

## **DISCRIMINATION AND FREEDOM OF CONTRACT**

### **Philosophical and Economic Foundations of the Law against Racial Discrimination in Employment**

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#### **ABSTRACT**

The aim of this article is to clarify the apparent antithesis between the fundamental private autonomy of the contractual parties and the right of a party not to be discriminated against and found anti-discrimination law's legitimacy in philosophy and economics. The purpose of reviving this controversy derives from a recent attack from some of the scholars of the 'law and economics' movement on anti-discrimination law, and from Richard Epstein's *Forbidden Grounds* in particular. Within the efficiency rationale discourse it is in reality the *freedom of contract* principle which is reassessed as being fundamentally violated by anti-discrimination law.

The study tackles the problem by, first, analyzing potential philosophical foundations, denying any plausibility to Epstein's derived libertarianism and supporting Gardner's autonomy-based perfectionism, and, secondly, presenting efficiency-based foundations of anti-discrimination law, leading to the conclusion that anti-discrimination law may lead to efficient results by speeding-up the market process. The final aim of the study is to reconcile anti-discrimination policy and freedom of contract within both a market- and a social-sensitive contract theory, such as the 'Social Market' Theory that conceives of freedom of contract as autonomy-based and thus conditioned upon the respect of the prohibition of discrimination.

#### **INTRODUCTION**

The aim of this article is to clarify the persistent and controversial issue of racial discrimination in employment contracts. There is an apparent antithesis between the fundamental private autonomy of the contractual parties, or the freedom to conclude an employment contract or not, and the right of a party not to be discriminated against or to be treated as an equal. Anti-discrimination law necessarily interferes with freedom of contract and, more generally, liberty rights

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necessarily conflict with equality rights because the former create a sphere of individual autonomy whereas the latter intrude on it.

In a way, every single act of contracting involves discrimination because if someone chooses to contract with someone else, then the former will not be able to contract with anyone else on the same terms. This type of 'endemic discrimination'<sup>1</sup> in a market constitutes an innocuous use of one's freedom of contract and will therefore not be our concern. This article will focus on more specific and *invidious* forms of discrimination and it is to these that 'discrimination' will hereinafter refer.

Invidious discrimination<sup>2</sup> is generally based on *ascriptive characteristics* of a potential contracting partner, such as race.<sup>3</sup> But the question of what makes these grounds of discrimination '*irrational*' is extremely controversial; the use of discriminatory grounds such as race can sometimes be rational, as in the case of use of reliable indicators of ability in statistical discrimination. So one must, first, explain why, even where there are reasons for discriminating, it is wrong to act on them. Secondly, one must legitimize<sup>4</sup> the restriction imposed on a potential contracting partner's freedom of contract, either by a moral or philosophical justification or by efficiency-based arguments and this is the aim of this article. Coercion in the private sphere or any limitation of private autonomy by the state should be theoretically founded.<sup>5</sup>

The purpose of reviving this controversy derives from a recent attack by some of the scholars of the 'law and economics' movement on anti-discrimination law, and by Richard Epstein's *Forbidden Grounds*<sup>6</sup> in particular. According to them, residual private discrimination, as the expression of a legitimately unrestricted freedom of contract, is often *rational* and *efficient* in an economic sense. Anti-discrimination law thus distorts competition in the market and even produces negative and contrary effects on the victims of discrimination. Epstein has gone as far, in his provocative book, as to advocate the *repealing* of Title VII of the Civil Rights Act and 'imperialist'<sup>7</sup> private anti-discrimination law.

Within the efficiency rationale discourse it is in reality the *freedom of contract* principle which is reassessed as being fundamentally violated by anti-discrimination law. At first sight, the resurgence of this principle within the discrimination debate may look awkward,<sup>8</sup> but this is mainly because, in the Anglo-American legal orders, as opposed to some civil legal orders like the Swiss one, anti-discrimination law was developed during the 1960s while freedom of contract was declining and their mutual relationship has never been perceived as antithetical until recently due to the economic critiques.

Freedom of contract requires *that individuals should be given the choice whether or not to enter a contract*. The concept has

changed significantly<sup>9</sup> since its appearance in the 19th century individualist and liberal justice and order of exchange and *laissez-faire*.<sup>10</sup> It has been subject to increasing restrictions since the second half of the nineteenth century,<sup>11</sup> in particular anti-discrimination law's impingement. It has also seen its role put into question within modern theories of contract law, such as the 'Social Market Theory', that conceives of contracts as structured obligations imposed by the law on individuals participating in markets and is based on a revised notion of freedom of contract as *autonomy*.<sup>12</sup> Some contemporary writing, as Epstein's, however, still refers since the 1980s to the classic and individualist nineteenth century interpretation of freedom of contract, but using different concepts and values mainly drawn from the economic and libertarian approach of law and it is this conception that is at the controversial origin of this article.

This article will tackle the problem by, first, analyzing potential philosophical foundations (I.) and, secondly, by discussing efficiency-based foundations (II.) of anti-discrimination law, such as the American Title VII of the Civil Rights Act (1964, amended in 1972) or the British Race Relations Act (1976). Its final aim is to reconcile anti-discrimination policy and freedom of contract within both a market- and a social-sensitive contract theory.

## I. PHILOSOPHICAL FOUNDATIONS OF ANTI-DISCRIMINATION LAW

### A. General

One of the difficulties that this legitimizing enterprise will face depends not only on which *grounds* the state can legitimately prohibit discriminatory practices, but especially on *whom* it can prohibit from such practices. Whether the state itself is bound by certain equal concern and respect requirements and non-discriminatory policies varies from one political theory to another, but the difficulty increases when one has to look for a justification for requiring *citizens* to abstain from discriminating against each other.<sup>13</sup>

Equal respect and concern cannot uncontroversially be considered as a duty which can be imposed as such on citizens, without emptying of their sense private autonomy, liberty and the whole sphere of individual judgment and personal preferences. To argue that citizens have towards one another the same obligations as the state to treat all citizens with equal concern and respect would be to invoke republican theories of citizenship. This would imply state's interference in matters of private character, morality and beliefs, ie *perfectionist* measures aiming at imposing a vision of the good life

upon its citizens. This would violate the (libertarian and) liberal principle of state's *neutrality*, according to which the state should only dictate what is «right» and not what is «good», ie abstain from imposing its view on its citizens of what is good for them in terms of moral conduct in particular.

This article presents the conceptions of two authors, who are representative of different approaches to the legitimacy of state interference with the individual freedom to discriminate, from extreme libertarianism to a more perfectionist conception: Richard Epstein's and John Gardner's.

## B. Epstein's Libertarianism

Richard Epstein begins his provocative and controversial book *Forbidden Grounds: The Case Against Employment Discrimination Law* with two introductory sections designed to ground his economic theory of anti-discrimination law. The first tackles foundational principles of philosophical, political and economic theory and the second the legal history of racial discrimination.

The conceptual introduction is a broad but summary defence<sup>14</sup> of the regime of *freedom of contract*, backed up by an economic theory of efficiency and an analysis of anti-discrimination law. For Epstein, it is the *equal* freedom of contract, and not anti-discrimination law, that enables victims of discrimination to seek the best opportunities available to them (ie 'discrimination in their favour') and through *competition* to drive *unjustified* discrimination from the marketplace.<sup>15</sup> Anti-discrimination law constitutes illegitimate state interference in the individual liberty and leads to inefficient and costly results where freedom of contract in a competitive market would eliminate most inefficient discriminations, preserve rational ones, and maximize wealth in conformity with a standard micro-economic argument Epstein adopts. State intervention should be restricted to a positive protection of the central right to freedom of contract, that is to eliminating state-sponsored discrimination and preserving the functioning of the market from fraud and coercion and does not extend to the prohibition of private discrimination. Any intervention against private discrimination is therefore unconstitutional.<sup>16</sup> Thus, paradoxically, Epstein's theory is also based on a version of *utilitarianism* maximizing the satisfaction of preferences of all individuals within society.<sup>17</sup>

Briefly restated, Epstein's basic principles follow this pattern. He reasserts, first, his attachment to the basic insight that law must *control private coercion* and to the libertarian conception of the restricted function of government. He focuses on distributive justice and *rules of 'natural' acquisition* to assign ownership of external

objects to individual persons, which rules fix a set of original rights that can then be transformed and recombined through voluntary transactions, following Nozick's conception of historical justice of entitlement and free disposition.<sup>18</sup>

He shifts then to the *rule of self-ownership* of individual labour, which while enabling voluntary transactions based on consent, ties best the arguments for *autonomy* to the modern economics definitions of social welfare and Pareto-efficiency. He considers it as the *cornerstone for freedom of contract* in labour markets.<sup>19</sup> Only in those rare instances where market failures occur, should government intervention extend beyond enforcement of property and contractual rights. Epstein's support of governmental provision of public goods is similarly conditioned on the payment of just *compensation* to anyone whose rights are impaired by governmental activity; his defense of the libertarian common law regime thus achieves a Pareto superior allocation of resources when compared to the state of nature.<sup>20</sup>

Private ordering of employment market and the resulting decentralized control of labour and property promotes everyone's participation. Epstein expresses his idealistic conception of the employment market as a competitive market without state's intervention for which freedom of contract is perfectly tailored without any concern for the difference between utility and wealth maximization. Within the alleged completeness of this set of 'natural and common law' principles, anti-discrimination law is considered as an illegitimate assault.<sup>21</sup>

*Free entry* has become, in Epstein's theory, one of the central features of the competitive employment market. It should be noted that Epstein's libertarian programme of free markets' condemnation of anti-competitive restrictions on entry could be easily extended in these terms to a promotion of anti-discrimination law as *pro-competitive* measures.<sup>22</sup> However, Epstein rejects the assimilation of *private discrimination* to *force*, ie to something state intervention should legitimately seek to eliminate. He considers that, whereas force leaves one exposed to the worst and fraud likewise requires one to guard against those who would take from them under pretext rather than coercion, the person who wishes to discriminate against another for any reason has it in her power only to refuse to do business with her, not to use force against her. Epstein then adds his extreme and simplistic conception that the victim of discrimination, unlike the victim of force, keeps her initial set of entitlements – even if she does not realize the gains from trade with a particular person or is exposed to a psychological sting which Epstein lightly neglects<sup>23</sup> – and is therefore free to look for another contract. In fact he considers that the more steadfastly discriminatory employers refuse to hire racial minority workers, the greater the incentive for other

employers to hire minority workers and that in the cases where discrimination is not eliminated by a competitive market, it is because it is efficient and rational.

Assessing Epstein's philosophical orientation is difficult mainly because of the alleged evolution of his legal views from natural rights *libertarianism* to a limited government *utilitarianism* and his special attachment to *freedom of contract*.<sup>24</sup> All three tendencies have in common that they are sceptical about interference with private markets and support Epstein's indebtedness to the economic theory. But, on the one hand, his utilitarian maximization of collective social welfare and satisfaction of preferences<sup>25</sup> cannot be reconciled with his libertarian claims of absolute autonomy and individual rights. Even his strong empirical claims about the effectiveness of the market and the ineffectiveness of government in satisfying individual preferences<sup>26</sup> do not succeed in it. On the other hand, his claim is too strong and absolute about the limited role of government in promoting social welfare to be as utilitarian as he alleges it to be. Besides, his stated fundamental attachment to libertarian values is not consistent with his concern for the positive outcomes of the market or even his a-libertarian ignorance of *historical harm* and its correction. Epstein's answer to the question of redistributive aims is that anti-discrimination law is an 'inefficient' mechanism.<sup>27</sup>

Moreover, Epstein's libertarian conception of *equal freedom of contract* refers to distributive assumptions he never acknowledges. Having appealed to distributive justice and to the principle of equality of opportunity, he should consider other liberal appeals to this principle regardless of how people have started out in life. However, he avoids the problem by inconsistently referring to the opposite utilitarian principle that all preferences should be treated equally and no preference to discriminate should be frustrated by achieving equality of opportunity.<sup>28</sup>

Replying to these critiques, Epstein still sustains his hybrid philosophical foundations. He considers legal rights as human creations to *maximize the overall level of utility* in society and limits the use of public force to two major grounds of intervention: use of public force to *control private force* against fraud and coercion and use of public force to overcome the *transactional obstacles* that prevent voluntary agreements from exhausting the potential gains of trade. In every case, state intervention's costs to prevent private violence must not outweigh the harm prevented. Since Epstein regards employment relationships as constitutive of a competitive market leading naturally to the best possible outcomes,<sup>29</sup> no justification is available for state's intervention.

Epstein regards his basic framework *not as libertarian but utilitarian*, because it does not at a first level treat individual autonomy and mutual exchange as the prime values of a legal system. On the contrary, since the theoretical discussion of anti-discrimination legislation

between individuals only arises *after* force, fraud and monopoly have been controlled, the evaluation of each case will take place at a second level within the framework of a derived libertarian principle that stresses the strong nature of property rights and freedom of contract<sup>30</sup> and the social losses induced by state intervention. As to the alleged contradiction between an affirmative 'freedom of contract' and a negative libertarian position,<sup>31</sup> Epstein rejects their incompatibility since all libertarians support freedom of contract, whilst prohibition of force and fraud are only concerned with external impositions of legal obligations.

Epstein's theory cannot only be regarded as *a-historical* because of its utilitarian neglect of historical injustices and their correction, but also in the sense that his social and legal theories lack a sufficient historical base.<sup>32</sup> Firstly, his historical section reinterprets the American history of racial discrimination equivocally to support his faith in the market. According to him, Title VII was needed to destroy the racist governmental power and to create a competitive market, but is nowadays only shackling the unrestrained competitive and efficient market that could prevent arbitrary discrimination. Thus not only does he ignore the existence of discrimination in the Northern competitive market, but also the *private* violent and racist norms and essential underlying patterns of *social* pressure and sanctioning mechanisms to discriminate which perverted the market.<sup>33</sup> Secondly, his account of legal theory is somewhat out of date and still refers to nineteenth-century liberal principles of common contract law, such as expressed in the *Lochner* case.<sup>34</sup> His conception of civil rights being restricted to the nineteenth-century narrower meaning, closely linked to civil capacity and freedom of association,<sup>35</sup> it is not difficult to understand why anti-discrimination law, which is not designed to maximize the satisfaction of preferences or to protect freedom of contract, but is directed against contracts expressing certain invidious preferences, does not fit into his legal theory.

It may be stated in conclusion that the opportunistic equivocation between Epstein's two antithetical theoretical justifications for a free market leads him to emphasize a biased legal and economic theory at the expense of available *empirical evidence*,<sup>36</sup> a flaw that vitiates most of his theory's credibility and makes the evaluation of his arguments against the wide consensus for anti-discrimination law difficult. Epstein thus fails to build a serious *normative basis* for his libertarian claims of contractual liberty as the standards by which to measure civil rights law and renders unsatisfactory his challenge to the right of any society to legislate morality.<sup>37</sup>

### C. Gardner's Autonomy-based Perfectionism

John Gardner's extensive work<sup>38</sup> on anti-discrimination law and its legitimacy to infringe private autonomy and individual liberty may

be divided between the 'early Gardner's' (until 1992) and the 'new Gardner's' (since 1996), although most of the literature still erroneously cites and uses his early work. The reason for this distinction lies in the fundamental difference previously mentioned between, on the one hand, explaining why discrimination on grounds of race is *wrongful* and, on the other, *justifying the use of law* to prevent such wrongful discrimination.<sup>39</sup> After disentangling the former from the latter, this article will focus on the latter in Gardner's work.

The issue of *law's legitimacy* in intervening in the private sphere and requiring individuals to treat each other as equals confronted Gardner with a choice between two different ways of fixing the law's limits in a free society.<sup>40</sup> One view originates from a conception of law as limited to the task of *harm-prevention* of *individual* victims and the other draws mainly on a perception of law as being properly preoccupied with the task of ensuring that *justice is done* in *society* as a whole. These two doctrines are cross-cutting in the sense that there can be harmless injustices as well as unjust harms. Some authors therefore see them as combined in the perfect law policy, whereas others, as Gardner, see them as genuinely *competing* views as to the limits of legal legitimacy in a free society.<sup>41</sup>

The confusion, now dissipated, is that having pointed to the conflict of views between these two different approaches of legal legitimacy in a free society and to the need to choose between them, the early Gardner conflated it with a quite different distinction between two different types of *wrongdoing*: corrective and distributive injustice. He regarded the competition between the harm-based and the justice-based accounts of what made legal regulation of discrimination legitimate as corresponding to the competition between two different accounts of what made discrimination wrong in the first place, namely a corrective and distributive account.<sup>42</sup> *Direct* discrimination was, non-controversially, considered as corrective injustice to be prohibited on the base of the harm principle whereas *indirect* discrimination was regarded as distributive injustice to be prohibited on the base of the principle of justice.<sup>43</sup> Therefore, just as the harm-based and justice-based approaches to legitimacy are in direct competition, so too direct competition was erroneously held to exist between the corrective and distributive accounts of discrimination's wrongfulness, that had to be solved by avoiding and criticizing, for instance, the recurring corrective twist, due namely to the test of justifiability,<sup>44</sup> in an otherwise purely distributive conception of indirect discrimination.

Gardner now considers that 'several kinds of reasons can conspire to make a certain action wrong. Thus, the profile of its wrongfulness can be formed out of an interaction of reasons of distributive justice and reasons of corrective justice, as well as reasons which are not reasons of justice at all'. There is no need to insist on a unified



view of what makes discrimination wrong and 'one should not expect the conflicts and discontinuities to be ironed out in the structure of the legal (and, for that matter, moral) duty'. The only thing one should expect is that *whatever* the structure of the *moral duty*, it should pass into law only so long as it *also* passes the *test* provided by *whichever* of the two accounts of the *limits of legal legitimacy* appears to be the superior account.<sup>45</sup> It is therefore wrong to promote, as the early Gardner did, the rejection of the fundamental idea that discrimination is a distributive injustice, only because one accepts as Gardner does, following Raz's concept of *autonomy*,<sup>46</sup> the view that anti-discrimination law exists fundamentally to prevent harm (in a broad sense) to those discriminated against, and not only those who are harmed by having their options reduced but also by not having them enhanced or maintained when others have a duty to do so.

Gardner's most recent work on anti-discrimination law has concentrated on the question of discrimination's *wrongfulness*, especially as the unacceptable differentiation made on the ground of someone's autonomy-derived *identity*.<sup>47</sup> The ideal of an autonomous life is the ideal of a life substantially lived through the successive *valuable choices* of the person who lives it, where valuable choices are choices from among an *adequate range* of valuable options.<sup>48</sup> The early Gardner saw liberal autonomy as the middle-path way to reconcile the competing corrective and distributive justice accounts of discrimination – and the two parallel competing legitimacy principles – in promoting a *single legitimacy doctrine* within our culture which associates the state with the protection and promotion of a particular conception of valuable freedom, autonomy.<sup>49</sup>

According to Raz, the harm principle sets the boundaries of the use of state power, but it is understood as a *wide harm principle*: it allows the state 'to use coercion both in order to stop people from actions which would diminish people's autonomy and in order to force them to take actions which are required to improve people's options and opportunities'.<sup>50</sup> Autonomy therefore subsumes the harm and justice principles into one legitimacy principle which authorizes the state to impose upon us the morality of autonomy and the related duties.<sup>51</sup> For Gardner, securing access to opportunities and preventing discrimination is therefore a government's task, but the employer who discriminates against someone on the grounds of her race also harms her in the sense required by the wide harm principle, because he fails to enhance her opportunities in the way that respect for her *autonomous agency* requires; *individual* and *collective* responsibility are thus both encompassed in a participative enterprise of protecting autonomy and of mutual life-enhancement.<sup>52</sup>

The promotion of autonomy also invests the state with a *creative* and *reconstitutive* role, especially in its legislative function. Each

of us is pursuing more than autonomy, that is a culture of autonomy or a *culture* in which the value of personal autonomy is understood to be the core value.<sup>53</sup> Since autonomy requires a culture of toleration and competitive pluralism, one of the valid reasons for precluding certain institutional structures in our society such as discriminatory structures is that they betray the pursuit of ideals of toleration and competitive pluralism, in restricting the range of optional values every person should have. The idea of autonomy does not require unfettered personal choice, but is instead the repository of (numerous enough) shared cultural values.<sup>54</sup> Anti-discrimination law with its methods of enforcement consists of two methods with a single end in view, the enhancement of the valuable autonomy of citizens and the implementation of the ideals of their shared culture. They fit comfortably within the context of this non-individualistic theory of autonomy according to which the state has its own project of providing the conditions of valuable fulfilment for its citizens and therefore of legitimately using *coercion* to redress previous *harm*, negatively in prohibiting discrimination which would destroy personal autonomy and positively in enjoining certain behaviours which would enhance personal autonomy.<sup>55</sup>

Gardner has used his autonomy-based conception of anti-discrimination law even further to put into question the *private/public* spheres cleavage<sup>56</sup> and the inclusion of various relationships into the private sphere, out of reach of public protective regulations, in the name of the liberal 'private autonomy'. Where precisely to draw the line is a highly contestable matter.<sup>57</sup> The key in this *grey area* is the social *role* the discriminator occupies and the responsibilities an employer, for instance, has towards her employees which limit her legitimate moral space for preferences and should prevent her from discriminating against her employees on improper grounds.<sup>58</sup>

Even if at first sight '*market*' relations, such as employment relations, seem to be entirely part of the public sphere and therefore submitted to anti-discrimination law, the case-law has revealed a worrying shift elevating 'economic factors' justifying discrimination to a discrete sphere of activity unassailable by other standards. Anti-discrimination law applied to private employers should not be a reactive form of legislative intervention and does not therefore merely back up the internal norms of the market in case of failure, as economists would have it. Moreover the fact that racial discrimination can be rational in a market shows that markets should only operate within *certain limits* in a society where members must enjoy personal autonomy. Anti-discrimination law is therefore part of the liberal society's *proactive interventions* to keep the market in check and does not come up against a 'played' liberal privacy barrier

around economic transactions anymore than around private households and clubs.<sup>59</sup>

In conclusion, Gardner's analysis and reconstruction of the legitimacy of anti-discrimination law in a free society on the basis of personal autonomy has proved extremely useful in giving us a valuable key to understand and answer anti-discrimination law's main opponents' arguments. Autonomy-based legitimacy enables to extract the debate from the 'harm' or 'justice' principles of legitimacy bipolarity, thus justifying state's anti-discriminatory intervention in the private sphere within a wide conception of the harm principle, that both authorizes preventive and proactive interventions against discrimination.

## II. EFFICIENCY-BASED FOUNDATIONS OF ANTI-DISCRIMINATION LAW

### A. The Efficiency Model of Analysis

*Efficiency* is one of the core concepts of the economic analysis of law. It refers to the relationship between the aggregate benefits and costs of a situation, and denotes that allocation of resources in which value is maximized.<sup>60</sup> It shall be used in this article in the Kaldor-Hicks sense,<sup>61</sup> that requires only that the increase in value with a change in allocation of resources be sufficiently large that the losers can be fully compensated.

The efficiency argument is conceived by most conservative economic analysts in relation to anti-discrimination law in the following way: 'unregulated and competitive labour markets are efficient, efficiency promotes highly desirable political, social and economic benefits, anti-discrimination law restricts labour markets, therefore it is inefficient and counterproductive'.<sup>62</sup>

It will readily be understood, however, that the assumption of a genuinely functioning competitive labour market is unrealistic. Characterized by structural imperfections (various types of uncertainty, limited information and sunk costs), it can never be fully competitive in the sense specified by neo-classical models of equilibrium and could therefore not be restored as conform to the competitive ideal of the 'common law of the contract of employment'.<sup>63</sup> Moreover, far from creating a link between wages and working conditions and the relative productivity of workers, 'unregulated' labour markets generate false labour standards which can be countered only by state intervention ensuring more equality.<sup>64</sup>

It may be deduced from the assumption of a competitive market

that, *a contrario*, law's intervention is justified in case of *market failures*, such as a monopoly or derived price discriminations. Regulation should thus seek to remove any factors that prevent the alleged 'anti-discriminatory aspects' of the market from operating.<sup>65</sup> Moreover, according to some authors, discrimination may always constitute a *market failure*, even in a *competitive market* and this ensures the general legitimacy of anti-discrimination legislation.<sup>66</sup>

## B. Free Market versus Regulation to eliminate Discrimination

An efficiency-based analysis of anti-discrimination law should be based on the opposition between the efficiency of discrimination in a free and '*unregulated market*' (1.) and the efficiency of state *regulation* against discrimination (2.). Anti-discrimination law produces benefits for society, but also costs and the question is whether these costs are worth incurring. The analysis of efficiency will therefore be a cost-benefit one and differentiate between taste-based (a.) and statistical discrimination (b.), ie the independent models of discrimination developed by the economic analysis.<sup>67</sup>

### 1. Unregulated Market

#### a. Taste-based Discrimination

##### i. Employer's Taste

An employer may discriminate in hiring on the basis of factors alien to the suitability of the candidate for the job in question. She might just be indulging in a 'taste for discrimination',<sup>68</sup> ie an inborn bias for or against a certain group of people. The effect of this taste is that the employer incurs an *additional cost* for employing a minority group member:<sup>69</sup> her own disutility. The question is therefore whether such biases are economically efficient.<sup>70</sup>

According to the neo-classic assumption, discrimination resulting from the employer's animus will tend, *in the long term*, either to be driven out by the market or to have no effect on the wages of the minority employees, since the employer's taste for discrimination will be *costly* and put her at a competitive disadvantage.

There are indeed two alternatives for such an employer. Firstly, she may *hire* minority employees, but will incur a psychological cost that she may try to compensate by forcing down employees' wages. However, she will not be able to compensate it entirely in an elastic labour market, since it will reduce her economic profits in compar-

ison to a non-discriminatory employer. Secondly, the employer may choose to *avoid hiring* minority employees and find perfect substitutes for them. But she will still be at a competitive disadvantage by offering her competitors a cheaper work force. Therefore, such discriminations will not persist in a harmful form.

It should, however, be noted that even in a vigorously competitive economy an *economically significant* amount of residual inefficient discrimination may persist, mainly because of market inherent imperfections.<sup>71</sup>

## ii. Co-employees' Taste

Employees might themselves have a taste for discrimination and refuse to work with other employees from designated groups or demanding a wage premium to work with them.<sup>72</sup> An (even unbiased) employer might then choose not to hire any workers from the designated groups or if she does, she will try to lessen the *additional cost* in lessening these employees' wages for instance.

In a competitive market, employees will tend, in the *long term*, to modify their tastes in favour of minority employees to be able to accept employment at competitive wages. However, in the *short term*, there will be an undesirable tendency to firms' segregation irrespective of wage differentiation.<sup>73</sup>

Thus, on the one hand, one model of employment discrimination, that is the model advocated by Becker,<sup>74</sup> predicts that the effect of co-employees' taste for discrimination will be *segregated firms without wage differentials* between minority and non-minority employees. Employers will tend to avoid reduced productivity costs or demand by non-minority employees for higher wages by not hiring an integrated work force. The market will reach therefore a non-discrimination equilibrium, but a segregated equilibrium corresponding to the 'separate but equal' theory. Besides, it is likely that customers will have a similar taste for discrimination and therefore tend not to patronize minority firms, thereby endangering the possibility of a long-term equilibrium. On the other hand, other models predict an equally undesirable alternative of an *integrated work force with wage differentials*, mainly due to the lack of perfect substitution between minority and non-minority employees and the various investments in employees.

In the *long term*, however, there will be a tendency for competition to drive out this form of discrimination. It might be more costly for employers to hire an integrated work force and they might loose out on valuable input when using a segregated work force. One should note that enhanced sensibility as to the negative consequences

of discrimination may impact on market choices and thus also contribute to drive out discrimination based on co-employees' and customers' taste. Nonetheless, *information* costs once again might cause this form of discrimination to persist, before employers identify the exact cause of the lack of productivity. *Regulation* might therefore beneficially accelerate the operation of the market.

### iii. Consumers' Taste

Those who purchase the employer's products or services may have tastes for discrimination.<sup>75</sup> An employer might therefore want or have to adapt her work force to accommodate the discriminatory preferences of customers, since she will incur an *additional cost* if customers are less willing to do business with firms which hire minority employees.

Discrimination resulting from consumers' animus, who would offer less for services from firms that employ minorities, will *not tend to be reduced* by competition. There are some arguments in favour of a tendency to reduce minority's wages and others against it.<sup>76</sup> According to the first competing model, Becker's model, as long as there is a sufficient number of non-discriminatory consumers, all firms will be able to sell without incurring additional costs. Once again this model promotes a *segregated market without any wage differentials*, thus forcing a long-term non-discriminatory equilibrium, but contributing to racial stratification. The second model argues that the presence of a substantial number of discriminatory consumers will *reduce minority wages* even if there are still a sufficient number of non-discriminatory consumers. The employer will indeed have to compensate the costs of losing a discriminatory trading partner if she hires minority employees as well as the costs of searching for non-discriminatory customers.

In conclusion, the long-term market equilibrium in the case of customers' taste-based discrimination will be discriminatory, since it may produce either a segregated market or wage discrimination. Regulation therefore will be needed as an *anti-competitive* means to prevent firms from competing for the patronage of discriminatory customers.

### b. Statistical Discrimination

When hiring an employee the employer must be able to assess the capabilities and suitability of applicants, on the base of relevant information. Imperfect and *costly information* coupled with the hiring

and firing costs, causes an attempt to reduce employee selection costs by using readily *proxies* or *observable characteristics* which are thought to be associated with productivity.<sup>77</sup> Without necessarily indulging antipathy towards a minority group, employers may therefore use '*statistical indicators*' to predict how well individuals will perform in a job, the latter being of two types. Some are *ascriptive characteristics*, or 'indices', over which the individual has no control, such as race or sex. Others include *controllable characteristics*, such as appearance, called 'signals'.

Two cases of statistical discrimination should be distinguished.<sup>78</sup> The first is the case where, although the proxies accurately capture average and relevant qualities of members of different groups, the distribution of these qualities across the groups significantly *overlap* and thus more individualized decision-making would enable members of the disadvantaged group to do the job as well as members of the advantaged group. The second is the case where both the proxies, and the qualities for which they are indirect indices, are *inappropriate* since they reflect a conception of merit that is biased by and in favour of the dominant group.

The central question is whether the use of such statistical characteristics improves the efficiency of the hiring process in the long term. The effect of competition on statistical discrimination depends on the aforementioned distinction between discrimination that does and does not correspond to actual *differences in productivity*.

If there are *no actual differences in productivity*, statistical discrimination should not persist in the long term, mainly because of the costs of generalization of inaccurate proxies on a firm's productivity. However, statistical discrimination is likely to occur and persist in these cases as '*erroneous*' discrimination based on unreliable information; this would induce the vicious circle of under-investment by minority employees in their human capital and this would in the end make discrimination economically 'rational', since the proxies would then more adequately reflect the qualifications of the candidates. Unreliable information thus leads to discrimination even in the long term and, in the absence of more reliable information, a risk-averse employer will not hire minority employees or will pay them less. The way out of the erroneous discrimination circle is to provide reliable information and to induce employers to sample minority employees. Thus, the progressive elimination of statistical discrimination will be achieved by the business cycle only in very few cases, and would therefore be more efficiently achieved by anti-discrimination law.<sup>79</sup>

According to Strauss, statistical discrimination will persist only if it corresponds to actual *differences in productivity* between groups. However, it might tend to be used less over time in competitive con-

ditions; this is due to its increasing cheapness (rather than its accuracy) and of the simultaneous appearance of new technology of employees' evaluation. Besides, the 'human capital' argument shows that differences in productivity are often exogenous. Indeed, an important part of the efficiency of statistical discrimination results from the vicious circle<sup>80</sup> that links statistical discrimination to underinvestment in one's human capital; this demonstrates therefore that even statistical discrimination that corresponds to actual differences in productivity might disappear in the long run.

When MacIntosh argues that even competitive markets may be afflicted by a relatively persistent *adverse selection* problem pertaining to the hiring of previously disadvantaged minorities, he concedes that it might be privately *rational* for an employer to rely on various statistical proxies. However, in the case of labour markets, he argues that these might be *socially inefficient*. Even an inaccurate proxy may persist indefinitely in the market, eventually becoming accurate and having the same deleterious dynamic effects of *discouraging investment by minorities in their human capital* and leading in both cases to a form of trap entailing incomplete realization of the economic and social potential of minority workers and, finally, produce a significant effect of *racial stratification* and demoralization.<sup>81</sup> There is therefore good reason to believe that the costs of the adverse selection dynamic may be excessive compared to the low cost of abandoning the use of statistical proxies; at least, the social costs of statistical discrimination will exceed their social benefits.<sup>82</sup>

## 2. Regulated Market

### a. General

Two distinct, but often intertwined, arguments against anti-discrimination regulation have been put forward. The first is that competition will eliminate non-profit motivated taste-based discrimination without regulations that are therefore not cost-justified and even inefficient. The second argument applies the wealth-maximization criterion to suggest that taste-based discrimination will in a number of residual cases lead to efficient outcomes.

The central question about anti-discriminatory regulation's efficiency is related to the first argument, ie the dynamic view of the market moving naturally towards a *non-discriminatory equilibrium*.<sup>83</sup> does anti-discrimination law move towards this equilibrium more quickly than market forces acting alone?

Conventional efficiency theorists such as Becker regard anti-



discrimination law not so much as inefficient, but as *unnecessary* in a competitive market and imposing a dead-weight social and administrative *cost* on the community: market forces will move alone towards the equilibrium in the most efficient way. Employers who refuse to hire minority workers whose marginal product exceeds their wage or who decline to serve minority customers are foregoing profits and will, over time, be driven from the market by non-discriminatory firms which are prepared to lower their costs through hiring qualified minority workers or increase their profits through the servicing of minority clientele.

The Becker model of employment discrimination is based on two assumptions which were plausible in 1959, but which have now been generally rejected.<sup>84</sup> First, the source of discrimination is the purely *individualistic* racial animus of the employer and, secondly, the labour market is perfectly *competitive*. These assumptions can be considered incomplete. Firstly, because this conception of discrimination ignores the social and communal dimension of discrimination, and, secondly, because the labour market is not highly competitive.

The argument has not gone unchallenged among economists. Donohue rightly argues that as a matter both of economic theory and reasonable empirical conjecture, laws that force markets to the equilibrium condition *more quickly* are likely to generate *in the long term* substantial net social benefits over costs. His analysis is based on a dynamic conception of Title VII in contrast to the static neo-classical model of labour markets. His argument is that in the long run efficient firms will all be free of discrimination because their inability to compete means that they will be eventually driven from the market. However, firms have imperfect abilities to adjust to relevant information and may therefore not respond to the powerful incentives on which the standard prediction rests. Title VII can thus fill the gap by *speeding up* a process that would otherwise take place, by adding a legal penalty to the market penalty for discrimination. The trade-off is worthwhile since the costs of expediting a non-discriminatory workplace are justified by the benefits obtained.<sup>85</sup>

Posner, assuming that the market has always been competitive, is willing to entertain the possibility that laws could achieve the equilibrium *more quickly*. However, he maintains that since a competitive market will secure the same outcome<sup>86</sup> at the most efficient rate, anti-discrimination law, even successful, would inefficiently reduce discrimination *too quickly*. Posner draws attention to the *costs* of administering Title VII and other substantial costs of adjustment it imposes. Thus, by making it more costly to employ minority workers, it reduces in the long term the number of minority workers who are employed. He also argues that since statistical discrimination is

profit-maximizing, it would be inefficient to draw it out of the market, as for other types of residual efficient and cost-minimizing discrimination.

Donohue's reply to Posner is that the fact that discriminators will be eradicated without legislation, is one of the strongest arguments against Title VII. This shows therefore that the costs of adjustment associated with driving discriminators out of the market will presumably be faced whether regulation is enacted or not. Consequently, the only *additional* burden imposed by the Act results from the fact that these costs are borne *earlier*. Donohue considers finally that if the process of eliminating discrimination does not occur more quickly, it is because of the *rigidity* in the market that prevents it from generating the optimal path to the non-discriminatory equilibrium; such rigidity can only be eliminated by regulation.

In opposition to the Chicago school's orthodoxy, Epstein regards Becker's traditional arguments and assumptions as well as anti-discrimination law's speeding-up advantages as irrelevant.<sup>87</sup> Epstein considers that the improvement in employment levels of minority employees immediately following the passage of Title VII represented only the effect of eliminating Jim Crow racist laws.<sup>88</sup> For him, in a world in which transaction costs do matter, a competitive market will eliminate most discrimination, but some forms of discrimination, which are rational and efficient, will be likely to persist. The fact that anti-discrimination law prohibits some of these rational discriminations will cause important hidden costs that Epstein denounces as making legislation even more inefficient and this brings him to call for the *repeal* of private anti-discrimination law.

Once the first dimension of the issue has been solved by considering, as Donohue, that anti-discrimination law is justified by speeding up the market process of elimination of discrimination, one still has to consider the second question, ie the question of the efficiency of residual discriminations, as brought up by Epstein in particular.

Epstein's thesis in favour of taste-based sorting is that after an efficient sorting, residual discrimination in a competitive market may in fact often be *rational and efficient*. His argument is, first, that long-term contractual relationships are governed by *formal* and *informal norms (relational contracts)* that are easier and produce less costs to set and enforce when the variance in preferences among employees is lesser. Epstein's second line of arguments refers to *collective choices within groups* and the related *governance costs*, which are a function of the level of variation of preferences and choices within the firm.<sup>89</sup>

Racial discrimination by employers cannot be explained in Epstein's terms in all contexts and the explanation will lie more often

in *invidious* tastes for discrimination among employers, employees or customers.<sup>90</sup> The argument would too easily legitimize numerous odious discriminations and is dangerously related to the nowadays discredited '*separate but equal*' doctrine. Besides, although taste-based discrimination or even statistical discrimination might sometimes be efficient or economically 'rational', it does not mean that it should be lawful; wealth effects of taste-based discrimination can be *dramatic* on a group which is a small part of the economy, since the impact on this group's income will be proportionately greater than on the other's.<sup>91</sup>

MacIntosh argues, with other commentators, that competitive markets may not gravitate towards an equilibrium, when they are for instance afflicted by a persistent *adverse selection* problem pertaining to the hiring of previously disadvantaged minorities, as in the case of the use of proxies.<sup>92</sup> However, even when he accepts that competitive markets sometimes advance the economic position of minorities, he rightly argues that they will always leave an economically significant degree of *residual discrimination*. The latter may produce important *externalities* and worse, have an effect on *human capital investment*.<sup>93</sup>

Finally, as to the *costs and benefits* of anti-discrimination law, it has been argued that the benefits from regulation of the victims of discrimination might not outweigh the costs of enforcement of the regulation. The first argument that they share anti-discrimination costs with the majority may easily be defeated by the fact that the benefits accrue only to them. The second argument of reflex-disemployment of minority workers as a mean to avoid anti-discrimination costs may easily be reversed by the connected loss of productivity.

All laws have *costs* and despite the symbolic and essential social *benefits* of anti-discrimination law, it is important to know what price society is willing to pay to achieve its purposes. Despite the relative incommensurability of benefits of anti-discrimination law in monetary terms, it is essential to try at least to evaluate them, and one way to do so is to evaluate the productivity consequences of the legal regime in terms of the average monetary amount a fully informed person would require to accept its repeal. If one accepts Donohue's cost-benefit analysis, then the law would be efficiency enhancing since the yearly benefits would exceed the yearly costs.<sup>94</sup>

As to the speculative *costs*, one should distinguish, first, between the *frustration of personal preferences*,<sup>95</sup> in matters of taste-based discrimination, and *economic costs*. Three *countervailing* factors are easily overlooked when evaluating these costs: taste-based discrimination can impair productivity, freedom from discrimination might improve the attractiveness of the working environment and, finally, the productivity gains from better screening techniques than statistical

proxies may easily outweigh their costs. As to the speculative *benefits*, the analysis should take into account not only the economic advantages on individuals, but also all the *moral* gains enjoyed by their proponents, the symbolic losses of their opponents, the actual gains to the statute's beneficiaries and the psychological losses of the biased opponents. Since the *public good* dimension of anti-discrimination legislation is a significant component of its value one cannot expect this benefit to be provided at the optimal level by a simple market-based regulatory scheme.<sup>96</sup>

#### b. Taste-based Discrimination

If a competitive market can reduce employer's and employees' taste-based discrimination in the long term, anti-discrimination legislation is justified as a way of *speeding up* the process and ensuring sufficient *information* to employers. Moreover, if one accepts the argument of the third parties' *externalities* and the *adverse selection dynamic* derived from residual discrimination,<sup>97</sup> one has to sustain the purposes of regulation.

The economic prescription for regulation is even more powerful in the case of customers' taste-based discrimination,<sup>98</sup> where a competitive market will *not be able to eradicate* discrimination, as described above, and where regulation is therefore essential to prevent further competition from increasing the negative and inefficient effects of this type of discrimination, ie to prevent firms from competing for the patronage of discriminatory customers.

#### c. Statistical Discrimination

Because statistical discrimination can occur even without taste for discrimination and since it can be rationally used as a proxy for a relevant characteristic, the costs imposed by anti-discrimination regulations are more difficult to justify. Posner considers that the fact that statistical discrimination is sometimes efficient does not mean that it should be lawful.<sup>99</sup> He recommends a *balancing approach* as used in constitutional cases.

An economic prescription, however, is made out for anti-discrimination legislation barring the use by employers of statistical indices such as race<sup>100</sup> and its *adverse selection* consequences, even in the case of statistical discriminations that are resistant to competitive pressures such as *accurate* statistical discrimination. Besides, it would be wrong to conclude that the market alone can solve the problem of *erroneous* statistical discrimination, which can be persist-

ent even in a competitive market and has dramatic stratifying consequences, as demonstrated before.<sup>101</sup>

## CONCLUSION

Although lacking any normative function,<sup>102</sup> the economic analysis of law has had the merit of having forced legal theorists to rethink some hitherto unquestioned positions about civil rights and anti-discrimination law.<sup>103</sup> However, it should be remembered that positive reassessment is not tantamount to 'repeal'.

As to the way to reconcile the economic critiques in favour of freedom of contract with anti-discrimination policies, it can be said, first of all, that anti-discrimination law's relation to freedom of contract is an old sore in the Anglo-American discrimination debate. It has recently been reopened and brought to the foreground by the economic analysis of law's challenge of anti-discrimination legislation. The efficiency critique refers to a *free* and competitive market, where private autonomy and freedom of contract are the key concepts and the possible remedy for discrimination. However, even in this perspective, anti-discrimination law draws its *economic legitimacy* as efficiency, on the one hand, from its ability to accelerate the appearance of a non-discriminatory equilibrium and, on the other, from its role in preventing the residual adverse discrimination, which even a perfectly free market cannot eliminate. There is no such thing as entirely efficient residual discrimination, and anti-discrimination law cannot therefore be regarded as inefficiently preventing freedom of contract from eliminating all inefficient types of discrimination or from preserving efficient types of discrimination.

The economic analysis of anti-discrimination law has therefore drawn attention, given the active role of a competitive market in eliminating discrimination, to the absolute centrality of the philosophical and moral foundations of anti-discrimination legislation's *legitimacy in a free society* and of state's coercion and infringement of freedom of contract to prevent and eradicate private discrimination. Among the two propositions of philosophical foundations legitimizing state's interference with individuals' freedom of contract by means of anti-discrimination law, analyzed above, the *autonomy-based* theory of legitimacy is the most consensual and convincing, given the incoherence of Epstein's 'derived' libertarianism. Anti-discrimination law is philosophically founded, then, since the state's (coercive) interference aims at preventing or remedying the harm that discrimination causes to someone's autonomy and her right to choose from a valuable range of options.

How may these economic and philosophical considerations in

favour of anti-discrimination law's legitimacy be reconciled with contract theory and in particular freedom of contract theory? Closely related to the philosophical argument for autonomy-based legitimacy of anti-discrimination policy, there has been a shift in modern contract theory towards a more positive conception of freedom of contract. This new dimension of modern contract theory has been presented previously as a '*Social Market*' theory and it acknowledges both the value of *autonomy* in private relationships and the *harm* which can occur from the deprivation of one's right to equal opportunities. It thus stresses that this may be legitimately remedied by state's legislative intervention.

An important dimension<sup>104</sup> of this reinterpretation of contract law is the link of '*co-operation*' between individuals. The central issue is no longer to identify a harm to others in order to enforce a contract against the will of the individual, but the central value of the institution of contract and the need to secure reliable and worthwhile opportunities for market exchanges. This view reflects the idea that contract law not only supports existing common moral practices, but also assumes some moral *initiatary* functions in a community, such as prevention of racism.<sup>105</sup> One of these duties thus introduces a limitation on the freedom to choose whether or not to enter a contract, in order to ensure more equality of opportunity in the market. This duty may deter refusals to enter a contract on the grounds of race. Modern anti-discrimination statutes can therefore legitimately impinge on freedom of contract on the premise that a party should not be free to *refuse* to enter into a contract on specific grounds.

The '*Social Market*' theory of contract enables us to close this article's circle in reconciling the, apparently economically and philosophically antithetical, concepts of anti-discrimination law and freedom of contract within a new social- and market-sensitive contract theory reinterpreting freedom of contract, and its requirements, according to a broader autonomy-based theory.

## NOTES

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1 Trebilcock, M.J. (1993) *The Limits of Freedom of Contract*, 188–189. Cambridge: Harvard University Press.

2 On the controversial concept of discrimination: McCrudden, C. (ed) (1991) *Antidiscrimination Law*, xviii. Aldershot: Dartmouth with further references.

3 For our purposes, 'race' will be understood as shorthand for race and

- ethnic origin, ie a group of people which considers itself or is considered as different from others because of inherited and immutable characteristics (*Mandla and another v Dowell Lee and another* [1983] 2 AC 548, HL).
- 4 See Gardner, J. (1996) 'Discrimination as Injustice', 16 OJLS 353, 365.
  - 5 See *Christie v York Corporation* (1940) 1 CLR 81, [SC Canada] and *Diaz v Pan American World Airways, Inc*, 442 F2d 385 (5th Circ., 1971).
  - 6 Epstein, R. (1992) *Forbidden Grounds, The Case Against Employment Discrimination Laws*. Cambridge: Harvard University Press.
  - 7 Epstein (1992), 495. See also Epstein/Chemerinsky (1993) 'Should Title VII of the Civil Rights Act of 1964 be Repealed?', 2 Southern California Interdisciplinary LJ 349; Epstein, R. (1996) 'The Subtle Vices of the Employment Discrimination Laws', 29 John Marshall LRev 575.
  - 8 Writings in contract law hardly mention the controversy, except Trebilcock, 1993, Ch. 9. See also Cheshire/Fifoot/Furmston's (1996) *Law of Contract* (13th edn), 20. London: Butterworths. See also Atiyah, P. S. (1996) *An Introduction to the Law of Contract* (5th edn), 106. Oxford: OUP.
  - 9 For an exhaustive account: Atiyah, P. (1979) *The Rise and Fall of Freedom of Contract*. Oxford: OUP.
  - 10 Collins, H. (1997) *The Law of Contract* (3rd edn) 25. London: Butterworths.
  - 11 Atiyah, 1996, 13–15. See however *Lochner v New York*, 198 US 45 (1905).
  - 12 Raz, J. (1986) *The Morality of Freedom*. Oxford: OUP. See also Brownsword, R. (1988) 'Liberalism and the Law of Contract', 36 Archives for Philosophy of Law and Social Philosophy 86; Sunstein, C. (1989) 'Disrupting Voluntary Transactions', in Chapman, J. and Pennock, J. (eds), *Markets and Justice*, Nomos XXXI, Ch. 10. New York: NYU Press.
  - 13 See Gardner, J. (1989) 'Liberals and Unlawful Discrimination', 9 OJLS 1, 2–3.
  - 14 See Rutherglen, G. (1992) 'Abolition in a different voice', Review, 78 Virginia LRev 1463, 1465. See also Epstein, R. (1985) *Takings: Private Property and the Power of Eminent Domain*. Cambridge: Harvard University Press; Epstein, R. (1989) 'The Utilitarian Foundations of Natural Law', 12 Harvard J of L and Public Policy 713.
  - 15 Epstein, 1992, 29–31, 59–72.
  - 16 Rutherglen, 1992, 1466; Epstein, 1992, 99–143.
  - 17 Epstein, 1992, 42, 65–67, 75–76.
  - 18 Epstein, 1992, 15–21; Nozick, R. (1974) *Anarchy, State and Utopia*, Ch. 7. New York: Basic Books.
  - 19 Epstein, 1992, 21–26; Crespi, G.S. (1992) 'Market Magic: Can the Invisible Hand Strangle Bigotry?', 72 Boston U LRev 991, 994.
  - 20 Epstein, 1992, 11–12, 23.
  - 21 Epstein, 1992, 27.

- 22 Verkerke, J.H. (1992) 'Free to search', Review, 105 *Harvard LRev* 2080, 2089.
- 23 Epstein, R. (1994) 'Standing Firm on Forbidden Grounds', 31 *San Diego LRev* 1, 8, 18–22; Epstein, 1992, 29 ff.
- 24 Epstein, 1994, 3, answering Brilmayer, L. (1994) 'Lonely Libertarian: One Man's view of Anti-discrimination Law', 31 *San Diego LRev* 105, 111.
- 25 Epstein, 1992, 15–24, 75.
- 26 Epstein, 1992, 156.
- 27 Epstein, 1992, 12, 20–24, 505; Verkerke, 1992, 2085–2086.
- 28 Epstein, 1992, 20, 29–31, 72–76.
- 29 Koppelman, A. (1996) *Antidiscrimination Law and Social Equality*, 188. New Haven: Yale University Press: critique of libertarians who as 'closet Rawlsians' focus on the benefits of a competitive and free market to the least well off, in contrast to the historical entitlements theory.
- 30 Epstein, 1994, 4.
- 31 Brilmayer, 1994, 109–110.
- 32 Rutherglen, 1992, 1470–1471; Verkerke, 1992, 2089; Epstein, 1992, 93–112.
- 33 Donohue, J. (1992) 'Advocacy versus Analysis in Assessing Employment Discrimination Law', 44 *Stanford LRev* 1583, 1595.
- 34 See *supra* note 11.
- 35 Epstein, 1996, 575.
- 36 Donohue, 1992, 1613; Verkerke, 1992, 2097.
- 37 Issacharoff, S. (1992) 'Contractual Liberties in Discriminatory Markets', 70 *Texas LRev* 1219, 1259.
- 38 See the previously mentioned Gardner, 1989; Gardner, J. (1992) 'Private Activities and Personal Autonomy: At the Margins of Anti-discrimination Law', in Hepple, B. and Szyszczak, E. (eds), *Discrimination: The Limits of Law*, 148. London: Mansell; Gardner, 1996; Gardner, J. (1998) 'On the Ground of her Sex(uality)', 18/1 *Oxford Journal of Legal Studies* 167.
- 39 Gardner, 1996, 365.
- 40 Gardner, 1989, 1–3, with references.
- 41 Gardner, 1996, 365–366; Gardner, 1989, 18. See Rawls, J. (1993) *Political Liberalism*, 187. New York: Columbia University Press.
- 42 Gardner, 1996, 355–357, 366.
- 43 Gardner, 1989, 3–5 and 5–11, with references.
- 44 Gardner, 1989, 12–15; Gardner, 1996, 362.
- 45 Gardner, 1996, 366–367.
- 46 Raz, 1986, 415–418.
- 47 Gardner, 1998, 179, with references.
- 48 Gardner, 1989, 17–22; Gardner, 1992, 154–155; Gardner, 1998, 170, referring to Raz, 1986, Ch. 14.
- 49 Gardner, 1989, 18.
- 50 Raz, J. (1987) 'Autonomy, Toleration and the Harm Principle', in Gavi-son, R. (ed), *Issues in Contemporary Legal Philosophy*, 313. Oxford: OUP; Gardner, 1989, 18–19.



- 51 Raz, 1986, 412 ff.
- 52 Gardner, 1989, 19.
- 53 Gardner, 1992, 162–163, referring to the *Mandla* case (supra note 3).
- 54 Raz, 1986, 410.
- 55 See Gardner, 1992, 155–157.
- 56 See Collins, H. (1987) 'The Decline of Privacy in Private Law', 14/1 J of L and Society 91, 102; Gardner, 1992, 148, 158–167.
- 57 On freedom of association: Gardner, 1992, 150–151. See also *Board of Directors of Rotary Intl v Rotary Club of Duarte*, 481 US 537 (1987) and *Charter v Race Relations Board*, [1973] 1 All ER 512, HL.
- 58 Gardner, 1998, 168, with references.
- 59 Gardner, 1992, 163–167, with references.
- 60 Posner, R.A. (1992) *Economic Analysis of Law* (4th edn), 12. Boston: Little Brown.
- 61 Posner, R.A. (1981) *The Economics of Justice*, 91–92. Cambridge: Harvard University Press.
- 62 Donohue, J.J. (ed) (1997) *Foundations of Employment Discrimination Law*, 158. Oxford: OUP.
- 63 See Epstein, R.A. (1984) 'In Defense of the Contract at Will', 51 U Of Chicago LRev 947; Epstein, R.A. (1983) 'A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation', 92 Yale LJ 1357.
- 64 See Wilkinson, F. (1994) 'Equality, Efficiency and Economic Progress: The Case for Universally Applied Equitable Standards for Wages and Conditions of Work', in Sengenberger, W. and Campbell, D. (eds), *Creating Economic Opportunities: The Role of Labour Standards in Economic Restructuring*. Geneva: International Institute for Labour Studies.
- 65 Strauss, D.A. (1991) 'The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards', 79 Georgetown LJ 1619, 1634 [Strauss, 1991]; even Epstein, 1992, 79–87.
- 66 Donohue, 1997, 183–184. See McAdams, R.H. (1995) 'Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination', 108 Harvard LRev 1003. Contra: Epstein, R. (1995) 'The Status-production Sideshow: Why the Anti-discrimination Laws are still a Mistake', 108 Harvard LRev 1085.
- 67 See Strauss, 1991, 1621–1622. See for a third type of classification: Donohue, J.J. (1994) 'Employment Discrimination Law in Perspective: Three Concepts of Equality', 92 Michigan LRev 2583, 2585. It should be noted that this twenty-years old classification has never been updated and thus heavily impairs the relevance of the economic analysis.
- 68 See Becker, G. (1971) *The Economics of Discrimination* (2nd edn). Chicago: University of Chicago Press.
- 69 Strauss, 1991, 1621.
- 70 See MacIntosh, J.G. (1987) 'Employment Discrimination: An Economic Perspective', 19 Revue de droit d'Ottawa 275, 280, with further references.
- 71 Strauss, 1991, 1632–1634; MacIntosh, 1987, 300.
- 72 MacIntosh, 1987, 280, with further references.
- 73 Strauss, 1991, 1632, 1635–1637.

- 74 Becker, 1971.
- 75 MacIntosh, 1987, 280–281; Epstein, 1992, 302–305; Issacharoff, 1992, 1244.
- 76 Strauss, 1991, 1632, 1638–1639.
- 77 MacIntosh, 1987, 278–279; Epstein, 1992, Ch. 2. See also Strauss, 1991, 1622.
- 78 Trebilcock, 1993, 205.
- 79 Strauss, 1991, 1641–1643.
- 80 Strauss, 1991, 1640.
- 81 Strauss, 1991, 1626–1630; Trebilcock, 1993, 199, 205; MacIntosh, 1987, 284–295.
- 82 MacIntosh, 1987, 292.
- 83 Donohue, 1997, 158; Donohue, J.J. (1986) 'Is Title VII Efficient?', 134 U Of Pennsylvania LRev 1411; Posner, R. (1987) 'The Efficiency and the Efficacy of Title VII', 136 U Of Pennsylvania LRev 513; Donohue, J.J. (1987) 'Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner', 136 U Of Pennsylvania LRev 523.
- 84 Donohue, 1997, 180–182.
- 85 Donohue, 1986, 1421–1422.
- 86 Posner, 1992, 652.
- 87 Epstein, 1992, 77; Donohue, 1992, 1593.
- 88 See Leech, M.J. (1996) 'Legalizing Employment Discrimination: A Foolish and Dangerous Policy', 29 John Marshall LRev 587, 597.
- 89 Epstein, 1992, Ch. 3, 61–69; Epstein, 1996, 580–581.
- 90 See Trebilcock, 1993, 200, with references.
- 91 Posner, 1992, 651 and 662.
- 92 MacIntosh, 1987, 295–308.
- 93 See Issacharoff, 1992, 1223 and Sunstein, C. (1991) 'Why Markets Don't Stop Discrimination', 8 Society, Philosophy and Politics 22.
- 94 Donohue, 1992, 1599–1607.
- 95 Posner, 1992, 658.
- 96 Donohue, 1992, 1606; Donohue, 1997, 185.
- 97 MacIntosh, 1987, 309–310.
- 98 MacIntosh, 1987, 310.
- 99 Posner, 1992, 662.
- 100 MacIntosh, 1987, 292.
- 101 Strauss, 1991, 1643.
- 102 Donohue, 1997, 157; even Posner, 1992, 13, 22–26. See esp. Dworkin, R. (1985) 'Is Wealth a Value?', *A Matter of Principle*, 237. Cambridge: Harvard University Press.
- 103 See Donohue, 1992, 1586 and 1611; Strauss, 1991, 1656–1657; Leech, 1996, 612.
- 104 Collins, 1997, 28–34, who refers to *Schroeder Music Publishing Co Ltd v Macaulay*, [1974] 1 WLR 1308, HL.
- 105 See Raz, J. (1982) 'Promises in Morality and Law', Review, 95 Harvard LRev 916, 933–935.

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