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STUDENT COMMENTARY

NOT ALL THAT UNFAMILIAR: A COMMENTARY ON PROFESSOR EPSTEIN'S *GENDER IS FOR NOUNS*

Last February, at the conference that generated the papers which comprise this symposium, Professor Richard Epstein noted that the title of his address, *Gender Is for Nouns*, is "provocative." His remark hinted at what the attendants hoped: that the address itself would be provocative in its approach to sex discrimination. At the conclusion of his address, there was no rush at the refund counter. Some quarreled with the reasoning of the address; others with its language. But no one, to my knowledge, disputed its deliciously politically incorrect provocativeness.

It may seem hard to dispute that take on what is now the lead article in this symposium.¹ Professor Epstein's arguments strike at the heart of employment discrimination laws in a way not often found in the academic debate. But outside the academic debate, the perspective is gnawingly familiar, not just in the abstract, but for its resemblance to another polemic on the insertion of biological arguments into the employment discrimination debate: the April 6, 1987, edition of ABC's "Nightline." Can it be that Professor Epstein (as he makes his case) is Al Campanis with tenure?

When Al Campanis, formerly a high-ranking executive for the Los Angeles Dodgers, appeared on "Nightline" in 1987, his remarks caused a stir that filled the media, shook Major League Baseball to its foundations, and led to his resignation. Mr. Campanis, recall, asserted on national television that blacks "may not have some of the necessities to be a field manager or general manager."² "How many quarterbacks are there?," he quipped. "How many pitchers?"³ Mr. Campanis graciously conceded that blacks were "very

1. Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981 (1992).

2. Bill Dwyre, *Campanis Questions Ability of Blacks*, L.A. TIMES, Apr. 7, 1987, § 3, at 1.

3. *Id.*

God-gifted and wonderful people," possessing "great musculature" and being "fleet of foot."⁴ But this athletic ability, it seems, was not universal. Mr. Campanis had earlier in the program answered his own question: "Why aren't blacks good swimmers? They don't have buoyancy."⁵

Not to be outdone, Professor Epstein relies heavily on biological arguments in his attack on sex discrimination law. The difference between men's and women's brains,⁶ the ability of women to carry milk,⁷ and the differing reproductive strategies of men and women⁸ are all enlisted as reasons not to be surprised, upset, or called to (state) action over sex discrimination. "Any regularities in perception that arise by this indirect and diffuse process are far more reliable, and should be accorded greater weight, than an explicit formal pronouncement of the state or any of its agencies."⁹ Where, Mr. Campanis must think, was Professor Epstein when I needed him.

Two questions arise: First, do Mr. Campanis' statements garner the protection of Professor Epstein's arguments? In other words, are they in a sense speaking the same language? Second, if the perspectives are similar, as I argue, what light does this shed on the debate that Professor Epstein's article engenders?

Professor Epstein might initially respond to the comparison of his analysis to the remarks of Al Campanis by noting the distinction between race and sex discrimination. The sexes more often than the races differ in ways that are relevant to employment decisions, he might argue.¹⁰ Title VII itself, after all, treats race discrimination more seriously than it does sex discrimination.¹¹

Enlisting such distinctions between sex and race discrimination, however, would violate the ground rules Professor Epstein has set.

4. *Id.*

5. *Id.* Mr. Campanis publicly apologized for the remarks. *Campanis Apologizes for His Racial Remarks*, WASH. POST, Apr. 8, 1987, at B2.

6. Epstein, *supra* note 1, at 988-89.

7. *Id.* at 990.

8. *Id.* at 992-93.

9. *Id.* at 984.

10. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION 269-74 (1992).

11. Intentional sex discrimination, unlike race discrimination, is excusable for a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e) (1988); see also EPSTEIN, *supra* note 10, at 280-81, 283-312. Furthermore, victims of intentional race discrimination are afforded the broad remedies of section 1981 actions. 42 U.S.C. § 1981 (1988 & Supp. III 1991). More limited remedies are available to victims of intentional sex discrimination under Title VII as amended by the Civil Rights Act of 1991. *Id.* § 1981a (Supp. III 1991).

Should we let the market determine which distinctions are rational or are we going to bar some distinctions through law? If the answer is, as Professor Epstein argues, Let the market work it through, then race-based assumptions may sometimes appear as rational as sex-based assumptions.

Where would these race-based assumptions appear in the absence of antidiscrimination laws? That is to a large extent unpredictable. But there is data that could be enlisted to justify assumptions. The disparity in IQ test scores among the races¹² seems to be a natural place for employers to start. At the point at which testing is costlier than being wrong some of the time, the assumption that a person possesses his or her race's average IQ test score (or strength or level of responsibility) is economically rational.

Other assumptions, as a matter of logic, might be validated. If one were to establish race-based averages in different categories—whatever they might be—some race would be first, some race would be last, and the rest would be in the middle. And the validity of the assumptions, Professor Epstein must conclude, should be tested in the market.

Nor do these racial assumptions necessarily depend upon the ugliest of assertions: innate genetic inferiority. Professor Epstein is asserting that a "confluence of separate pressures"¹³ are responsible for different employment skills in the sexes. Perhaps holders of the Campanis point of view would ground their assertions not in some notion of inherent inferiority, but in the notion that situations and choices—a "confluence of separate pressures"—have rewarded and punished different mental and physical skills among the races. Al Campanis' view of employment decision making appears to fit in well with the structure of Professor Epstein's arguments.

What light, then, does this comparison of sex to race and of Professor Epstein's statements to those of Al Campanis shed on the debate? In short, the remarks of Mr. Campanis are what we as a nation have to look forward to if Professor Epstein's provocative ideas become repealing legislation, except that the assurance that federal law seeks to prevent those remarks from becoming either explicit or

12. Andrew Hacker, *The Myths of Racial Division*, NEW REPUBLIC, Mar. 23, 1992, at 21, 22. Hacker, it is important to emphasize, acknowledges that unexplained disparities exist, but rejects the disparities as ultimately irrelevant race differences. *Id.* at 22, 24.

13. Epstein, *supra* note 1, at 984.

implicit policy will be removed.¹⁴ Reliance on race- and sex-based assumptions will be tested in the market, not the courts. Professor Epstein has not just acknowledged this regarding sex-based assumptions; he has applauded it. As an eighty-one-game fan of the market, it would be disingenuous of him to make such bold assertions regarding sex-based patterns, and back off on the subject of race-based patterns. The comparison forces the moment to its crisis: Is sex discrimination to be taken as seriously as race discrimination? Does sex discrimination have the ugly history and ability to tear the nation apart that race discrimination has? If so, then biological arguments have as much place in the sex discrimination debate as they do in the race discrimination debate.

Perhaps the use of statistics in employment discrimination suits has gotten out of hand;¹⁵ perhaps the concept of bona fide occupational qualification has been interpreted away so as to be useless;¹⁶ and perhaps the antidiscrimination principle cannot sustain both a ban on discrimination and an approval of private affirmative action.¹⁷ But the notion of the federal government abandoning the position that private employment discrimination is—in the main—Big W wrong is disconcerting. The *normative* message of the Civil Rights Act must remain.

The first generation that was born into a country which had adopted that norm is now just beginning to work, teach, and raise families of its own. That generation has benefitted from the condemnation of private employment discrimination, from the knowledge that the statements of Al Campanis violated not only personal morals, but collective morals as well. At least part of the value of the original 1964 Civil Rights Act lies in the expression of that norm at a vital moment in United States history. I, like Professor Epstein, think we should be "extremely cautious"¹⁸ in these matters, but extremely cautious in deciding that the vital moment has

14. Admittedly, professional baseball may be an inappropriate example with which to challenge Professor Epstein, as its monopoly status complicates the analysis. Cf. EPSTEIN, *supra* note 10, at 79-87 (acknowledging that monopoly status may warrant antidiscrimination regulation, but concluding that "no private employer in any industry has anything close to the level of monopoly power that justifies the use of the antidiscrimination principle"). The purpose here, however, is not to work the specific example completely through the analysis, but to illustrate what biological arguments look like when applied to race.

15. *Id.* at 205-41.

16. *Id.* at 283-312.

17. *Id.* at 395-438.

18. Epstein, *supra* note 1, at 984.

passed.

“We” categorically disagree with Professor Epstein in matters of sex, reads the Civil Rights Act—just as “we” categorically disagree with Al Campanis in matters of race. Differences, for those keeping score, are easy to document; but differences need not drive public policy. The differences among us will always reveal themselves. The happy irony of being united in defiance of those differences tearing us apart, however, should remain codified in the Civil Rights Act.

Patrick D. Hughes

