ECONOMIC ANALYSIS OF LAW

SIXTH EDITION

RICHARD A. POSNER
Judge, U.S. Court of Appeals for the Seventh Circuit;
Senior Lecturer, University of Chicago Law School

ASPEN
PUBLISHERS

1185 Avenue of the Americas, New York, NY 10036
www.aspenpublishers.com

CHAPTER 27

RACIAL DISCRIMINATION

§27.1 The Taste for Discrimination

Some people do not like to associate with the members of racial, religious, or ethnic groups different from their own and will pay a price to indulge their taste. Thus, although there are pecuniary gains to trade between blacks and whites—to blacks working for whites (or vice versa), whites selling houses to blacks, and so forth—much as there are pecuniary gains to trade among nations, by increasing the contact between members of the two races such trade imposes nonpecuniary, but real, costs on those members of either race who dislike association with members of the other race. These costs are analogous to transportation costs in international trade, which also reduce the amount of trading.

There is nothing inefficient about this, but the wealth effects can be dramatic. Assume that whites do not like to associate with blacks but that blacks are indifferent to the racial identity of those with whom they associate. The incomes of many whites will be lower than they would be if they did not have such a taste.[1] They forgo advantageous exchanges: For example, they may refuse to sell their houses to blacks who are willing to pay higher prices than white purchasers. But the racial preference of the whites will also reduce the incomes of the blacks, by preventing them from making advantageous exchanges with whites; and the reduction in the blacks' incomes will be proportionately greater than the reduction in the whites' incomes. Because blacks are only a small part of the economy, the number of advantageous exchanges that blacks can make with whites is greater than the number of advantageous transactions that whites can make with blacks. The white sector is so large as to be virtually self-sufficient; the black sector is much smaller and more dependent on trade with the white.

The international trade analogy can help clarify the point. The United States constitutes so large an aggregation of skills, resources, and population that it could survive a substantial reduction of its foreign trade in relative comfort. Switzerland could not. Its markets are too small and its resources too limited to permit it to achieve economies of scale and of specialization without trading with other countries. The position of the black minority in the United States is similar to that of Switzerland in the world economy.

§27.1 1. Some whites—those who are not prejudiced—will have higher incomes than they would if other whites were not prejudiced (why?).

Although discrimination is consistent with competition, just as a reduction in international trade due to higher costs of transportation would be no evidence that international markets were not competitive, there are economic forces at work in competitive markets that tend to minimize discrimination. In a market of many sellers the intensity of the prejudice against blacks will vary. Some sellers will have only a mild prejudice against them. These sellers will not forgo as many advantageous transactions with blacks as their more prejudiced competitors (unless the law interferes). Their costs will therefore be lower, and this will enable them to increase their share of the market. The least prejudiced sellers will come to dominate the market in much the same way as people who are least afraid of heights come to dominate occupations that require working at heights: They demand a smaller premium.[2] This is not to say that discrimination is bound to disappear completely, without need for government intervention, provided only that markets are competitive. Some discrimination is efficient (see §11.7 *supra* and §27.5 *infra*) and will therefore persist whether or not a firm's owners or managers have any taste for discrimination. So will (or may) discrimination that reflects the tastes of consumers rather than of sellers, consumers do not face competitive pressures to change their tastes. But notice that, the smaller the discriminated-against group, the less harmed the members of the group will be by less than complete discrimination by the majority. Can you see why?

The tendency for the market to be dominated by firms with the least prejudice against blacks is weaker under monopoly. The single seller in the market will be, on average, as prejudiced as the average, not as the least prejudiced, member of the community. True, any monopolies that are freely transferable (such as patents) are likely to come into the hands of the least prejudiced. A monopoly that requires association with blacks is less valuable to a prejudiced owner; he suffers either a reduction in his pecuniary income by forgoing advantageous transactions with blacks or a nonpecuniary cost by making such transactions. Therefore the less prejudiced will tend to purchase monopolies from the more prejudiced. But not all monopolies are freely transferable.

If the monopoly is regulated, the market forces working against discrimination are weakened further. One way to evade a profit ceiling is by substituting nonpecuniary for pecuniary income, since the former is very difficult for a regulatory agency to control; and one type of nonpecuniary income is freedom from associating with the people against whom one is prejudiced.[3]

Labor unions that have monopoly power may reduce the effectiveness of competition in minimizing discrimination. A monopolistic union, by increasing wages above the competitive level, creates excess demand for the jobs in which these wages are paid. If the union controls the jobs, it will have to allocate them somehow. It could auction off vacancies as they occur or permit members to sell their union membership, or it could adopt nonprice criteria, such as nepotism or, as unions once did, membership in the white race. The members of the union took a part of their monopoly profits in the form of freedom from a type of association they found distasteful.[4]

2. For evidence that blacks in fact benefit from competition among employers, see Price V. Fishback, Can Competition Among Employers Reduce Governmental Discrimination? Coal Companies and Segregated Schools in West Virginia in the Early 1900s, 32 J. Law & Econ. 311 (1989).

3. For evidence, see Armen A. Alchian & Reuben A. Kessel, Competition, Monopoly, and the Pursuit of Money, in Aspects of Labor Economics 157 (Nat'l Bur. Econ. Research 1962).

4. An alternative explanation suggested earlier is that race is an inexpensive method of rationing

Thus government policy, which is responsible for profit controls on monopolists and for strong labor unions, may increase discrimination above the level that would exist in an unregulated market. And these are not the only government polices that have an adverse effect on racial minorities. Another is the minimum wage.[5]

§27.2 School Segregation

In *Brown v. Board of Education*,[1] the Supreme Court invalidated state laws requiring or permitting racial segregation of public schools. The Court held that segregated education was inherently unequal because it instilled a sense of inferiority in black children. The analysis in the preceding section suggests an economic as distinct from a psychological basis for rejecting the notion of separate but equal. Segregation reduces the opportunities for valuable associations between races, and these associations would be especially valuable to the blacks because of the dominant position of the whites in the society. The Court had recognized this point in *Sweatt v. Painter*,[2] which held that blacks could not be excluded from state law schools. The Court pointed out that black students in a segregated law school would have no opportunity to develop valuable professional contacts with the students most likely to occupy important positions in the bench and bar after graduation. It rejected the argument that this disadvantage was offset by the disadvantage to white students of being barred from association with black law students, noting that the blacks' weak position in the profession made such associations less valuable to white students.

If our earlier analysis is correct, the laws invalidated in *Brown* that forbade local school districts to operate integrated schools made discrimination greater than it would have been in the absence of such laws—but perhaps not much greater. While the federal courts, the Department of Justice, and other agencies were eventually able to compel the southern states to stop enforcing their segregation laws, many whites were willing to pay the additional costs necessary to perpetuate school segregation. They sent their children to segregated private schools or moved to school districts containing few black residents. The Supreme Court had made discrimination more costly but since the white population valued such discrimination highly, the effect of the Court's action on the amount of discrimination was for many years small (it may still be small). Further, since the white population controlled the public finance of the states, it could deflect the force of the Court's action, in part at least, by reducing appropriations for public education and by subsidizing private education through tuition grants and tax credits. These measures made it cheaper for parents to shift their children to segregated private schools.

---

access and thereby increasing the net gains from monopolizing the labor supply. See §11.9 *supra*. Either explanation has the same consequences for the welfare of the excluded blacks.

5. See §11.7 *supra*; Harold Demsetz, Minorities in the Market Place, 43 N.C.L. Rev. 271 (1965). Does the analysis in this section suggest an economic reason why the disemployment effects of the minimum wage might be concentrated on the members of a minority that is discriminated against rather than on the members of the majority?

§27.2 1. 347 U.S. 483 (1954).

2. 339 U.S. 629 (1950).

Economic analysis might be helpful in the design of desegregation decrees, which in the 1990s are still enforced and contested. Suppose a court wants to promote the integration of the public schools of a community that practiced segregation in the past (and can therefore be placed under a remedial decree), without causing so much "white flight" that black children will derive no benefit from the decree. From the standpoint of white parents who for whatever reason regard the presence of black children as a detriment to their own children, any desegregation decree will operate as a tax. The higher the tax, the more likely the white parents are to incur the costs of moving to another school district or sending their children to private school. The court can minimize this effect (and thus maximize the benefit of the decree to blacks) by (1) imparting as broad a geographical scope to the decree as possible, so that the costs to the white families of relocating are maximized, (2) imposing as many of the costs of the decree as possible on blacks rather than whites, as by busing black children rather than white children, and (3) limiting the fraction of any school that is black, since the desegregation "tax" on whites rises with the ratio of black to white children in the school.

Even if black children benefit greatly from integrated education, it does not follow that they might not benefit even more from alternative strategies. For example, the Supreme Court in *Brown*, rather than invalidating public school segregation, might have exploited the value that southern whites attached to segregation by requiring, as a condition of maintaining segregated schools, that the southern states devote much larger sums to the education of blacks than had been their practice. Blacks conceivably might have been better off under such an arrangement even if the *Brown* decision had received prompt and wholehearted compliance. Imagine a community composed of 200 blacks and 800 whites, where the average income of the blacks is $5,000 and of the whites $10,000. Assume that the elimination of segregated education would increase the pecuniary and nonpecuniary income of the blacks by an average of $2,000 (ignore the lag between changed educational conditions and better employment). The black community would therefore gain $400,000 from desegregation. But suppose the whites in the community would be willing to pay an average of $1,000 apiece not to integrate the schools. They would therefore be willing to spend $800,000 on better education for the blacks as the price of continued segregation, and let us assume that every dollar so spent would benefit blacks by one dollar. Then this expenditure would increase the blacks' incomes by $400,000 more than integration would increase it.

This alternative strategy would not work for all segregated public facilities. Blacks cannot be compensated for the insult implicit in a regime of racially segregated rest rooms and drinking fountains by a judicial decree requiring the state to spend as much money on the black as on the white facilities. Yet if the segregated facilities are truly equal in quality, this would lend plausibility to the criticism that the *Brown* decision denied freedom of association to whites at the same time that it promoted freedom of association of blacks, and that there is no neutral principle by which to choose between the associational preference of whites and blacks.[3] But economic analysis suggests an important distinction: Because blacks are an economic minority, the per capita cost to them of the whites' prejudice is much greater than the cost to the whites. Well, but what has this point to do with efficiency? And how is it applicable to segregated rest rooms and drinking fountains?

3. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).

§27.3 The Requirement of State Action

The Fourteenth Amendment, which was enacted primarily for the benefit of racial minorities, provides that no *state* shall deny anyone the equal protection of its laws or deprive anyone of life, liberty, or property without due process of law. Economic analysis can help clarify the issues involved in distinguishing state from private action.

Three levels of state involvement in discrimination can be distinguished: a law or other official action that orders discrimination; discrimination by a public enterprise; state involvement in private enterprises that practice discrimination but not in the decision of the enterprise to discriminate. Both the first and second levels of state involvement were involved in the *Brown* case, but they were not distinguished. The Court invalidated laws requiring all public schools in a state to be segregated. Such laws may be presumed to enact the prejudices of the more prejudiced half of the population and thus to produce greater discrimination than if the decision to segregate were left to individual public school districts. The Court also invalidated state laws permitting local school districts to segregate at their option. When the decision to segregate is left to each local school district it is not so obvious that the result will be a different amount of discrimination from what there would be if all education were private; but probably there will be more. A public school system is a nontransferable monopoly (private education, because it costs the consumer as distinct from the taxpayer more than public education, is not a good enough substitute for the latter to deprive a public school district of all its monopoly power), and we saw earlier that nontransferable monopolies may be expected to discriminate more, on average, than competitive firms or freely transferable monopolies. Since most governmental services are in the nature of nontransferable monopolies, this point has general application to public agencies.

The analysis is different when the decision to discriminate is made by a private individual or firm, even though the state is involved to some extent in the private activity. The question should be whether the state's involvement makes discrimination more likely. Where that involvement takes the form of public utility or common carrier regulation, then, as we saw earlier, the likelihood that the firm will discriminate is indeed greater. The state also maintains an extensive system of land title recordation and is otherwise deeply involved in the regulation of land use. But this does not increase the probability that a white homeowner will refuse to sell his house to a black buyer because of distaste for association with blacks.

The foregoing analysis suggests a different definition of state action from what the courts have employed. It would prohibit racial discrimination by trade unions, for the governmental policies that have fostered the growth of monopolistic unions have thereby increased the likelihood that they would practice racial discrimination. But it would not forbid discrimination by the private concessionaire in a public office building,[1] unless the public authority had encouraged the concessionaire to discriminate.

An interesting question is presented when the state involvement takes the form of legal enforcement of a private decision to discriminate. May racial covenants be enforced?[2] May the City of Macon as trustee of the park donated by Senator Bacon

§27.3 1. But see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
2. Shelley v. Kraemer, 334 U.S. 1 (1948).

comply with the racial condition in the gift?[3] Does the equal protection clause forbid recourse to civil and criminal trespass remedies by shopkeepers who do not want black customers? It is hard to believe that without property rights there would be less discrimination. There might be more, especially in communities where the taste for discrimination was widespread, since without legally protected property rights more economic activity would be directed either by political decision or by threat of violence.

It is true but trivial that if the state enforced all private decisions except those to discriminate, the cost of discrimination would be higher and the incidence lower. A more interesting point is that the effect of enforcing a racial condition in the restrictive covenant and charitable gift cases would be to create more discrimination than the members of society want today. To return to the international trade analogy, it is a little as if nations had agreed in the nineteenth century that they would never permit trade to be conducted other than in sailing ships. This is an instance of the broader concern discussed in Chapter 18 that a perpetual condition in a deed or gift may cause resources to be employed inefficiently if an unforeseen contingency, in this case a decline in the taste for discrimination, materializes. But it is fortuitous whether the result of a perpetual condition is more discrimination than contemporaries want or less. Were there a secular increase rather than decline in racial discrimination, enforcing racially motivated deed or gift restrictions (such as a provision in a foundation charter declaring the purpose of the foundation to be to promote racial integration) might produce less discrimination than contemporaries wanted.

§27.4 Antidiscrimination Laws

Federal laws forbidding private discrimination in the sale and rental of real estate, in employment, and in restaurants, hotels, and other places of public accommodation are sought to be justified first as necessary to eliminate the effects of centuries of discriminatory legislation and second as promoting interstate commerce. The second justification strikes many people as contrived, yet makes economic sense. Discrimination reduces transactions between blacks and whites and many of the transactions that are prevented would be in interstate commerce, even narrowly defined. The first justification is plausible but indefinite. *Any* deprivation from which black people suffer today could be due in part to past discrimination resulting from discriminatory laws or other governmental policies. If black children on average perform less well than whites even in northern schools, it may be due to the fact that the financial return to education for black people has traditionally been low because of particularly severe employment discrimination against educated blacks, which may have been influenced by the discriminatory governmental policies of the southern states from which many northern blacks originated. This kind of argument provides the strongest justification for reverse discrimination, discussed in the next section.

Economic analysis helps explain the variance in compliance with anti-discrimination laws. If the interracial associations brought about by such a law are slight,

3. See Evans v. Newton, 382 U.S. 296 (1966); §18.2 *supra*.

the cost of association even to prejudiced people will be low and they will not be willing to incur heavy costs in the form of punishment for, or legal expenses of, resisting compliance in order to indulge their taste. It is not surprising that there has been general compliance with laws forbidding people to refuse on racial grounds to sell real estate, although few resources have been allocated to enforcing these laws. Unless the seller plans to stay in the neighborhood, his association with a black purchaser is limited to negotiating the sale (and a broker does that anyway). Most housing-discrimination cases, therefore, involve rentals rather than sales. The association between a hotel owner and staff on the one hand and the guests of the hotel on the other are impersonal except where the establishment is very small—and for this reason small establishments were exempted from the public accommodations law—so again it is not surprising that widespread compliance was rapidly and easily achieved. School integration is different. Not only is the association among school children intimate and prolonged but to the extent that black children, for whatever reason, on average perform worse in school than white children, integration may involve costs to whites over and above the nonpecuniary costs imposed by an undesired association.

Laws forbidding discrimination in employment involve interesting questions of proof, of statutory purpose, of remedy, and of efficacy. A firm may have no black employees, even if it is located in an area with a large black population, for reasons unrelated to discrimination by either the management of the firm or the white workers. There may be no blacks with the requisite training or aptitude, or blacks may not like the type of work, or they may simply be unaware of job openings at the firm. If an employer is forced to hire unqualified blacks, pay them a premium to induce them to do a type of work that they do not like, or advertise in the black community openings for jobs in which very few blacks are interested, the firm incurs costs greater than the benefits to the blacks who are hired. The unqualified black employee imposes productivity losses that he does not recoup in higher wages. The premium paid to the black employee who does not like to work in this type of job is a cost to the firm but not a benefit to the black employee; it just offsets the nonpecuniary cost of the job to him. Advertising job openings in the black community may not confer a benefit commensurate with its costs if the advertising fails to generate a significant flow of qualified applicants. Since most of the additional costs probably will be passed on to the firm's customers, these methods of improving the welfare of black people are regressive as well as inefficient.

Laws forbidding job discrimination (see also §11.9 *supra*) are costly even when they are applied to employers who in fact discriminate. The employer may have to pay a higher wage to those white workers who have both a taste for discrimination and attractive alternative employment opportunities in firms that do not have black employees. If they lack such opportunities, the elimination of discrimination may impose no pecuniary costs—by hypothesis the workers have no choice but to accept association with blacks—but it will impose nonpecuniary costs in the form of an association distasteful to the whites. And the costs are unlikely to be offset by the gains of black workers for whom jobs in the firm are superior to their alternative job opportunities or by the economic advantages that increased trading with blacks brings to the firm and hence to its customers; if there were such offsetting gains, the blacks would probably have been hired without legal pressure (why?).

So far in this discussion it has been assumed that, whatever the costs of antidiscrimination laws, the intended beneficiaries benefit. But they may not. The first and lesser point is that blacks pay as consumers and as workers their proportionate

share of any costs that antidiscrimination laws impose on firms. However, they share these costs with whites, whereas the benefits accrue only to them. Second, the more it costs firms to employ black workers, the greater the efforts firms will make to minimize their employment of blacks. For example, they will be less inclined to locate their plants or offices in areas of high black population—especially if, as under the disparate-impact theory of discrimination, they will be more vulnerable to charges of discrimination the larger the black population in the area in which their plants and offices are located.

What should be the remedy in a case in which an employer is adjudged to have discriminated? Economic analysis suggests that the employer should be required to pay the damages of the person discriminated against, perhaps doubled or trebled to facilitate enforcement in cases in which the damages are small. This will both compensate and deter and seems preferable to an injunctive remedy requiring the employer to hire a specified number or percentage of blacks. The injunction will force him to lay off white workers or, what amounts to the same thing, to favor black over white job applicants until the quota fixed in the decree is attained. By imposing costs on white employees who may be untainted by discrimination in order to improve the condition of black workers, such an injunction operates as a capricious and regressive tax on the white working class.

The analysis is more complicated if the employees share responsibility with the employer for the discrimination. The employees may have barred blacks from their union. Or the employer may have discriminated only because of his workers' taste for discrimination—he himself being free from it. (Indeed, from an economic standpoint, who is more likely to harbor discriminatory feelings—the white employer or the white employee? What is the appropriate remedy in a case in which employee responsibility for the discrimination is proved?)

Suppose an employer pays white workers more than black workers in the same job classification. Should the measure of damages be the difference between the two wage rates? What if any weight should be given to the possibility that if the employer had had to pay the same wages to whites and blacks, he would have employed fewer workers of both races? Should the employer be allowed to defend by showing that part of the wage difference is a return to the white workers' greater investment in education? If only a few employers in a labor market discriminate, can it be argued that no difference in wages between black and white workers could be due to discrimination, whatever the employer's taste?

One might suppose that the number of antidiscrimination suits would fall over time, as prejudice diminished among sellers in competitive markets. Actually the number has increased. Does this refute the economic theory of discrimination? Not at all. Apart from the fact, noted earlier and explored in the next section, that prejudice and discrimination are not synonyms, there is the fact that, as more and more blacks are hired, the composition of antidiscrimination claims shifts from refusals to hire to discharges. Discharge suits are more lucrative for plaintiffs because damages are based on mid-career rather than ordinarily lower entry-level salaries, because the former are more likely to exceed opportunity cost (why?), and because there are more dimensions along which an employer can discriminate against an employee than against an applicant (e.g., harassment, failure to promote, inferior working conditions). So a decline in employment discrimination can actually produce an increase in employment discrimination suits![1]

§27.4 1. On whether the net effect of employment discrimination laws has been beneficial to blacks,

§27.5 Reverse Discrimination[1]

It is often urged that blacks should be given preferential treatment—for example, that law schools should set lower admission standards for blacks than for whites even if the admission criteria provide unbiased estimates of black academic performance. Many law schools do this. Is such reverse discrimination a fundamentally different animal from the old-fashioned discrimination *against* blacks? To answer this question will require us to go behind the assumption heretofore employed that discrimination is simply a result of taste and inquire more closely into its causes.

Racial discrimination has a number of possible causes. Sheer malevolence and irrationality are factors in many cases. Discrimination is sometimes anticompetitive—this appears to have been a factor in the internment during World War II of California's Japanese residents and has been a frequent factor behind antisemitism—and sometimes exploitive, as in slavery. Race enters as a convenient factor identifying the members of the competing or exploited group. Another factor, however, is the costs of information. To the extent that race or some attribute similarly difficult to conceal (sex, accent, etc.) is positively correlated with the possession of undesired characteristics, or negatively correlated with desired characteristics, it is rational for people to use the attribute as a proxy for the underlying characteristic with which it is correlated ("statistical discrimination"). If experience has taught me (perhaps incorrectly)[2] that most Mycenaeans have a strong garlic breath, I can economize on information costs by declining to join a club that accepts Mycenaeans as members. Although I might be forgoing valuable associations with Mycenaeans who do not have a strong garlic breath, this opportunity cost may be smaller than the information cost that more extensive sampling of Mycenaeans would entail. Discrimination so motivated has the same basic character (its distributive effects may of course be different) as a decision to stop buying Brand X toothpaste because of an unhappy experience with a previous purchase of it, albeit the next experience with the brand might have been better.

The fact that some racial discrimination is efficient does not mean that it is or should be lawful. On utilitarian grounds it may well be unjust, even if efficient (explain). It is likely, however, to be offensive. Suppose, for example, that all airplane hijackers were members of a particular ethnic group, but that only a small percentage of the members of the group were airline hijackers. It would be a rational police strategy to use "ethnic profiling" whereby only members of the group in question would be searched before being permitted to board an aircraft. But then the *entire* cost of airport searches of innocent persons would be borne by members of one ethnic group.[3] As this example illustrates, from a pure efficiency standpoint the type of discrimination that is motivated purely by information costs (the type usually called by economists "statistical discrimination") might, if sub-

---

see the judicious discussion in John J. Donohue III & James Heckman, Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks, 29 J. Econ. Lit. 1603 (1991). They find few such benefits outside the South.

§27.5 1. See also §11.9 *supra*.

2. Because of the difficulty of establishing property rights in information, people may have inadequate incentives to investigate even the average characteristics of the groups they deal with. What are the policy implications if this proposition is accepted?

3. See Amy Farmer & Dek Terrell, Crime Versus Justice: Is There a Trade-off?, 44 J. Law & Econ. 345 (2001).

jected to the balancing approach often used in constitutional cases (see §28.2 *infra*), result in upholding some racial discrimination on efficiency grounds (depending, however, on the weight placed on the distributive costs of discrimination).

An alternative to balancing is to argue that what is forbidden by the Fourteenth Amendment and other antidiscrimination measures is precisely the use of race as a proxy for underlying personal characteristics. This principle has the many appealing characteristics of a simple rule (see §20.3 *supra*), compared with a rule—really a standard—merely forbidding unreasonable discrimination. But a possible corollary of the suggested principle is that reverse discrimination is unconstitutional, because it is based on the use of race as a proxy for underlying personal characteristics. The rationale for preferential admissions of blacks to law school is not that blackness per se is a desirable characteristic but that it is a proxy for characteristics relevant to the educational process or to performance in the legal profession—characteristics such as a background of deprivation, empathy for the disadvantaged, etc. Blackness is used as the criterion for preference in order to economize on search costs. The result, it can be argued, is to confer capricious benefits on middle-class blacks in much the same way that discrimination against blacks based on the characteristics of many poor blacks has imposed capricious burdens on the middle-class blacks who lack these characteristics.

A subtler point is that reverse discrimination brings about a capricious redistribution of income among blacks, just as discrimination against blacks does. To the extent that employers find it costly to assess the quality of an individual worker, black workers in a particular line of work who are as good as white workers in that line will find it difficult to separate themselves from the affirmative-action hires and will therefore be assumed to be of the average quality of black workers in the line of work—an average dragged down by the affirmative-action hires. In the language of game theory, there will be a pooling equilibrium in which below-average black workers will benefit at the expense of above-average ones.

Information costs also help explain why reverse discrimination is so unpopular. Every time a white male fails to gain admission to a college that is known to practice reverse discrimination, or isn't hired by an employer known to practice it, there is some probability that he has lost this valuable opportunity because of reverse discrimination. The probability, however, will often be much less than one. Suppose four people apply for a job. Three are white and one is black, and the black is hired. Even if all the whites are better than the black, who was hired solely because of his race, we know that two of the three whites would not have gotten the job even if the employer did not discriminate. The two may not know who they are; all three whites, therefore, will believe that they *may* have been hurt by reverse discrimination. Each is, as it were, a probabilistic victim of the practice.

Evaluate this argument: reverse discrimination is a fair policy so long as the number of persons actually harmed by it is no greater than the number of persons harmed by direct discrimination. Would your answer be different if for "fair" the word "efficient" were substituted?

Suggested Readings

1. Gary S. Becker, The Economics of Discrimination (2d ed. 1971).
2. John J. Donohue III, Is Title VII Efficient?, 134 U. Pa. L. Rev. 1411 (1986).

3. ——— & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983 (1991).

4. Amy Farmer & Dek Terrell, Crime Versus Justice: Is There a Trade-off?, 44 J. Law & Econ. 345 (2001).

5. Edmund S. Phelps, The Statistical Theory of Racism and Sexism, 62 Am. Econ. Rev. 659 (1972).

6. Tomas Philipson, Desegregation and Social Monopoly Pricing, 4 Rationality and Society 189 (1992).

7. Richard A. Posner, The Efficiency and the Efficacy of Title VII, 136 U. Pa. L. Rev. 513 (1987).

8. Thomas Sowell, Civil Rights: Rhetoric or Reality? (1984).

9. Discrimination in Labor Markets (Orley Ashenfelter & Albert Rees eds. 1973).

Problems

1. This chapter has suggested a neutral principle for forbidding discrimination. Is it an economic principle? Can one argue that discrimination is inefficient? In economic terms, are the costs of interracial associations, given prejudice, any different from the crop damage caused by the interaction of railroading and farming?

2. Suppose a number of blacks bought homes on land contracts and later defaulted on the contracts. They claim that they should not be held liable for the default because they were forced to pay higher prices than white purchasers of similar property, as a result of discrimination against blacks. The developers reply that the blacks should be grateful that they were willing to sell them such desirable property. What light can economic analysis shed on the issues in such a litigation? Would the welfare of blacks as a whole be increased or reduced if the developers lost?

3. Can it be argued that racially restrictive covenants might increase efficiency?

4. Suppose that a law school that found that its black graduates had lower lifetime professional earnings than whites because of racial discrimination decided therefore to impose higher admission requirements on blacks than on whites. Could this policy be defended as enhancing efficiency?

5. Black males have a shorter life expectancy than white males. Discuss the allocative and distributive effects of rules forbidding life insurance companies to vary premium rates on the basis of the race of the insured.

6. Compare two forms of reverse discrimination: In one the employer sets a quota for black employees and hires only blacks until the quota is reached; in the other he hires without discrimination but he gives his black employees greater seniority than his white employees, so that when and if economic conditions require layoffs fewer blacks than whites will be laid off. Consider whether it makes a difference whether the employer is public or private, whether there is or is not a union, and whether the policy of granting superseniority to blacks is adopted before or after any whites affected by it are hired. Which combination of attributes produces the most inefficient discrimination, which the least inefficient?

7. Employers who wish to discriminate against blacks but are forbidden by law to do so may look for a proxy characteristic possessed by more black than whites

and use that as the basis for personnel decisions. The proxy might be some level of educational attainment. If you were an employer, would you be more concerned about being forbidden to use the proxy or required to have a specified fraction of black employees? See Shelly J. Lundberg, The Enforcement of Equal Opportunity Laws Under Imperfect Information: Affirmative Action and Alternatives, 106 Q.J.E. 309 (1991).