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COUNTER-POINT

LEGALIZING EMPLOYMENT DISCRIMINATION: A FOOLISH AND DANGEROUS POLICY

MICHAEL J. LEECH*

INTRODUCTION

Professor Richard A. Epstein's extreme proposal to abolish employment discrimination laws is misguided and unwise. Reasonable people may differ on questions such as the forms of discrimination that should be actionable, the proof required to establish a violation, the enforcement mechanisms to use and the remedies that should be available. Professor Epstein's proposal declares that courts should permit all forms of employment discrimination whenever and however practiced by private employers. The proposal is foolish because it assumes that our racial and other social problems will evaporate if they are ignored. It is dangerous because the likely consequence is increased social unrest and racial divisiveness.

We need employment discrimination laws because employers should make decisions that affect job opportunities and careers on the basis of individual merit and business considerations and not on the basis of skin color, sex, religion, age or disability. These laws affirm that we are all God's creatures, none intrinsically better than any other. They represent the embodiment of the American ideal of human equality. Why should an employer be permitted to make decisions that have a profound effect on an individual's life on such an arbitrary basis? What countervailing social benefit does such discrimination provide?

This Article responds to Professor Epstein's proposal to eliminate discrimination laws. Part I points out the real-life imbalance in the American workplace and recalls the justification for these laws at the time they were adopted. Parts II and III describe the central problem of race relations in the United States: persistent black poverty. Part IV points out and challenges the assumptions

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made by Professor Epstein in justifying his proposal and contrasts them with social, economic and legal reality. Part V disputes Professor Epstein's version of how Title VII disparate impact standards and government contractor affirmative action requirements work in real life. Part VI points out some of the problems with these laws that require reform, but not repeal. Finally, this Article concludes by pointing out the historical failure and moral bankruptcy of the discredited laissez-faire ideology on which Professor Epstein's proposal is premised.

I. EMPLOYMENT LAWS AND THE NEED FOR DISCRIMINATION LAWS

The general rule of employment at will¹ allows great flexibility to employers. The rule, however, results in economic dislocation of individuals, threatening their ability to meet financial commitments, causing emotional pain and sometimes ultimately affecting the stability of the employee's family. Professor Epstein makes the unsupported assumption that employers and employees are on an equal footing economically.² In the real world, most fair-minded people will concede that this is not true.

Employers are constantly in the employment market, which generally has a ready supply of workers to fill available jobs. Employees make long term financial commitments such as mortgages, education expenses, car loans and, for that matter, families themselves by relying on jobs that can be revoked at a moment's notice. To meet their commitments, employees depend on their jobs. Following termination, it can take months or years before the employee finds a new comparable position. The power to discharge at will is in sharp contrast to almost every other industrialized nation in the world.³ Because we allow employers great flexibility in deciding who and when to hire and fire, it is not too much to ask that the employer's decision not be discriminatory.

Discrimination against racial minorities, against women, against the religious, against older workers and against disabled individuals are similar phenomena. Each form of discrimination

1. Michael A. DisSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for any Reason*, 12 A.L.R.4th 544, 551 (1982).

2. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 24-27* (1992).

3. See, e.g., Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1, 4 (1994) (describing most European labor law systems as cooperative, rather than adversarial); Erin E. Lynch, *Late-Life Crisis: A Comparative Analysis of the Social Insurance Schemes for Retirees of Japan, Germany, and the United States*, 14 COMP. LAB. L.J. 339, 344 (1993) (noting Japan's distinctive labor system characterized by life-time employment, and noting Germany's labor system being devoted to its workers and their ability to plan for the future through stable, long-term employment for an indefinite period).

represents an abuse of an employer's power over the life of its employees and each presents a distinct need for legal protection. Congress adopted the first discrimination law, Title VII of the Civil Rights Act of 1964,⁴ to curb the widespread discrimination against African Americans.⁵ The problem of employment discrimination against Black Americans is a logical focus for this discussion, recognizing that other classes subject to these laws present somewhat different considerations.

To justify the retention of Title VII, one only need to consider the rationale President Kennedy, who initially proposed the Civil Rights Act of 1964, offered for its adoption. His words remind us that ending discrimination is part of a continuous struggle to live up to ideals on which our nation was founded. What was true thirty-three years ago is true today:

The Negro baby born in America today, regardless of the section of the Nation in which he is born, has about one-half as much chance of completing high school as a white baby born in the same place on the same day, one third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life expectancy which is 7 years shorter, and the prospects of earning only half as much.

This is not a sectional issue. Difficulties over segregation and discrimination exist in every city, in every State of the Union, producing in many cities a rising tide of discontent that threatens the public safety. Nor is this a partisan issue. In a time of domestic crisis men of good will and generosity should be able to unite regardless of party or politics. This is not even a legal or legislative issue alone. It is better to settle these matters in the courts than on the streets, and new laws are needed at every level, but law alone cannot make men see right.

We are confronted primarily with a moral issue. It is as old as the scriptures and is as clear as the American Constitution.

The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated. If an American . . . cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are

4. Pub. L. No. 88-352, 78 Stat. 257 (1964) (codified at 42 U.S.C. §§ 2000e-2000h-1 (1988)).

5. H.R. REP. NO. 914, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2393; S. REP. NO. 872, 88th Cong., 2d Sess. (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362.

not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

Those who do nothing are inviting shame as well as violence. Those who act boldly are recognizing right as well as reality. . . . This is one country. It has become one country because all of us and all the people who came here had an equal chance to develop their talents.

We cannot say to 10 percent of the population that you can't have that right; that your children can't have the chance to develop whatever talents they have; that the only way that they are going to get their rights is to go into the streets and demonstrate. I think we owe them and we owe ourselves a better country than that.⁶

Professor Epstein wants to return to an era when the country did nothing about discrimination. He does not propose reform to limit perceived abuse or perversion of the non-discrimination principle.⁷ Instead, he advocates allowing private employers the freedom to discriminate as blatantly as they wish,⁸ contending that the problem will evaporate if we ignore it.⁹ This is wrong, both morally and practically.

II. PERSISTENT BLACK POVERTY: A SERIOUS SOCIAL PROBLEM

Professor Epstein begins his analysis with basic principles of free market economics. A better starting point for a discussion of this question would consider the persistent social problem of poverty among African Americans. Months after Title VII became effective, Dr. Martin Luther King, Jr. had identified poverty as the principal obstacle to racial equality.¹⁰ He was in Memphis in April 1968, to support a strike among sanitation workers to fight against poverty when he was assassinated.¹¹ Poverty has contributed to a climate of hopelessness and violence in African American urban communities at least since the ghetto riots during the "long hot summer" of 1967.¹²

6. PUB. PAPERS, 1963, at 468-70.

7. EPSTEIN, *supra* note 2, at 2-3.

8. *Id.* at 9, 76-77, 495-96.

9. *Id.* at 59, 419. He also contends that whatever discrimination does persist after it is legalized would be economically efficient and, therefore, best for society as a whole. *Id.* at 77.

10. See, e.g., John H. Fenton, *Dr. King, in Boston Common Rally, Warns Against Nation of Onlookers*, N.Y. TIMES, Apr. 24, 1965, at 1, 12 (quoting Dr. Martin Luther King Jr. as saying it would be irresponsible for him to deny the "crippling poverty and the injustice" exists in heavily black populated areas such as Roxbury, in Boston).

11. Earl Caldwell, *Guard Called Out*, N.Y. TIMES, Apr. 5, 1968, at 1.

12. See, e.g., Maurice Carrol, *Downtown Is Hit*, N.Y. TIMES, July 14, 1967, at 1; *Looting Erupts in Chicago, But Police Limit Violence*, N.Y. TIMES, July 26, 1967, at 19; *More Were Killed and Jailed in Watts in '65 Than in Newark*, N.Y. TIMES, July

The statistical measures of economic status show with unremitting consistency that Black Americans continue to be socially and economically disadvantaged according to almost every meaningful measurement. Households without a father represent 13.6% of white families, but 46.7% of African American families.¹³ Blacks have a 13.4% chance of being arrested while whites only have 3.1% chance.¹⁴ Even though 82.9% of the country is white and only 12.6% is black,¹⁵ the estimated prison population of the United States includes 425,500 black inmates and 410,100 white inmates.¹⁶ African Americans also have a higher rate of being victims of crimes. Most strikingly, the murder rate for white men is 9.3 victims per hundred thousand persons but increases to 72 victims per hundred thousand persons for black men.¹⁷

The gap in household income between whites and blacks has remained consistent since 1967, with both black and white income levels varying with changes in economic conditions but not in relation to one another. The unemployment rate for African Americans is 12.9% as compared to 6% for whites.¹⁸ Since 1971, the rate of completion of high school among black students has steadily increased, making the disparity between white and black rates less than one-third of the rates in 1971.¹⁹ The 30% gap between the rates of employment for recent white and black high school graduates, however, has not shown a concomitant narrowing.²⁰ While 12.5% of white households have an income below \$10,000, 30.5% of black households fall below this amount.²¹ At the other end of the spectrum, household income exceeds \$100,000 for 5.3% of white households but only for 1.5% of black households.²² Persons living below the government's poverty line represent 11% of whites and 33.3% of blacks.²³ The gap between white and black median household income (inflation-adjusted) has gradually widened from \$12,500 in 1967 to about \$18,000 today.²⁴

14. 1967, at 1; *Negroes in Detroit Defy Curfew and Loot Wide Area*, N.Y. TIMES, July 24, 1967, at 1.

13. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 48 (1994) [hereinafter 1994 STATISTICS].

14. *Id.* at 205.

15. *Id.* at 13.

16. BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS OF THE UNITED STATES 46 (1992).

17. 1994 STATISTICS, *supra* note 13, at 201.

18. *Id.* at 396.

19. Christopher Farrell, *Is Black Progress Set to Stall?*, BUS. WK., Nov. 6, 1995, at 68.

20. *Id.* at 72.

21. 1994 STATISTICS, *supra* note 13, at 467.

22. *Id.*

23. *Id.* at 48.

24. Farrell, *supra* note 19, at 72.

African Americans also lag behind whites in professional employment. Twenty-two percent of whites hold a four year college degree, while only 12.2% of blacks do.²⁵ Rather than representing a proportionate 12.6% of the physicians in the country, only 3.7% of the physicians and 3.7% of the professional engineers are African Americans.²⁶ The legal profession is no different: only 2.7% of the attorneys and 2.8% of the federal judges in the United States are African Americans.²⁷

These statistics are a reminder that many African Americans live in a world quite different from the one most of us inhabit. What these racial comparisons do not show, is that significant disparities now exist among African Americans. A significant percentage of African Americans are finding their way into the middle class. The percentage of African Americans who completed college increased from 11% to 16% between 1971 and 1983, although no substantial increase has occurred in the last decade.²⁸ Across a broad range of white collar and professional positions, the rate of increase in employment of African Americans has actually been higher than for whites over the past five years. The wealthiest 20% of African American households are, on average, now equal to the national average.²⁹ Signs of upward mobility among the educated African Americans are evident in the following statistics:

	Blacks in Selected Professions, 1950-1990				
	1950 ³⁰	1960 ³¹	1970 ³²	1980 ³³	1990 ³⁴
Physicians	1.7%	N/A	2.1%	2.8%	3.7%
Attorneys	1.4%	1.4%	1.3%	2.8%	N/A

25. 1994 STATISTICS, *supra* note 13, at 157.

26. *Id.* at 407.

27. *Id.*

28. Farrell, *supra* note 19, at 68.

29. *Id.* at 72.

30. BUREAU OF THE CENSUS, INDUSTRIAL CHARACTERISTICS 1-17 (1950) (basing the numbers on the following categories: Medical and Other Health Services; Legal Services; Engineering and Architectural Services; and Miscellaneous Professional and Related Services).

31. BUREAU OF THE CENSUS, OCCUPATIONAL CHARACTERISTICS 507, 513 (1960) (basing statistics on "white males" and "non-white males" and using the category Lawyers and Judges). Accurate percentages could not be obtained for minority physicians in 1960 data, or attorneys in 1990, due to incompatible classification methods. *Id.*

32. BUREAU OF THE CENSUS, OCCUPATIONAL CHARACTERISTICS 593, 596 (1970).

33. BUREAU OF THE CENSUS, OCCUPATION BY INDUSTRY 1 (1980) (basing the statistics on the following categories: Lawyers and Judges and Health Diagnosing Occupations).

34. BUREAU OF THE CENSUS, CHARACTERISTICS OF THE BLACK POPULATION 185 (1990) (using Health Diagnosing Occupations as a classification); BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 392 (1990).

Engineers	.01%	1.4%	1.2%	2.5%	10.9%
Managers	1.5%	1.5%	1.9%	4.0%	7.6%

The point of this statistical presentation is not to blame white Americans for the deplorable conditions in which many black Americans live. The statistics simply describe a state of affairs that confronts society. A variety of causes exist for this condition. At least *one* of the causes is a heritage of racism: black slavery until 1865; legal segregation in the South until the 1960's and *de facto* segregation elsewhere that continues today in most housing markets; and a consensus among whites that blacks were intellectually inferior that lasted until the mid-twentieth century (and to which many quietly cling today). Many would say continued racist attitudes by whites are a principal cause of black poverty today. However, it is enough here simply to acknowledge that a long history of racial economic disadvantage is at least one significant cause of continued black poverty.

The statistics are consistent with a hypothesis that social programs and laws adopted in the 1960's had some salutary impact on the economic condition of some African Americans. Not everyone will agree about the positive or negative impact of programs, such as changes in income tax structures, food stamps and Medicaid. Many criticize such programs as ultimately ineffective because they spawn dependency.

But Title VII is not properly subject to this criticism because it clearly states a principle of non-discrimination that mandates equality and not preference. Title VII has likely contributed to a significant improvement in the life of at least a percentage of African Americans. Professor Epstein acknowledges that Title VII had an impact on employment of minorities in the first several years after its adoption.³⁵ His theory rests on the notion that this impact resulted from the overturning of Jim Crow laws.³⁶ He contends that since the mid-1960s, Title VII has been unnecessary and counterproductive.³⁷ However, this is just his assumption. He does not demonstrate that the other economic conditions affecting black people and weak enforcement of the statute are not to blame for the slow economic progress of African Americans. Moreover, he does not demonstrate that the gains resulting from Title VII would survive if it was repealed.

The persistence of black poverty in the face of employment discrimination laws and social programs is troubling. We are tempted to throw up our hands and say that our efforts to relieve African American poverty have failed. But we cannot ignore the

35. EPSTEIN, *supra* note 2, at 243-46, 248, 251-54.

36. *Id.* at 245-46, 248, 251-54.

37. *Id.* at 260-63, 266.

reality we see on our city streets and evening news programs. Our society as a whole suffers from the condition in which many of its citizens find themselves. Young people in the black urban ghetto see life as a choice between a dead-end job flipping burgers at minimum wage and earning a good, if dangerous, living in the business of drug trafficking. The predictable response to this choice in turn makes society significantly more dangerous and less stable for those of all races who work for a living, pay taxes and expect to live in a society with a reasonable level of safety.

III. THE DAILY REALITY OF RACISM FOR AFRICAN AMERICANS

Those who, like me, have been raised and have lived their lives in a middle class white society have difficulty comprehending the impact racism has on the daily life of African Americans. The stereotype of blacks as "dishonest" means that whenever money or property is missing, suspicion immediately falls on you. It means you are consistently asked for identification when trying to cash a check or followed around a store by a detective when shopping. Your success is not a personal triumph. Instead, you are congratulated as "a credit to your race." Taxicabs will not stop to pick you up. Instead of explaining to your children that the word "nigger" is a cruel word that should not be used, you must console your child when she has been the target of this racial epithet. These indignities, and many others, constantly remind blacks that they are defined first by their race and only second as human beings.

Every few months a new public event reminds us that racism still exists and then quickly fades from our consciousness. Most of the events seem to occur in the criminal justice system, reflecting our fear of the violence nourished by poverty. White criminals in Boston³⁸ and South Carolina³⁹ divert suspicion from themselves by claiming that imaginary African Americans are responsible for horrible crimes that whites actually committed against their loved ones. Our first reaction is, "Oh, yes, of course that's what must have happened." Rodney King is brutally beaten by police officers,⁴⁰ but we know that without the videotape we would have

38. See, e.g., Constance L. Hays, *Obsession in Boston: Mystery of Couple's Deaths*, N.Y. TIMES, Jan. 13, 1990, at 10 (describing how easily a white man convinced the city of Boston that a black man had shot his wife, though he was the murderer).

39. See, e.g., Don Terry, *A Woman's False Accusation Pains Many Blacks*, N.Y. TIMES, Nov. 6, 1994, at 32 (reporting how Susan Smith, who drowned her two children, convinced the nation that a black man had kidnapped them).

40. See, e.g., Robert Reinhold, *Violence and Racism are Routine in Los Angeles Police, Study Says*, N.Y. TIMES, July 10, 1991, at A1 (explaining how the videotaped beating of black motorist Rodney King by white police officers sparked national outrage).

dismissed the claim as an unreliable, self-serving accusation by a petty criminal. We recoil in shock to hear Mark Fuhrman making repeated and vicious racial slurs.⁴¹ To our amazement, African Americans readily accepted a theory that white police officers planted false evidence to make a case against O.J. Simpson.⁴²

These events and experiences illustrate the concrete harm of racism, both to its direct victims and to the national state of mind. These events, however, do not begin to capture the impact of a childhood spent in ghetto poverty. Recent popular films depicting life in the urban ghetto provide some illustration. Imagine being a child and trying to study when your classmates trash you for being a good student⁴³ or trying to study when police helicopters flash lights from the sky into your neighborhood and the constant threat of a drive by shooting lingers in the air.⁴⁴ Imagine waking up as a ten year old in the middle of the night listening to your alcoholic father throw dishes and abuse your mother while screaming about indignities inflicted by a white man.⁴⁵ Imagine that your only hope of escaping to create a successful life is the foolish hope that you can steal money from a drug dealer and disappear.⁴⁶ Few white attorneys can count these sorts of events as a part of their formative experiences in life. Certainly not me.

Society has a responsibility to acknowledge these harsh realities and to assist in remedying the tragic reality of urban black poverty. Incredibly, Professor Epstein never even mentions these realities and their effect on individuals in his book advocating the repeal of employment discrimination laws. While everyone has barriers and problems to overcome, those that I have faced pale in comparison to those faced by African American youngsters growing up on the west side of Chicago. Those who would deregulate the American economy generally suggest that people living in such circumstances should "pull themselves up by their own bootstraps." Without some assurance that every employer has a legal obligation not to discriminate on the basis of race, what is the point in trying? Professor Epstein asks these prospective employ-

41. See, e.g., Kenneth B. Noble, *Ex-Detective's Tapes Fan Racial Tension in Los Angeles*, N.Y. TIMES, Aug. 31, 1995, at A18 (discussing how the taped racist comments of Detective Mark Fuhrman exposed deep racial divisions within Los Angeles and its Police Department).

42. See, e.g., Martin Gottlieb, *Racial Split at the End, as at the Start*, N.Y. TIMES, Oct. 4, 1995, at A1 (reporting how reactions to the O.J. Simpson verdict were shaped largely by race).

43. See generally HIGHER LEARNING (Columbia Pictures 1994) (depicting life as an African American college student on a California campus).

44. See generally BOYZ IN THE HOOD (Columbia Pictures 1991) (depicting the environment of high school students in South Central Los Angeles).

45. See, e.g., STRAIGHT OUT OF BROOKLYN (Samuel Goldwyn 1991).

46. *Id.*

ees to accept a world where the law will permit employers to reject them on the basis of nothing but their race.

It is in our collective self-interest to change the persistent pattern of poverty among the African Americans. Imagine for a moment the improvement in your own life that would result if existing racial tensions and fears were eliminated. Simply doing nothing to reduce discrimination will not accomplish that improvement. Employment discrimination laws, which help provide black Americans with an opportunity to enter and progress in the work force, are one reasonable step in that direction. Whatever the critique of other social programs might be, requiring that the road of employment be open to everyone, whether the employer is private or public, is a sound element of any plan to change the current pattern of poverty.

IV. PROFESSOR EPSTEIN'S UNSUPPORTED ASSUMPTIONS

Professor Epstein makes three central points, each founded on unsupported assumptions. First, he believes that the improvement in employment levels of minority employees immediately following the passage of Title VII represented only the effect of eliminating the Jim Crow laws that mandated segregation.⁴⁷ Second, he contends that the market, left to its own devices, will drive discriminators out of business.⁴⁸ Third, he asserts that the coercive power of a majoritarian government will more likely create discriminatory conditions than an entirely free market.⁴⁹

A. Elimination of Jim Crow Laws Alone Did Not Cause the Improvement in Employment Levels for Minorities

The dubious assertion that the elimination of legal barriers to employment represented the basis for improvement of black employment following the passage of Title VII can be tested empirically. A state by state review of the improvement of black employment levels from 1960 to 1970 reveals that substantial increases in employment for minority employees also occurred outside the dozen or so states⁵⁰ that had legal segregation.⁵¹ In reality, seg-

47. EPSTEIN, *supra* note 2, at 245-46, 248, 251-54.

48. EPSTEIN, *supra* note 2, at 59, 419.

49. *Id.* at 94-95.

50. The states that mandated segregation were former slave states located in the South. See H.R. Rep. No. 904, 88th Cong., 1st Sess. (1964), *reprinted in* 1963 U.S.C.C.A.N. at 1510 (describing primary locations of desegregation activity in education since 1954 and listing Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Louisiana, Arkansas and Texas as having segregated school facilities).

51. In Minnesota, for example, unemployment levels among minorities in 1960 were approximately 12.8%. BUREAU OF THE CENSUS, MINNESOTA, CHARACTERISTICS

regation and discrimination existed throughout the country and not just in the South.

In the North, laws did not mandate segregation, but it nevertheless existed. For example, although the state did not legally mandate segregation or discrimination in the work place during the 1950's and 1960's, management at the paper mill in Luke, Maryland, systematically excluded blacks from consideration in certain categories of positions. Management based this exclusion on the assumption that blacks were incapable of performing in those jobs. Once management gave blacks the opportunity, they proved that assumption wrong.⁵² It was the destruction of barriers to employment, imposed not so much by law as by custom, tradition and stereotype, that explains the immediate impact of Title VII which Professor Epstein acknowledges.

B. The Market On Its Own Will Not Drive Discriminatory Employers Out Of the Market

Professor Epstein theorizes that market forces will drive employers who discriminate out of business.⁵³ He proclaims that skilled minority employees will gravitate to employers who do not discriminate.⁵⁴ This gravitation will allow those employers to obtain a competitive advantage over discriminators.⁵⁵ These discriminators will have a less capable work force because they must select from a smaller pool of capable employees.⁵⁶ This strategic advantage will then drive the discriminators out of business as

OF THE POPULATION 394-95 (1960). By 1970, however, minority unemployment rates were only at 5.4%. BUREAU OF THE CENSUS, MINNESOTA, CHARACTERISTICS OF THE POPULATION 590 (1970).

In Wisconsin, unemployment levels for minorities in 1960 were approximately 11.4%. BUREAU OF THE CENSUS, WISCONSIN, CHARACTERISTICS OF THE POPULATION 358-59 (1960). By 1970, the unemployment levels of minorities had dropped to 8.3%. BUREAU OF THE CENSUS, WISCONSIN, CHARACTERISTICS OF THE POPULATION 594 (1970).

In Nevada, minority unemployment levels in 1960 were approximately 10.1%. BUREAU OF THE CENSUS, NEVADA, CHARACTERISTICS OF THE POPULATION 64 (1960). By 1970, the minority unemployment level had fallen to 5.4%. BUREAU OF THE CENSUS, NEVADA, CHARACTERISTICS OF THE POPULATION 276 (1970).

In New Hampshire, the 1960 minority unemployment level was 10.2%. BUREAU OF THE CENSUS, NEW HAMPSHIRE, CHARACTERISTICS OF THE POPULATION 64 (1960). By 1970, the minority unemployment level had dropped to 5.9%. BUREAU OF THE CENSUS, NEW HAMPSHIRE, CHARACTERISTICS OF THE POPULATION 301 (1970).

52. My father worked as a chemical engineer in that paper mill from 1951 to 1962.

53. EPSTEIN, *supra* note 2, at 38, 43.

54. *Id.* at 31-32.

55. *Id.* at 34-35.

56. *Id.* at 35-36.

the more capable work forces of non-discriminating employers will be more efficient.⁵⁷ Professor Epstein is not troubled by the fact that by the laws of supply and demand, the compensation of minority workers in this hypothetical world will necessarily be lower than that of white workers as a result.

Curiously, no one has ever observed Professor Epstein's dynamic at work. Nothing in Title VII would *prevent* such a sequence of events from occurring. Yet, despite keen interest in the causes of business success and failure, no report of any business bankruptcy or downsizing anywhere in the American economy has yet been attributed to this phenomenon. If this theory bore any resemblance to real life, discrimination in employment would have been unheard of outside the South before the passage of Title VII since most of the country did not have laws that mandated discrimination or segregation in employment.

Nor can Professor Epstein attribute the absence of any proof to support his theory of collective bargaining and union discrimination in the North. Under the National Labor Relations Act,⁵⁸ collective bargaining agreements may not impose limitations on employer hiring and unions have no direct legal say in employer hiring decisions.⁵⁹ Moreover, until the late 1930's, American unions were generally weak,⁶⁰ and even in 1953, at the zenith of their power, unions never controlled more than 35% of private sector American jobs.⁶¹

The selection of employees is a highly unscientific process and involves much guesswork. Every employer has stories of employees who appeared wonderful on paper but proved to be disastrous, and others hired with trepidation and only due to unusual circumstances who proved to be outstanding. While businesses attempt to hire the most capable employees, hiring decisions have a large margin of error. A discriminatory business whose choices are intuitively superior will continue to thrive even if its pool of recruits is reduced by thirteen percent.

In order for Professor Epstein's model to operate, significant differences need to exist between the skills of employees for each position that would accumulate over the entire organization. In fact, in today's world, most employers have a plethora of appli-

57. *Id.* at 37-38, 41-43.

58. July 5, 1935, ch. 372, § 1, 49 Stat. 449.

59. 29 U.S.C. §§ 158(c)-(d) (1988).

60. Stephen W. Sears, *Shut the Goddam Plant: The Great Sit-Down Strike that Transformed American Industry*, 33 AM. HERITAGE 3, 49-50 (1982).

61. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 232, t.278 (1957). Between the years 1940 and 1950, labor unions barely controlled 20% of the labor force. *Id.* Between the years 1955 and 1960, labor unions had an average of 24.1% control over the labor force. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 241, t.319 (1962).

cants from whom to choose in almost any job. The differences between the applicants at a given salary level is typically not great. Thus, the overall impact of eliminating thirteen percent of the potential applicant pool would simply reduce the number of applications to process. The differences between employees are not great enough to impact the bottom line. Moreover, when an employee performs poorly, his or her supervisor will typically adjust how the work is performed to compensate for it. As much as employees hate to believe it, no one is indispensable.

Businesses suffer and die most often because they are unable, or their managements are unwilling, to respond to externalities. Changes in the cost of money, entry of new competitors, changes in the market, shifts in public taste and technological innovations drive companies out of business. By the same token, success in the business world is sometimes nothing more than the result of inertia. The company with a significant market position has the established relationships and expertise to maintain that position despite numerous foolish steps. Thus, the rise or fall of a company involves much more than its hiring practices.

C. A Free Market is as Good a Vehicle for Discrimination as a Majoritarian Government

Professor Epstein claims that governments, being controlled by simple majorities, are more susceptible to outside pressures to impose coercive requirements based on race than markets.⁶² When a fifty-one percent majority approves of discrimination, he claims it will impose this requirement on everyone in the marketplace by legal coercion.⁶³ Markets, by contrast, operate on a case by case basis. If fifty-one percent of the firms believe in discrimination, then forty-nine percent of the firms will not discriminate.⁶⁴ Thus, he concludes that the market is a better mechanism to fight discrimination than a political system.⁶⁵

When James Madison designed the constitutional system, he had decades of real life experience with legislators.⁶⁶ He knew it

62. EPSTEIN, *supra* note 2, 94-95, 97, 266.

63. *Id.*

64. *Id.*

65. *Id.* This theory leaves to one side the question of whether those who own firms hold the same views or attitudes as the population at large in a society, such as the United States, having drastic inequalities of wealth. Farrell, *supra* note 19, at 72. This disparity in wealth is nowhere more evident than in the case of African Americans. *Id.* In 1993, the median net worth of all U.S. households was \$45,700. *Id.* The median net worth of Black households was \$4400, less than 10% of the figure for all households. *Id.*

66. ROBERT A. RUTLAND, JAMES MADISON AND THE SEARCH FOR NATIONHOOD xv-xviii (1981). In 1776, Madison was a delegate to the Virginia Convention. *Id.* at xv. In 1780, he was a delegate to the Continental Congress. *Id.* In 1784, he held a

was inevitable that pressure groups, predominately economic interests, would consistently appeal to legislatures for special treatment and benefits.⁶⁷ To control this phenomenon, Madison deliberately designed a government that acts slowly.⁶⁸ He used devices such as a bicameral legislature,⁶⁹ a strong executive branch,⁷⁰ a staggering of electoral terms from two to six years,⁷¹ an independent judiciary with life tenure⁷² and a specific Bill of Rights,⁷³ to ensure that government could not efficiently initiate laws to satisfy the whim of the majority.

These restrictions have helped to slow majorities from imposing their will on a vocal and organized minority. For example, a large majority of Americans for twenty years has favored restrictions on the sale of handguns.⁷⁴ That majority, however, has only a recent ban on assault weapons⁷⁵ and a waiting period⁷⁶ to show for its efforts. To say that majorities have the capacity to impose coercion on minorities easily through government forgets the wisdom of the founding fathers.

Moreover, firms in a free market will not readily resist the will of a majority, or even a committed minority, that favors segregation or discrimination. Consider the example of a drug store in a small town in a border state without Jim Crow laws in the 1950's.⁷⁷ The store's profit margin depended on the patronage of

seat in the Virginia House of Delegates. *Id.* In 1787, he was a delegate to the Constitutional Convention. *Id.* at xvi.

67. ROBERT A. RUTLAND, *JAMES MADISON THE FOUNDING FATHER* 6-7 (1987). As an experienced statesman, Madison knew the significant political pressures imposed upon the legislatures by economic and agricultural interests. *Id.* Madison soon realized that the new nation would see a great deal of bargaining for favorable laws. *Id.*

68. *Id.* at 15-21. Madison is often credited with establishing a semblance of order at the Constitution Convention. *Id.* In fact, Madison was thought to have "writ[ten] the Constitution." *Id.* at 17.

69. U.S. CONST. art. I, § 7, cl. 2.

70. U.S. CONST. art. II.

71. U.S. CONST. art. I, § 2, cl. 1; § 3, cl. 1.

72. U.S. CONST. art. III, § 1.

73. U.S. CONST. amends. I-X.

74. Since 1972, Roper polls have shown support between 69% (1980) and 81% (1991, 1993) for a law requiring a police permit for gun ownership. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 206, table 2.63 (1993).

75. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (1994).

76. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

77. This drug store existed in Piedmont, West Virginia. West Virginia did not have any Jim Crow laws. The movie theater and municipal swimming pool in Piedmont were segregated, too. I lived there as a child. As it happens, so did Harry Lewis Gates, Jr., who became a Harvard Professor. Although he was only a year or so older than I, we never met despite the small size of the "Tri-Towns" spanning the Potomac River (about 5000 people total). Harry Lewis Gates, Jr. is black and

its white customers, who included a significant percentage (not a majority) of racists. The business had significant fixed costs for real estate, minimum inventory and labor. A ten percent drop in sales would have wiped out its profit margin. Rather than risk the loss of some white customers, the business set aside a separate part of the store to serve blacks and barred them from the shopping area for whites. This segregation made economic sense, but it responded to the racist preference of a minority of the customers.⁷⁸ In other words, the will of a minority through the market forced segregation among races. Thus, Professor Epstein's theory about the effect of a majoritarian government, like his other theories, represent a logical model divorced from reality, and thus lacks any persuasive power.

V. THE REALITY OF THE OPERATION OF TITLE VII

Professor Epstein's critique of the employment discrimination laws demonstrates a lack of familiarity with how Title VII actually operates in the federal courts. This misunderstanding leads him to repeat the widely circulated falsehood that Title VII and federal contractor affirmative action rules effectively mandate racial favoritism.⁷⁹ Professor Epstein does not criticize the federal courts' use of uncertain and expensive inquiries into motive as the basis for deciding individual Title VII claims. He does not acknowledge the important positive effect of employment discrimination laws that is limited under current law. Surprisingly, he offers no significant critique of the costly and usually pointless administrative investigation stage in individual employment discrimination cases.

Professor Epstein asserts that it is just "too easy" for plaintiffs to prevail in disparate impact cases, which he says disregard the risk that discrimination will be found where none exists.⁸⁰ He contends that federal contractors must give racial preferences to minorities under the guise of affirmative action.⁸¹ Both state-

he wrote a memoir about the segregation and the arrival of integration entitled *Colored People*. HARRY LEWIS GATES, JR., *COLORED PEOPLE: A MEMOIR* (1994). During the 1950's, the world he inhabited and mine, although geographically identical, could just as well have been continents apart. Legal coercion had nothing to do with it. The segregation was a matter of custom and accepted as a part of life at the time. Not surprisingly, I find nothing convincing in Professor Epstein's theory that markets will cure racism and government cannot. I have seen it work the other way around.

78. A store like this may also exist in the black part of town that serves only the nearby black clientele because whites rarely stray into the neighborhood. Since all of that store's customers are black and also less affluent, the better goods that can be found in the segregated drug store are not available anywhere else in town.

79. EPSTEIN, *supra* note 2, at 183, 206-12, 234-36.

80. EPSTEIN, *supra* note 2, at 206, 223-25.

81. *Id.* at 434-35.

ments are incorrect, despite the wide circulation such charges have been give.

A. "Affirmative Action" Does Not Mean, or Even Allow, Reverse Discrimination

Employers who are federal contractors governed by Executive Order 11246⁸² are not required or even permitted to give preferences under present law. As used in the Order, "Affirmative Action" is *not* racial favoritism. Affirmative Action consists of examining each stage of the employment relationship, determining whether signs of discrimination exist and eliminating the discriminatory practices.⁸³ This examination includes performing statistical analyses as a diagnostic tool. No court, however, has ever required an employer to apply standards or measures of analysis more favorable to minorities than those applied under Title VII that are described below.⁸⁴ That standard is exceedingly generous to the employer.

If the employer's statistical analysis of its employment practices shows that minorities are being treated less favorably overall, the Order does *not* call for favoritism towards minorities.⁸⁵ Where a disparity is shown, the Order requires setting "goals" in keeping with employee turnover,⁸⁶ directs the employer to examine its processes to identify and eliminate discriminatory practices and insists that employers consider the qualifications of minority

82. Exec. Order No. 11,246, 3 C.F.R. 339, 342 (1965-1969).

83. Exec. Order No. 11,246, 3 C.F.R. § 339, 342 (1965-1969). Contractors having over 50 employees, with contracts over \$50,000 or serving in certain financial capacities are required to develop Affirmative Action Plans. 41 C.F.R. § 60-1.40(a). The plan must include "a set of specific and result-oriented procedures to which the contractor commits itself to apply every good faith effort" and having the objective of attaining equal employment opportunity. It must include "an analysis of areas in which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed." 41 C.F.R. § 60-2.10. All major job groups at a facility are to be analyzed. 41 C.F.R. §§ 60-2.12(a), (e), (f). Suggested steps include dissemination of the policy of equal employment opportunity, involvement with local organizations, auditing programs and processes to remove impediments, communication with management employees, review of qualifications of minority employees and women to ensure that they are given full opportunities, career counseling for all employees and evaluation of supervisory performance for equal employment opportunity efforts. 41 C.F.R. §§ 60-2.21-2.22.

84. Exec. Order Nos. 640a2 (Jan. 20, 1987) and 640a5 (Feb. 23, 1987); 41 C.F.R. § 60-2.11(b); *Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F. Supp. 1330, 1337-38 (E.D. Tex. 1981).

85. "The purpose of a contractor's establishment and use of goals is to ensure that it meets its affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or individual because of race. . . ." 41 C.F.R. § 60-2.30.

86. 41 C.F.R. § 60-2.12(f).

candidates.⁸⁷ The Order expressly stipulates that the employer has not committed a violation so long as it makes a "good faith effort" to achieve these goals.⁸⁸ No court has ever held that this "good faith effort" requires, or even allows, favoritism towards minority candidates.⁸⁹ Nor has any court *ever* sanctioned an employer simply on a showing that an employer did not meet the goals.⁹⁰ "Affirmative Action," as used in the Order, means action to ensure that an employer does not use discrimination in employment decisions.⁹¹ Under the Executive Order, the courts rarely award retrospective relief or debarment, which eliminates any genuine risk to an employer who makes a meaningful effort to prevent discrimination.⁹²

B. Application of the Disparate Impact Test by Courts

Contrary to Professor Epstein's theory of disparate impact, courts do not make statistical comparisons under Title VII between workforces and the local population.⁹³ Rather, courts make the comparisons on a position by position basis.⁹⁴ They compare the employer's rate of applicant selection in the relevant labor markets⁹⁵ to the percentage of qualified persons available for

87. 41 C.F.R. § 60-2.22(b)(5).

88. "Each contractor's compliance posture shall be reviewed and determined by reviewing the contents of its programs, the extent of its adherence to the programs and its good faith efforts to make its program work towards the realization of the program's goals within the timetable set for completion." 41 C.F.R. § 60-2.15.

89. "No contractor's status shall be judged alone by whether or not it reaches its goals or meets its timetables." *Id.*

90. *See Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F. Supp. 1330, 1337-38 (E.D. Tex. 1981).

91. The operative clause inserted into federal contracts reads: "The contractor will not discriminate against any employee or applicant for employment because of race. . . . The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated, without regard to their race. . . ."

92. *See, e.g., First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 722 (11th Cir. 1982) (refusing debarment because its purpose is to encourage compliance, not punish non-compliance); *OFCCP v. Disposable Safety Wear*, 59 FEP Cases 1597, 1603 (Sec'y of Labor 1992) (overturning ALJ decision refusing sanctions based on four-year delay in complying with requirements of conciliation agreement).

93. *New York Transit Authority v. Beazer*, 440 U.S. 568, 585-86 (1979); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987); *O'Neal v. Riceland Foods*, 684 F.2d 577, 586 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Swint v. Pullman-Standard*, 539 F.2d 77, 104 (5th Cir. 1976).

94. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977); *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642, 647 (1989); *Cox v. City of Chicago*, 868 F.2d 217, 226 (7th Cir. 1989).

95. This selection does not include its overall work force, which may, depending on turnover or contraction, reflect a pattern of hiring over a period that can be decades long.

that position.⁹⁶ The only statistics representing the availability of qualified persons are reports showing the percentage of persons already occupying such positions.⁹⁷ As a result, the calculation does not include qualified persons not presently occupying their position, who are disproportionately African American in most instances.⁹⁸ In a time when the percentage of minority candidates being educated or trained for a position is increasing, additional statistical bias against a finding of discrimination will exist because the statistical undercounting will assume that those persons are not part of the pool of qualified minorities. In short, the employer need not worry about the possibility of a disparate impact suit outside of nonskilled entry level positions unless the employer selects minority candidates at a lower rate than other employers in the area. Under this test, a court would not have found any car dealer in Alabama in 1950 guilty of discrimination in the hiring of sales managers. The statistics would have shown that no qualified black candidates existed because no other car dealer employed any black sales managers.

A statistical discrepancy is only the beginning of the analysis, it is not enough to create a violation. Such discrepancies could occur by the random operation of chance. The disparities observed must be substantial and persistent over time. Many courts insist that the probability of chance be eliminated to a level of mathematical certitude by a binomial distribution test of statistical probability.⁹⁹ Unless the possibility that random chance could explain the statistical disparity is less than five to ten percent, the courts will not find discrimination.¹⁰⁰ This means that *no* case involving a small number of employees can *ever* satisfy the legal standard because, without a sample of around thirty, proof that random chance is not operating is mathematically impossible.¹⁰¹ This rule also means that a discriminatory impact must be proven, in effect, beyond a reasonable doubt and not simply by a preponderance of the evidence.

Even this dramatic statistical disparity may not be sufficient to make out a Title VII violation. The employer may offer nondis-

96. See, e.g., *Movement For Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1244-45 (7th Cir. 1980).

97. BARBARA LINDERMAN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1358 n.262 (2d ed. 1983).

98. *Id.*

99. *Hazelwood Sch. Dist. v. United States*, 483 U.S. 299, 308-09 (1977); *Mister v. Illinois Central Gulf R.R.*, 832 F.2d 1427, 1436 (7th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

100. *Rivera v. City of Wichita Falls*, 665 F.2d 531, 540 (5th Cir. 1982); *Boggs v. Bancroft-Whitney Corp.*, 25 FEP cases 13, 15 (C.D. Cal. 1981). See *Cox v. City of Chicago*, 868 F.2d 217, 220 n.1 (7th Cir. 1989).

101. *E.g., Dendy v. Washington Hosp. Ctr.*, 431 F. Supp. 873, 876 (D. D.C. 1977).

criminatorily explanations for the dramatic disparity¹⁰² or may critique the validity of the statistical analysis without offering anything at all in response.¹⁰³ Unless statistical proof is compelling and analytically proper in its entirety, courts reject it as having no probative value.¹⁰⁴ Analyses that show substantial disparities may be attacked for focusing on specific categories and ignoring others and rejected on that basis alone.¹⁰⁵

If possible, the claimant must tie the statistical disparity directly to a specific employment practice, such as a test or other selection device.¹⁰⁶ Thus, cases cannot generally be proven by simply examining statistics of, for example, all hires in a position. They must focus on an employment practice, such as a test or other screening device, and show that it has caused disparity. If the employer uses more than one screening device, each device must be analyzed separately.¹⁰⁷ This requirement complicates proof in these cases; it may preclude Title VII liability where the specific practice to blame for the disparity cannot be readily identified.

C. Effect of the "Disparate Impact" Test On Private Enforcement

The result of this tremendous level of complexity applied to disparate impact cases by the federal courts has been to virtually eliminate private enforcement of disparate impact standards. Before suit, the plaintiff has no access to the statistical data needed to determine whether a case exists. Federal Rule of Civil Procedure 11 exposes attorneys who pursue such cases without having a factual basis to substantial sanctions. The probability that some methodological error will be found and lead to the rejection of the case, along with the high cost required for the statistical studies, has eliminated the use of this theory by all but a small percentage of private practitioners. Where a plaintiff could prove a case, a court can throw out the case simply because the court finds some weakness or unique aspect of the individual representative plaintiff's case that renders him or her an "inadequate" class representative.¹⁰⁸ Thus, the idea that employers must prefer minor-

102. *Bazemore v. Friday*, 751 F.2d 662, 672-74 (4th Cir. 1984).

103. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1272 (N.D. Ill. 1986), *aff'd*, 839 F.2d 18 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3154 (1989); *EEOC v. General Tel. Co. of Northwest Inc.*, 885 F.2d 575, 582 (9th Cir. 1989).

104. *E.g.*, *EEOC v. Lacy Baltimore Foods, Inc.* 643 F. Supp. 406, 411 (D. Kan. 1986).

105. *E.g.*, *Washington v. Electrical Joint Apprenticeship and Transp. Comm. of Northern Ind.*, 845 F.2d 710, 713 (7th Cir. 1988).

106. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

107. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

108. *E.g.*, *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 333-34 (4th Cir. 1983).

ity employees because of exposure to disparate impact liability through action in which employees have an unfair advantages is inconsistent with reality.

The Equal Employment Opportunity Commission (EEOC) has the power to bring such discrimination cases. Furthermore, the EEOC has access to employer statistical reports and statistical experts. If it brings an action, the employer can expect that substantial defense costs will result. But as a litigation agency, the EEOC is a paper tiger. Its resources allow it to bring only a handful of cases. The Chicago District office of the EEOC received 4462 charges of discrimination in 1995,¹⁰⁹ but it initiated only thirty lawsuits, of which sixteen were individual complaints and fourteen were class complaints.¹¹⁰

On the other side of the coin, Title VII has always *prohibited* racial quotas in express terms.¹¹¹ Since 1976, white victims of "reverse" discrimination have had a cause of action under the statute, which prohibits all employment decisions made "because of" race.¹¹² Courts have permitted race conscious employment practices only to remedy a demonstrable history of discrimination. Even then, courts allow the remedy for only a limited period of time.¹¹³

Sometimes employers do specifically hire or advance minority employees in significant numbers in order to avoid liability in discrimination cases. This practice is wrong. Title VII cannot be blamed for this "chicken little" phenomenon. Employers do so in part due to the inaccurate characterization of Title VII that Professor Epstein makes. Because of the high costs associated with Title VII cases, employers seek to minimize all risks of liability. Employers may also want to "keep up with the Joneses" to receive recognition as good corporate citizens.

Mostly, when employers give illegal preference to minorities, they do so because the statistics are handy and helpful persuaders in the much more common individual discrimination cases that might be asserted. The employer hopes the statistics will show that the employer likely did not have a racial motive for an employment decision. The strategy is misguided, however, since statistics alone are never determinative.¹¹⁴ The real problem is

109. Equal Employment Opportunity Commission, Chicago District Office, Internal Records (provided by Information Officer Frank Keller, Apr. 23, 1996).

110. *Id.*

111. "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or any group because of the race . . . of such individual or group. . . ." 42 U.S.C. § 20002-2(j).

112. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976).

113. *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 444 (1986); *Davis v. City of San Francisco*, 890 F.2d 1438, 1447-48 (9th Cir. 1989).

114. *E.g.*, *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1253 n.8 (7th Cir. 1990);

that the circumstantial evidence motive test for discrimination in disparate treatment cases is so vague and uncertain that an employer seeking to minimize that risk has no easy way to do so. Courts should replace this "motive" test for discrimination with a more predictable and reasonable test which might well reduce the frequency of this illegal practice.

VI. REAL LIFE UNDER THE EMPLOYMENT DISCRIMINATION LAWS: MOTIVE TESTS, THE BENEFIT OF INDEPENDENT REVIEW AND POINTLESS ADMINISTRATIVE INVESTIGATIONS

While relatively few employers experience (statistical) disparate impact cases, a great many have experienced charges of disparate discrimination and lawsuits by individual employees. The motive test used in disparate treatment individual discrimination cases assumes that discrimination is always conscious and intentional. Personal reflection about the assumptions and expectations that automatically leap to mind when we meet a person of a different race suggests people who are not overt race haters may practice discrimination. Personal reflection should also explain that few employment decisions are made for a single reason. Most decisions are the product of a number of considerations.

Anyone genuinely concerned with the costs and inefficiencies of the employment discrimination laws should focus on these cases. My experience in representing both employers and employees has been that there is a real need for reform. The problem is that the vagueness of the tests for discrimination drives up the time and money needed to resolve these cases. The culprits are the motive test for discrimination and the generally pointless administrative proceedings EEOC state agencies require. Both my employer clients and employee clients complain most about how Title VII either allows exposure to liability for manifestly reasonable decisions or does not create liability for manifestly arbitrary decisions. At the same time, I have observed that the most visible salutary effect of Title VII has been the way employers have, with increasing regularity, responded to this and other charges in employment law by using an independent internal review of decisions before they are made to ensure that their decisions are reasonable. My suggestion is to play to this strength in modifying the test for Title VII liability.

A. The Misguided Effects of the Motive Test for Discrimination

The motive test favors plaintiffs by entertaining a presumption of discriminatory motive when the employer's reason or rea-

sons for a decision are not the "real reason" for the decision. As presently applied, however, the motive test offers skillful defense counsel a fairly easy opportunity to defend the employer's decision. In the absence of a racist statement by a decision maker, the defense counsel need only formulate a reason that cannot be contradicted by the evidence. Take the case of an employee fired for stealing. Under the motive test, the employer would be foolish to give this as the reason, because if the employee proves he or she was not responsible for the loss, the employer's reason may easily be called a pretext for discrimination, as it well may be. Rather, counsel will offer an explanation such as "loss of money under suspicious circumstances." If no proof of theft emerges, the employer can easily say that it simply made a mistake because the exculpatory evidence was not available at the time the decision was made. The employer is thus not liable because the reason given is not demonstratively false.

But the reality may well be that the manager jumped to conclusions because the employee was an African American. If the employee was not in fact guilty of theft, Title VII does not require the employer to take the employee back to correct the mistake. The result is a termination that should never have happened is upheld, and where the stereotype of the dishonest black is the reason, that is bad social policy. Since we cannot reliably determine whether race was or was not the reason, I propose that we order reinstatement of that employee, since the employer has no good reason not to bring the employee back.

Allowing an easy escape for employers was not the original idea of Congress when it enacted Title VII. While Congress sometimes spoke of intent, it relied equally on the notion that instead of considering race, employers should rely on merit to make decisions. After the adoption of Title VII, the idea that the court should consider, let alone rely upon, the merit or business wisdom of a decision has virtually disappeared from the picture.

B. The Evolution of Disparate Treatment into a Motive Test

In *McDonnell Douglas v. Green*,¹¹⁵ the Supreme Court took its first stab at defining discrimination in the context of an individual employee case. The Court held that a plaintiff may show a prima facie¹¹⁶ case of discrimination in hiring by proving that the employee was qualified for the position, applied for an open position and was rejected. The employer may rebut this by prov-

115. 411 U.S. 792 (1973).

116. In tort law, "[p]rima facie evidence, if not rebutted, is conclusive." J.D. LEE & BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY & LITIGATION § 15.10, at 503 (rev. ed. 1994).

ing a "legitimate, nondiscriminatory reason" for its decision. Upon such a showing by the employer, the burden shifts back to the employee to prove that the reason offered by the employer was a "pretext," or not the real reason for the decision. In *McDonnell Douglas*, the employee's conduct¹¹⁷ was obviously a legitimate reason for the decision. Thus, the focus of the case was whether and how the employee could prove pretext.

The Court changed this model in *Furnco Construction Co. v. Waters*,¹¹⁸ which held that prima facie did not mean prima facie. Justice Rehnquist reasoned that the only issue was employer motive and changed the "legitimate, non-discriminatory reason" stage of the test from that of an affirmative defense to a virtually non-existent burden of production on the employer of "articulating" a reason.¹¹⁹ Lower courts¹²⁰ and subsequent decisions by the Supreme Court¹²¹ have confirmed this motive theory.

Under this pure motive theory, an employer can offer several reasons and, if even one of them is not pretextual, the employer wins.¹²² The employer can even prevail if it withholds the true reason out of embarrassment even though the true reason is not race.¹²³ Anything other than race, no matter how mistaken, unfair or unreasonable, can qualify as a "legitimate, nondiscriminatory reason" for a decision.¹²⁴

The employee's only response must be to show pretext, and the effort is always made. But judges resist finding liability for intelligent decisions, even where there is evidence of pretext. They worry, too, about juries finding liability for clearly unwise decisions for that reason, rather than because of discrimination. As a result, they have perverted the procedural rule against deciding questions of fact. In recent years, judges have increasingly

117. The employee, with others, illegally stalled and locked his car on the main road leading to the plant entrance in order to tie up traffic at the time of the morning shift change as a protest. *McDonnell Douglas*, 411 U.S. at 794-95.

118. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576-78 (1978).

119. *Id.* at 578.

120. *E.g.*, *Davis v. Lambert of Ark.* 781 F.2d 658, 660 (8th Cir. 1986); *Monroe v. United Airlines, Inc.*, 776 F.2d 394, 403 (7th Cir. 1984).

121. *See generally* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

122. *E.g.*, *Germane v. Heckler*, 804 F.2d 366, 368 (7th Cir. 1986).

123. *Benzies v. Illinois Dep't of Mental Health & Dev. Disabilities*, 810 F.2d 146, 148-49 (7th Cir. 1987); *see also* *Mason v. Continental Ill. Nat'l Bank*, 704 F.2d 361, 366-67 (7th Cir. 1983) (possibility that employer's reasons are phoney insufficient to prove pretext for discrimination).

124. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1709 (1993) (treating unlawful reason as legitimate); *see also* *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (holding that an unfounded belief honestly described precluded liability).

decided disputed questions of fact at the summary judgment stage rather than allowing the cases to go to trial.¹²⁵ These decisions are increasingly in the direction of finding no liability, but they are also very hard to predict.

Why did the Court adopt the motive test? One reasonable explanation is that mostly white judges made the law. We all tend to judge the actions of others towards us on the basis of what others do, yet judge our own actions towards others on the basis of our intentions. Judges and lawyers tend to identify with the employer, who is almost always white. A basic skepticism toward claims of discrimination and a strong belief in the wisdom of employers in making decisions about employees have no doubt also contributed to the increased protection of employers from the rigors of trial in recent years.

C. The Harmful Effects of the Overly Vague Motive Test

This emphasis on intent has caused much mischief. The litigation costs of these cases are made much more expensive. Both sides scrutinize the details of the decision and build the record to seek out inconsistencies in the decision maker's testimony. This means extensive document discovery and multiple depositions, along with the attendant motion practice, all of which entails tens of thousands of dollars in legal fees on both sides, and months or years of delay. The case eventually turns upon whether the court believes the decision maker's protestations of mental innocence or not. The jury trials most often last for at least one week as the lawyers plow through the minutiae of the decision making process seeking to determine why the decision maker reached the conclusion he or she did. Oddly, the employee's counsel generally seeks to make points with the trier of fact about the lack of merit of the decision. Counsel usually offers these points as part of a pretext showing on the theory that the decision was so foolish that race must have been the "real" basis of the decision.

As a result of this attention to detail, a decision that might be objectively reasonable on its face can become the basis for a finding of liability where the decision maker simply stumbles while trying to explain the decision. By the same token, a minority employee who has plainly been treated shabbily and stupidly in a particular case will nevertheless have no remedy because the evidence does not clearly show the employer based the decision on race. In light of the status of African Americans in our economy and society, this system makes no sense and is bad policy.

125. See *Kotarski v. Binks Mfg. Co.*, 537 F. Supp. 247, 251-52 (N.D. Ill. 1992) (accepting employers overall conclusion about plaintiff's performance and thereby finding no genuine issue of fact).

Most importantly for employers, every decision, no matter how clearly correct it is from a business standpoint, is subject to a challenge as motivated by discrimination. Except for deciding layoffs by seniority, employers do not have any safe harbors that will allow dismissal of cases where a decision was manifestly correct without a great deal of expensive discovery. In fact, the more sound the decision appears, the more expensive the discovery will be because plaintiff's counsel will scorch the earth with document requests, interrogatories and depositions hoping something will support an attack on the bona-fides of the decision. Thus, employers need a change in the system as well as employees. What I suggest is that the employer's burden be to affirmatively prove that its decision was a sound and consistent business decision. The employee could attack the decision as being pretextual, but that burden would increase substantially depending upon how compelling the employer's business reason was. The employer's proof would have to meet an objective test and the "I made a stupid mistake" defense would disappear. Such mistakes should be corrected.

Employers, employees and society as a whole would benefit if we made the validity of the business reasons for a decision the central focus of the case. A jury, and even a judge, cannot be unaffected in deciding the case if it appears that the decision was stupid or wise as a matter of business judgment. An occasional case might occur where so much racial malevolence or an established pattern of inconsistencies in treatment of races would create a question about a good, sensible and truly "legitimate" reason for the employment decision. In most instances, however, these cases would result in a decision as the framers of the statute expected it would: one based on whether the decision was meritorious. Employers could more frequently obtain summary resolution of the suit without extensive discovery and the perversion of having factual issues decided by judges. No longer would minority employees leave courts without a remedy as the judge laments that, "While the decision was unfair to you, and based on a stupid mistake by management, you have not proven that the decision was motivated by your race."

D. Employers' Response to the Current System

Many employers have responded to Title VII by reviewing decisions to determine whether they are vulnerable to an attack on reasonableness grounds. As a general rule, the individual cases most subject to an attack involve poor management practices that could be characterized as discriminatory. For instance, every experienced employment lawyer has encountered an employer who wanted a legal green light to fire an employee for poor performance where the employee had a long series of favorable perfor-

mance evaluations in the personnel file. These favorable evaluations usually happen because the employee's manager was too lazy or fearful of confrontation to give an honest evaluation. The discharge decision is generally the consequence of a new boss or pent-up frustration. Whatever performance problems the employer offers as an explanation for the decision appear to be pretextual even though discrimination might not have played a part in the decision to fire the employee. As a result of this situation, employers increasingly have hired skilled professionals in human resource positions who police managers and force them to evaluate employees honestly. These honest evaluations in turn have allowed employers to make better employment decisions.

When an employer prepares to make a discharge decision, it knows that independent review of the decision, without unswerving loyalty to the chain of command, can head off a decision that could lead to liability.¹²⁶ The final decision about who gets fired and who gets promoted is then more intelligent and less impulsive. Thus, while employees actually challenge a relatively small percentage of employment decisions, the effect of the statute has been to make employment decisions more well-considered. Executives rarely complain about taking these steps, which have led to better management. They complain about the high cost of litigation which mainly results from the unpredictable results of the motive inquiry.

E. The Need to Reform the Administrative Process

Another aspect of Title VII that Congress should reform is the administrative process. In Illinois, a complainant must file claims of discrimination in the EEOC¹²⁷ or the Illinois Department of Human Rights.¹²⁸ Neither agency, however, has the power to adjudicate employment disputes of private sector employees.¹²⁹ In every case, the agency requests a position statement¹³⁰ and usually poses something similar to interrogatories and a request to produce documents to the employer.¹³¹ The process of responding to these requests is time consuming and costly.

The exercise is usually pointless. The EEOC may file suit for the employee, but as the statistics related above show, it almost never does. The employee, though, may always bring a *de novo*

126. *E.g.*, *Melnyk v. Adria Lab., Div. of Ebramont, Inc.*, 799 F. Supp. 301, 315 (W.D.N.Y. 1992).

127. 42 U.S.C. § 2000e-5(e)(1).

128. 775 ILCS 5/7A-102(A) (1993).

129. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f).

130. *Eq. Empl. Compl. Man. (Callaghan)* § 22.2 ¶ 802 (1991); 775 ILCS 5/7A-102(B) (1993).

131. *Id.*

action in federal court, regardless of the EEOC's determination.¹³² In the state system, the Department of Human Rights is presently so backlogged and strapped for resources that it frequently does not assign an investigator within a year and rarely reaches a conclusion within that time. Under the Illinois statute, the employee may bypass the Department of Human Rights investigation by filing for a hearing with the Illinois Human Rights Commission during a one month window period about a year after the initial charge.¹³³

No one benefits from this "investigation." The employee endures a pointless delay in obtaining either closure of the dispute or a remedy. The employer must go through the exercise all over again during discovery if proceedings progress to the federal court or Human Rights Commission. Surely, a better and more expeditious way exists to resolve these disputes without enduring an investigation that generally has no impact on the outcome of the charge and simply delays the case for a year or more. For example, the parties could be given the option of either stipulating to a quick, no discovery hearing where a decision would be reached, or proceed to full blown litigation.

Other areas where discrimination laws could be modified to reduce costs without eliminating the protections they provide certainly exist. Reasonable people could disagree over which reforms are wise and which are not. This is another debate for another time. It is not what Professor Epstein is talking about.

CONCLUSION: THE IMMORALITY OF DOING NOTHING

By encouraging the legalization of all forms of discrimination by private employers, Professor Epstein urges us to do nothing about one of the most significant social problems of our day. For all but the most dogmatic believers in the wonders of the free market, his solution is wrong because it is counterintuitive. What happens in our own lives when we operate on the theory that the big problems in our lives will go away if we would simply ignore them? Sometimes the problems go away, but usually things go from bad to worse.

Believers in *laissez-faire* like Professor Epstein must deal with history. The policy of unregulated free markets was the policy of our national government and, indeed, was the constitutional law from the dawn of the Industrial Age until the New Deal.¹³⁴

132. 42 U.S.C. § 2000e-5.

133. 775 ILCS 5/7A-102(G)(2) (1993).

134. See generally *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), overruled by *West Coast Hotel v. Parish*, 300 U.S. 379 (1937); *Adair v. United States*, 208 U.S. 161 (1908); *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Mugler v. Kansas*, 123 U.S. 623 (1887).

The late nineteenth century, a time when industry was almost completely free of all government regulation, was also a time of repeated panics and tremendous economic instability.¹³⁵ Less affluent Americans paid a huge price in hardship for that policy,¹³⁶ while the rich and powerful exploited the poor and helpless.¹³⁷ The conditions during the great depression that led to the present welfare state would certainly have threatened the very survival of democratic government had laissez-faire continued as a government policy. Thus, history proves that a policy of laissez-faire is not the panacea that Professor Epstein contends it is. Regulation of business, beyond the minimal "force and fraud" test he advocates, is necessary.

Consider the play "An Inspector Calls,"¹³⁸ set in the early twentieth century. A police inspector interrupts an upper class British family as they happily celebrate their daughter's engagement to a young man with fine prospects. The inspector informs them that a penniless and pregnant young woman has died by suicide and that he is investigating her death. No one in the family knows the woman by name, but the inspector has the young woman's diary. Each family member, in turn, recognizes her by a different alias that she used.

The father, a factory owner, fired the woman because she was a troublemaker, attempting to organize her co-workers to demand a raise in pay. The woman then obtained a job in a dress shop. Later, the daughter, in a fit of jealousy, insisted that the shop fire the woman because a particular dress did not look good on the daughter, but looked wonderful when the woman tried it on.

The young woman's next stop was a salon where prostitutes often plied their trade. The daughter's fiance had encountered the woman when he went to the salon. He befriended the young woman and fell in love with her. He ended their relationship because of class differences. Again left without support or work, the woman returned to the salon. The son of the family then encountered and took up with her. He embezzled money from his father's business to support her after he impregnated the woman. When the young woman discovered that the son used stolen money to support her, she left and refused to see him again.

Finally, in a desperate state, the woman sought assistance from a prominent charity. Because she was carrying the child of the son of the family, she used his name as her latest alias. The mother was an influential leader of the charity. Angry that the

135. GREG DAVIDSON & PAUL DAVIDSON, *ECONOMICS FOR A CIVILIZED SOCIETY* 96-97 (1988).

136. *Id.*

137. *Id.*

138. J.B. PRIESTLEY, *AN INSPECTOR CALLS* (1945).

young woman used her own name, the mother made sure that the young woman did not receive assistance. Shortly thereafter, the woman committed suicide.

The story is a parable about the responsibility that each member of a society has for every other member and the disastrous consequences that result from abdication of that responsibility. The story addresses the same moral problem that Professor Epstein's call for abolition of the employment discrimination laws presents. Like some of the family members, Professor Epstein insists that we all would benefit in a world where none of us had any responsibility towards anyone else. His call for abolition of the employment discrimination laws is a call for eliminating all employment regulation, from minimum wage and collective bargaining statutes to child labor laws and family and medical leave legislation.

Few of us can watch "An Inspector Calls" and adopt the view some of the family members take, absolving themselves of moral responsibility for the young woman's death. Something within each of us tells us we are connected to others in society and have some responsibility for the plight of others.

Professor Epstein recognizes that a consensus favors laws against employment discrimination.¹³⁹ This consensus is based on the idea that racism is not something to be practiced openly or supported publicly. This idea represents a remarkable change in public attitude in only a generation or two. The Civil Rights Act of 1964 played and continues to play an important part in forming and maintaining that consensus. The persistence of black poverty is one factor that prompts many whites to question this consensus out of a sense of despair. In suggesting that society do nothing, Professor Epstein plays on that despair and may unwittingly lend legitimacy to those who would turn back the clock in order to promote racism.

Professor Epstein theorizes a salutary effect of the free market on employment discrimination. In my eighteen years of practicing employment law representing both employees and employers, I have seen instances in which the employment discrimination laws did not work as I wished, and also instances in which they have prevented discrimination or brought relief when it had occurred. I have *never* seen racism in the employment setting being restrained by the operation of free market economics.

Professor Epstein underestimates the power of racism. For fifty years, various ethnic groups lived side by side in Yugoslavia, coexisted peacefully and often had friendly relations. In the past several years, the world has seen the grossest of atrocities in the

139. EPSTEIN, *supra* note 2, at 577, 584.

former Yugoslavia¹⁴⁰ growing out of that most irrational of hatreds: racism. Jewish history also testifies to the malevolent power of racism generation after generation over thousands of years.¹⁴¹ Professor Epstein should recognize that even within his own theoretical structure racism belongs with "force and fraud" as a form of anti-social behavior requiring the government to protect its citizens.

There is another invisible hand, one more potent than the one Professor Epstein relies upon, which has been effective in combating racism. It is the power that called a washed up politician out of Springfield, Illinois to insist, "A house divided against itself cannot stand,"¹⁴² leading America to reject the moral abomination of Black slavery despite the many thousands of lives it cost. It is the power that called a young preacher out of Montgomery, Alabama to intone, "Let justice roll down like waters,"¹⁴³ leading a remarkable, peaceful revolution in law and public attitude.

Reflecting on those times, the outcome now seems so certain. At the time, the end results were not at all so clear. Many voices feared the changing of the status quo. Many more voices counselled delay. Change happened because that power moved in the hearts of the people and challenged political leaders to exercise moral courage and leadership. I pray that this power will continue to move in our hearts until this sad subject no longer requires consideration, until racism becomes a relic of the past and until Title VII suits are a curiosity from a bygone era. That day may be far off, but it may be sooner than we could dare hope. Only then will America have any reason to repeal the employment discrimination laws.

140. Jon Immanuel, *Bosnian Jews: A Support Group in Demand by All Sides*, JERUSALEM POST, July 26, 1995, at 7.

141. PAUL JOHNSON, *A HISTORY OF THE JEWS* 586-87 (1987).

142. *Matthew* 12:25; *Mark* 3:25; *Luke* 11:17.

143. *Amos* 5:24.