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# Epstein on His Own Grounds

RICHARD H. McADAMS\*

*Forbidden Grounds fails to follow through on its own terms. Epstein invokes Thomas Hobbes but never considers the Hobbesian argument for Title VII; employs economic analysis without disclosing its dependence on controversial empirical assumptions; and makes empirical claims, particularly about social norms, without applying the standards of criticism to supporting evidence that he applies to contrary evidence.*

Richard Epstein has a bold thesis. It is not merely that laws banning intentional employment discrimination are, on balance, imprudent. Rather, by express statement and general tone Epstein wishes to deny even that reasonable minds can differ on whether the effect of Title VII is positive or negative. He says, for example, that “the *only hard* questions about the employment discrimination laws concern the types and magnitudes of the social dislocations that result from their vigorous enforcement.”<sup>1</sup> I believe that Title VII accomplishes a net social good,<sup>2</sup> but I will here pursue a more modest

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\* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I would like to thank Anita Bernstein, Jacob Corré, Steve Heyman, Linda Hirshman, Pam Karlan, Andy Kull, Jim Lindgren, Anna Marshall, Rick Matasar, and George Rutherglen for their thoughtful comments on an earlier draft. My work on this Article was supported by the Marshall D. Ewell Research Fund.

1. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* xii (1992) (emphasis added) [hereinafter *FORBIDDEN GROUNDS*]. Elsewhere Epstein notes: “Given the efficiency losses . . . of antidiscrimination rules, very powerful justifications have to be found for one group to announce that another group’s preferences just do not matter . . . . None of substance is offered.” *Id.* at 305. “At bottom are only two pure forms of legislation — productive and redistributive. Antidiscrimination legislation is always of the second kind.” *Id.* at 494. “The modern civil rights laws are a new form of imperialism that threatens the political liberty and intellectual freedom of us all.” *Id.* at 505. Epstein does state, however, that his “critique . . . should . . . pay handsome dividends even if its only consequence is to prod defenders . . . to strengthen their defense of the antidiscrimination principle.” *Id.* at 7. However, I found this temperate introductory remark unreflective of the subsequent tone.

2. I outlined an economic argument for prohibiting race discrimination in Richard

claim: that to maintain the vehemence and apparent simplicity of its argument, *Forbidden Grounds* carefully avoids or obscures some of the difficult questions directly raised by its analysis. In important respects, Epstein has not fairly stated the arguments contrary to his own position, nor disclosed the degree to which his own sources sometimes lend support to arguments he seeks to refute. While scholarly work can be argumentative, and polemical work can be scholarly, these weaknesses exemplify Epstein's failure in combining the two.

I offer three examples. The first two concern Epstein's pivotal distinction between "force and fraud," on the one hand, and "a refusal to deal," on the other. Epstein defends the distinction with a social contract claim and an economic claim; I argue that he fails to disclose important differences in his position and that of Thomas Hobbes — one of his favorite social contractarians — and the degree to which his economic analysis depends on his claim that transaction costs in the labor market are minimal. The third example is Epstein's treatment of social norms, where he concludes that norms cannot perpetuate discrimination in the face of market competition based on what I argue is a strikingly incomplete review of the empirical literature. In each case, even accepting Epstein's method of analysis — his judgment for what counts as a winning argument — there remain "hard questions" that Epstein fails to explore, much less resolve.

## I. THE SOCIAL CONTRACT CLAIM

Epstein begins with Hobbes. At the very start of *Part I: Analytical Foundations*, Epstein quotes Hobbes' statement that, in war, "Force, and Fraud are . . . the two cardinal virtues."<sup>3</sup> He thinks Hobbes, Locke, and other social contractarians have correctly located the legitimacy of government in the evil of "life without law,"<sup>4</sup> which, as Epstein further quotes Hobbes, would consist of "continual fear, and danger of violent death[,] and the life of man, solitary, poor, nasty, brutish and short."<sup>5</sup> Lacking a state, individuals would wastefully expend most of their efforts in life protecting themselves against the force and fraud of others. Government is necessary to

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H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 91-103 (1992). For a more complete argument, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 *HARV. L. REV.* (forthcoming 1995).

3. *FORBIDDEN GROUNDS*, *supra* note 1, at 15 (quoting THOMAS HOBBS, *LEVIATHAN* 63 (1651)). Epstein also referred to Hobbes several times at the Symposium when defending his position that government power should be limited to preventing force and fraud.

4. *Id.* at 17.

5. *Id.* (quoting HOBBS, *supra* note 3, at 62).

provide protection against the dangerous, or as Epstein says, “law must control the most lawless.”<sup>6</sup> “The control of force was [the] overriding theme” of “the writers in the social contract tradition, broadly conceived to cover Hobbes, Locke, Hume, and Blackstone.”<sup>7</sup>

All of which leads Epstein to conclude that governmental power is justified *only* when it is providing protection against the force or fraud of this “most lawless” contingent. In particular, Epstein draws a contrast between the danger posed by force and fraud and that posed by discrimination:

Recall that in dealing with force, each of us has to be concerned about the person who bears us the most ill will . . . .

[In contrast, t]he person who wishes to discriminate against another for any reason has it in her power only to refuse to do business with him, not to use force against him. The victim of discrimination, unlike the victim of force, keeps his initial set of entitlements—life, limb, and possession—even if he does not realize the gains from trade with a particular person.<sup>8</sup>

For Epstein, the distinction is crucial. As a mere “refusal to deal,” discrimination falls beyond the reach of appropriate governmental power. “It never occurred to any of [the social contract writers],” Epstein says, “that the private refusal to deal, for whatever reason, was any threat to the social order.”<sup>9</sup>

With this characteristically sweeping statement, Epstein invokes the authority of Hobbes and other great thinkers, appearing to ground his criticism of discrimination laws within a respected tradition of political philosophy. Of course, invoking a philosophical tradition usually obligates one to acknowledge if not respond to long-standing criticisms of the tradition, whereas Epstein does not even allude to the existence of voluminous critical commentary on social contract theory.<sup>10</sup> But setting aside this and other potential objections,<sup>11</sup> I will ask only whether Hobbesian theory provides Epstein

6. *Id.* at 19.

7. *Id.* at 16.

8. *Id.* at 29-30.

9. *Id.* at 16.

10. See for example, the recent comments of political philosopher Russell Hardin: “Despite enormous appeal on its face, consent is among the most troubled and troubling notions in all of political philosophy. Contractarian theory has been based on the supposed moral superiority of consent over other principles for making social arrangements and such theory is a shambles.” Russell Hardin, *The Morality of Law and Economics*, 11 *LAW & PHIL.* 331, 361 (1992) (citing Russell Hardin, *Contractarianism: Wistful Thinking*, 1 *CONST. POL. ECON.* 35, 35-52 (1990); Russell Hardin, *Political Obligation, in THE GOOD POLITY* 103-19 (Alan Hamlin & Philip Pettit eds., 1989)).

11. One might demand a precise definition of force and fraud. When discussing sexual harassment, Epstein tells us that “[t]he common law does not take harassment lightly,” and that “shadowing or following a person” may constitute the tort of invasion

the support he claims.

Perhaps the less important of two reasons for disputing Epstein's use of Hobbes is that Hobbes would not recognize the minimal state Epstein constructs from his social contract analysis. Hobbes, after all, did not speak of *restraining* government, but of creating the "great *Leviathan*,"<sup>12</sup> his central point being that the dangers of the "state of nature" were so great as to justify a sovereign of nearly unlimited power.<sup>13</sup> Although some Hobbes scholars have sought to reinterpret or reformulate the argument of *Leviathan* to justify a government with *some* liberal protection of individual rights, they have rarely if ever reached as far as the vision of *Forbidden Grounds*.<sup>14</sup> Perhaps Epstein has a new reading of Hobbes; perhaps Epstein rejects Hobbesianism on the all-important issue of the powers of government. But rather than disclose his position, Epstein fails even to acknowledge any possible controversy in his invocation of Hobbes.

Epstein might say that he has merely extracted a severable insight

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of privacy. FORBIDDEN GROUNDS, *supra* note 1, at 352-53. Unlike the examples of battery, assault, and intentional infliction of emotional distress, he does not claim that this privacy tort requires any actual or threatened physical contact or harm (or fraud). *Id.* at 353. But if following or watching people in or from public places constitutes "force," why is ritual shunning or social ostracism not also "force"? If Epstein's distinction is based on the claim that discriminators never intend to harm or never succeed in harming their victims psychologically, then it is quite controversial. Epstein does not address this or any definitional challenge.

12. THOMAS HOBBS, *LEVIATHAN* 120 (Richard Tuck ed., 1991).

13. "[T]he Sovereign Power . . . is as great, as possibly men can be imagined to make it. And though of so unlimited a Power, men may fancy many evill consequences, yet the consequences of the want of it, which is perpetuall warre of every man against his neighbour, are much worse." *Id.* at 144-45; see JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 3 (1986) ("Hobbes meant his work to be appreciated as a philosophical argument for absolute sovereignty . . ."); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 23 (1986) (criticizing Hobbes' "arguments that people would favor unlimited government over limited government.").

14. Kavka offers a Hobbesian justification for a less-than-absolute state, but only by expressly identifying and rejecting certain of Hobbes' arguments. KAVKA, *supra* note 13. Even then, the state he justifies is far more powerful than Epstein's, including, for example, a "guaranteed economic minimum for all citizens." *Id.* at 210-24. Richard Tuck, editor of the recent Cambridge University Press edition of *Leviathan* says that "it has often proved possible to read Hobbes as a surprisingly liberal author." *HOBBS*, *supra* note 12, at xviii. But his examples of liberality do not approach the Epsteinian limitations on governmental power, both because the limitations are only theoretical not actual, and because the sovereign need not respect market outcomes. See, e.g., *id.* at xviii-xxii. An exceptional view, and the one example I have found of a reading somewhat friendly to Epstein's, is Michael Levin, *A Hobbesian Minimal State*, 11 *PHIL. & PUB. AFF.* 338 (1982) (arguing that the only legitimate ends of the state is the suppression of violence). But Levin at least addresses the fact that Hobbes describes what appears to be an absolute sovereign and concedes that Hobbes would permit the sovereign to use *any* means it thought necessary to preserve peace, including restraining the liberty of people who have not themselves used or threatened force (or fraud). *Id.* at 340-43. If Epstein intended to rely on and extend Levin's views, he should first have replied to Kavka's persuasive criticisms of Levin. See KAVKA, *supra* note 13, at 223-24.

of Hobbes — the necessity of governmental power to avoid the war of all against all — to form an argument that the only legitimate end of government is to maintain peace. But this claim merely leads to the second and more serious flaw in his reliance on Hobbes. One cannot accept Hobbes' claim that the state of nature is perpetual war and silently disregard the reasons that Hobbes gives for such war. Hobbes believed that one of the fundamental dangers to peace is the tendency of individuals to deny others the honor and respect they generally demand. Since Hobbes gives the sovereign the power to select any means to maintain peace,<sup>15</sup> one legitimate means must be to control the manner by which individuals show each other honor. Thus, even Hobbes' "basic insight" raises a plausible claim for discrimination laws.

Consider again the chapter of *Leviathan* to which Epstein refers at the beginning of his *Analytical Foundations*. There, Hobbes explains that one of the three causes of war is competition for honor or glory:

For every man looketh that his companion should value him, at the same rate he sets upon himself: And upon all signes of contempt, or undervaluing, naturally endeavours, as far as he dares (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other,) to extort a greater value from his contemners, by damage; and from others, by the example.

So that in the nature of man, we find three principall causes of quarrell. First, Competition; Secondly, Diffidence; Thirdly, Glory.

The first, maketh men invade for Gain; the second, for Safety; and the third, for Reputation . . . . [T]he third, [causes men to use violence] for trifles, as a word, a smile, a different opinion, and any other signe of undervalue, either direct in their Persons, or by reflexion in their Kindred, their Friends, their Nation, their Profession, or their Name.<sup>16</sup>

Hobbes repeatedly expresses concern for this cause of conflict. One ground on which Hobbes distinguishes humans from social animals like bees and ants (that appear to cooperate even in a state of "nature") is that "men are continually in competition for Honour and Dignity, which these creatures are not; and consequently amongst men there ariseth on that ground, Envy and Hatred, and finally Warre . . . ." <sup>17</sup>

15. The sovereign shall "be Judge both of the meanes of Peace and Defense; and also of the hindrances, and disturbances of the same." HOBBS, *supra* note 12, at 124. Even Levin concedes this point. LEVIN, *supra* note 14, at 340-41.

16. HOBBS, *supra* note 12, at 88. Following this passage is the famous description of life in a state of nature ("nasty, brutish, and short"), and additional material, that Epstein also quotes. See FORBIDDEN GROUNDS, *supra* note 1, at 17-18.

17. HOBBS, *supra* note 12, at 119. Elsewhere, Hobbes states: "Competition of Riches, Honour, Command, or other power enclineth to . . . War . . . . Particularly, competition of praise, enclineth to a reverence of Antiquity. For men contend with the

For Hobbes, the sovereign is empowered to do what is necessary to preserve peace, which in countless ways means not only to punish those who commit violent acts, but to prevent conditions that are known to threaten peace.<sup>18</sup> Because one cause of war is competition for honor and dignity, one necessary function of the state is to control the awarding of honor and dignity to the end of preserving peace. In specifying the rights of sovereigns, Hobbes states:

Lastly, considering what values men are naturally apt to set upon themselves; what respect they look for from others; and how little they value other men; from whence continually arise amongst them, Emulation, Quarrells, Factions, and at last Warre, to the destroying of one another, and diminution of their strength against a Common Enemy; It is necessary that there be Lawes of Honour, and a publique rate of the worth of such men as have deserved, or are able to deserve well of the Common-wealth; and that there be force in the hands of some or other, to put those Lawes in execution . . . . To the Sovereign therefore it belongeth also to give titles of Honour; and to appoint what Order of place, and dignity, each man shall hold; and what signes of respect, in publique or private meetings, they shall give to one another.<sup>19</sup>

We have certainly ventured a long way from Epstein's conclusion that "[s]ymbols are, in a sense, too important and too volatile to be either the subject of, or the justification for, direct government regulation."<sup>20</sup>

Nor can we possibly accept Epstein's claim that "[i]t never occurred" to Hobbes "that the private refusal to deal, for whatever reason, was any threat to the social order."<sup>21</sup> Hobbes simply does not make Epstein's critical distinction between force/fraud and refusals-

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living, not with the dead; to these ascribing more than due, that they may obscure the glory of the other." *Id.* at 70. "[A]ll signes of hatred, or contempt, provoke to fight; insomuch as most men choose rather to hazard their life, than not to be revenged . . ." *Id.* at 107. "[M]an, whose Joy consisteth in comparing himselfe with other men, can relish in nothing but what is eminent." *Id.* at 119; see also HAMPTON, *supra* note 13, at 66-68, 87-88 (emphasizing role of honor and glory in Hobbes as cause of conflict); Arthur Ripstein, *Hobbes on World Government and the World Cup*, in HOBBS: WAR AMONG NATIONS (Timo Airaksinen & Martin Bertman eds., 1989) (same); Robert Shaver, *Leviathan, King of the Proud*, 1990 HOBBS STUD. 54 (same).

18. The sovereign has the right "to do whatsoever he shall think necessary to be done, both before hand, for the preserving of Peace and Security, by prevention of Discord at home, and Hostility from abroad; and, when Peace and Security are lost, for the recovery of the same." HOBBS, *supra* note 12, at 124. A good example of what the sovereign might do "before hand" is to prevent violence arising from economic deprivation. Hobbes notes the danger: "[N]eedy men, and hardy, not contented with their present condition . . . are enclined . . . to stirre up trouble and sedition: for there is no . . . such hope to mend an ill game, as by causing a new shuffle." *Id.* at 70-71; see also *id.* at 106. Hobbes later states: "[W]hereas many men, by accident unavoidable, become unable to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provided for . . . by the Lawes of the Common-wealth." *Id.* at 239. (Kavka uses these passages in criticizing the argument of Levin discussed in note 14, *supra*. KAVKA, *supra* note 13, at 223.).

19. HOBBS, *supra* note 12, at 126; see also *id.* at 65, 68-69.

20. FORBIDDEN GROUNDS, *supra* note 1, at 499.

21. *Id.* at 16.

to-deal. Where Epstein says that an act of “dishonoring” someone is not force — the victim still retains his “life, limb, and possession”<sup>22</sup> — Hobbes is keenly interested in the fact that it will predictably lead to the use of force. Hobbes does not think that dishonor can occur only from force or fraud, but recognizes that people will resort to violence for “trifles” if they signify the “undervaluing” of themselves or their “Kindred.”<sup>23</sup> It is hard to imagine that refusals-to-deal are categorically less incendiary than “a word, a smile, a different opinion.”<sup>24</sup> Were there any doubt, *Leviathan* specifically lists means of “dishonoring” others, none of which mention and all of which encompass far more than force and fraud. For example: “To employ in counsell, or in action of difficulty, is to Honour; as a signe of opinion of his wisdome, or other power. To deny employment in the same cases, to those that seek it, is to Dishonour.”<sup>25</sup> In short,

22. *Id.* at 30.

23. HOBBS, *supra* note 12, at 88. Thus, Hobbes would understand W.E.B. DuBois’ expression of anger in a passage that must puzzle Epstein, so great is the outrage it expresses at dishonor of one’s “kindred”:

I shall forgive the white South much in its final judgment day: I shall forgive its slavery, for slavery is a world-old habit; I shall forgive the fighting for a well-lost cause, and for remembering that struggle with tender tears; I shall forgive its so-called “pride of race,” the passion of its hot blood, and even its dear, old, laughable strutting and posing; but one thing I shall never forgive, neither in this world nor the world to come: its wanton and continued and persistent insulting of the black womanhood which it sought and seeks to prostitute to its lust. I cannot forget that it is such Southern gentlemen . . . who insist upon withholding from my mother and wife and daughter those signs and appellations of courtesy and respect which elsewhere he withholds only from bawds and courtesans.

W. E. B. DU BOIS, *DARKWATER: VOICES FROM WITHIN THE VEIL* 172 (1920).

24. HOBBS, *supra* note 12, at 88.

25. *Id.* at 65. Of course, when Hobbes refers to employing others “in counsell” or “action of difficulty,” he probably only meant seeking occasional advice or assistance from others, not the creation of an employment relationship, and certainly not an employment relation in the modern economic sense. But it is equally clear that he meant that certain means of “dealing” with others bestowed honor on them, while the parallel refusal to deal with them bestowed dishonor. Other examples confirm Hobbes’ sensitivity to the social meaning of what Epstein calls refusals-to-deal:

To be sedulous in promoting anothers good; also to flatter, is to Honour; as a signe we seek his protection or ayde. To neglect, is to Dishonour.

. . . .  
To shew any signe of love, or feare of another, is to Honour; for both to love, and to feare, is to value. To contemne, or lesse to love or feare, then he expects, is to Dishonour. . . .

To do those things to another, which he takes for signes of Honour, or which the Law or Custome makes so, is to Honour; because in approving the Honour done by others, he acknowledgeth the power which others acknowledge. To refuse to do them, is to Dishonour.

*Id.* at 64 (emphasis added).



Hobbes' work provides considerable reason for thinking that, when they dishonor, refusals-to-deal *are* a powerful threat to the social order.

We arrive then at a respectable and obvious Hobbesian argument for at least some employment discrimination laws: that to preserve social peace, members of one race should not be allowed to "dishonor" members of another race by certain acts of discrimination. We can be certain that Epstein rejects the soundness of this argument. We may speculate that he (1) does not believe acts of discrimination are expressions of dishonor, (2) does not believe that any acts of dishonoring, or that acts of racial dishonoring, are a serious threat to social peace, or (3) does not think that the government should concern itself with the causes of violence (or fraud) but act only to punish individuals once violence (or fraud) occurs. But nowhere in a 500 page book does he offer an *argument* for any of these points;<sup>26</sup> Epstein has begun with Hobbes but failed even to consider the most obvious Hobbesian argument for the position he attacks.<sup>27</sup>

Nor would the argument be mooted had Epstein never enshrouded his claim in Hobbesian theory. For what I have termed the "Hobbesian argument" for Title VII is sufficiently conspicuous and plausible to have independently merited consideration in what purports to be a comprehensive argument against such laws. The social order argument is, for example, quite similar to one Richard Posner recently made against Epstein's view of property rights. Posner noted that the kind of wealth redistribution Epstein condemns may protect property rights by "heading off revolution or, less dramatically, violence, by the have-nots."<sup>28</sup> How could Epstein ignore the argument in the con-

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26. As to point (1), it is not enough to claim that "the fear of exclusion *should* lose some of its sting" once we realize that exclusion is ubiquitous. FORBIDDEN GROUNDS, *supra* note 1, at 496 (emphasis added). For Hobbes, and given Epstein's utilitarian approach, for him as well, the relevant question is what people will rather than should feel, and this statement grudgingly concedes that refusal-to-deals can actually "sting" or dishonor those "refused." As for point (2), Epstein implicitly rejects the possibility that white violence would return to its pre-Title VII levels if Title VII were repealed but does not explain this view, *see infra* note 56, nor discuss the possible reaction by minorities or women to the social meaning of such a repeal. Nor does Epstein argue the final point; a consequentialist argument for categorically barring government action to prevent violence would, to say the least, be a complex one.

27. In a similar vein, George Rutherglen has noted that Epstein disregards the most plausible Lockean argument for antidiscrimination laws. *See* George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1469 (1992) (reviewing FORBIDDEN GROUNDS, *supra* note 1) (slavery represents "the best possible claim . . . of a taking without just compensation" yet Epstein "dismisses all questions of rectification at the outset with the assertion that 'there is no adequate remedy' for such historical injustices.").

28. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 323 (1990).

text of Title VII? I can hardly believe that this country's long history of violent racial disturbances<sup>29</sup> does not demonstrate a serious threat to social peace from private acts of racial dishonoring. Certainly, other observers have made this inference, believing that the Civil Rights Acts were needed at the time to forestall further violence.<sup>30</sup> Given today's racial climate, one can only wonder how Epstein thinks he can sustain his utilitarian argument for repeal of Title VII without addressing the prospect of social unrest that official indifference to discrimination would likely cause.

Let me reiterate that my point here is not to prove definitively that this claim refutes Epstein's thesis, resolving the factual and predictive questions the claim raises, but only to note that such factual and predictive questions remain to be discussed. Without addressing all the arguable gains from Title VII, Epstein can scarcely sustain his view that "the only hard questions" concern how negative the effects are.

## II. THE ECONOMIC CLAIM

Now I wish to turn to the second basis of Epstein's distinction between force/fraud and refusals-to-deal. Epstein makes an economic claim that under most circumstances, a refusal to deal in the labor market need not harm its victims. Unlike the victim of force, the victim of discrimination need devote

[n]o resources . . . to self-defense . . . . Instead, the victim can *unilaterally* . . . seek out those persons who wish to make the most favorable transactions with him. Thus, in a world in which 90 percent of the people are opposed to doing business with me, I shall concentrate my attention on doing business with the other 10 percent, . . . my enemies [being legally] powerless to block our mutually beneficial transactions by their use of force. The universe of potential trading partners is surely smaller because some people bear me personal animus and hostility . . . . But the critical question for my welfare is not which opportunities are lost but which are retained.<sup>31</sup>

29. See, e.g., *READING RODNEY KING READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993); *9 RACE, LAW, AND AMERICAN HISTORY 1700-1990: LYNCHING, RACIAL VIOLENCE, AND LAW* (Paul Finkelman ed., 1992); DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (1965).

30. See, e.g., HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY: 1954-1980*, at 156 (1981) (President Kennedy had to push civil rights legislation in 1963 "to dampen the explosive potential of widespread racial violence and to maintain the confidence of the mass of blacks in government."); see also TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 808 (1988); GODFREY HODGSON, *AMERICA IN OUR TIME* 158 (1976).

31. *FORBIDDEN GROUNDS*, *supra* note 1, at 30.

Epstein elaborates this point with his “urn” analogy. Supposing a worker’s search for a suitable employer is like retrieving balls from an urn — each ball containing a number corresponding to the desirability of the job — Epstein considers “the prospects of two workers, one who can draw balls from either urn, and one who knows that she is confined to the urn that contains only a tenth as many balls as the other.”<sup>32</sup> He reasons: “[I]f the variations in both original distributions are about the same, then the difference between the *highest* numbers in each urn is apt to be small, even if the *majority* of the desirable balls are in the larger urn.”<sup>33</sup>

Putting other potential issues aside,<sup>34</sup> let us focus only on one narrow economic point Epstein himself later raises: the existence of imperfect information. Epstein admits that his above urn analogy has implicitly

assumed that a search for either employer or employee was costless in that one could look at all the balls in the urn individually before deciding which one to choose. A more realistic model assumes that in each and every case there is some cost to inspecting any ball taken from the urn. Job applicants must spend time filling out forms, attending interviews, providing references, and taking tests . . . . With an offer in hand, a worker will seek another only if the anticipated wage increase is greater than the costs incurred to procure it.<sup>35</sup>

Indeed, transaction costs in the labor market play a key role in Epstein’s argument in a number of places, in particular, being the foundation of his modification to Gary Becker’s theory of discrimination.<sup>36</sup> Having raised this real world complication in the above passage, however, Epstein immediately begins describing how markets act to minimize such transaction costs, as “headhunters”

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32. *Id.* at 32.

33. *Id.*

34. We might ask Epstein, for example, in what sense the likely difference in the best offer in each urn will be “small.” Certainly the differences will be “small” compared to the differences between the best and worst jobs within either urn. But for many occupations, people do not consider the difference between, for example, the best and third best available jobs to be “small.” Second, we might ask how often the less-than-probable case will arise in which the differences are by any measure “large.” Occasionally, for example, even a random sampling of 10% will produce jobs that are *all* below average. (That some samplings produce only above average jobs is irrelevant since one can only take one job.) Third, given that one factor that makes one job better than another is the opportunity it provides for acquiring human capital and advancing to even better jobs, one might wonder what the consequences of even small job differences may be over a worker’s lifetime.

35. *Id.* at 37.

36. *Id.* at 76-77 (“discrimination has survival value which is apt to be missed if firm behavior is modeled on the more traditional, pre-Coasean pattern of homogeneous actors in a world of zero transaction costs”). More generally, Epstein notes: “The marginal costs of search are critical to the decision of how long to look after a qualified candidate appears. If these costs are low, then the next look may be worth taking. But if they are high, then it may not.” *Id.* at 179; *see also id.* at 231 (“Internal to the firm, labor is not impersonal, and transaction costs are always positive.”).

and “hiring fairs” do in labor markets.<sup>37</sup> In the pages following, Epstein argues that search costs do not cause or permit discrimination.<sup>38</sup> Curiously, however, it is not clear what argument Epstein is seeking to refute. These pages hint at the existence of an argument that because of search costs, discrimination harms its victims, but it is an argument Epstein never actually explains.<sup>39</sup>

How does the presence of search costs affect Epstein’s example in which ninety percent of employers will not hire people of a certain race? Epstein’s claim that discrimination victims suffer no significant harm works if, but only if, the worker has perfect information about precisely *which* ten percent of employers will hire people of her race or gender. To the extent the worker’s information is less than perfect, the worker necessarily has higher search costs as a result of the discrimination. If, for example, the worker has no advance information about which employers discriminate, the target of discrimination in Epstein’s example would on average need to investigate ten potential employers to find one who will even consider offering a job (compared to those not suffering from discrimination, for whom every employer will consider offering a job). The existence of discrimination thus raises the cost of finding a ball with *any* number on it by a factor of ten. With fewer discriminators or more information, this factor obviously declines, but with any information imperfection, discrimination raises the costs to some degree.<sup>40</sup>

Search costs in turn affect the bargaining between employer and worker. Epstein’s analysis bypasses the bargaining process, as if the job package (salary, benefits, prospects for advancement, etc.) was always a fixed offer for the worker to take or leave. But parties will bargain based on their “reservation” prices: the most the employer is

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37. *Id.* at 38.

38. *Id.* at 38-41.

39. Epstein does briefly describe the argument of Paul Milgrom and Sharon Oster, *Job Discriminations, Market Forces, and the Invisibility Hypothesis*, 102 QUART. J. ECON. 453 (1987). FORBIDDEN GROUNDS, *supra* note 1, at 38-39. That article, however, is confined to the problem of discrimination in promotions, discussing not the general problem of search costs I outline in the text, but a special problem they term “invisibility.” Even when a worker locates nondiscriminatory employers with suitable job openings, there may be high costs in overcoming the invisibility of one’s abilities, i.e., convincing potential employers of one’s above-average productivity. *See also infra* note 43.

40. *See, e.g.*, James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 193 (1992) (“These [discrimination] figures [from the Urban Institute Washington study] imply that blacks would have to sample about 50 percent more jobs than whites to get an offer.”).

willing to pay and the least the worker is willing to accept. If the worker's reservation price is lower than the employer's, then the parties may bargain to a solution somewhere in between. The effect of higher search costs, however, is to lower the worker's reservation price. Recall Epstein's statement that "[w]ith an offer in hand, a worker will seek another only if the anticipated wage increase is greater than the costs incurred to procure it."<sup>41</sup> In other words, the worker will accept *Offer One* if it exceeds the amount: (*Expected Offer Two* minus *Expected Search Costs*). Consequently, the higher the *Expected Search Costs*, the lower *Offer One* need be to induce the worker to accept. And unfortunately for the discrimination victim, a nondiscriminatory employer will likely be familiar with the pervasiveness of discrimination, reason that the worker has a lower reservation price, and make a lower final offer.<sup>42</sup> Thus, contrary to Epstein's claim, *the opportunities lost affect the opportunities retained*.

The effect of search costs is especially powerful if the worker is initially unemployed; part of the "search cost" is the disutility of living without income. I take Epstein's argument that search costs are usually low to apply to those workers already employed. Once a job is accepted, however, there are often costs associated with quitting and moving to a new employer. Moreover, there are new search costs: (i) a higher value of one's scarcer leisure time used for the search, and (ii) the risk that an employer will invest less in training workers she believes are actively searching for other employment. In a law firm, for example, if an associate is suspected to be looking elsewhere for employment, she is less likely to be assigned the scarce kind of work on which one gains experience indispensable to advancement. These latter two costs will be greater for a discrimination victim who has to search more to find a nondiscriminatory employer.

Epstein might respond to these search cost problems<sup>43</sup> by pointing

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41. FORBIDDEN GROUNDS, *supra* note 1, at 37.

42. Cf. Heckman & Siegelman, *supra* note 40, at 193; George A. Akerlof, *Discriminatory, Status-based Wages Among Tradition-oriented, Stochastically Trading Coconut Producers*, 93 J. POL. ECON. 265, 274 (1985).

43. I do not think Epstein's criticism of Milgrom and Oster's "invisibility" argument is responsive to the general concerns I raise concerning search costs. See *supra* note 39. In response to their theory explaining how unpromoted workers could be paid less than their productivity, Epstein says underpaid workers would intentionally decrease their productivity, "tak[ing] out in leisure what she cannot obtain in higher wages." FORBIDDEN GROUNDS, *supra* note 1, at 39. Whatever the merit of the argument in attacking the "invisibility" theory, such a strategy fails to solve the general problem of search costs. The employer would respond to decreases in productivity by further decreases in wages; the employer can afford to underpay by the amount of expected search costs (not to mention that "slacking off" would likely make it harder to convince other potential employers of one's value). Epstein also says that information costs show that the law should not restrict information on which employers rely. *Id.* at 40. He apparently

out that in a world without Title VII, discriminatory firms would be free to state their discriminatory preferences, e.g., to advertise for "white males only." Such disclosures would provide free information, saving search costs, potentially to the point where the costs for discrimination targets and non-targets were equal. But there is no reason to believe that after repealing Title VII, more than a small percentage of discriminating firms would actually advertise their discrimination. Certainly before Title VII, many discriminatory enterprises did not advertise their racial and gender requirements. Today, those who openly discriminate risk social and economic sanctions from a segment of society, so it is likely that most of those who discriminate after repeal of Title VII would try to do so with some discretion. Second, most discriminators today probably do not wish to exclude *all* racial minorities or women, but rather to impose different standards on different groups, making sure that any minority or woman worker is "the right kind," in contrast to the stereotype the discriminator holds of their group. If so, the employer will genuinely not wish to advertise "white males only," and I doubt many will advertise their more complex racial and gender requirements.<sup>44</sup> Finally, by revealing its special needs, a firm that advertises its desire for a particular racial and gender group will weaken its bargaining position with potential employees who belong to the desired group.<sup>45</sup>

In short, the fact — not the extent — of transaction costs in the labor market means that the presence of discriminatory employers will harm the victims of discrimination. *How much* discrimination harms its victims in a competitive market is sensitive to precisely *how far* the market goes in reducing search costs. Now we see why Epstein never expressly states why search costs matter. All that he

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means this to criticize disparate impact analysis, but it does not support his general claim that workers are not injured by refusals-to-deal.

44. The complexity of discriminatory desires in turn raises job search costs. Some employers may discriminate only in promotion to certain ranks, which means that a worker cannot assume from the existence of a job offer that the firm is nondiscriminatory. With discrimination, ascertaining prospects for promotion is more costly.

45. Firms have search costs too. To paraphrase Epstein, given one available worker, an employer will seek another only if the anticipated wage decrease (or productivity increase) is greater than the search costs incurred to procure it. FORBIDDEN GROUNDS, *supra* note 1, at 37. Because a firm seeking a racial or ethnic subset of all available workers will have higher search costs than nondiscriminatory firms, the former firms will be willing to pay acceptable candidates more than the latter ones. If firms advertise their racial and ethnic specifications, they will reveal their higher reservation price and weaken their bargaining position. I would like to thank Pam Karlan for suggesting this point.

can demonstrate is that those costs are made “smaller” by market forces, not that they are too small to cause harm to discrimination victims.<sup>46</sup> His argument that worker welfare depends on opportunities retained, not opportunities lost, is therefore contingent on the untidy and uncertain fact of how much search cost remains. And here is the crux of the matter: markets work to lower all transaction costs. Given Epstein’s belief that search costs nonetheless have important consequences in other contexts,<sup>47</sup> his conclusory judgment that “[t]he effort . . . to find [within such costs] any persistent large-scale source of discrimination should fail,”<sup>48</sup> is hardly proof that such an effort will fail, or an excuse for not making the effort at all. The size and effect of search costs remains a thorny empirical question — a “hard question” — even within Epstein’s chosen method of argument.

### III. SOCIAL NORMS

There are places in the argument of *Forbidden Grounds* where Epstein considers how empirical evidence bears on his claim. To his credit, Epstein sometimes considers economic data adverse to his thesis, as for example, evidence of significant discrimination in competitive markets and evidence of the effectiveness of Title VII in raising the wages of black workers. Epstein subjects these studies to extended methodological scrutiny, however, and finds them wanting.<sup>49</sup> His methodological criticisms and reinterpretations of these studies have already generated substantial and, in my view, compelling responses.<sup>50</sup> My concern here, however, is Epstein’s failure to

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46. As James Lindgren has noted in discussing job searches, “whether the transaction costs are low or minimal in any absolute sense is largely irrelevant.” James Lindgren, “*Ol’ Man River . . . He Keeps on Rollin’ Along*”: A Reply to Donohue’s Diverting the Coasean River, 78 GEO. L.J. 577, 583 (1990). What matters is the size of the search costs in relation to the incremental advantage of the next job offer the search produces.

47. See *supra* note 36.

48. FORBIDDEN GROUNDS, *supra* note 1, at 40.

49. Concerning how much discrimination exists in competitive markets, Epstein cites no empirical study showing the absence or insignificance of discrimination, but selects three studies with contrary results and criticizes their methodology at length. *Id.* at 47-58. Later Epstein states that “[i]here has been a rash of detailed investigations of the effects of the Civil Rights Act” which tend to show improvement in the wages of blacks from 1965 to 1975. *Id.* at 243-44. He then selects one such study and argues that its data do not support its conclusion attributing these results to Title VII’s prohibition of private discrimination (as opposed to its effect of eliminating state laws requiring discrimination). *Id.* at 244-51 (citing James J. Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989)).

50. Ian Ayres responds to Epstein’s criticism of his findings of discrimination in the automobile market in Ian Ayres, *Alternative Grounds: Epstein’s Discrimination Analysis in Other Market Settings*, 31 SAN DIEGO L. REV. 67 (1994) (responding to FORBIDDEN GROUNDS, *supra* note 1, at 51-54). J. Houtt Verkerke and John Donohue

apply the same kind of scrutiny to empirical data supporting his thesis as he does to empirical data contradicting it. A good example is his discussion of social norms. After setting forth his economic thesis — that market competition will eliminate all undesirable forms of discrimination — Epstein himself raises the claim that social norms of discrimination may be resistant to market pressure. Related is the historic argument that Jim Crow segregation did not depend in entirety on legal sanctions — as Epstein contends — but rested in significant part on custom and “informal codes.”

Epstein makes several responses to these claims. He points out that Jim Crow segregation was sustained not merely by specific laws mandating particular forms of discrimination, but by the more general control whites had over governmental power: “the ballot, the police force, the courts, and the other instruments of state domination.”<sup>51</sup> In addition, the white majority wielded the threat of private violence against those who threatened the discriminatory norm.<sup>52</sup> Absent this violence and the white monopoly on state power, “new entry can take place by firms willing to cater to blacks in all segments of the economy. The tighter the social cartel against blacks under Jim Crow, the larger the returns to new entry in the marketplace, notwithstanding a social consensus in the opposite direction.”<sup>53</sup> This point is crucial to Epstein’s overall thesis; only if social norms are excluded as an explanatory force can Epstein infer, merely from the absence of “new entry” into the South prior to 1964, that the cause was covert governmental opposition.<sup>54</sup>

Yet Epstein’s a priori assertions are not enough to resolve the issue in his favor. Although it was not possible for the South to maintain

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respond to Epstein’s reinterpretation of Heckman and Payner’s study, *supra* note 49, of the effects of Title VII on black wages. See J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2090-91 (1992) (reviewing FORBIDDEN GROUNDS, *supra* note 1); John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law* 44 STAN. L. REV. 1583, 1594-96 (1992) (reviewing FORBIDDEN GROUNDS, *supra* note 1).

51. FORBIDDEN GROUNDS, *supra* note 1, at 97.

52. *Id.* at 96-97. Epstein notes that violence was effective because of “the willingness of law enforcement officials to turn a blind eye to its prosecution, or indeed to participate in it.” *Id.* at 97.

53. *Id.*

54. See *id.* at 127 (“The dog that did not bark gives the best evidence of pervasive government involvement in this area.”); see also *id.* at 251. The silent dog is certainly the “best evidence” Epstein has found, for, as Ian Ayres has pointed out, Epstein cites not one example of a local government abusing its police powers to deter investment by outside entrepreneurs. Ian Ayres, *Price and Prejudice*, NEW REPUBLIC, July 6, 1992, at 30, 31 (reviewing FORBIDDEN GROUNDS, *supra* note 1). The inference thus works only if social norms cannot explain the same result.



*the same magnitude* of discrimination absent pervasive restraints on black political power, it is a different question whether market competition would eliminate or even nearly eliminate discrimination “notwithstanding a social consensus in the opposite direction.”<sup>55</sup> And it is not a question that can be resolved without reference to empirical data. Epstein, for example, appears to concede that Title VII was initially justified as a “jolt” to the system of violence that prevented free contractual exchange, yet his argument for repeal implicitly makes the empirical claim that Title VII is no longer necessary to overcome such violence today.<sup>56</sup> One can easily imagine why Title VII might remain necessary: Even with unbiased law enforcement, it is rarely possible to deter all violence or threats of violence, especially if they have some popular support.<sup>57</sup> Even a low risk of violence posed by only a few bigots will diminish the “returns to new entry” and cause firms to forego some otherwise profitable business that a norm prohibits.<sup>58</sup> Without violence, it is still plausible that people care enough about their standing in their community that they would regard the social ostracism and scorn as a high cost to violating norms.

These possibilities again raise messy empirical issues. But, here, Epstein is prepared to argue on empirical grounds. Epstein concludes his discussion of norms with the following:

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55. FORBIDDEN GROUNDS, *supra* note 1, at 97.

56. *See id.* at 142, 252. Epstein’s point is that Title VII is *only* justified as a “jolt” to the system of violence, but “when the system returns to a steady state, that justification ceases . . . . It does not provide any justification for the statute in a ‘first-best’ world without prior official and private abuse.” *Id.* at 142. But given Epstein’s concession that the “first-best” world he describes never existed, the question simply becomes whether we have yet reached the “steady state” to which he refers, i.e., whether in the absence of Title VII, violence would reemerge as a threat to nondiscriminators. Epstein is careful not to suggest, however, that the attitudes underlying racial violence have improved markedly since 1964, lest he give support to the idea that the Civil Rights Act helped bring about such an attitude change, desirably shaping people’s preferences — an idea he abhors. *See id.* at 273-74, 304-06.

57. Popular support for a crime makes law enforcement more difficult both because there are more potential suspects and less cooperative witnesses. As an example, consider the success of a small number of violent anti-abortion actors in restraining the market for abortion services, especially in areas where the actors receive some sympathy. *See* Dan Baum, *Violence is Driving Away Rural Abortion Providers*, CHI. TRIB., Aug. 21, 1993, at 1; Donohue, *supra* note 50, at 1610 n.126. More pointedly, consider the success of anonymous threats in keeping Vidor, Texas entirely white. *See Hate Prevails: Blacks Leave Town*, CHI. TRIB., Sept. 10, 1993, at 10.

58. Title VII, on the other hand, helps solve the problem of violence by imposing a serious threat on the opposite side of the balance. It is more difficult to coerce people into a particular course of conduct when they face other threats if they engage in that very course of conduct. Title VII thus undermines the effectiveness of low risks of violence. (Because there are much greater costs associated with maintaining a credible threat at higher levels — the likelihood of apprehension and serious punishment increases — conventional criminal sanctions may deter high level violent threats). This effect constitutes the “jolt” Epstein acknowledges.

J. Mark Ramseyer and Minoru Nakazato have demonstrated in the Japanese context that these community norms are fragile in the sense that a single outsider who has little to fear from ostracism can undermine them by going to court. Once the first party has left the fold, then others will find it more easy to follow. Japan is regarded as a closed society, perhaps even more so than the Old South. If the single marginal entrant can change the social balance of power in the one case, then it can do so in the other.<sup>59</sup>

At first, Epstein's claim may seem peculiar. One might think the best way to resolve the power of discriminatory social norms in the United States would be to consider studies of discriminatory social norms in the United States.<sup>60</sup> Instead, Epstein offers a study of Japanese norms against litigation. Nonetheless, such a study is relevant if it is sufficient to show *as a general proposition* that social norms are fragile. And this seems to be Epstein's claim: the particular study of Japanese litigation norms shows that American discriminatory norms are fragile and ineffective because it shows that *all* social norms are fragile and ineffective.<sup>61</sup>

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59. FORBIDDEN GROUNDS, *supra* note 1, at 97 (footnote omitted) (citing J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 286-87 (1989)).

60. Given, for example, Epstein's claim that it was the "hostile laws [that] made the South a less attractive place for new entrants from outside the region who might otherwise have made substantial business from doing business with local blacks," FORBIDDEN GROUNDS, *supra* note 1, at 96 (emphasis added), he might have consulted and responded to such classics as GUNAR MYRDAL, *AN AMERICAN DILEMMA* (1944) or JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (3d ed. 1957), which give norm-based explanations for why whites, including transplanted northerners, failed to act against social consensus:

When [northerners] come down South . . . they usually accept the social arrangements and become loyal white-caste members. A number of cases of this were pointed out, especially those of northerners who had come to do business in the South . . . . It seemed very likely that [such a person] had to accept southern views because his social contacts and those of his wife and family were with whites; he could not stand out against the tremendous pressure of white sentiment; and further, he could advance his economic interests only by cooperating with the dominant group.

DOLLARD, *supra*, at 47-48. Private social and economic ostracism were an effective sanction; as Dollard later states: "If one lives in Southerntown, 'not to be received' is a very serious matter and would be more so if one's family were there; living would be quite intolerable without opportunity for friendly contacts within the white caste." *Id.* at 354. Contrary to Epstein's claim that "the single outsider" can unravel a social norm, Dollard reports powerful norms despite one wealthy "Yankee" in Southerntown who "defied southern customs at many points." *Id.* at 47.

61. Verkerke, while offering similar criticism, more charitably reads Epstein as offering *two* empirical studies on the power of the market "to break down the segregated system." Verkerke, *supra* note 50, at 2090. Perhaps I am being miserly but I do not count Epstein's citation to Price V. Fishback, *Can Competition among Employers Reduce Governmental Discrimination? Coal Companies and Segregated Schools in West Virginia in the Early 1900s*, 32 J. L. & ECON. 311 (1989), as evidence that social norms are fragile. Fishback shows that during a "coal boom" mining companies raised wages

The brevity in which Epstein makes this sweeping claim is, if one does not miss it entirely, nothing short of breathtaking. The existence and power of social norms is a rich subject representing a fault line between the social sciences: sociology viewing norms as an important mechanism of social control, economics being more skeptical about apparently nonmaterial and/or nonselfish explanations of behavior.<sup>62</sup> Whether discrimination can exist in a competitive labor market would appear to depend, in Epstein's mode of argument, on how the debate is resolved. But given the depth of the issue, it is rather unsatisfying to be told only that two scholars "have demonstrated" that social norms are impotent. One must wonder how Epstein would respond if a Title VII proponent cavalierly cited a single study (published, no less, in a sociologically-inclined journal then edited by the proponent herself) "demonstrating" the empirical invalidity of price theory or some other central tenet of economic analysis.

Even if Epstein thinks it unnecessary to survey the opposing data before dismissing the ability of social norms to shape behavior, he should have at least addressed two legal sources supporting the power of social norms. First is Epstein himself, specifically his claim about "informal enforcement" of promises in his chapter *Rational Discrimination in Competitive Markets*.<sup>63</sup> Epstein there says that

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for blacks and successfully pressured West Virginia to improve black education as a means of attracting black labor. As Verkerke points out, however, because the coal companies had uncommon "difficulty attracting sufficient white labor," the example represents "the most favorable possible conditions for the elimination of segregation," and yet the coal companies still excluded blacks from jobs supervising whites. Verkerke, *supra* note 50, at 2093; see Fishback, *supra*, at 315 n.11. Merely showing that social norms do not fully explain behavior — that material interests sometimes cause people to violate norms — does not show that one can fully explain behavior without resort to social norms. Unlike the study discussed in the text — which makes such a claim — Fishback simply does not explicitly discuss norms at all.

62. Epstein's only allusion to the literature on social norms is in a footnote where he states that Ramseyer's and Nakazato's "particular targets are the social anthropologists, such as Marshall Sahlins." FORBIDDEN GROUNDS, *supra* note 1, at 97 n.15. For examples of the sociological literature, see WILLIAM J. GOODE, THE CELEBRATION OF HEROES: PRESTIGE AS A CONTROL SYSTEM (1978); MICHAEL HECHTER, PRINCIPLES OF GROUP SOLIDARITY (1987); 1 TOWARD A GENERAL THEORY OF SOCIAL CONTROL: FUNDAMENTALS (Donald Black ed., 1984); 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL: SELECTED PROBLEMS (Donald Black ed., 1984); for a psychological discussion, see Robert B. Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 ADVANCES IN EXP. SOC. PSY. 201 (1991). Examples of philosophical treatments of norms are JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 97-151 (1989); EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977). Economic work on norms includes ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991) and GEORGE A. AKERLOF, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, in AN ECONOMIC THEORIST'S BOOK OF TALES (1984).

63. FORBIDDEN GROUNDS, *supra* note 1, at 59-78.

firms seek to draw workers from one ethnic or racial group to maximize the effectiveness of informal enforcement because

[t]he party who cheats at work now knows that he faces stricter sanctions, given the strong likelihood that the information will be brought home to him at play, at church, or in other business and social settings. The complex networks of human interactions thus induces persons to honor their deals.<sup>64</sup>

Perhaps Epstein only meant to say that once a party is known as a “cheater” within his own network, people will fear being cheated and engage in fewer business deals with him. This much may even suffice for the point Epstein is making in this Chapter, but his express reference to sanctions “at play [and] at church” suggests, *in addition*, that people will no longer wish to socialize or worship with someone who cheats, that is, with someone who violates their group norm against cheating. Of course, to invoke *this* cost of cheating contradicts Epstein’s attack on norms.<sup>65</sup> But the actual force of social norms is so common-sensical that Epstein cannot help but appeal to them in this context.

Aside from resolving such inconsistencies, the one source Epstein might have been expected to address — for reasons internal to the Ramseyer-Nakazato study — is the work of legal scholar Robert Ellickson. Ellickson has sought to bridge the gap between “law and economics” and “law and society” with an economic analysis of social norms.<sup>66</sup> A comparison of Ramseyer and Nakazato with Ellickson is worthwhile for two reasons. First, Ramseyer and Nakazato studied the effect of social norms on disputes between *strangers*; although Epstein does not mention it, they expressly qualify their results as applying only to such disputes, *expressly contrasting the work of Ellickson*.<sup>67</sup> This distinction is vital to any attempt to apply the study to social norms of discrimination, since those norms are at least partly enforced between people who know each other.<sup>68</sup>

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64. *Id.* at 70.

65. If “a single outsider who has little to fear from ostracism” can completely undermine the norm against litigation, the single outsider could also undermine the norm against cheating. If there were no norm against cheating, there would be no reason for people to ostracize cheaters in (at least, noncompetitive) play or at church.

66. See ELICKSON, *supra* note 62.

67. Ramseyer & Nakazato, *supra* note 59, at 265 n.6, (citing Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEG. STUD. 67 (1987); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986)). Epstein himself discusses the latter work in RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 547-48 (5th ed. 1990).

68. Discriminatory norms may be enforced within clusters of people with social and economic ties, such as one’s family, friends, neighbors, church members, co-workers,

Second, the particular disputes Ramseyer and Nakazato study (not described in *Forbidden Grounds*) are automobile accident cases involving a fatality. Ellickson's own empirical work concerns how residents of Shasta County, California resolve three kinds of disputes involving livestock: (i) damages to property caused by cattle-trespass, (ii) allocation of the costs of boundary fences, and (iii) damages from automobile accidents caused by livestock wandering onto highways. While Ellickson found that social norms dominated resolution of the first two kinds of disputes, legal rules and litigation did control the third. Ellickson says that because (i) the parties to the automobile accident are usually strangers to each other and to each other's community, (ii) the stakes are quite high, and (iii) third party insurers are always involved, social norms are less powerful than legal rules.<sup>69</sup> Thus, the decision to file suit for injuries arising out of an automobile accident — despite norms to the contrary — is *Ellickson's own example* of one instance in which social norms fail, in contrast to other contexts where norms predominate; they hardly serve as proof that social norms generally have no significance. For the broad point he is asserting, Epstein could not have selected a more inapposite example.

Even with respect to norms among strangers, Ramseyer and Nakazato make an important theoretical limitation to their claim that social norms are fragile. They do claim generally that social norms persuade individuals only when they are widely followed. They then reason, as Epstein suggests, that “outsiders on the social margin” who are immune to ostracism “can corrode the entire normative order” by violating the social norm. But they also state: “Where outsiders form a *distinct ethnic group*, of course, insiders in many societies have been able to contain their corrosive effect by defining them as categorically ‘other.’ In ethnically more homogeneous societies like Japan, these tactics often do not work.”<sup>70</sup>

Ramseyer and Nakazato appear to believe that ethnic vilification is an effective means of maintaining significant social norms in heterogeneous societies. The idea seems to be that after “defining” the ethnic minority as “other,” their noncompliance with norms is attributed to their inferiority rather than to the falsity of the norm. At a minimum the claim suggests an interesting and complex motivation for systemic discrimination against ethnic minorities — symbolic

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local merchants, etc.

69. ELLICKSON, *supra* note 62, at 94-95.

70. Ramseyer & Nakazato, *supra* note 59, at 287 (emphasis added).

subordination of minorities assists the majority in maintaining its social norms<sup>71</sup> — a motivation Epstein neither mentions nor explores. Moreover, the claim raises at least the possibility that Ramseyer and Nakazato think that the operative mechanism for causing discrimination is a social norm “defining” the minority as “other.” I cannot imagine how one group “defines” another without some costly, cooperative behavior among members of the group doing the defining. In an article devoted to diminishing the significance of social norms, I would have expected the authors to say so if they believed the mechanism of “definition” was exclusively state, as opposed to private, action. Thus, notwithstanding their general views on social norms, I read Ramseyer and Nakazato as implying either that “many societies” have obtained full participation by the dominant ethnic group, or that less than full participation can effectively sustain a discriminatory norm. I expect Epstein reads the passage differently, but given the importance of this article to his dismissal of norms, he owed his readers a more thorough and candid discussion of it.

The point — again — is not that Epstein’s beliefs about social norms are wholly untenable. Rather, given the extended methodological scrutiny Epstein provides studies that run contrary to his general point, one might also have expected an examination of the methodology of studies, like this one, that he claims as support for his argument.

#### IV. CONCLUSION

Although the three claims considered above are each important to the argument of *Forbidden Grounds*, I do not claim that my brief criticism is sufficient, by itself, to disprove Epstein’s overall thesis. Instead, I have sought only to illustrate what I view as the general weakness of the work: that Epstein’s urge to deal Title VII a devastating blow overwhelms his need to admit complexity or difficulty in measuring the consequences of the statute. Given the scope of *Forbidden Grounds*, three examples are perhaps too few to establish

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71. See, e.g., KAI T. ERICKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 64 (1966) (“One of the surest ways to confirm an identity, for communities as well as for individuals, is to find a way of measuring what one is *not*.”). Recall that Ramseyer and Nakazato state that “[i]n ethnically more homogenous societies like Japan, these tactics often do not work.” Ramseyer & Nakazato, *supra* note 59, at 287. Thus, in contrast to Epstein’s inference that social norms should work more effectively in a “closed society” like Japan than in the Old South, *FORBIDDEN GROUNDS*, *supra* note 1, at 97, the study suggests that social norms should be generally less effective in Japan than in a more heterogenous society like the bi-racial “Old South.”

even this claim. But consider the similarity among the examples: concerning Hobbes, Epstein utterly ignores a competing claim from the source on whom he relies; concerning transaction costs, he responds to a competing claim that he never adequately describes, thus obscuring the weakness in his response; concerning social norms, he fully states the competing claim but then purports to disprove it by a grossly incomplete and unbalanced reference to empirical literature on the issue. There is, in my view, a disturbing pattern here, one in which the impulse to advocate has undermined the commitment to scholarly principles of candor and objectivity.

Epstein's book has understandably generated much controversy. Those of us who are unpersuaded by his argument should nevertheless applaud him (and others on the left and right) for challenging cherished beliefs and conventional wisdom, an essential part of what scholars are supposed to do. But it would be quite wrong to attribute all objections to this work to the failure to tolerate such challenges. The negative reaction also arises from the kind of failings I and others have documented; this scholarly criticism is richly deserved.