287. See, e.g., WILLIAMS, *ALCHEMY*, *supra* note 78; Taunya L. Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1991); Bell, *supra* note 237; Derrick Bell, *The Supreme Court Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter Bell, *Civil Rights Chronicles*]; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Ellis, *Sexual Harrassment*, *supra* note 78; Kline, *supra* note 78; Williams, *On Being Invisible*, *supra* note 78.

to intersectionalities of race, gender, and class.<sup>288</sup> Both race and gender perspectives suggest that denial of the imbeddedness of race and sex discrimination is the challenge for advocates of equality and justice. Defining the goals, clarifying what equality and justice will look like, and uncovering the myriad and complex pieces of racism and sexism and how they function to constrain us is the task. Where Epstein's approach encourages us to forget subjectivity and individuality in the process of evaluating principles, stories provide the individual cases that challenge the objective, neutral rule and expose its point of view.<sup>289</sup> Stories also demonstrate the irrelevancy or harm through intended or unintended consequences for particular groups.<sup>290</sup>

The stories that I have in mind that Epstein should read include Patricia Williams' story of searching for an apartment in New York City;<sup>291</sup> Derrick Bell's "Story of the DeVine Gift" in the *Civil Rights Chronicles*,<sup>292</sup> challenging our notions of affirmative action, and his story of the "Space Traders,"<sup>293</sup> speculating on how deep the commitment to inequality and self-interest reaches; and Herma Hill Kay's collection of stories of women law professors, past and present, detailing the pervasive reach of gender bias in legal academics.<sup>294</sup> All of these are stories of outsiders; all speak with voices that have traditionally been silent and disempowered.<sup>295</sup> They tell us to pay attention to point of view and to

288. On intersectionalities, see Scales-Trent, *Black Women*, *supra* note 78. On class focus, see EUGENE GENOVESE, *ROLL, JORDAN, ROLL* (1974); WILLIAM WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978); Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 *SAN DIEGO L. REV.* 879 (1988); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 *YALE L.J.* 1880 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (1980)). On antiessentialism, see ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Kline, *supra* note 78.

289. Delgado, *supra* note 287; Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 *MICH. L. REV.* 2099 (1989).

290. The challenge is whether the story presents a singular or more general perspective, but that is always an issue for argument.

291. WILLIAMS, *ALCHEMY*, *supra* note 78, at 146-65.

292. Bell, *Civil Rights Chronicles*, *supra* note 287.

293. Bell, *supra* note 237.

294. Herma H. Kay, *The Future of Women Law Professors*, 77 *IOWA L. REV.* 5 (1991).

295. See also SUSAN ESTRICH, *REAL RAPE* (1987); Susan Estrich, *Rape*, 95 *YALE L.J.* 1087 (1986); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of*

acknowledge the partiality of legal regimes.<sup>296</sup> They also provide us with perspective, and challenge claims of universality and benefit.

What is Epstein's story? How would he describe the world as it should be? His concepts of choice, freedom of association, "rational discrimination," and merit suggest a world that reprises the line from the dissent in *Wards Cove*;<sup>297</sup> it sounds like a plantation economy, or Jim Crow without state sanction.<sup>298</sup> Segregation would be not only by race, but also by gender, the product of choice as well as well-defined gender roles and patriarchal bargains. Disabled workers would stay hidden—financially supported, but closeted away from the workplace. All workers would be equally subject to age-based limitations, except those with the power to dictate overriding contract terms. The controlling ideology of choice would ensure the illusion of individual autonomy, while the impact of power and privilege would ensure the inequality of actual choices and consequences.

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*Separation*, 90 MICH. L. REV. 1 (1990); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990).

296. Unstated reference points lie hidden in legal discourse, which is full of the language of abstract universalism. Legal language seeks universal applicability, regardless of the particular trails of an individual. Yet abstract universalism often "takes the part for the whole, the particular for the universal and essential, the present for the eternal." Making explicit the unstated points of reference is the first step in addressing this problem; the next is challenging the presumed neutrality of the observer who in fact sees from an unacknowledged perspective.

Minow, *Justice Engendered*, *supra* note 12, at 44-45.

297. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

298. *Id.* at 664 n.4 (Stevens, J., dissenting) (1989) ("Some characteristics of the Alaska salmon industry described in this litigation—in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines—bear an unsettling resemblance to aspects of a plantation economy."). Justice Blackmun expressed a similar sentiment when he stated that:

The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest-level positions, on the condition that they stay there.

One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.

*Id.* at 662 (Blackmun, J., dissenting).

Another way to think of Epstein's story is to wonder what he fears, or how he sees contemporary reality. This is the story of privileged white males trying to preserve and maintain their position—a story of fear and threat. As I was reading this book, two images kept entering my head. One was the image of a white male faculty member ensconced in the faculty lounge, suddenly startled by the entry of a group composed of women (black, white, yellow, and brown), minorities (blacks, Hispanics, Asians, Native Americans), and several persons in wheelchairs. The white male faculty member not only wants to get the locks changed, but is also horrified at the prospect of being forced to stay in the lounge. The threat is the threat to his sense of identity and connection and to the power recognized and shared among those of the privileged minority who have the real power of their class, a power defined by skin and gender, but limited by class. He fears that these people, people he considers “other,” will be let into the room and even worse, that he will be forced to associate with them. The faculty lounge invaders, however, have a different agenda. “We don't want to change your choices or associations; none of that matters to us unless it affects our ability to make it as you have in academics. We want the salary, perks, and prestige; we want to do something that we love and do it well; we want to write and contribute to legal scholarship. If association with you is an integral part of that opportunity, then we will put up with it, and expect you to deal with us professionally.”

The other vision that I had reading Epstein's book was generated by wondering what would be Epstein's nightmare. The image that instantly came to mind was inspired by the movie *Switch*,<sup>299</sup> in which an inveterate womanizer dies and is reborn inside a woman's body.<sup>300</sup> I imagined Epstein reincarnated in the same body and skin, but in a world where all the power structures of color, gender, ability, and age have been reversed. He opens his morning paper and the lead stories on domestic and international affairs

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299. *SWITCH* (Time Warner, Inc. 1991)

300. A much more eloquent literary version of this idea appears in VIRGINIA WOOLF, *ORLANDO* (1928). My alternative vision here is Epstein reborn as a black woman, but with his same mind and principles. He gets to leave the situation only when he finds a way to achieve equality and justice for minorities and women in the context of contemporary American inequality.



picture women, more black than white, and a few men, mostly black, and only an occasional white male. The advertisements for laundry detergent and home appliances all picture a smiling white male. Turning to a story about the law school, he spots a recent picture of the faculty. Gasping for breath, he sees that the picture is dominated by black men and women, with a token white woman—and no white males. He slowly makes his way to his unskilled hourly job as one of the housekeeping staff at the law school—the only employer who would hire him. Professors often assume what he has to say is stupid or trivial. Some have even tried to make a pass at him. Just then, he wakes up, but still in a cold sweat.

#### IV CONCLUSION

What, finally, should we do with this book? My sense is that it should not be taken seriously. It is not well grounded, well argued, or convincing. It could have been written much more eloquently and persuasively as an essay in defense of autonomy and associational rights, attempting to elevate them above the antidiscrimination principle. The positions are admittedly and deliberately well beyond the mainstream of scholarly debate about discrimination law. When Epstein adopts positions within the the mainstream, he offers nothing significantly new nor does he meaningfully contribute to existing academic dialogues.

On the other hand, perhaps this book should be taken very seriously, as evidence of the extreme to which backlash against equality has risen. This book blatantly ignores equality and justice and blatantly favors those with power and privilege. It turns a blind eye to reality and to the complex picture of significant progress at the same time that there is continuing, and deepening, division on the basis of race and sex. The vision of liberty, choice, and freedom of association cannot exclude equality and justice; rather, equality and justice must be the frame within which the picture can be imagined.

The worst thing to do would be to give it more power or visibility by paying attention to it. As with the abortion debate, by turning back to revisit fundamental principles, we are deterred from more important concerns. Because we are still struggling to retain the right to choose to control our bodies, we fail to be able to dis-

cuss the tragic slide of many of our children into poverty We also fail to discuss the structure of employment and family and how to make it work for families and children. By trying to defend the fundamental principles of discrimination law and buying the argument that the existing structure is radical, we may be deterred from analyzing why that structure has had only limited success, and what is necessary to confront racism and sexism. We will be content to save what we have, instead of exploring the variety of complex ways, through law and other mechanisms, to address discrimination.