Chapter VII

Capitalism and Discrimination

IT IS A STRIKING HISTORICAL FACT that the development of capitalism has been accompanied by a major reduction in the extent to which particular religious, racial, or social groups have operated under special handicaps in respect of their economic activities; have, as the saying goes, been discriminated against. The substitution of contract arrangements for status arrangements was the first step toward the freeing of the serfs in the Middle Ages. The preservation of Jews through the Middle Ages was possible because of the existence of a market sector in which they could operate and maintain themselves despite official persecution. Puritans and Quakers were able to migrate to the New World because they could accumulate the funds to do so in the market despite disabilities imposed on

them in other aspects of their life. The Southern states after the Civil War took many measures to impose legal restrictions on Negroes. One measure which was never taken on any scale was the establishment of barriers to the ownership of either real or personal property. The failure to impose such barriers clearly did not reflect any special concern to avoid restrictions on Negroes. It reflected rather, a basic belief in private property which was so strong that it overrode the desire to discriminate against Negroes. The maintenance of the general rules of private property and of capitalism have been a major source of opportunity for Negroes and have permitted them to make greater progress than they otherwise could have made. To take a more general example, the preserves of discrimination in any society are the areas that are most monopolistic in character, whereas discrimination against groups of particular color or religion is least in those areas where there is the greatest freedom of competition.

As pointed out in chapter i, one of the paradoxes of experience is that, in spite of this historical evidence, it is precisely the minority groups that have frequently furnished the most vocal and most numerous advocates of fundamental alterations in a capitalist society. They have tended to attribute to capitalism the residual restrictions they experience rather than to recognize that the free market has been the major factor enabling these restrictions to be as small as they are.

We have already seen how a free market separates economic efficiency from irrelevant characteristics. As noted in chapter i, the purchaser of bread does not know whether it was made from wheat grown by a white man or a Negro, by a Christian or a Jew. In consequence, the producer of wheat is in a position to use resources as effectively as he can, regardless of what the attitudes of the community may be toward the color, the religion, or other characteristics of the people he hires. Furthermore, and perhaps more important, there is an economic incentive in a free market to separate economic efficiency from other characteristics of the individual. A businessman or an entrepreneur who expresses preferences in his business activities that are not related to productive efficiency is at a disadvantage compared to other individuals who do not. Such an

individual is in effect imposing higher costs on himself than are other individuals who do not have such preferences. Hence, in a free market they will tend to drive him out.

This same phenomenon is of much wider scope. It is often taken for granted that the person who discriminates against others because of their race, religion, color, or whatever, incurs no costs by doing so but simply imposes costs on others. This view is on a par with the very similar fallacy that a country does not hurt itself by imposing tariffs on the products of other countries.[1] Both are equally wrong. The man who objects to buying from or working alongside a Negro, for example, thereby limits his range of choice. He will generally have to pay a higher price for what he buys or receive a lower return for his work. Or, put the other way, those of us who regard color of skin or religion as irrelevant can buy some things more cheaply as a result.

As these comments perhaps suggest, there are real problems in defining and interpreting discrimination. The man who exercises discrimination pays a price for doing so. He is, as it were, "buying" what he regards as a "product." It is hard to see that discrimination can have any meaning other than a "taste" of others that one does not share. We do not regard it as "discrimination"—or at least not in the same invidious sense—if an individual is willing to pay a higher price to listen to one singer than to another, although we do if he is willing to pay a higher price to have services rendered to him by a person of one color than by a person of another. The difference between the two cases is that in the one case we share the taste, and in the other case we do not. Is there any difference in principle between the taste that leads a householder to prefer an attractive servant to an ugly one and the taste that leads another to prefer a Negro to a white or a white to a Negro, except that we sympathize and agree with the one taste and may not with the other? I do not mean to say that all tastes are equally good.

[1] In a brilliant and penetrating analysis of some economic issues involved in discrimination, Gary Becker demonstrates that the problem of discrimination is almost identical in its logical structure with that of foreign trade and tariffs. See G. S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957).

On the contrary, I believe strongly that the color of a man's skin or the religion of his parents is, by itself, no reason to treat him differently; that a man should be judged by what he is and what he does and not by these external characteristics. I deplore what seem to me the prejudice and narrowness of outlook of those whose tastes differ from mine in this respect and I think the less of them for it. But in a society based on free discussion, the appropriate recourse is for me to seek to persuade them that their tastes are bad and that they should change their views and their behavior, not to use coercive power to enforce my tastes and my attitudes on others.

FAIR EMPLOYMENT PRACTICES LEGISLATION

Fair employment practice commissions that have the task of preventing "discrimination" in employment by reason of race, color, or religion have been established in a number of states. Such legislation clearly involves interference with the freedom of individuals to enter into voluntary contracts with one another. It subjects any such contract to approval or disapproval by the state. Thus it is directly an interference with freedom of the kind that we would object to in most other contexts. Moreover, as is true with most other interferences with freedom, the individuals subjected to the law may well not be those whose actions even the proponents of the law wish to control.

For example, consider a situation in which there are grocery stores serving a neighborhood inhabited by people who have a strong aversion to being waited on by Negro clerks. Suppose one of the grocery stores has a vacancy for a clerk and the first applicant qualified in other respects happens to be a Negro. Let us suppose that as a result of the law the store is required to hire him. The effect of this action will be to reduce the business done by this store and to impose losses on the owner. If the preference of the community is strong enough, it may even cause the store to close. When the owner of the store hires white clerks in preference to Negroes in the absence of the law, he may not be expressing any preference or preju-

dice or taste of his own. He may simply be transmitting the tastes of the community. He is, as it were, producing the services for the consumers that the consumers are willing to pay for. Nonetheless, he is harmed, and indeed may be the only one harmed appreciably, by a law which prohibits him from engaging in this activity, that is, prohibits him from pandering to the tastes of the community for having a white rather than a Negro clerk. The consumers, whose preferences the law is intended to curb, will be affected substantially only to the extent that the number of stores is limited and hence they must pay higher prices because one store has gone out of business. This analysis can be generalized. In a very large fraction of cases, employers are transmitting the preference of either their customers or their other employees when they adopt employment policies that treat factors irrelevant to technical physical productivity as relevant to employment. Indeed, employers typically have an incentive, as noted earlier, to try to find ways of getting around the preferences of their consumers or of their employees if such preferences impose higher costs upon them.

The proponents of FEPC argue that interference with the freedom of individuals to enter into contracts with one another with respect to employment is justified because the individual who refuses to hire a Negro instead of a white, when both are equally qualified in terms of physical productive capacity, is harming others, namely, the particular color or religious group whose employment opportunity is limited in the process. This argument involves a serious confusion between two very different kinds of harm. One kind is the positive harm that one individual does another by physical force, or by forcing him to enter into a contract without his consent. An obvious example is the man who hits another over the head with a blackjack. A less obvious example is stream pollution discussed in chapter ii. The second kind is the negative harm that occurs when two individuals are unable to find mutually acceptable contracts, as when I am unwilling to buy something that someone wants to sell me and therefore make him worse off than he would be if I bought the item. If the community at large has a preference for blues singers rather than for opera singers, they are certainly increasing the economic well-being

of the first relative to the second. If a potential blues singer can find employment and a potential opera singer cannot, this simply means that the blues singer is rendering services which the community regards as worth paying for whereas the potential opera singer is not. The potential opera singer is "harmed" by the community's taste. He would be better off and the blues singer "harmed" if the tastes were the reverse. Clearly, this kind of harm does not involve any involuntary exchange or an imposition of costs or granting of benefits to third parties. There is a strong case for using government to prevent one person from imposing positive harm, which is to say, to prevent coercion. There is no case whatsoever for using government to avoid the negative kind of "harm." On the contrary, such government intervention reduces freedom and limits voluntary co-operation.

FEPC legislation involves the acceptance of a principle that proponents would find abhorrent in almost every other application. If it is appropriate for the state to say that individuals may not discriminate in employment because of color or race or religion, then it is equally appropriate for the state, provided a majority can be found to vote that way, to say that individuals must discriminate in employment on the basis of color, race or religion. The Hitler Nuremberg laws and the laws in the Southern states imposing special disabilities upon Negroes are both examples of laws similar in principle to FEPC. Opponents of such laws who are in favor of FEPC cannot argue that there is anything wrong with them in principle, that they involve a kind of state action that ought not to be permitted. They can only argue that the particular criteria used are irrelevant. They can only seek to persuade other men that they should use other criteria instead of these.

If one takes a broad sweep of history and looks at the kind of things that the majority will be persuaded of if each individual case is to be decided on its merits rather than as part of a general principle, there can be little doubt that the effect of a widespread acceptance of the appropriateness of government action in this area would be extremely undesirable, even from the point of view of those who at the moment favor FEPC. If, at the moment, the proponents of FEPC are in a

position to make their views effective, it is only because of a constitutional and federal situation in which a regional majority in one part of the country may be in a position to impose its views on a majority in another part of the country.

As a general rule, any minority that counts on specific majority action to defend its interests is short-sighted in the extreme. Acceptance of a general self-denying ordinance applying to a class of cases may inhibit specific majorities from exploiting specific minorities. In the absence of such a self-denying ordinance, majorities can surely be counted on to use their power to give effect to their preferences, or if you will, prejudices, not to protect minorities from the prejudices of majorities.

To put the matter in another and perhaps more striking way, consider an individual who believes that the present pattern of tastes is undesirable and who believes that Negroes have less opportunity than he would like to see them have. Suppose he puts his beliefs into practice by always choosing the Negro applicant for a job whenever there are a number of applicants more or less equally qualified in other respects. Under present circumstances should he be prevented from doing so? Clearly the logic of the FEPC is that he should be.

The counterpart to fair employment in the area where these principles have perhaps been worked out more than any other, namely, the area of speech, is "fair speech" rather than free speech. In this respect the position of the American Civil Liberties Union seems utterly contradictory. It favors both free speech and fair employment laws. One way to state the justification for free speech is that we do not believe that it is desirable that momentary majorities decide what at any moment shall be regarded as appropriate speech. We want a free market in ideas, so that ideas get a chance to win majority or near-unanimous acceptance, even if initially held only by a few. Precisely the same considerations apply to employment or more generally to the market for goods and services. Is it any more desirable that momentary majorities decide what characteristics are relevant to employment than what speech is appropriate? Indeed, can a free market in ideas long be maintained if a free market in goods and services is destroyed? The

ACLU will fight to the death to protect the right of a racist to preach on a street corner the doctrine of racial segregation. But it will favor putting him in jail if he acts on his principles by refusing to hire a Negro for a particular job.

As already stressed, the appropriate recourse of those of us who believe that a particular criterion such as color is irrelevant is to persuade our fellows to be of like mind, not to use the coercive power of the state to force them to act in accordance with our principles. Of all groups, the ACLU should be the first both to recognize and proclaim that this is so.

RIGHT-TO-WORK LAWS

Some states have passed so-called "right-to-work" laws. These are laws which make it illegal to require membership in a union as a condition of employment.

The principles involved in right-to-work laws are identical with those involved in FEPC. Both interfere with the freedom of the employment contract, in the one case by specifying that a particular color or religion cannot be made a condition of employment; in the other, that membership in a union cannot be. Despite the identity of principle, there is almost 100 per cent divergence of views with respect to the two laws. Almost all who favor FEPC oppose right to work; almost all who favor right to work oppose FEPC. As a liberal, I am opposed to both, as I am equally to laws outlawing the so-called "yellow-dog" contract (a contract making non-membership in a union a condition of employment).

Given competition among employers and employees, there seems no reason why employers should not be free to offer any terms they want to their employees. In some cases employers find that employees prefer to have part of their remuneration take the form of amenities such as baseball fields or play facilities or better rest facilities rather than cash. Employers then find that it is more profitable to offer these facilities as part of their employment contract rather than to offer higher cash wages. Similarly, employers may offer pension plans, or require participation in pension plans, and the like. None of this involves any interference with the freedom of individuals to

find employment. It simply reflects an attempt by employers to make the characteristics of the job suitable and attractive to employees. So long as there are many employers, all employees who have particular kinds of wants will be able to satisfy them by finding employment with corresponding employers. Under competitive conditions the same thing would be true with respect to the closed shop. If in fact some employees would prefer to work in firms that have a closed shop and others in firms that have an open shop, there would develop different forms of employment contracts, some having the one provision, others the other provision.

As a practical matter, of course, there are some important differences between FEPC and right to work. The differences are the presence of monopoly in the form of union organizations on the employee side and the presence of federal legislation in respect of labor unions. It is doubtful that in a competitive labor market, it would in fact ever be profitable for employers to offer a closed shop as a condition of employment. Whereas unions may frequently be found without any strong monopoly power on the side of labor, a closed shop almost never is. It is almost always a symbol of monopoly power.

The coincidence of a closed shop and labor monopoly is not an argument for a right-to-work law. It is an argument for action to eliminate monopoly power regardless of the particular forms and manifestations which it takes. It is an argument for more effective and widespread antitrust action in the labor field.

Another special feature that is important in practice is the conflict between federal and state law and the existence at the moment of a federal law which applies to all the states and which leaves a loophole for the individual state only through the passage of a right-to-work law. The optimum solution would be to have the federal law revised. The difficulty is that no individual state is in a position to bring this about and yet people within an individual state might wish to have a change in the legislation governing union organization within their state. The right-to-work law may be the only effective way in which this can be done and therefore the lesser of evils. Partly,

I suppose, because I am inclined to believe that a right-to-work law will not in and of itself have any great effect on the monopoly power of the unions, I do not accept this justification for it. The practical arguments seem to me much too weak to outweigh the objection of principle.

SEGREGATION IN SCHOOLING

Segregation in schooling raises a particular problem not covered by the previous comments for one reason only. The reason is that schooling is, under present circumstances, primarily operated and administered by government. This means that government must make an explicit decision. It must either enforce segregation or enforce integration. Both seem to me bad solutions. Those of us who believe that color of skin is an irrelevant characteristic and that it is desirable for all to recognize this, yet who also believe in individual freedom, are therefore faced with a dilemma. If one must choose between the evils of enforced segregation or enforced integration, I myself would find it impossible not to choose integration.

The preceding chapter, written initially without any regard at all to the problem of segregation or integration, gives the appropriate solution that permits the avoidance of both evils — a nice illustration of how arrangements designed to enhance freedom in general cope with problems of freedom in particular. The appropriate solution is to eliminate government operation of the schools and permit parents to choose the kind of school they want their children to attend. In addition, of course, we should all of us, insofar as we possibly can, try by behavior and speech to foster the growth of attitudes and opinions that would lead mixed schools to become the rule and segregated schools the rare exception.

If a proposal like that of the preceding chapter were adopted, it would permit a variety of schools to develop, some all white, some all Negro, some mixed. It would permit the transition from one collection of schools to another — hopefully to mixed schools — to be gradual as community attitudes changed. It would avoid the harsh political conflict that has been doing so much to raise social tensions and disrupt the community. It

would in this special area, as the market does in general, permit co-operation without conformity.[2]

The state of Virginia has adopted a plan having many features in common with that outlined in the preceding chapter. Though adopted for the purpose of avoiding compulsory integration, I predict that the ultimate effects of the law will be very different—after all, the difference between result and intention is one of the primary justifications of a free society; it is desirable to let men follow the bent of their own interests because there is no way of predicting where they will come out. Indeed, even in the early stages there have been surprises. I have been told that one of the first requests for a voucher to finance a change of school was by a parent transferring a child from a segregated to an integrated school. The transfer was requested not for this purpose but simply because the integrated school happened to be the better school educationally. Looking further ahead, if the voucher system is not abolished, Virginia will provide an experiment to test the conclusions of the preceding chapter. If those conclusions are right, we should see a flowering of the schools available in Virginia, with an increase in their diversity, a substantial if not spectacular rise in the quality of the leading schools, and a later rise in the quality of the rest under the impetus of the leaders.

On the other side of the picture, we should not be so naïve as to suppose that deep-seated values and beliefs can be uprooted in short measure by law. I live in Chicago. Chicago has no law compelling segregation. Its laws require integration. Yet in fact the public schools of Chicago are probably as thoroughly segregated as the schools of most Southern cities. There is almost no doubt at all that if the Virginia system were introduced in Chicago, the result would be an appreciable decrease in segregation, and a great widening in the opportunities available to the ablest and most ambitious Negro youth.

[2] To avoid misunderstanding, it should be noted explicitly that in speaking of the proposal in the preceding chapter, I am taking it for granted that the minimum requirements imposed on schools in order that vouchers be usable do not include whether the school is segregated or not.