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Regulatory Sins versus Market Legacies: A Short Reply to Mr. Leech, 29 J. Marshall L. Rev. 617 (1996)

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REPLY

REGULATORY SINS VERSUS MARKET LEGACIES: A SHORT REPLY TO MR. LEECH

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I think everything that Michael Leech has said, without exception, is dead wrong. Now, let me explain why. His first point is to indict American society as it operates today for its divisiveness, its decline in education and its overall stress and strain.[1] Fair enough. However, nothing I have advocated has been the law of this country since 1965. Every one of the social ills that Mr. Leech referred to, from illegitimacy, to lack of education, to crime, to racial segregation, is higher and more pitched today than it was in 1965.[2] To say that the current situation should be attributed to policies which are *not* in effect is to ask the obvious question — why are these unanticipated, unexpected and unwanted consequences laid at the doorstep of those who oppose the dominant legal policies *after* they were implemented? It is simply odd to claim that those policies which were never adopted should be invoked to explain the deplorable conditions that society experiences today. We should not lay the sins of modern regulation on the doorsteps of markets.

If you compare the shifts that took place between 1946 and 1965, you will see that the overall level of wage improvement in the earlier period was far higher than it is today, and that the

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* James Parker Hall Distinguished Professor of Law, The University of Chicago. The short rejoinder that follows was a response to Michael Leech's oral presentation that only touched on some of the topics that he raised in his paper. I have not attempted to address the other issues that he raises in his paper, but silence should not be treated as a sign of agreement.

It is, for example, odd if not absurd to measure American attitudes toward race by the contemptible statements of two murder defendants who try to unsuccessfully whip up racial sentiment to help them in their case. *See* Michael J. Leech, *Legalizing Employment Discrimination: A Foolish and Dangerous Policy*, 29 J. MARSHALL L. REV. 587, 594-95 (1996). The issue of employment (or affirmative action) depends not on the desperate ploys of isolated citizens, but on the conscious policies of major institutions and their leaders. Mr. Leech would have a point if he could find examples of similar speech or behavior from the heads of the FORTUNE 500 companies.

1. *See* Michael J. Leech, *Legalizing Employment Discrimination: A Foolish and Dangerous Policy*, 29 J. MARSHALL L. REV. 587, 590-94 (1996).

2. *See id.* at 590-96.

level of unemployment before the minimum wage increases and the Civil Rights Act was far lower in the black population than it is today.[3] Additionally, the educational achievements of blacks were in many cases were higher than they are today, notwithstanding affirmative action. These observations are clear if you only extrapolate modestly from the 1946 to 1964 period and compare that figure to the wage stagnation during the 1973 to 1995 period. Then you might conclude that something has gone very wrong. The social situation which Mr. Leech deplores is an indictment of the law that brought it about, not of the proposals which urge "look, this is not the way that things ought to have been."

The second point of Mr. Leech's that I wish to dispute is his astonishing claim that laissez-faire brought on Jim Crow.[4] This is not what laissez-faire is about. Laissez faire is the utter antithesis of any system of state regulation that tries to limit freedom of association.[5] In effect, all Jim Crow statutes represented the view that the government knew best as to who should be able to associate, and with whom. The Jim Crow era was the embodiment of a large government syndrome that was allowed to flourish with the acquiescence of a compliant and flaccid Supreme Court. The first John Marshall Harlan was the only Supreme Court Justice who was prepared to strike down the various statutes in *Plessy v. Ferguson*.[6] He was also the Justice who was prepared to, and did strike down, the collective bargaining laws in the labor statutes in 1908 in *Adair v. United States*.[7] He understood perfectly well that when you are talking about open markets you are speaking of the antithesis of a state-run system. If you look closely at the situation, you will often discover that the enemy of the open market was not businesses, but often workers, who by their unions directed all the good jobs to their members and away from individuals in minority groups. They sometimes functioned then, as they sometimes function now, as the most retrograde, elemental force in any civil society.

Third, Mr. Leech's proposals on how to restructure the workforce may be a boon to lawyers but they invite economic ruin-

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3. For a detailed discussion of recorded data regarding the effects of the Antidiscrimination Laws, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 242-66 (1992) [hereinafter FORBIDDEN GROUNDS].

4. *See* Leech, *supra* note 1, at 596-97, 612-13.

5. *See* Richard A. Epstein & Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 be Repealed?*, 2 S. CAL. INTERDISCIPLINARY L.J. 349, 354 (1993) [hereinafter *Title VII Repeal*].

6. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

7. Adair v. United States, 208 U.S. 161, 180 (1908).

ation.[8] As I understand him, his proposal does not focus on the question of the discrimination as such, but on whether any employer's decisions make good business sense. That proposal means that every time someone challenges an employment decision in court, some judge, jury, panel or board will impanel a committee to review it. The committee will be staffed by individuals who do not know the business and who do not have any incentive to make the right decision. They are wholly detached from the firm, inexperienced in what it does, and yet, society asks them to decide years later about whether some earlier decision was rational. It cannot be done. It should not be tried. We do not need government socialism on the judicial installment plan.

A deeper fallacy pervades Mr. Leech's remarks. He assumes that whenever markets are not perfect, intervention is appropriate.[9] However, the question is never whether markets are perfect. I never said that they were; no one in his or her right mind could believe that. You have to ask questions, such as: do governments work better than markets? are employers going to get a higher level of error when the decisions are made by people who have to bear the financial consequences of error, or are they going to get a higher level of error by individuals who escape the consequences of their mistakes?

Mr. Leech has fallen prey to one other common error. If you are trying to figure out whether you get discrimination in unregulated markets, you cannot look at the behavior of employers in regulated markets. The reported incidents of discrimination, assuming that they are accurate, give a poor guide to market behavior without civil rights laws. Right now, if employers have identical white and black workers coming to them, they would not have identical future employees: one of the workers they probably could dismiss without complications and the other worker could sue them on the same event.

The upshot is that the law creates a complicated set of incentives that have different impacts at different stages of the relationship. Once employers hire workers, black workers may get better treatment than whites, especially if the threat of litigation seems real. But in terms of the initial hiring decision, the white workers may well get better treatment than blacks. Those two results help explain why everyone has reason to regard himself or herself as a victim. Those people who focus on the hiring process can see the words "affirmative action employer" written in every journal and in every magazine in the United States at the bottom of the ads. Those people who start to focus on the covert refusal to

8. *See id.* at 598-99.

9. Leech, *supra* note 1, at 597-99.

hire black workers see discrimination running in the opposite direction.

I submit that a legal regime which has helped make race as raw an issue as it is today is one that is wrong. This is not a question of who believes in "human dignity." We all do. This is a question of whether society thinks it can get dignity from a set of rules which, in their enforcement, ignore every aspect of dignity. They force employers to bear the indignities of false charges. They force employers to humiliate, in public, workers for incompetence and worse when in a previous time they could simply let the workers go. They force society to labor under the indignities of a command and control system of economy.

Jim Crow laws came from politics. They did not come from markets. They come from the same situation where by majority vote fifty-one people can wipe out the fortunes of the other forty-nine. You might say that this is an exaggeration because we have checks and balances in political institutions that prevent simple majorities from prevailing. But that point would not be responsive here. One obvious point is that checks and balances will not help individuals and groups that are systematically cut out from the political process, which is of course what Jim Crow did. Nor will they help when people are only admitted into politics unless they can organize in sufficient numbers to stop the steamroller that would run over them. A minority of forty-five percent may well be able to hold out against a majority, but the smaller discrete and insular minorities do not have sufficient power to hold back the tides of oppression that can be heaped on them. If it were possible to keep to the model of a limited but strong government dedicated to protecting property and contract, then an individual could be secure in his individual rights no matter how much the numbers are stacked against him. Additionally, the prospect of new entrants drawn to the region by greater economic prosperity could alter the political climate for the better. These dynamics should remind us all that Jim Crow is not possible to replicate. We cannot replicate Jim Crow even with full judicial enforcement of private contracts. This is the same point that I made earlier about the collective decision of the jury. Jim Crow laws all come through legislation.[10]

Voluntary markets do not propagate Jim Crow statutes. Markets work because a minority is allowed to have its way. Legislation allows the majority to snuff out the associational preferences

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10. Jim Crow laws came into effect not through limited government, but by massive state regulation left unchecked by passive judicial action. FORBIDDEN GROUNDS, *supra* note 3, at 94. *See generally* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: the Heyday of Jim Crow Laws*, 82 COLUM. L. REV. 444 (1982).

of the minority. It prevents those firms from entering the South who would do business with black workers by forcing them to toe a line set by others. A market regime does not countenance segregation, bloodshed, murder and lying, but prohibits them categorically. What a market simply says is that people can choose the individuals with whom they associate, and other individuals — black or white — can make that same choice.[11] A market cannot stop a political order from bringing public force to bear on them. It cannot stop a lynching. It is for that reason that venomous and hateful people are much more dangerous in a political situation than a market one. Society needs a strong constitutional system that protects life, liberty and property from exaggerated regulation under the police power to stop such people. Government lacked this when the courts held the Jim Crow legislation of the 1890s constitutional.

The dispute between Mr. Leech and myself is not whether we think bad motives are bad. We agree that they are. The dispute here is whether we think bad motives are more dangerous when you have political power behind them than when they do not. People can migrate away from terrible racists to better employers, but they cannot migrate away from a lynch mob, and they cannot migrate away from a statute. If it turns out that a working majority of the people are racist, society will still get that Jim Crow statute. With the same situation in an open market protected by constitutional safeguards, society will have a thriving economy because of the power of politically dominant groups to squelch their rivals.[12] The question people have to ask is whether society's collective determinations will allow minority sentiments of good will to survive. The answer to that question is that they will not in a strong majoritarian world. The upshot is that you do not have a sufficient condition for a Jim Crow law by showing racial animus. To get Jim Crow, society must have a political mechanism that allows people to aggregate preferences in a destructive fashion.[13] The bigots in the South did not implement their programs through a market because markets protect minorities. In fact, if you look in the South before 1890, black educational levels, nutritional levels and all the rest were moving smartly upward until 1890 when the increases stopped.

Now, what is going to happen today? The simple point today is: the wage figures and levels in the United States have not significantly moved since 1975. If you measure wages by race and

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11. Comparative markets do a much better job in arranging people by tastes, abilities and preferences than a political system based on heavy government regulation. *Title VII Repeal*, *supra* note 5, at 356.

12. FORBIDDEN GROUNDS, *supra* note 3, at 95.

13. *Id.* at 95-97.

sex, you see that white male wages have gone down about seven or eight percent, and female wages have gone up two percent.[14]

If you look at the 1946 to 1965 period, you will see aggregate wages moving up around two and a half to three percent a year. To defend civil rights laws, government must explain why these trends just stopped when the modern legal regime came into place. My answer is that these kinds of restrictions on productivity make it harder to earn a good return on human capital. Under the current legal regime, therefore, we should expect to see some businesses moving out of urban areas to suburban ones. So long as these employers do not have the ability to hire and fire at will, the best way they can protect themselves in employment markets is to switch locales.[15] Society would have more inner city businesses today if it allowed firms to hire people as they chose, knowing that if it did not work out in a particular case, they could fire without having to justify that decision to a court or board. So once again we have the same problem that I mentioned before. Civil rights statutes only protect people after they get jobs. They are useless to get people jobs. Society cannot enhance the ex-post protections without increasing the ex-ante costs.

There are no free lunches, even here. Every time an individual brings a civil rights suit, remember that there is some nameless black person or nameless woman out there whose chances of getting employment have been reduced by your action. The law of unanticipated social consequences holds for even society's most cherished social programs.

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14. *See, e.g.*, James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Laws: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 297-98 (1988). *See also* Sylvia Nasar, *Statistics Reveal Bulk of New Jobs Over Average*, N.Y. TIMES, Oct. 17, 1994, at A1 (observing that hourly pay of those at the bottom half of the workplace continues to decline).

15. Heckman & Verkerke, *supra* note 14, at 297-98.