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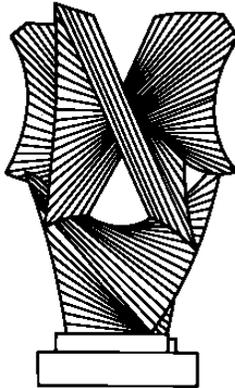
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DEVELOPING A TASTE FOR NOT BEING DISCRIMINATED AGAINST

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Developing a Taste for Not Being Discriminated Against

Mary Anne Case*

Let me begin this review essay on Ian Ayres's *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* and *Crossroads, Directions, and a New Critical Race Theory*, edited by Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris,¹ in the classic style of outsider jurisprudence, with a story of my own experience.² Ian Ayres's *Fair Driving*³ changed my life more directly than any other piece of legal scholarship has before or since. At the time he published this, the first installment of his empirical research into the higher prices car dealers tended to offer black and female customers, I had just begun teaching at the University of Virginia School of Law, where Ayres was then a visiting professor. I had moved to Charlottesville, Virginia from my native Manhattan anticipating that I would need to make many changes in my life, not the least of which would be the acquisition of a driver's license and a car. Getting the driver's license proved surprisingly easy. A decade later, however, I have yet to buy a car. There are many reasons for this, but I fear one of them is that among the things I read before heading out to the car dealerships to negotiate a purchase, in addition to standard informational material such as *Consumer Reports*, was Ayres's work. *Fair Driving* impressed on me the likelihood that, at the very least, I as a woman would be given a less

* Arnold I. Shure Professor of Law, University of Chicago Law School. I am grateful to the other symposium participants for their encouragement and patience; to organizer Clark Freshman for putting it all together; to the Square Table of Bigelow fellows, Douglas Baird, bGary Becker, Lauren Berlant, Robyn Borok, Adam Cox, Adrienne Davis, Mary Duros, Margaret Schilt, Richard Epstein, Eric Hurst, Jenia Iontcheva, Frances Kamm, Saul Levmore, Martha McCluskey, Tracey Meares, Marsha Nagorsky, Carl Nightingale, Mary Patillo-McCoy, Dick Posner, Eric Posner, Todd Preuss, Gina Sanders, Cass Sunstein, David Weisbach, and Iris Young for brainstorming and bibliographic help; and to Virginia Kim for valuable research assistance. Research support for this project came from the Arnold and Frieda Shure Research Fund of the University of Chicago.

1. Although everything I have to say in this essay was sparked by review symposium organizer Clark Freshman's mission of reading the two books in conjunction with one another, this essay is not in any conventional sense a book review, but rather an exploration of what, as I see it, lies at the intersection of the two books and the significance I see in the contrasts between them. Let me at the outset stress that the task of considering these two works in relationship to one another will inevitably mean that I cannot consider either one in all its richness and will be forced to omit mention of those valuable portions of both books that do not fall at the intersection of the two as I have construed that intersection for the purposes of this essay. The only consolation I can offer for this is that the other symposium participants, having each focused on a different intersection, highlight some of the portions of both works I overlook. Additionally, I have not attempted to summarize the content of either book, in part because other symposium participants have done so better than I could hope to without being redundant. See, e.g., Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 101 (2003).

2. Or, to put it another way, "a trendy note of personal confession." AYRES, p. 427.

3. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). *Fair Driving* is the foundation for Part I of *Pervasive Prejudice?*

favorable opening bid from the dealer than a man and that there was a good chance my final deal could be less favorable as well. I have an extremely strong taste for not being discriminated against. While I generally try not to be paranoid about the extent to which my sex may factor negatively into the way I am treated, Ayres's reinforcement of my suspicions was enough to paralyze my purchasing power. Not that I was too paralyzed to negotiate. To the contrary, I attacked the negotiations with more than my usual toughness (this in genteel Charlottesville) and in short order was offered deals knowledgeable friends urged me to take, better deals than some males of my acquaintance had been offered. But still, I was suspicious and unsatisfied. For me the question was not whether I could get a better deal than a man, but whether I could get a better deal if I were a man, a question I could not satisfactorily answer.⁴ Just the thought of some dealer saying to himself, after I had signed on the dotted line, "There's another extra hundred bucks from another sucker female," was enough to cause me to find every offered price unsatisfactory.

From this personal experience I draw the two main themes I shall explore in this essay: first, the need to examine and articulate far more precisely the victim's preferences and concerns in shaping remedies for many of the kinds of discrimination Ayres and the *Crossroads* reader address; and second, the relationship of anecdote to data. One of the most striking contrasts between *Pervasive Prejudice?* and *Crossroads* is that the former centers on the perspective of the perpetrators of discrimination and the latter on the perspective of the victims.⁵ By this I do not mean that the former is written primarily by a white male⁶ and the contributors to the latter are [almost] all people of color or white women. Rather, I mean that Ayres's main concern is to establish to what extent and why discriminators discriminate, while the *Crossroads* reader stresses, in classic Critical Race

4. This is the question Ayres tries his best to isolate, in seeking to reduce the differences between his testers to their identity categories by rigidly controlling their dress, behavior, negotiating style, and background information to make them as identical as possible. AYRES, p. 26-7.

5. This difference in perspectives is only a tendency; it is not categorical. For example, Ayres begins his book with an Eddie Murphy sketch about the experience of discrimination from the victim's perspective and, in his important contribution to *Crossroads*, Devon Carbado carefully enumerates the advantages of being what he calls "[p]rivileged [p]erpetrators . . . [t]hose of us who unquestionably accept the racial, gender, and heterosexual privileges we have, and those of us who fail to acknowledge our victimless status vis-à-vis racism, sexism and homophobia . . ." Devon W. Carbado, *Straight Out of the Closet: Race, Gender, and Sexual Orientation*, in *CROSSROADS*, p. 221.

6. Although Ayres's name alone appears on the jacket, individual chapters in the book are co-authored with, among others, a woman, Laura G. Dooley.

Theory fashion, the voices from the bottom and how discrimination affects them.

Taking seriously the emphasis on “Crossroads” and “Directions,” Frank Valdes urges, in his contribution to the reader he helped edit, the need for “postsubordination vision as jurisprudential method,” for “shifting the focus to visions, agendas, and projects of substantive security” so that “critical legal scholars from varied subject positions constructively can begin coalitional OutCrit theorizing by imagining and articulating the substantive end goal of our respective yet collective antsubordination activities and communities.”⁷ Valdes notes that “it sometimes is useful to imagine and spell out for oneself (and others) not only what the project is ‘against’ but what also it is ‘for.’”⁸ Ayres similarly imagines his book to be potentially the beginning of a much larger project of research. After setting forth the results of his “intensive investigation of a smaller set of markets” and suggesting that “discrimination *may* occur in a wide range of retail markets,”⁹ Ayres ends his book by urging that “[g]overnment should more systematically test for disparate treatment across a wide variety of markets.”¹⁰ I agree with Ayres that obtaining and disseminating such information would be quite valuable. But because I also agree with Valdes in particular that spelling out what we are for is useful, and with critical race theorists more generally that listening to the voices from the bottom is necessary, let me urge as well that more systematic data gathering, testing, surveying, analysis, and theorizing should also be done from the perspective of the victims of discrimination in the retail markets.

What I have in mind is this: for some time, the motives of one who discriminates, including the so-called taste for discrimination, have been the subject of a well-developed taxonomy.¹¹ We now understand, for example, that some sellers may have a personal

7. Francisco Valdes, *Outsider Scholars, Critical Race Theory, and “OutCrit” Perspectivity: Postsubordination Vision as Jurisprudential Method*, in *CROSSROADS*, p. 399, 403. In urging more such constructive imaginings, particularly in the area of remedies for the sort of discrimination in consumer transactions highlighted by Ayres’s research, I do not mean to suggest that *Crossroads* is devoid of the sort of work Valdes calls for more of. For example, Julie A. Su and Eric K. Yamamoto’s chapter, *Critical Coalitions: Theory and Praxis*, details the emergence of alliances between Asian and Latina garment workers in litigation and negotiations. *CROSSROADS*, p. 379-84.

8. Valdes, *supra* note 7, at 403.

9. AYRES, p. 11.

10. AYRES, p. 397.

11. My colleague, Gary Becker, was one of those instrumental in beginning to develop this taxonomy. *See, e.g.*, GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1957).

aversion to contact with blacks;¹² they may prefer to discourage black customers altogether and pay a price in lost sales to do so. Others may not mind the contact so long as it leaves blacks in a one-down position; they may actually prefer to have some black customers, so long as they can have the satisfaction of overcharging them or treating them shabbily. Still others may have no personal aversion to blacks, but believe their core clientele has such an aversion; they may discourage black customers to curry favor with white customers or to retain what for them is a high-class lily-white image from which they hope to profit monetarily. And there are others who overcharge or underserve black customers, not out of animus, but because they believe them to be suckers more likely prepared to pay inflated prices or to put up with shoddy treatment. Additional forms of statistical discrimination include merchants acting on the belief that blacks are more likely to rob (and therefore need to be followed around), less likely to buy (and therefore need less sales attention), more likely to default on credit (and therefore should be extended worse terms or no credit), less likely to tip well or be repeat customers (and therefore need not be treated as courteously). In addition to spelling out these important varieties of discriminatory intent, economists have modeled the costs and the price of discrimination in an elaborate literature. As I shall discuss below with reference to Ayres's work, it is well understood that the effective remedy for discrimination may depend on where in the taxonomy of discrimination a particular actor falls.¹³

I have been surprised not to find in the literature a comparably well-worked out taxonomy on the taste for not being discriminated against, a taxonomy that focuses on the victim's perspective rather than the perpetrator's.¹⁴ To be sure, a careful reader of

12. I use blacks here only by way of example and because most of Ayres's research focuses on them. I could substitute any other group likely to be the targets of discrimination, for example women, sexual minorities, Latinos, Asians, aboriginals, or immigrants, to name just a few of the groups included in the *Crossroads* reader's big tent of "coalitional theorizing."

13. Ayres devotes a substantial portion of *Pervasive Prejudice?* to using the evidence he has gathered to tease out distinctions among the motives of those discriminating in the transactions he studies. *See, e.g.*, ch. 3, *Toward Causal Explanation*, in AYRES, pp. 45-87 (including a game-theoretical model of animus and statistical discrimination in bargaining).

14. I do not mean to suggest that no work at all has been done on this question. Much of what I have been able to find in either legal or economic literature centers on variations of the so-called Ultimatum Game, in which Proposer is given a sum of money to divide with another player, Responder, who must either accept or reject the offered division. In the event of Responder's rejection of Proposer's offer, the sum of money is returned to the experimenter and both players get nothing. The fact that Proposers most often offer something close to a 50-50 split and Responders most often reject offers of less than 20% of the total sum is seen to provide insight into a taste for fairness. *See, e.g.*, Werner Güth, Rolf Schmittberger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. OF ECON. BEHAV. AND ORG. 367

Ayres's work will observe that he mentions most of the major components such a taxonomy would contain. For example, he notes that not only price and product quality, but also "discretionary aspects of service" may vary depending on a customer's race or gender. These discretionary aspects, Ayres notes, can include quantifiable and less quantifiable transaction costs such as longer waiting time, less friendly or accommodating service, and less willingness to accede to special requests.¹⁵ As I shall explain below, a more systematic enumeration of these components, including their monetary and less tangible costs, as well as survey and other research on the relative importance and value of each to consumers, would, in my view, be a useful part of "planning the journey" Valdes calls for.¹⁶

I realize that the sort of thing I am here advocating may not be the kind of postsubordination vision Valdes is most interested in. It may be too limited in its horizon: it is a vision of the second best, not of the world after the revolution. According to Ayres, "[s]ome civil rights advocates seem to worry that even acknowledging the possibility that discrimination may have a variety of causes undermines the moral claims that discrimination is wrong."¹⁷ Similarly, some of those represented in *Crossroads* may worry that my call for an increasing emphasis on distinguishing among the variety of effects of discrimination may not only undermine the moral claim that all effects of discrimination are harmful, but also give a falsely conciliatory impression that victims are prepared to tolerate some forms of discrimination in return for being exempted from others. Of course the antisubordination communities represented in *Crossroads* would say of their postsubordination vision of consumer transactions what Jerome Culp said in response to me when this symposium was first presented at Law and Society in

(1982); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1491 (1998); cf. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1565 (1998) ("I would like to see a series of ultimatum-game experiments in which the proposers make the same offers to respondents who differ both among themselves and from the proposers in age, sex, income, and education, viewed as proxies for or sources of differences in status, self-esteem, or other plausible correlates of the sense of pride that causes respondents in the game to reject chintzy offers.")

15. AYRES, p. 7.

16 Of course, any taxonomy of a taste for not being discriminated against would not be symmetrical to a taxonomy of discrimination. Among the reasons for this is precisely that those at risk of being discriminated against are not in a position to fulfill all their own tastes and preferences but are forced to react to the actualized preferences of those who choose to discriminate against them.

17. AYRES, p. 415.

Vancouver—“we want it all.” That is to say, when we enter consumer markets, we want a low price that is also a fair price on goods structured to suit our needs and preferences purveyed to us by sellers that welcome us and treat us well. But just as, like Ayres, I think that “acknowledg[ing] the possibility of multiple causes”¹⁸ is an important part of proscribing discrimination, I think that acknowledging the possibility of multiple effects is important in devising effective transitional remedies for it.

Once again emphasizing the perpetrator’s perspective, Ayres stresses that:

[D]ifferent causal theories [of disparate treatment] can militate toward the use of dramatically different remedial measures. For example, mandating nondiscriminatory car pricing (the so-called no-dicker sticker) is more likely to bring about refusals to deal if cost-based statistical inferences are causing the discrimination than if revenue-based discrimination or consequential animus is driving the discrimination. That is, dealers who believe that it costs more to sell to African Americans are more likely to react to a mandated no-dicker sticker by refusing to deal than are dealers who initially offer higher prices because they think African Americans have a higher willingness to pay.¹⁹

Similarly, I would argue, different preferences on the part of consumers can also “militate toward the use of dramatically different remedial measures.” Consider three recent potential market ameliorations of the problem of race and sex discrimination in the car markets discussed by Ayres, each of which responds best to an importantly different component of the taste for not being discriminated against.

A legally mandated no-dicker sticker may assure a customer of pricing unaffected by race or sex, but of little else—neither of a low price nor of friendly service. A black or female customer interested, not only in making sure the price s/he pays is no higher than that offered a white man, but also that s/he is doing business with a welcoming dealer, may prefer something like the Saturn dealerships, where not only is no-haggle pricing voluntarily chosen, but the company has engaged in an extensive advertising campaign designed to market itself as valuing the patronage of women and African Americans and committing to treat them well.²⁰

A black or female customer primarily interested in negotiating the lowest possible

18. AYRES, p. 415-16.

19. AYRES, p. 415.

20. *See, e.g.*, AYRES, p. 153 (describing ad campaign in which an African American Saturn salesman describes his father’s bad experiences in purchasing cars elsewhere as influencing his decision to join Saturn). I do not mean to suggest that advertising suggesting fair or good treatment is necessarily inherently trustworthy. But, as I shall discuss below with reference to marketing targeted to gays and lesbians, the mere signal of welcome to an underserved or victimized group may be valuable to its members.

price, especially one who is “already relatively sophisticated,” may well choose the Internet, however.²¹ Because the Internet will allow such a customer to conceal race and sex until a price has been fully negotiated, it can reassure such a customer that s/he is not paying a discriminatory race or sex premium. And the Internet tends to yield lower prices overall than visits to dealerships.²² But precisely by concealing race or sex, by making the transaction more anonymous and impersonal, the Internet deprives such customers of what may be an important part of some people’s taste for not being discriminated against—the opportunity to be treated fairly, respectfully, and as a welcome and valued customer precisely as a woman or an African American, rather than as an anonymous, raceless, sexless, faceless e-mail address on a computer screen.

Ayres noted another available trade-off in the Chicago car market into which he sent his testers—dealerships in the city and in all-black neighborhoods tended to offer less discriminatory (more equal) but higher prices; at suburban dealerships and in all-white neighborhoods there tended to be more discriminatory pricing (i.e., greater variance between the prices offered to white men and those offered to blacks) but over-all prices were lower. A fully informed black consumer with a strong taste for not being discriminated against might therefore prefer purchasing from a city dealership, but s/he might pay for that taste in the form of a somewhat higher, though slightly more equal, price.²³ It therefore becomes worth asking as an empirical matter: How expensive in a particular case is a taste for not suffering price discrimination, and how strong is such a taste? How much might someone have to pay, and how much would s/he be willing to pay to satisfy such a taste?

21. AYRES, p. 157. Ayres “worr[ies] that the primary impact of the Internet will be to improve the bargaining power of consumers who are already relatively sophisticated. . . . There is thus the dark possibility that the advent of the Internet may actually increase the variance in prices paid as negotiated prices would increasingly tend to exhibit a bimodal distribution—with the savvy Internet shoppers getting low prices and the less sophisticated, non-Internet shoppers continuing to pay substantial markups.” AYRES, p. 157. But, while “[t]he Internet, by itself, does not seem to be an innovation directed toward protecting those consumers who have been most likely to pay a high markup,” AYRES, p. 157, it may well be just the innovation needed by those for whom only race or sex stands in the way of getting the best possible deal by haggling in person. These “savvy,” “sophisticated” purchasers are just the sort of women and minorities a classic merit-based view of the harms of disparate treatment sees as the most innocent victims and the ones most worthy of protection. The Internet prevents “irrelevant” characteristics from getting in the way of such customers’ profiting from “relevant” merits such as computer sophistication and bargaining skills.

22. *See, e.g.*, AYRES, p. 156 n.103.

23. *See* AYRES, p. 90. I am grateful to Ayres for reminding me of these findings at the symposium in Vancouver. In setting forth these disparate results in his book, Ayres cautions that they are not all statistically significant.

Keeping the taxonomy clear is important—what I am calling a taste for not suffering price discrimination is only a subset of the broader taste for not being discriminated against. (I will have more to say about other potential component parts of this taste below.) More generally, the taste for not being discriminated against is only a subset of what is often referred to as a taste for fairness. In addition to the taste for not being the victim of discrimination, a taste for fairness also encompasses tastes for not being the beneficiary of discrimination, the perpetrator of discrimination, or an observer of or participant in a system in which discrimination occurs.

The strength of one's taste for fairness may be strongly dependent on whether one would otherwise be the victim or the beneficiary of any unfairness. For the sake of simplicity, let us concentrate for the moment on only the price term and the transaction time in the sort of new car purchases Ayres studied. I have thus far equated the perpetrator perspective with the dealership and the victim perspective with those blacks and women offered higher prices. But, as Devon Carbado's *Crossroads* contribution reminds us, another important perspective in this situation is that of the white male purchaser, a perspective Carbado calls that of the "privileged perpetrator," who, if he "tak[es his] identity privileges for granted, helps to legitimize certain problematic assumptions."²⁴ I suspect that the taste for fairness among potential beneficiary groups like white male car buyers spans the full range of potential alternatives with nontrivial representation of each alternative. That is to say, some white males may get extra satisfaction out of getting not only a low price, but one that is lower than that offered members of particular other groups such as blacks and women;²⁵ some may even be willing to pay extra, not so much to reduce their own transaction costs, but to increase the relative transaction costs of members of other groups.²⁶ Other white men may just be

24. Carbado, *supra* note 5, at 221.

25. Some of this satisfaction may be the result of simple group-based animus. Additionally, doing better than members of other groups may reinforce a false sense of the comparative merit of one's own group. Thus, for example, columnist Mike Royko (erroneously, given Ayres's testers' emphasis on uniform bargaining strategy and background) gloated that, white men got better deals because, in comparison to blacks and women, they were "smart," not "dumb," "more experience[d]," "better educated," and "more likely to do the research that helps them get a fair price." Mike Royko, *Color Not an Option in Best New Car Deal*, CHI. TRIB., Dec. 17, 1990, *quoted in* AYRES, p. 154. A reaction like Royko's can in turn be the result of anything from an offensive desire to be superior to a defensive desire to eliminate the suspicion of unfair advantage on the part of beneficiaries eager to forestall in their own and others' minds the notion that their advantage is unearned.

26. Among legal scholars, Richard McAdams has given the most sustained attention to the way in

happy to get a low price, and indifferent to the fact that members of other groups get charged more; the inequality in their favor is something they would be unwilling to pay to reduce. Still other white men²⁷ have a taste for fairness they would be willing to pay at least something and possibly a substantial amount to satisfy: given the choice, they would pay a somewhat higher price to a dealer they could be assured was not discriminating in their favor. Of course, very few of them are put to the hard choice of saying to a dealer who has offered them the lowest price, sorry, I won't take it because you would not offer it to my black and female friends.²⁸ Instead, "privileged perpetrators" interested in renouncing their privilege may be part of the market segment that responds to ads like Saturn's, touting a company's eagerness to do business on welcoming terms with members of historically disadvantaged groups and committing to offer the same (not the lowest) price to all.

Even assuming that there are some "privileged perpetrators" prepared to suffer some cost to satisfy their taste for fairness, it is almost certainly true that the taste for fairness is unevenly distributed among potential victims and beneficiaries: not only will a far higher percentage of the victim group likely be distressed by their relative position, the amount one is prepared to pay to satisfy a taste for fairness is, I suspect, other things equal, likely to be significantly higher if one would otherwise be the victim of unfairness. And, of course, other things rarely are equal, as I will discuss further below. Among other difficulties, women and minority group members also tend to have less disposable income and wealth with which to indulge their taste for fairness—they may simply not be in a financial position to turn down the lowest price available to them in favor of dealing with a merchant whose prices, though less discriminatory, are higher. Moreover, even

which the taste for being relatively advantaged compared to members of another group influences behavior. See generally Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

27. Ayres gives every indication he might be one of them himself, although I do not know where and how he buys his cars.

28. There are other steps a well-intentioned beneficiary of retail car market discrimination might possibly take to actualize a taste for fairness vis-à-vis individual blacks and women of his acquaintance—he could offer to do the negotiating for them, split his savings with them, or facilitate their using his offered price to shame a dealer into matching it. Similar measures have been used to avoid another form of retail price discrimination, the tendency of laundries and dry cleaners to charge more for women's shirts, jackets and pants. I am aware of men who, knowing that a particular shop will judge the sex of otherwise fairly androgynous garments by the sex of the person bringing them to the shop, will deliver the tailored shirts and pants of their female friends together with their own so all will benefit from the lower "men's" price.

starting with no disadvantage in wealth or income, the more systematically someone suffers discrimination, the less s/he will be able to afford to pay to satisfy a taste for fairness on any given occasion. A white male who rarely suffers discrimination can afford to turn down the occasional discriminatory deal he gets and walk off in a huff because he is both unlikely to have to bear this cost often and likely to find alternative deals favorable to him with respect to the transaction at hand.

The function becomes exponentially more complicated once we factor in all the elements of service beyond the offering price. Some of those elements can readily be monetized, at least to some degree. Consider the time spent on a transaction, waiting for sales attention or bargaining with a salesperson, for example.²⁹ One plausible measure of its monetary cost to a customer is his or her hourly wage. But, just as there are both dignitary and practical components to discriminatory pricing, so increased transaction time costs more than just lost wages. As Ayres says after reporting an audit study on African Americans' higher waiting times for D.C. taxis, "white readers should try to imagine what their life would be like if *every* (or even just many) transactions took 27 percent longer."³⁰

Of course, many elements of discrimination one might have a strong taste for not suffering are difficult if not impossible to place a monetary value on,³¹ but are not

29. Time spent negotiating, like waiting time, can be counted as a cost, at least with respect to the average customer for whom such transaction costs are not a consumption good, as they may be for persons who enjoy the process of haggling or chit-chatting with a salesperson. Ayres's Table 2.3 indicates that "dealers displayed a willingness to bargain longer with black male and white female testers—in terms of both number of bargaining rounds and number of minutes." AYRES, pp. 37-38. "Moreover, in 43.5 percent of the tests, white males received an *initial* offer that was lower than the *final* offer made to the nonwhite male testers." AYRES, p. 36. Thus, there was a substantial relative cost in time imposed on testers who were not white males.

30. AYRES, p. 7. Male readers should do the same. See Mary Anne Case, Toilet Paper: Public Toilets as Gendered Spaces (last revised March 5, 2003) (unpublished manuscript, on file with author).

31. This is not to say there might not be some price for which a victim might cheerfully consent to endure such discrimination. Consider, for example, the young Thurgood Marshall's experience working as a summer waiter at the club of which his father was head steward, recounted in Richard Kluger's *Simple Justice*. As Justice Marshall told the story decades later, "in that off-stage dialect of his," "a very crude" United States senator came in and yelled, "'Hey nigger! . . . Nigger, I want service at this table!' So ah give him the service an' he is always callin' me nigger all during the meal an' ah'm likin' it less an' less. But when he gets up to go, he leaves me a twenty-dollah tip. Now this crude fellah keeps comin' into the club and keeps on callin' me nigger—and keeps on leavin' me twenty-dollah tips. In a few days, I got myself almost enough money to pay off all my bills." When another senator called Marshall over to inquire solicitously about the names he was being called, Marshall insisted, "'He's callin' me 'Boy,' Senator. . . . [A]h'm sure that's all he's callin' me' Now 'course Senator Smith he don't know this other in-div-idual is givin' me the twenty dollahs each time. Well, now, that evenin' my daddy . . . hears this fellah callin' me that and sees me runnin' right over there takin' good care of him. So my daddy he calls me over and says, 'Thurgood, you are fired! And you are a disgrace to the colored people!' . . . Naturally I explained to

therefore less significant. Even if some aspects of courteous treatment, as Ayres reminds us, have a practical component,³² “service with a smile” rather than a suspicious glance or surliness, does not. Taxonomizing the taste for not being discriminated against must include both the tangible and intangible aspects. Of course, even with respect to a single transaction, there are not only a multiplicity of aspects to discrimination, but a multiplicity of preferences for tradeoffs among them.

Consider one fairly basic real-life example, Gwendolyn M. Parker’s analysis of going “out to both family style and fancy restaurants” as she accompanied her middle class Southern-born African American parents on sightseeing trips through the North and West in the early 1960s:

While my mother always tried to steer us toward the cheaper choices on the menu, my father would tell us we could have anything we wanted. His attitude was worth more than the lobster and shrimp I invariably chose. It kicked open the doors of the world and held them wide for us. . . . Even as he went casually into debt to finance these excursions, he had his rationales. “I don’t want them to grow up thinking lobster is a big deal,” he would tell my mother.

This was one source of constant friction between my parents: [W]hat sort of accommodation the world would demand. . . .

“I don’t think they’re serving yet,” my mother would say, turning from the entryway of a restaurant she feared might be too expensive or less than welcoming.

“I’ll go find the maitre d’,” would be my father’s response. On spying him, my father would call out confidently, “Table for five.” It was my mother who noticed the stares that might accompany us on one of our forays. My father would just laugh and say, “Well, what can they do?”

There lay their differences in a nutshell: all my father needed was access, and the

my daddy what it was all about.” Justice Marshall concluded the story by insisting to his interlocutor, a law professor, “‘Between you, me, an’ the lamp-post, Robert, any time you wanna to call me nigger, you just put your twenty dollahs down on this table. And you can keep doin’ it all day.’ Then his eyes narrowed and his voice suddenly hardened and he said, ‘But the second you run outa them twenties, Robert, I’M GONNA BUST YOU IN THE NOSE!’” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 181 (1975).

32. These include the willingness to make exchanges without receipts and make restrooms available without a purchase, as studied by Jane Connor in Binghamton, N.Y. AYRES, p. 7.

rest he would get on his own; my mother hoped that the world would welcome her, and when it didn't, she retracted her feelings behind an imposing façade of "proper" colored reserve. People in Durham had always said how much I was like my father; in the North I learned I was my mother's daughter as well. I might stride in, apparently eager and confident like my father, but like my mother, as the years went by, I grew alert to the lingering stare that dampened my own hopes for acceptance.³³

At the extreme, variations in the taste for not being discriminated against can even reverse the valence of giving one's business to an establishment that would prefer to exclude the members of one's group—while some may find the chilly reception to be a cost, others may derive satisfaction precisely from being where they are not wanted but cannot be excluded. David Caplovitz's study of low-income black and Puerto Rican consumers' dealings with peddlers in New York City in 1960 shows one extreme of what a customer might be willing to trade off in price and quality for respectful treatment, however. In enumerating "the elements of the system of exchange that comprise the low-income market," Caplovitz stressed the importance to the consumers of "the reassurance of dealing with merchants who ma[d]e them feel at home" even when these merchants purveyed "low-quality merchandise at exorbitant prices."³⁴ In a very different variant of willingness to reward merchants who welcome one's business, the gay and lesbian community has been notoriously loyal to the first brands to place gay-themed ads and advertise widely in gay publications, such as Absolut vodka.³⁵

33. GWENDOLYN M. PARKER, *TRESPASSING: MY SOJOURN IN THE HALLS OF PRIVILEGE* 54-56 (1997).

34. DAVID CAPLOVITZ, *THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES* 20 (1967). Caplovitz also observed, "In the large, bureaucratic stores where prices are standardized, the race of the customer does not affect the price. The neighborhood merchants and peddlers, on the other hand, are specialists in a more personal system of credit and apparently do take the race of the customer into account" with the result that a far higher percentage of blacks and Puerto Ricans buying from traditional neighborhood dealers are paying a "higher" price than those who buy from a "bureaucratic" ("department, chain, [or] discount") store. *Id.* at 92. According to Caplovitz, however, "consumers from a more traditional society," such as recent arrivals from the South or Puerto Rico, "unaccustomed to the impersonality of the bureaucratic market" may have found merchants' "read[iness] to personalize their services" valuable. *Id.* at 20.

35. See, e.g., Dan Baker, *A History in Ads: The Growth of the Gay and Lesbian Market*, in *HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE* 11, 12 (Amy Gluckman & Betsy Reed eds., 1997). Not having advertisers target them appropriately is yet another form of discrimination some groups can suffer. Consider the resistance of advertisers of certain luxury car brands to purchasing air time on "radio stations that serve primarily Black and Hispanic" urban consumers, as described in Robert Millar, *Racism is in the Air: The FCC's Mandate to Protect Minorities from Getting Shortchanged by Advertisers*, 8 *CommLaw Conspectus* 311, 315 (2000). Such a decision not to advertise to them hurts these

For some the taste for dealing with an in-group salesperson or store owner might be worth paying for with higher prices.³⁶ Others may assume (often erroneously, if Ayres's findings are representative)³⁷ that an in-group member will give them a better price or more favorable terms; their use of group status as a proxy is as imperfect as that of vendors. Still others may have a preference for in-group vendors only all other things being equal: they may be unwilling to travel an additional block or pay an additional dime to deal with one of their own.

Price and courtesy by no means exhaust the parameters of a taste for not being discriminated against. Additionally, there is the question of whether the products available for sale, regardless of price, meet the preferences and the needs of groups like women, blacks, and other minorities. Thus, the woman who follows the rule of a character in Alison Bechdel's comic strip "only [to] go to a movie if it satisfies three basic requirements—one, it has to have at least two women in it . . . who, two, talk to each other about, three, something besides a man"³⁸ will find precious few mainstream movies to attend. Even the supply of art house flicks will soon give out. African Americans have long voiced similar complaints about available entertainment options, as have Asian Americans, Latinos, Native Americans, gays, and lesbians.

The problem of lack of suitable options becomes all the more serious when the product in question is a practical necessity, like a car, and the lack of suitable options compromises not ideological preference alone, but also safety. Yet women drivers are faced with exactly such choices—cars are systematically designed to ensure increased safety for the typical male driver at women's expense.³⁹ It adds insult to injury if women

groups not only as potential consumers of the product to be advertised, but as consumers of the medium in which the ads might have appeared: it means a reduction in the revenues and potentially in the viability of stations favored by minority listeners.

36. There are many reasons why this might be so. Among them are a desire to support the business ventures and contribute to the success of in-group members, e.g., to keep black dollars in the black community. Comfort level may also play a role, as Caplovitz argues. *See e.g.*, CAPLOVITZ, *supra* note 34, at 19-20 (describing merchants' success in hiring Puerto Rican salespersons to reassure recent arrivals "concerned about possible embarrassment because of their broken English or their poor dress.").

37. *See* AYRES, p. 43 (reporting that testers "were steered toward salespeople of the same race and gender" and "that testers systematically received higher offers from salespeople of the same race and gender").

38. Alison Bechdel, *Dykes to Watch Out For Presents THE RULE*, DYKES TO WATCH OUT FOR 23 (1986). The character acknowledges that the "last movie [she] was able to see was Alien. . . . The two women in it talk to each other about the monster." *Id.*

39. Consider the evidence of U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-95-4, HIGHWAY SAFETY: CAUSES OF INJURY IN AUTOMOBILE CRASHES 51 (1995):

are asked to pay more for a less suitable product. Moreover, products announced as specifically designed for them tend to be even more expensive, as a casual walk down the aisles of a typical drugstore should indicate: t-shirts, underwear, and socks labeled as being for women, though differing from “men’s” chiefly in being smaller, tend to be significantly more expensive; pastel-colored “feminine” shaving equipment can be twice the price; even drugs like ibuprofen tend to cost more when branded for women’s complaints.⁴⁰

One of the substantial costs of being a member of a group likely to be discriminated against is perpetually walking the fine line between blithely naive obliviousness of discriminatory treatment and the paranoia of suspecting discrimination in every situation and around every corner. It is the cost of living at all times with the question mark Ayres so eloquently appends to his title *Pervasive Prejudice*? Let me illustrate this difficulty with a variant on the oft-told tale of an African American consumer finding limits placed on her access to a retail establishment and the consumer goods it purveys. The variant of this scenario likely most familiar to readers of law journals is Patricia Williams’s Benetton story, about being locked out of a branch of the clothing store at midday in the Christmas season. The version I shall explicate is fictional, from a recent episode of the new television series *Monk*, whose title character, an obsessive-compulsive detective, is assisted in dealing with his phobias and, eventually, in dealing with the cases he must

One possible reason for the relatively high degree of crash protection enjoyed by men drivers and younger drivers is that efforts at improving automobile crashworthiness have concentrated on the crash types and occupant characteristics most experienced by them. Current safety regulations and automobile safety designs emphasize protection in high-speed frontal collisions, and men drivers and younger drivers are more likely to be in single-car crashes, which disproportionately involve frontal impacts. The automobile crash tests NHTSA currently requires for all cars include full-frontal crashes into a rigid barrier at 30 mph (although the introduction of a requirement for side-impact tests is under way). Air bags reduce the risk of injury in frontal impacts only, not in side impacts. Similarly, safety belts are more effective in frontal than in side impacts . . . and because of this, safety belts have a somewhat greater benefit in single-car crashes than in collisions with cars and light trucks.

A second possible reason for the crashworthiness deficit of women drivers compared with men drivers is that current NHTSA regulations require the use of only one size of crash test dummy—a dummy representing the 50th percentile of the male population, or 5 feet 9 inches tall, weighing 165 pounds. Maximizing the safety of persons with these characteristics may, in a relative sense, compromise the safety of others.

Another possible explanation for the greater injury risk for women drivers is that, on the average, women are shorter and lighter than men. Automobiles designed to accommodate taller and heavier men drivers may not accommodate women as well. For example, the Insurance Institute for Highway Safety (1993) recommends that drivers sit back as far as possible from the steering wheel and dashboard in order to minimize the risk of hitting those structures in a crash. Shorter drivers obviously cannot sit as far back as taller drivers if they hope to reach the accelerator and brake pedals, and this may expose them to more risk.

40. See, e.g., *Marketplace: You May Be Paying Too Much*, CONSUMER REPORTS, Oct. 1998, at 8 (noting that “peculiar pricing” with items targeted to women sold at higher prices “is alive and well at your local supermarket, drug store, and department store” and giving examples).

solve, by the nurse assigned to him after his wife's murder occasioned his nervous breakdown. A running theme of the show are the threats of the nurse, Sharonna, a white woman, to quit and find other employment if she isn't paid more regularly. In the relevant episode, Sharonna has actualized this threat by taking a job in an upscale lamp store. But just as she is trying to throw herself into this brand new job and put Monk and his troubles behind her, she has a flash of insight into the case he had been working on when she quit. She realizes that if she doesn't act on this insight immediately, someone might be killed. So she prepares to rush out of the store to forestall the danger. Precisely at this moment, she is approached by a polite, well-dressed African American female consumer seeking to purchase a lamp.⁴¹ They have roughly the following conversation: Sharonna (somewhat frantically): "Excuse me, we're closing." Customer (incredulously): "Now?" Sharonna: "It's a holiday." Customer (more incredulously still, but politely): "What holiday?" Sharonna: "Lamp Day." Whereupon Sharonna rushes out of the store, never to return, and proceeds to prevent a murder and save the day for Monk. Looked at from the customer's perspective, what has happened to her is just what happened to Patricia Williams and countless other people of color rebuffed when trying to participate in a routine way in consumer transactions. Precisely because the history of such rebuffs is so well-known and widespread, it is likely to factor into this particular customer's understanding of what has happened to her on this particular occasion. Of course, we, the viewers, privileged with a broader and deeper angle of vision into Sharonna's motivations, know that the customer's abrupt exclusion from the store was not at all the result of pervasive prejudice. Given the urgency of Sharonna's mission and her lack of attachment to her position as salesperson, no other customer, not even the boss, would have been treated better. But the customer herself can never know that. From her angle of vision, she has been a victim. My point is surely not that "pervasive prejudice" is all in the mind of African American female consumers. It is rather that one of the costs of the pervasiveness of certain kinds of prejudice to its victims is never being able to be sure you are not a victim, even on those occasions when you are not.⁴² This is the uncertainty

41. I do not know, but I wonder, whether the show's producers cast an African American woman in this part advisedly.

42. As Ayres notes, "having a better inkling about the existence of discrimination is different than knowing, first, whether a particular instance of treatment is inferior to that of other customers and, second,

that poisoned my dealings in the car showrooms, that led me, like Patricia Williams, to be “quite willing to disenfranchise myself, in the heat of my need to revoke the flattery of my purchasing power.”⁴³

The need not to be or be perceived as a victim can shape attitudes and shopping behaviors in a multiplicity of ways. For example, Devon Carbado enumerates some of what he calls “race-negating strategies to challenge this dignity-destroying social meaning” of “potential criminal[ity]” imposed on a black male “walk[ing] into a department store”—he can “dress ‘respectable,’” rapidly purchase an expensive item, ingratiate himself with “a white sales associate,” etc.⁴⁴ In contrast to this strategy of conciliation designed to prove one is not a criminal or too uppity or difficult to deal with, Carol Rose describes other potential strategies designed to prove one is not a sucker. She demonstrates that women, merely because they are perceived to have a greater taste for cooperation and less of a taste for confrontation and aggressive bargaining, may—because of that perception alone—be offered systematically worse deals. Having constantly to prove oneself to be a tough bargainer, just like having constantly to prove oneself not as vulnerable as might be assumed, can be wearying—it may take such a toll that “even a . . . strong woman . . . may grow weary of the constant challenges and simply stay at home.”⁴⁵ If she continues the fight, as Carbado notes, she risks being dismissed as “moody, irritable, or brusque” and crossing “the line between being assertive and aggressive.”⁴⁶ Thus, rather than achieve the better deal potentially available to tough bargaining white males, she may provoke a refusal to deal. Regardless of the ultimate outcome, as both Carbado and Ayres make clear in their different ways, any change of behavior imposed on someone to avoid his or her suffering other forms of race or sex discrimination is a harmful cost.⁴⁷

whether that disparate treatment is caused by your race.” AYRES, p. 10.

43. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 46 (1991).

44. Carbado, *supra* note 5, at 231.

45. See Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 440 (1992). While Rose’s chief focus is the effect of perceptions of women’s comparative willingness to cooperate on the bargains they can reach in the marriage and employment markets, her analysis can be applied to the retail car market described by Ayres.

46. Carbado, *supra* note 5, at 229-30.

47. See *e.g.*, *id.* at 231-32 (“White people do not have to worry about employing these strategies. White people do not have to work their identities to respond to these racial concerns. Nor should they have to. No one should.”); AYRES, p. 51 (“Even if women and other minority members *could* avoid

The experience of discrimination in the markets, in addition to shaping one's shopping behaviors, may also shape the products for which one shops. Because there is some, albeit contradictory, evidence that this effect may be particularly strong with respect to the purchase of cars by African American men in Chicago, Rachel Moran is right to be critical of the fact that "[w]hen Ayres discusses animus in the retail car market, he does not root it in the history of segregation and discrimination in Chicago. Nor does he explore the special meaning of cars as a mark of status and freedom."⁴⁸ How might the history of discrimination and the social meaning of cars intersect to affect the purchasing choices of a black consumer? In his study of patterns of black consumption before 1960, Marcus Alexis notes that a "prominent black comedian has quipped that blacks can afford to buy expensive automobiles because of all the money they 'save' by not having to spend it on high-rent apartments, club fees, and eating out" due to exclusion caused by segregation.⁴⁹ The data Alexis analyzed indicated "that blacks actually spen[t] less for automobile transportation than d[id] whites at comparable-income levels" and he found no study that "supports the stereotype of large-scale ownership of Cadillac-class automobiles by blacks."⁵⁰ Yet, according to Carl Husemoller Nightingale:

In 1949 and in various surveys in the late 1960s, advertisers discovered that poor black men were much more likely than poor white men to buy Cadillacs, Lincolns, and high-priced Buicks (though all poor men usually bought their cars used.) The author of an article called "Why Negroes buy Cadillacs," which appeared in a 1949 edition of *Ebony*, confirmed that "basically, a Cadillac is an instrument of aggression, a solid and substantial symbol for many a Negro that he is as good as any white man."⁵¹

Mary Patillo-McCoy's sociological study of a middle-class black Chicago neighborhood at the time Ayres conducted his initial tests reconfirms the symbolic significance of buying a particularly expensive car to black Chicagoans: "The driver of [a

discrimination by acquiescing in not violating their expected roles, however, forcing black or female consumers to conform to a particular societal stereotype as a prerequisite for receiving equal treatment represents a powerful form of discrimination.").

48. Moran, *supra* note 1, at 118 n.67.

49. Marcus Alexis, *Patterns of Black Consumption 1935-1960*, 1 J. OF BLACK STUD. 55, 57 (1970).

50. *Id.* at 73.

51. CARL HUSEMOLLER NIGHTINGALE, ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS 144 (1993).

Cadillac] buys it to signify first to him- or herself, then to friends, and finally to ‘the white man,’ that he or she has made it. This affront, however, is always at the symbolic level. It does nothing to alter the actual inequalities that consumers try to overcome.”⁵²

Decades ago, David Caplovitz introduced the notion of “compensatory consumption,” by which he meant to indicate that “the motive to acquire expensive durable goods is quite strong among low-income groups, and that the ownership of such goods is apt to take on symbolic significance of social progress for people whose chances for social mobility are blocked.”⁵³ The caveat he raised then is still important today: “[T]he existence of this motive is still more in the realm of hypothesis than demonstrable fact. What is needed is more research that would separate the various motives to buy among the poor and assess the importance of each. How much of the consumer behavior of the poor stems from their needs, how much from their vulnerability to unscrupulous merchants, and how much from the motive of compensatory consumption remains to be determined.”⁵⁴ I would add that such research also remains to be done for groups likely to be discriminated against regardless of income level. Again, the victim’s perspective has received far less attention than the perpetrator’s.

What Critical Race Theory and Ayres’s style of Law and Economics have in common is an interest in evidence, even if, as Ayres’s sub-title makes clear, that evidence is sometimes “unconventional”—neither assumes a can opener, each is about cans and can openers they have come to know. But a methodological divide remains between those who are most likely to believe evidence when it can be reduced to numbers in a graph or chart and those who are most likely to believe the evidence of first person experience.⁵⁵

52. MARY PATILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 148 (1999). Moving toward the purchase of overpriced automobiles may be the inevitable next step for the black youth Patillo-McCoy documents as obsessed with another expensive and highly visible means of getting around: brandname, celebrity-endorsed athletic footwear.

53. CAPLOVITZ, *supra* note 34, at xxvii. Recall Gwendolyn Parker’s father’s willingness to go into debt so his children would not grow up thinking “lobster is a big deal.” *See supra* text accompanying note 33.

54. CAPLOVITZ, *supra* note 34, at xxvii.

55. Note that I am exaggerating this divide for effect. Moreover, I by no means intend to suggest that Ayres and the contributors to *Crossroads* themselves mark out the extremes of this divide. Ayres, for example, acknowledges the effect his own personal experience and his observation of others’ experience had on his thinking. And graphs, charts, and statistics, as well as personal narrative, form part of the contributions to *Crossroads*. *See, e.g.*, Sumi Cho & Robert Westley, *Historicizing Critical Race Theory’s Cutting Edge: Key Movements That Performed the Theory*, in *CROSSROADS*, p. 32 (incorporating statistical tables and figures in analysis of Boalt Hall’s minority hiring record over time). My sense is that the divide is greatest among potential readers, rather than authors, of the two books.

What may be hardest of all to remember is that behind every dot on a graph and line in a chart is a flesh and blood individual and that the chart is the result of aggregating these individuals. Consider the number tattooed into the skin of a concentration camp survivor, say 71502. It is important to remember the number, that its bearer is one of many, not an aberration or exceptional; but it is also important that she is Judith Pinczovsky Jaegermann and important that she is a Jew.⁵⁶ It is difficult to hold name, number, and identity category in your head at once—the horror of particularity and the horror of aggregation is each in its own way overwhelming. To take a less freighted image, consider the trick of making a face out of the photos of several thousand faces—what you see in this mosaic is entirely a question of how finegrained is your examination of what is before you.

Reading *Crossroads* and *Pervasive Prejudice?* together caused me to reflect more deeply than I had previously on the often casually asserted proposition that “the plural of anecdote is not data.” Different proponents of this view mean different things by the contrast between data and anecdote. Some may have in mind the difference between a controlled study and happenstance observation, others the difference between a large and a small sample size, and still others the difference between that which can be quantified and that which cannot. I am personally becoming more convinced that to the extent that the plural of anecdote is indeed not data (and under some definitions of both it may be) this only reinforces the need for both anecdote and data to make a case. Ayres himself repeatedly, both explicitly and implicitly, acknowledges the usefulness of anecdote as a supplement to the sort of data he gathers.⁵⁷

But the full extent of Ayres’s own faith in data of the sort generated by controlled testing is revealed by his enthusiastic endorsement of the Implicit Association Test (“IAT”) as a means of testing for discriminatory intent. Ayres’s faith in the test is

56. See *Women in the Holocaust: Personal Reflections—In Camps*, at <http://www.interlog.com/mighty/personal/jaeger.htm> (detailing an individual’s personal reflections on her holocaust experience).

57. For example, his own uncontrolled (anecdotal) experience being told by a nanny agency, “Tell me your prejudices. We’ll only send you *pink* polka dotted nannies if that’s what you want. If you’re not comfortable with a [sic] older or a younger girl, we’ll make sure that you only have to interview candidates that you like,” not only led him to file a complaint, but also suggested a new avenue for research. AYRES, p. 403. And, although critical of the failure of a television news program to discuss statistics, he acknowledges the power of the stark visual (anecdotal) image of blacks and whites being treated differently on one occasion as they enter a store filmed on a hidden camera by beginning his book with it. AYRES, p. 1.

unshaken by his own results. He is “saddened to report that after taking the implicit attitude test several times, I have consistently been rated as having a ‘moderate’ to ‘strong’ automatic preference for whites relative to blacks.”⁵⁸ From these results, Ayres concludes not only specifically that he is “less qualified for holding certain types of employment,” but more generally that the test would be a useful way to prove discrimination lurking beneath the surface.⁵⁹ Paradoxically, my own opposite results on the test lead me to the opposite conclusion about its usefulness. I, too, taking up the explicit challenge with which Ayres ends his book,⁶⁰ have gone through the IAT several times. When I do, I consistently turn up as one of that small minority of the population with no association strong or weak, positive or negative, between blacks and bad things. If that were my only result on the test I might self-righteously rejoice in a demonstrable absence of racism, conscious or unconscious. But I also turn out, on another version of the IAT, to be one of that equally small minority of the population who do not show any association between males and science. Now, my principal area of expertise as a feminist legal theorist is gender discrimination, including the coding of occupations and disciplines as masculine or feminine.⁶¹ As a theorist, I deplore such coding, but I do not exempt myself from it. On the contrary, I quite consciously associate males more strongly with science than females, as any sane well-informed adult⁶² in this society would have to as a descriptive matter. I do not take my results on the IAT for gender to be a triumph of my normative feminist commitments over my local knowledge. I take them to be something else entirely—a tribute to the nuns who trained me to ace standardized tests. The skill that now lets me demonstrate my impartiality once brought me from an inner-city tenement to the Ivy League. Grateful though I am for the possibilities opened by standardized tests, I owe much to the essay question as well—

58. AYRES, p. 427.

59. *Id.*

60. AYRES, p. 427 (“Now gentle reader, what about you? An answer is a few clicks away.”). The test may be found at <http://www.yale.edu/implicit/race/race2.html>. See AYRES, p. 420 n.38.

61. See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

62. Children may be a somewhat different matter, simply because their local knowledge can be very local indeed. Consider the experience of the young daughter of an actor and a lawyer with whom I practiced. Seeing her first male lawyer on a television program, her initial reaction was, “Men can’t be lawyers.” After her parents carefully explained that yes, indeed, many men are lawyers, she confided in a knowing whisper to a friend watching the next week’s episode, as one revealing a little-known secret: “Men can be lawyers, too.”

anecdote and data work best hand in hand.

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