

Competition, Discrimination, and Law--Posner's Comment

Becker points to India as an example of a society in which competition has been more effective than law in reducing discrimination in employment. As with most analyses of historical phenomena, determining causation is rife with uncertainty. Had the Indian government not abolished the caste system, would discrimination against untouchables have declined as much as it has?

The question is of more than academic interest from an American standpoint because we have laws against so many forms of employment discrimination--discrimination on racial grounds, of course, but also on grounds of ethnicity, religion, sex, disability, and age. We also had a caste system in the South until relatively recently. So do we need discrimination laws, or can competition be relied on to eliminate discrimination?

The answer I would give is that competition cannot be relied upon to eliminate discrimination (nor has Becker ever argued that it can be), but that, even so, laws against discrimination may not be desirable on balance, at least from the standpoint of economic efficiency, as distinct from making a political or moral statement. They may also not be very effective. I will confine my analysis largely to employment discrimination.

If an important class of customers does not want to be served by, say, black employees, or if an important class of workers does not want to work with black employees, then the tendency in the absence of a discrimination law, as Becker explains, will be segregation of the workforce: the market will be served by a combination of all-white and all-black firms. If, however, segregation raises employers' costs by more than the increase in wages that they would have to pay their white employees to induce them to work side by side with blacks, plus the loss of net revenues from white customers who do not want to be served by black employees, there will be competitive pressure on the employers to integrate their work forces. The pressure will depend in part on how strong the whites' aversion to working with or dealing with blacks is. There is no reason for competition to affect that aversion, other than by bringing the costs of it home to employers and through them to their white workers and customers.

Although law can try to eliminate employment discrimination, it is unlikely to be very effective and if it is effective it may not be efficient. Take the second point first. Suppose white employees have a strong aversion to working with blacks. Then forbidding discrimination will impose a heavy cost on the white employees. If there are more of them than there are blacks, the cost to the white employees may exceed the benefits to the black employees. Of course, an antidiscrimination law may rest on a political or moral judgment that costs imposed by thwarting a taste for discrimination should not count in the social calculus, but that is a judgment outside of economics.

Now as to the efficacy of such laws: it is bound to be limited unless enforced by savage penalties, which our discrimination laws are not. There are three reasons for their limited efficacy. The first is that an employer who wants to continue discriminating against blacks can (within limits) reconfigure his work force to reduce his demand for skills likely to be possessed by black applicants for employment, can substitute capital for labor, and can relocate to areas in which the applicant pool contains few blacks. Second, felt legal pressure to hire blacks results in "affirmative action," which both creates resentment among whites and casts some doubt on the average quality of black employees and so in effect stigmatizes the entire class. And third, because a discrimination law makes it more difficult to fire a member of the class protected by the law, it increases the cost of hiring members of the class and so increases the incentive to discriminate in hiring. There is some evidence that the passage of the Americans with Disabilities Act, forbidding discrimination against the disabled, led to an actual decline in the number of disabled persons employed.

Although an employment discrimination law is thus apt to be of limited (though not zero) efficacy, other bodies of law can play a large role—larger even than market forces—in reducing employment discrimination. Much employment is public, and public bodies can decide to incur the costs of eliminating discrimination in their work forces and hire many blacks. In addition, laws that reinforce a caste system, such as the Jim Crow laws in the southern states that persisted into the 1950s, can reduce employment opportunities for blacks beyond what private discrimination would do, for example by limiting their educational opportunities. The repeal or invalidation of such laws can thus indirectly increase black employment opportunities.

Deregulation is a minor but interesting legal change that tends to reduce discrimination. A regulated monopoly is constrained in the amount of monetary profit that it can obtain, but unconstrained in nonmonetary perks, including indulging a taste for discrimination.

Neither legal nor market forces have brought employment parity between whites and blacks in the United States. Parallel with the struggle of blacks for parity, Jews, East Asians, and immigrants generally, have made rapid economic progress and indeed (at least in the case of Jews and East Asians) largely overcome discrimination, yet without significant help from the law. An open economy provides opportunities even to victims of discrimination, especially if the victim group is large enough to achieve economies of scale in trade within the group. As members of the group grow modestly affluent and thus achieve a standard of living that enables them to assimilate to the larger culture, as by consuming similar goods and services and sending their children to good schools, discrimination against them declines because they cease to seem "different" from the majority. When members of a minority group talk and think and act like the majority and have the same tastes and in short share the same culture, the fact that they may have a different physical appearance ceases to count greatly against them, as indicated by high rates of intermarriage in the groups I have mentioned. Assimilation to the dominant culture, as yet incomplete for a great many blacks, may thus be the major force in reducing discrimination, with competition and law playing lesser roles.

Posted by Richard Posner at 09:48 AM | Comments (15) | TrackBack (0)

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Comments

"Becker points to India as an example of a society in which competition has been more effective than law in reducing discrimination in employment." is not an accurate statement. Deep seated discrimination still exists in non urban areas (which is 65% by population). And the only means of reverse discrimination or affirmative action has been through reservations in government and public sector jobs and reservations in much of the educational system.

Posted by [Sandeep](#) at September 7, 2008 11:46 AM | [direct link](#)

The analysis here is quite insightful and accurate. There still seems to be a bias in the analysis in favor of integration. There are social costs to integration of people of different ethnicities and races that can unravel the "social capital" necessary for people to act in concert spontaneously. Various sociological studies have consistently found that people withdraw from public life when confronted with too much ethnic and racial "diversity." Studies by Robert Putnam, Duke University, and the British government among others have come to the conclusion that diversity is corrosive of a shared community life.

Professor Putnam offers hope for racially diverse communities over time as Judge Posner seems to be holding open the possibility for in his concluding remarks. James Q. Wilson offers a much more pessimistic analysis of the possibilities for racial diversity in his review of

Professor Putnam's study.
<http://www.commentarymagazine.com/viewarticle.cfm/bowling-with-others-10936>

Judge Posner asserts that people do not pay attention to differing appearances over time as various people assimilate. This assertion might be true on the surface, but again, we have Professor Putnam's studies as well as the psychological tests that identify unconscious reactions most people have to those of other races. Most people instinctively recoil from people of other races. Here is a link to the Harvard Implicit Association Test that you can take online right now to see what I mean. <https://implicit.harvard.edu/implicit/>

People are generally happier and more productive in a homogeneous setting. Why disrupt this natural tendency people have to aggregate with those with whom they share more in common including biology?

Posted by Chris Graves at September 7, 2008 04:51 PM | [direct link](#)

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Posted by [beijing hotel](#) at September 7, 2008 09:08 PM | [direct link](#)

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Posted by [beijing hotel](#) at September 7, 2008 09:10 PM | [direct link](#)

Suppose white employees have a strong aversion to working with blacks. Then forbidding discrimination will impose a heavy cost on the white employees. If there are more of them than there are blacks, the cost to the white employees may exceed the benefits to the black employees.

I think your model omits critical factors. The cost to the discriminatory employees is not stable over time: for many, their aversion will decrease with familiarity. For others, aversion will increase because they will resent the fact that the familiarity is nonconsensual.

Likewise, the benefit to the employees discriminated against is also not stable over time: segregation is the justification for all kinds of unequal treatment, and obviously unfairness is easier to perpetrate when its consequences are hidden.

It is very easy to retain prejudice against people you never see. It is difficult to retain prejudice against people who make common cause with you day in and day out, for instance in the workplace.

So if it is true that anti-discrimination laws decrease the cost of being in the protected category for all time, while the cost to those who prefer to discriminate is front-loaded, then it is an investment with infinite present value. Thus it follows that we should adopt anti-discrimination laws that most decrease the cost of being in the protected category. Presumably those would be laws that are as stringent as possible without causing "nonconsensual familiarity resentment" to exceed the benefits of familiarity.

(This ignores the decreased liquidity of the labor market, which I'll leave to the politicians.)

Posted by Daniel at September 7, 2008 11:59 PM | [direct link](#)

Judge Posner wrote:
"Neither legal nor market forces have brought employment parity between whites and blacks in the United States. Parallel with the struggle of blacks for parity, Jews, East Asians, and immigrants generally, have made rapid economic progress and indeed (at least in the case of Jews and East Asians) largely overcome discrimination, yet without significant help from the law."

A couple of assumptions that I would challenge:
First, a serious black presidential candidate would have been unthinkable only a few decades ago. So I would challenge the notion that steady application of legal/regulatory protections has had no significant impact on racial parity. Second, I would argue that emphasis on education and resulting socio-economic advancement and access to legal recourse among Jewish and East Asian immigrant groups has empowered those groups so as to create a significant deterrent to persons inclined to engage in discrimination. To be sure, incidents of hatred/discrimination -- or at least the inclination to hate -- continue against all of the ethnic/religious groups discussed. But clearly some groups consolidate their socio-economic power more effectively than others in order to protect and advance group interests. One need not indulge lunatic-fringe conspiracy theories to acknowledge this simple fact.

All of this really reduces to the fundamental question of whether or how government systems can help the black community gain traction in order to operate more competitively and effectively. "Diversity training" in the workplace, which insists that we should "celebrate diversity," rather than merely tolerate it, breeds cynicism and resentment. But the laissez-faire/Darwinist approach to dealing with economic racial inequalities is hideous.

Posted by Dan at September 8, 2008 01:07 PM | [direct link](#)

If I remember correctly, the Caste system was imposed from the top down by a conquering tribe on the Indian subcontinent many years ago. Subsequently, the conquerers, organized their "new state" on various trade/craft/ethnic groupings. Starting with Brahmins at the top and the Untouchables at the bottom tier of trade craft work (who else are you going to get to cleanup the garbage and sewers). As for the Untouchables emancipation, undoubtedly economic advancement has broken down some barriers, but as Sandeep has pointed out, hiring quota's have gone much further in advancing the Untouchable class.

Now for the U.S. experience. This starts with the expansion of slavery into the new territories. Ever wonder why the North was so against slavery? It really had nothing to do with "moral qualms" per se, but with the direct competition of free-independent farmers and the slave system of the plantation owners. Not too mention, the fears of a nascent Trade Unionist movement that was fearful of having to compete with industrial operations manned by slaves. As Lincoln himself said, "This Nation will become all one thing or all another... a house divided against itself cannot stand..." and as they say, the rest is history. As for the failure of the integration of Blacks into the American mainstream, this can be laid directly at the doorstep of the failure of Reconstruction and the South's return to a modified form of the status quo. Although, the Government has gone far in correcting the failures of Reconstruction.

As for the the development of various religious,national and ethnic groups and their integration into American Society this can be explained in one phrase, "Mutual Aid Societies". Something Blacks seem not to have been able to develop on their own.

Posted by neilehat at September 8, 2008 07:18 PM | [direct link](#)

I see a couple of remarks made by neilehat just above that are thought-provoking. Here is the first one that I want to comment on:

"As for the failure of the integration of Blacks into the American mainstream, this can be laid directly at the doorstep of the failure of Reconstruction and the South's return to a modified form of the status quo. Although, the Government has gone far in correcting the failures of Reconstruction."

My comment: Neilehat, if you think forced busing and affirmative action produced a strong reaction in our lifetime, just imagine what effect the following approach to race relations would have: the Federal government marching troops into your city, burning it, confiscating land and redistributing it to a disfavored minority, disenfranchising the majority, doing all of this as the military continues to occupy your region. Is it any wonder that Southerners reacted rather negatively to Reconstruction and still do (note my reaction)? Forced association not only does not work (see Putnam's study that I reference in my remarks to Posner's essay posted above) but breeds intense resentment. As Lyndon Johnson said when he signed the Civil Rights Act, "We have lost the South for a generation." It is longer than a generation.

Finally on this point, the South is in no way unique on this issue. People around the world react in a similar way when confronted with large numbers of people of another race, ethnicity or culture in close proximity. For example, Northern cities were and still are more segregated than are Southern cities. Northerners have always taken steps to maintain racial segregation, e.g. see *Sundown Towns: A Hidden Dimension of American Racism* by James W. Loewen.

Now, I do find your concluding remarks insightful:

"As for the the development of various religious,national and ethnic groups and their integration into American Society this can be explained in one phrase, "Mutual Aid Societies". Something Blacks seem not to have been able to develop on their own."

My comments: I agree with this point. Other immigrant groups were able to form communities and help each other until they assimilated. Why have blacks been different? This is an interesting question. One reason might very well be the Civil Rights laws instituted after the Civil War as well as in the 1960's that allowed the more accomplished and responsible blacks to leave their communities leaving the less adaptable behind before individuals could develop the necessary skills and before the community could develop the social infrastructure to pull their fellows up the economic ladder.

Posted by Chris Graves at September 8, 2008 10:28 PM | [direct link](#)

Chris, You're quite right in pointing out one of the main failures of Reconstruction. But the concerns of Congress and the President at the time were more pedestrian and political in nature. Such that, how does a Nation keep Unreconstructed Rebels from regrouping and striking at the Union once again (the oath of allegiance is meaningless)? The answer was simple, division of the South into Military Districts and it's occupation.

The rise of Jim Crow was just one method to circumvent the integration of an "inferior" into the mainstream and protect the "privileges" of a separate class. "The South shall rise again"!

Posted by neilehat at September 9, 2008 05:16 AM | [direct link](#)

If minorities develop a culture of education and stability, they will be integrated into American society. Religious and /or ethnic discrimination despite qualification is irrational and counterproductive. The strictest Islamic states will never be able to compete in an open market until women are equalized.

Posted by Jim at September 9, 2008 08:15 AM | [direct link](#)

I agree that the market provides the greatest gains against discrimination. I believe that the market and our story hungry media would do a better job reducing discrimination than our laws. While a fluid job seekers market has helped, the only discrimination laws that I don't think the market and media can be trusted to police are maternity laws. In a competitive market young professional females, expecting mothers, and recent mothers on average will not be viewed as productive as their male counterparts because of the time of (or expected time off). Laws that require offering time off for each child's birth for both male and female employees goes a long way to reducing this problem.

Posted by SS at September 9, 2008 09:56 AM | [direct link](#)

It's undeniable that discrimination will have an impact on production costs and market clearing prices. Discrimination on one end represents some inefficiency. But producers and consumers, I think, tend to typically feel that it's some sort of signalling device that helps establish a level of risk. While in the past, the most obvious area of discrimination in the United States is along racial and ethnic lines, the same principles can be applied to

consumer and producer choices even in making hiring and purchasing decisions based upon the school that a new employee attended or the grades that the employee received.

Yes, discrimination (based on race or ethnic background or even educational pedigree) arguably leads to a competitive disadvantage. But I believe discriminatory behavior persists because its viewed by the discriminator as a way of deciding who is a riskier new employee or customer or supplier or even social partner.

Enacting laws to banish discrimination do nothing to mitigate the discriminators fears concerning the consequences of serving a less credit worthy customer or hiring a less trustworthy or competent employee. Posner's position concerning assimilation goes far further in making the common supplier or customer more comfortable in overlooking other outward signs that might otherwise point to heightened risk.

Posted by Tom at September 9, 2008 02:23 PM | [direct link](#)

Neilehat,

Thanks for your replies to my comments on your original post. I would agree with you that the Congress at the time of the close of the Civil War had more narrow concerns than to remold human nature and create a multi-cultural, multi-racial society based on equality of status for all. In fact, they rejected such a vision themselves. Consider the same Congress voting to segregate schools in Washington, D.C.

I do not believe that the South, though, was in any position to restart the war again anytime soon. The Southern economy, population, army, leadership, and morale of the average people had been decimated by war. I believe that the Radical Republicans' motive for maintaining Reconstruction so long was to disenfranchise white Southern Democrats and enfranchise black Republicans to gain and hold political power indefinitely in the White House and Congress. They also sought to punish the South for seceding. Northern whites just got a kick out of gloating and dominating an out-group, viz. white Southerners. There were also economic interests wanting to handicap competition from the South. There was really no justification for Reconstruction past a couple of years after the war ended. Of course, it is questionable that the Federal government had any justification for its military actions to stop secession in the first place.

As for Jim Crow laws, I see them as justifiable in terms of allowing white Southerners to live in close proximity to blacks and foster mutually beneficial relationships. Without that kind of legal protection for whites, we see what happens--white flight and greater income inequality.

I believe that the best solution after the war would have been to free the slaves, pay them reparations taken from sales of slave-holders' property, and then repatriate them to Africa as Lincoln proposed (at times).

As I have argued above, there is overwhelming evidence that people who are very different in race, culture, language, etc. cannot live together in a common community as social equals. This is sad, but it is true of human nature as we know it. I believe a Burkean approach of leaving each race, ethnicity, linguistic group, culture to its own evolutionary trajectory is salutary for all concerned. I believe such an approach was what Daniel Patrick Moynihan was getting at when he suggested that the best approach to the problem of the black underclass might be one of "benign neglect."

Thanks for your concluding, "The South shall rise again!" We have risen thanks to people such as Henry Grady and other advocates of the New South. Unfortunately, their vision is pretty much that of Hamilton that shaped the North. We now have the benefits but also the costs of the Northern system that Jefferson identified so accurately in his criticism of Hamilton's vision.

Posted by Chris Graves at September 9, 2008 06:53 PM | [direct link](#)

The Big Picture:
<http://weblog.ecommunica.org/gary.lammert/>

Posted by The Economic fracatlist at September 9, 2008 07:09 PM | [direct link](#)

"Parallel with the struggle of blacks for parity, Jews, East Asians, and immigrants generally, have made rapid economic progress and indeed (at least in the case of Jews and East Asians) largely overcome discrimination, yet without significant help from the law."

Depends on the field. Asians, especially Asian men, are still heavily discriminated against in entertainment where customers care at least as much about looks as they do about ability. What to do about this, if anything?

Posted by [RR](#) at September 11, 2008 11:06 AM