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Fifteen years ago, Richard Epstein and I shared two exchanges on the subject of discrimination, a topic on which he has written extensively.[1] In 1993, Epstein wrote *Forbidden Grounds: The Case Against Employment Discrimination Laws*[2] where he advocated the repeal of Title VII. The institution of tenure is supposed to create space for intellectual daring, so scholars feel free to challenge the most conventional wisdom. Epstein did just that, boldly advancing a libertarian critique of anti-discrimination law by arguing that market competition had already worked to greatly reduce discrimination; that what remained likely served some defensible ends; that discrimination litigation is costly and ineffective; and that because people need only one job, it is not justified to use government coercion to root out the remaining levels of indefensible discrimination. In a symposium devoted to the book, I commented quite critically on his arguments[3] and Epstein gave me an equally critical reply.[4] Later, I published a new economic theory of race discrimination[5]–claiming that it is a pathological form of group-based status competition–and the law review invited Epstein to provide critical commentary, which he happily did.[6]

On the whole, neither of us persuaded the other and our differences remain large as I accept the conventional wisdom–the need for anti-discrimination laws–that Epstein rejects. In this symposium honoring his work, I will not reargue our differences. I focus

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1. He was particularly active on this subject in the 1990s. *See* Richard A. Epstein, *Liberty, Patriarchy, and Feminism*, 89 U. Chi. Leg. Forum (1999); Richard A. Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 John Marshall L. Rev. 575 (1996); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 Mich. L. Rev. 2456 (1994); Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. Rev. 1 (1994); Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 Geo. L.J. 75 (1993); Richard A. Epstein, *Affirmative Action in Law Schools: The Uneasy Truce*, 2 Kan. J.L. & Pub. Policy 33 (Spring 1992); Richard A. Epstein, *Gender is for Nouns*, 41 DePaul L. Rev. 981 (1992).

Though he has focused more on other issues in this decade, Epstein has not stopped writing on this general topic. *See e.g.* Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 Mich. L. Rev. 2036 (2002); Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. Chi. Leg. Forum 73 (2002).

2. Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harv. U. Press 1992).

3. *See* Richard H. McAdams, *Epstein on His Own Grounds*, 31 S.D. L. Rev. 241 (1994).

4. *See* Richard A. Epstein, *Standing Firm, on Forbidden Grounds*, 31 S.D. L. Rev. 1 (1994).

5. *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003 (1995).

6. *See* Richard A. Epstein, *The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake*, 108 Harv. L. Rev. 1085 (1995).

instead on a narrow plot of common ground. There are some skeptical implications in my prior work that I draw out for the first time here. Essentially, the economic theory I propose requires us to analyze separately each form of discrimination to decide whether and what kind of legal intervention is appropriate. I will not undertake that large task here, but only point out how much work is needed to fully answer Epstein's critique, at least within economic theory. Economics does not easily support treating each form of discrimination as similarly as we do.

The economics of discrimination has grown considerably more complex in recent years, but the legal literature pays too little attention, I think, to two simple points. First, all plausible normative theories depend on a descriptive theory. The descriptive starting point–one's understanding of the causal processes producing discrimination–has a significant effect on the ending point–the normative status of discrimination. The right legal policy depends on what precisely motivates discrimination.

Second, there is no reason to assume that the right descriptive theory for one form of discrimination is also the right descriptive theory for another, nor that only one descriptive theory is correct for a given form of discrimination. The causal processes producing race discrimination need not be the same as the causal processes producing discrimination on the basis of sex, sexual preference, or age. Even within the category of race discrimination, we cannot simply assume that the right descriptive theory explaining discrimination against African-Americans applies equally to discrimination against Asians or Hispanics, much less whites (though I argue for one overarching theory). We might even be mistaken if we assume that the causal processes producing employment discrimination against African-Americans are the same as those producing housing or automobile pricing discrimination against African-Americans.

These two points lead to a third, normative point: to fully justify anti-discrimination law, we must separately examine each discriminatory context. We should not uncritically analogize from one context to another and it will turn out to be an astonishing coincidence if the same legal regime is ideal across many different forms of discrimination. I will illustrate this point by examining three economic theories of race discrimination–tastes, information, and status-production–and show how each has different normative implications. Of course, there are many alternatives to these economic theories, but they are part of the common ground I share with Epstein and they provide interesting examples of the complex fit between descriptive and normative theories.

Preference for Avoiding Association

The case against anti-discrimination law, such as Epstein's, usually begins with a particular description: that discrimination results from a simple preference for avoiding association with members of a certain group. This is Gary Becker's theory,[7] work that contributed to his winning a Nobel Prize. And it is the implicit basis of Milton Friedman's argument against the adoption of Title VII.[8] If discrimination occurs to

7. *See* Gary S. Becker, *The Economics of Discrimination* (2d ed., U. Chi. Press 1971).
8. *See* Milton Friedman, *Capitalism and Freedom* 108–18 (U. Chi. Press 1962).

satisfy a preference for non-association, then there is no necessary market failure from the occurrence of discrimination, undermining the economic argument for banning the practice. Barring the use of force or fraud, our society generally permits individuals the freedom to satisfy their preferences in the marketplace. To justify a ban, one must argue that there is something about the non-association preference that distinguishes it from other preferences. This might be easily done within moral philosophy, but is controversial within welfare economics.

According to one argument, we can distinguish discriminatory preferences from other preferences on the grounds that they disfavor individuals on the basis of some immutable and morally irrelevant characteristic like skin color. Milton Friedman responded to this claim by noting that the same can be said for a preference for hearing a singing voice of a certain tone or quality.[9] At some level, vocal tone depends on the physical, immutable characteristics of one's vocal apparatus. These characteristics also seem morally irrelevant, but Friedman and Epstein argue for a general freedom to allow people to engage in voluntary transactions to indulge their preferences for such arbitrary characteristics. As Epstein put it in his book: "The taste for discrimination is just another preference . . . . I incline toward the economists' account, and to the theoretical rigor that it makes possible by not requiring one to ask whose preferences are legitimate and whose are not."[10]

Perhaps a better argument for distinguishing discriminatory preferences is that they are spiteful or sadistic–one gains from the loss inflicted on others. Though controversial, some welfare theorists would "launder" preferences to exclude utility from satisfying such negatively interdependent preferences.[11] There is much one might say on this topic, but for my purposes, the only thing that matters is to note how different anti-discrimination law should be if this spitefulness description is accepted. Were that the only objection to discrimination, the law should be sensitive to whether a person discriminated against another *because* the discriminator gains from the victim's suffering. This approach is vastly narrower than current law, which, in accord with common intuitions, prohibits disparate treatment even if the discriminator acts without spite. Indeed, the spite theory implies a defense for one who discriminates, say, only because he has stronger altruistic feelings towards members of his own race than towards other races or from a sincere but false belief in some negative stereotype about a racial group.

One might respond to these points by further complicating the preference-laundering approach, but I think a better way to justify anti-discrimination law is to reject Becker's descriptive theory and move to an alternate account. In 1995, I identified several weaknesses in Becker's taste-based description.[12] I took as a central example the Jim Crow South because there the whites' racially discriminatory behavior was overt and therefore easy to study. It turns out that Jim Crow segregation fits the associational

9. *Id.* at 110.

10. Epstein, *supra* n. 2, at 42, 43.

11. *See e.g.* Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 149–53 (Harv. U. Press 2006); Robert E. Goodin, *Utilitarianism as a Public Philosophy* 132–48 (Cambridge U. Press 1995).

12. *See* McAdams, *supra* n. 5, at 1036–43.

preference theory very poorly. First, the theory falsely implies that whites in the Jim Crow South would seek to avoid all associations with blacks. To the contrary, whites seemed quite happy to associate intimately with African-American workers in menial service positions, bringing black maids into their homes and entrusting black nannies to raise their children.[13] Some of the most racist white men maintained long-term sexual relationships with African-American women.[14] A better interpretation is that whites sought to avoid, not association per se, but those associations that implied equal (or inferior) standing with blacks, while they sought out associations that implied a superior standing to blacks.

Second, the theory fails to predict the extent to which whites enforced norms against other whites regarding associations with blacks. Given that it was acceptable to associate with black nannies or gardeners, the theory does not explain, for example, why whites addressed the African-Americans they employed only by their first names, denying them the customary (for whites) title of Mr. or Mrs., and only allowed them to enter and exit though the back door.[15] Nor does the theory explain the harsh and even violent ways that whites would sanction other whites for failing to adhere to these kinds of subordinating norms.[16]

Apart from Jim Crow, the associational preference model suffers from empirically dubious implications about the contemporary practice of discrimination. First, with associational preference, racial profiling should occur in just the opposite way that it does. Becker's idea of "association" is not well defined and appears to include any kind of physical proximity or interaction. If so, then discriminatory white police officers would prefer to stop *white* drivers for speeding; they would prefer to avoid even the short interaction required to give a ticket to an African-American driver. Once discriminatory white officers made a stop, they would prefer to end the encounter more expeditiously when the driver was African-American. Yet the available evidence suggests the opposite.[17] Ian Ayres notes a similar point in his study finding race discrimination in the sale of automobiles.[18] The sales personnel giving worse deals to African-Americans spent a significantly longer period of time in close negotiations with them. The associational preference model predicts the opposite: that discriminatory white salespersons would seek to spend as little time negotiating with black buyers as possible,

13. *Id.* at 1037.

14. *Id.*

15. *Id.* at 1041.

16. *Id.* at 1040–41.

17. *See e.g.* Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. Chi. L. Rev. 1275, 1290 (2004) (summarizing racial disparities in traffic stops); Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City* (Columbia Pub. L. Research Paper No. 09-203, June 6, 2009) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1399073) (finding racially disproportionate street stops, frisks, and arrests of racial minorities in New York City, controlling for neighborhood crime rates); Matthew R. Durose, Erica L. Schmitt & Patrick A. Langan, *Contacts Between Police and the Public: Findings from the 2002 National Survey* 8, (U.S. Dept. of Just., Bureau of Just. Statistics, Apr. 2005) (available at http://www.ojp.usdoj.gov/ bjs/pub/pdf/cpp02.pdf) (table showing black and Hispanic drivers substantially more likely to be searched, handcuffed, or arrested following a stop).

18. *See* Ian Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* 19–124 (U. Chi. Press 2001).

thereby giving such buyers a bargaining edge.

Finally, even though we should consider the possibility that different forms of discrimination have different causes, it would count as an advantage to a theory if it could explain both racism and sexism. But Becker's associational preference theory is a nonstarter for understanding sex discrimination. Heterosexual males do not discriminate against females because of a preference to avoid associating with them.

In sum, the associational preference theory brings with it some strong normative implications. The best reason to reject those implications is that the theory's description of discrimination is defective. Discrimination is not properly described as an effort to satisfy a simple preference for non-association.

Rational and Irrational Statistical Discrimination

In a second economic approach, information and beliefs rather than preferences cause discrimination. The original theory posits that the beliefs arise from rational statistical inference.[19] Because information about individuals is costly, people economize by judging an individual member of a group by the statistical average of that group. Race becomes a proxy for some other relevant trait. As a non-racial example, consider an employer who discovers that high school hockey players tend to be good employees because they understand teamwork or, conversely, tend to be bad employees because they are overly aggressive. Given the costs of observing these traits directly, it is rational for the employer to use hockey experience as a positive or negative proxy. That is, it is rational to treat hockey experience as evidence that the individual will have the average characteristics of high school hockey players even though this generalization will be false in many individual cases. One could avoid making false inferences by investigating each individual more thoroughly, but the rationality of the generalization (like all generalizations) is that the costs of acquiring more specific information exceed the benefits. Thus, Epstein notes: "If white workers on average have higher levels of productivity (say, because they have had a better education), then the employer is better off engaging in statistical discrimination . . . ."[20]

The normative implications of the theory of statistical discrimination are complex. Under some conditions, the process of generalization increases efficiency. But there is a possible market failure: the anticipation of being judged by one's immutable group memberships may cause inefficient underinvestment in developing human capital.[21] If one expects to be judged negatively by one's membership in a racial group, then the

19. *See* Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 Am. Econ. Rev. 659 (1972); Kenneth J. Arrow, *Models of Job Discrimination*, in *Racial Discrimination in Economic Life* 83, 83–102 (Anthony H. Pascal ed., Lexington Books 1972); Kenneth J. Arrow, *Some Mathematical Models of Race Discrimination in the Labor Market*, in *Racial Discrimination in Economic Life* 187, 187–203 (Anthony H. Pascal ed., Lexington Books 1972); Kenneth J. Arrow, *The Theory of Discrimination*, in *Discrimination in Labor Markets* 3, 3–33 (Orley Ashenfelter & Albert Rees eds., Princeton U. Press 1973).

20. Epstein, *supra* n. 2, at 33.

21. *See* Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 Am. Econ. Rev. 340 (1983); Stewart Schwab, *Is Statistical Discrimination Efficient?* 76 Am. Econ. Rev. 228 (1986); Lisa R. Anderson, Roland G. Fryer & Charles A. Holt, *Discrimination: Experimental Evidence from Psychology and Economics*, in *Handbook on the Economics of Discrimination* 97, 104–09 (William M. Rogers III ed., Edward Elgar 2006).

pecuniary returns from a level of education or skills training may be lower. With statistical discrimination, even though a dollar of education improves one's expected productivity by more than a dollar (discounted to present value), one may not make the investment because one expects to be judged more negatively than one's true productivity. Underinvestment in human capital may in turn preserve the value of the statistical generalization that the group membership predicts lower productivity. The negative generalization becomes self-fulfilling.

But here is where the analysis gets difficult. And without Epstein's bracing critique of anti-discrimination laws, I might never have made these connections. If the problem of discrimination is that rational overgeneralizations deter investment in human capital, then the solution is quite different from the non-discrimination law we have. What intervention would this market failure justify? First, the theory recommends some manipulation of labor and education markets to create new incentives for targets of adverse statistical discrimination to invest in human capital.[22] Second, whatever form government intervention takes, a statistical discrimination theory of market failure gives no reason for prohibiting discrimination against the *majority* racial group. The theory predicts that one or more economically deprived races will under-invest in its human capital, not that the economically dominant race will. The theory, therefore, justifies only the part of the law that prohibits discrimination against the racial minorities that currently under-invest in human capital. The ban on discrimination against whites is, on this view, entirely undesirable, though it may be pragmatically necessary as a political or constitutional matter.

The same is true if we introduce behavioral economics and the possibility of biased rather than rational statistical inferences. The literature on the implicit association test suggests that white Americans exhibit bias favoring whites over various minorities.[23] On average, American racial minorities–African-American, Hispanic, and Asian–exhibit a slight bias in the same direction, for whites and against their own group, though with considerable variation.[24] Thus, if this anti-minority bias is the normative basis of anti-discrimination law, it justifies only the ban on discriminating against minorities, not the ban on discriminating against whites.

This result may be attractive to some theorists who would be willing to jettison the legal protection of whites. But the theory is a poor (and highly contingent) fit if one wishes to defend the basic structure of our anti-discrimination regime. For that reason, let me then move on to a third economic description of race discrimination, the one I offered in 1995.

22. For an interesting example, see Jessica Calefati, *Giving Students Cash for Grades*, http://www.usnews.com/articles/education/2008/11/28/giving-students-cash-for-grades.html (posted Nov. 28, 2008).

23. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 951, 961 (2006); Kirstin A. Lane et al., *Implicit Social Cognition and Law*, 3 Annual Rev. L. & Soc. Sci. 427, 433 (2007).

24. The variation includes many African-Americans exhibiting a pro-black bias, though the average African-American favors whites. *See* Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 Group Dynamics 101, 105 (2002).

Group-Based Status Production

I claim that race discrimination is a pathological form of status competition.[25] I will not here fully restate the theory; my focus is the complicated connection between descriptive and normative theories of discrimination. But here is a short summary.

One way in which humans are social animals is that they care what others think of them not only as a means, but also as an end. Individuals have a preference for the *esteem* of others.[26] And individuals bestow esteem on others–think well of them–for reasons that are not entirely voluntary. A person who values accomplishments in cooking or gardening will reflexively esteem someone who demonstrates the right kind of mastery. We may think of an individual's social *status* as a kind of aggregation of the esteem judgments others in society have about that individual.

Note three points about esteem-seeking. First, an individual may seek esteem or status by distinguishing himself positively, which may be done directly or indirectly. Directly, one may favorably distinguish oneself by new and observable positive achievements or making past positive achievements observable. But because one is often judged relative to others, one can gain esteem if others are revealed to be comparatively worse. So, one can acquire esteem indirectly by disclosing or articulating the poor performances or traits of others. Denigrating others may be risky if the audience disapproves of such behavior, but sometimes the risk bears fruit.

Second, an individual may seek esteem individually or as part of a group. A group has status by virtue of the status of its members. One gains "reflected glow" by belonging to high status groups. Group status production is a particularly important way for most people to gain esteem from strangers because one's group memberships may be one of the few facts a stranger will know about oneself. Thus, where membership in a group is voluntary, one seeks to join high status groups and exit low status groups. One also seeks to make one's membership in high status groups observable, as by distinctive clothing, jewelry, or tattoos. Where group membership is not voluntary, however, as where it is based on ascriptive traits like those associated with race, one cannot enter and exit and cannot easily manipulate the observability of the trait. One can only invest in directly or indirectly changing the status of the trait-based group.

Third, the competition for status may be positive sum or zero sum. To some degree, the "market" for status increases overall welfare because humans have the adaptive tendency to care most about the dimensions of status along which they excel. The body builder, chess player, and artist each care more about the esteem he receives for his forte than the low rating he receives for failing at the other endeavors. But sometimes status competition is zero sum. When people compete for status on the same observable dimension, one person's gain is another person's loss. An example is money. When people compete for relative income, they may face an "arms race" problem, where the resources invested in the relative competition are wasted.[27] If my neighbor and I

25. McAdams, *supra* n. 5, at 1044–62.

26. On esteem, see also Geoffrey Brennan & Philip Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford U. Press 2004); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

27. *See* Richard H. McAdams, *Relative Preferences*, 102 Yale L.J. 1 (1992).

each want to make more money than the other, we might each wind up working sixty hours a week even though we would be in the same relative position if we each worked fifty-five hours a week and we each prefer working fifty-five hours instead of sixty. We each wind up working sixty hours because, otherwise, the one who worked less would lose the relative competition. If so, the competition is pathological and we are both better off if we can bind ourselves to work only fifty-five hours.

Now I can state the theory. Individuals in racial groups compete for status by trying to raise the relative rank of their group. Discrimination is an indirect means of raising one's group status by lowering the status of other groups. This descriptive theory explains the evidence considered above. In the Jim Crow South, southern whites sought out social and economic associations–such as employing a maid–that expressed their superiority, but sought to avoid associations–such as co-worker–that implied equality or inferiority. Similarly, the theory explains Jim Crow norms–e.g., whites refusing to give black acquaintances titles of respect or requiring them to use the back door–as means of generating or preserving white status. One of the key features of group-based status production is that individuals within the group have an incentive to free-ride on the efforts of other group members, which is why we observed white southerners sanction other white southerners for failing to honor the norms of discrimination and segregation.

Beyond Jim Crow, employment discrimination lowers the status of racial minorities, first by the simple insult and second by the economic loss in a culture that respects wealth. Moreover, discriminatory white police officers and car sales personnel gain from interactions that lower the status of African-Americans. Forcing black drivers to incur the costs of a traffic stop or to pay more for their car produces the status gain. That discriminatory whites are willing to spend more time with black drivers to achieve that outcome is not a puzzle.[28]

Like competition for relative wealth, the status competition embodied in race discrimination presents an "arms race" problem, a market failure I explained in more detail in the 1995 article.[29] The descriptive theory here views discrimination, like other forms of disparagement, as a costly investment in status competition. Discrimination is costly because the discriminator foregoes the gains from employing or transacting with the best available economic partner. The salience of race makes the competition zero-sum, which means the investments in it are socially wasteful. This is true when whites discriminate against racial minorities and also when minorities respond in kind by discriminating against whites or other minorities. (The same can be said of other channels of competition such as insulting epithets and violence). Thus, the theory's normative recommendation is to prohibit racial discrimination by a member of any race against a member of any race, consistent with the basic structure of anti-discrimination law.

28. *See also* Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. Rev. 689, 732–33 (2007) (finding support for the status production model of race discrimination through an analysis of discrimination complaints across different industries).

29. *See* McAdams, *supra* n. 5, at 1074–74.

Discrimination Based on Factors Other Than Race

Richard Epstein disagrees with much of what I've just said. But his critical work brings attention to a point of methodological agreement: if the status production theory is the only economic theory that leads to the basic structure of our law against *race* discrimination, it is not clearly consistent with other aspects of anti-discrimination law. Other theories–economic or otherwise–may justify other elements of anti-discrimination law, but if the normative basis is entirely different, it would be surprising that the positive law should be the same. Put differently, some commentators have noted the complications in the casual analogies those seeking anti-discrimination protection make to race discrimination.[30] The analogy cannot be good, except by coincidence, unless the underlying descriptive theory is the same.

To take an obvious example, more than half the states prohibit employment "discrimination" on the basis of off-premises activity like smoking or alcohol consumption.[31] Surely that is not because the refusal to hire smokers or drinkers is generally an investment the employer makes into raising the status of his non-smoking or non-drinking social group. (It seems designed to lower the employer's health care costs). The Fair Housing Act prohibits landlords from discriminating on the basis of "familial status," meaning the fact that the prospective renter has children.[32] Most likely, that discrimination does not occur because the landlord is seeking to produce status by subordinating children or families with children. Federal law also prohibits discrimination on the basis of age or disability. The aged and especially the disabled suffer from low status in society, but status competition does not seem to explain their exclusion as well as statistical discrimination–the expectation of low productivity. Indeed, where the basic structure of race discrimination law is reciprocal (a member of any race is prohibited from discriminating against a member of any race), age and disability discrimination laws are not reciprocal (only members of a protected class can sue for discrimination). That structure fits better with a statistical theory of discrimination, not the status production theory.

I am inclined to think that discrimination on the basis of sex, sexual preference, and religion is explained by status competition. But the argument is complex and factually contestable. Any status competition between the sexes, for example, is greatly complicated by the fact that the family connections between the sexes–by blood, marriage, and co-habitation–ensure that an individual's status depends in part on the status of individuals of the opposite sex. In the end, I think this does not rule out the status competition theory, but merely explains why sexism involves positive, as well as negative, stereotypes of women. Men can claim high status for their mothers, sisters,

30. *See e.g.* Richard Thompson Ford, *The Race Card: How Bluffing About Bias Makes Race Relations Worse* 93–177 (Farrar, Straus & Giroux 2008) (chapter on "racism by analogy"); Serena Mayeri, *"A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective*, 110 Yale L.J. 1045 (2001).

31. *See* Matthew W. Finkin, *Life Away from Work*, 66 La. L. Rev. 945, 946 (2006).

32. *See* 42 U.S.C. § 3604(b) (2006) (prohibiting "discriminat[ion] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . familial status."). Familial status is defined as meaning "one or more individuals (who have not attained the age of 18 years) being domiciled with" a parent, lawful custodian, or designee. *See* 42 U.S.C. § 3602(k) (2006).

wives, and daughters, based on their conformity to a "good woman" stereotype, but remain free otherwise to assert their status above the general class of women. In any event, neither I nor anyone else has actually extended the economic model of status production to forms of discrimination other than race.[33] To Epstein, I must concede that I have only met his attack on race-based anti-discrimination law and that his critical work on other fields of discrimination requires further rejoinder. My hope is that others will enter the economic debate.

33. Indeed, though Gersen finds support for the status production model of race discrimination, the same analysis yields no support for the status production model in explaining sex discrimination. Gersen, *supra* n. 28, at 731–32.