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PREVENTION PERSPECTIVES ON "DIFFERENT" KINDS OF
DISCRIMINATION: FROM ATTACKING DIFFERENT "ISMS"
TO PROMOTING ACCEPTANCE IN CRITICAL RACE THEORY,
LAW AND ECONOMICS, AND EMPIRICAL RESEARCH

Clark Freshman

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Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research

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PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION. By Ian Ayres.** Chicago: University of Chicago Press, 2001. 433 pp. + xi.

CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY. Edited by Francisco Valdes,† Jerome McCristal Culp‡ & Angela P. Harris.§ Philadelphia: Temple University Press, 2002. 414 pp. + xxi.

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INTRODUCTION

It shall soon be no secret that Ian Ayres's collection of empirical evidence of discrimination in a wide range of "markets," and the new critical race theory (CRT) collection¹ are two of the best and most important books in publishing, academic or otherwise. But both are so engaging and beautifully written that many may fail to notice that neither a book seemingly about critical approaches to "race" nor one that promises evidence of "race" and "gender" discrimination is, really, about "race" or "gender." Before getting too detailed, consider first that the Ayres book includes several studies but only two of them look at women at all—and both conclude that women in general² don't face discrimination in either car sales or bail rates. (African-American women pay more for cars, and, by some complex measures, African-American women and Latinas probably³ pay too much for bail.)⁴ And likewise consider that one

1. CROSSROADS, pp. v-vi.

2. I use the term "in general" reluctantly for two reasons. It might be more accurate to say the study only showed that women who were also either Latina or African-American faced bias. From a theoretical point of view, the phrase "women in general did not face discrimination" might suggest that white women (at least those who are neither Latina nor African American) are the benchmark of women. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (offering the early critical race theory critique that some feminist work used the condition of white women as the model of all women). Second, as discussed below, and as Ayres acknowledges in his response to this Review, the Ayres studies simply did not look at other combinations of women, such as lesbians, women with disabilities, Asian women, and so on. See Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2423-24 (2003); *infra* text accompanying notes 183-88.

3. Ayres qualifies his analysis of bail rates by noting that at least two distinct methods suggest African Americans and Latina/os pay more for bail than whites, but he admits that

can't even get past the dedication to the reader in the CRT reader on "race" without the first of many announcements that one really can't look at unfairness involving race without looking at "other" ("interlocking") forms of discrimination.⁵ As I've suggested elsewhere, this type of confusion is pervasive in everyday life, law, and social science: We get in the habit of seeing discrimination and prejudice as if they fit some fixed natural category like race or gender.⁶ Like other efforts by Ayres and other CRT scholars, then, one might take simply a "second look" at this same issue.⁷ In particular, one might look again at the updated works here about how one might prove discrimination in court, change statutes, and take other similar formal action.

Instead this Review looks at this question of categories from a prevention perspective: How does one prevent unfairness (be it "racism" or "sexism" or some other "ism") in the first place? Should employee training include specific information about stereotypes of specific groups or some version of general

this does not necessarily establish discrimination. Other factors may explain differences, AYRES, pp. 262-68, or minorities may negotiate better rates with bailbond persons because they may be more likely to have lower search costs, AYRES, p. 276.

4. AYRES, p. 29 (reporting that African-American men paid the most for cars, and African-American women paid less than African-American men, but more than either white men or white women); AYRES, p. 269 (reporting that African Americans and Latina/os, male and female, paid more bail than Ayres calculated was necessary). White women did pay more on average for cars, but the amount was not statistically significant. AYRES, p. 33. Ayres acknowledges that the core of his studies looks at race, and that the statistically significant results do not include white women). Ayres, *supra* note 2, at 2419 n.3.

5. CROSSROADS, pp. v-vi (celebrating Trina Grillo for "creat[ing] a learning community where students who differed from other law students because of class, race, gender, sexual orientation, physical ability or cognitive processing ability could thrive"). The editors' introduction lists one of three core commitments of CRT that one cannot "fight racism without paying attention to sexism, homophobia, economic exploitation, and other forms of oppression or injustice." CROSSROADS, p. 2; CROSSROADS, p. 397 ("I see an emerging consensus among the progressive wing . . . that race, gender, class, ethnicity, and sexuality are complex, interlinked and indisputable locations of oppression, and any attempt to erase or dilute one analysis in order to do another is a reactionary move.").

6. See Clark Freshman, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241 (1990) [hereinafter Freshman, *Beyond Atomized Discrimination*]; see also Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 321 (2000) [hereinafter Freshman, *Whatever Happened to Anti-Semitism?*] (defining an atomized theory as one that "assumes that there is some natural boundary of the group, just as scientists once emphasized the natural boundary of an atom").

7. See, e.g., Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995) (expanding research on discrimination in car buying); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1361 (1992) (referencing a prior article that "found that the bulk of writing in the areas of equality and civil rights was done by a small circle of approximately two dozen white male scholars writing in the top [law] reviews and teaching at the top law schools" and that ten years later "some scholars have continued their old ways").

diversity training? Pairing CRT and Ayres with this prevention focus makes sense for many theoretical, historical, and quite pressing doctrinal reasons. From a theoretical perspective, the often-neglected focus on prevention gives us some room to sidestep other well-worn and often emotionally taxing debates.⁸ Consider again the metaphor of “racism” as a “disease.”⁹ It’s easy to get lost in sorting through similarities and differences in diagnosing different diseases and their different causes. Whatever value such distinction-making may have, it may not be necessary for prevention and treatment. Syphilis and strep throat come from very different sources, and yet the best treatment for both may *often* be exactly the same antibiotic.¹⁰ Likewise something as simple as aspirin may tame headaches, relax sore muscles (whether sore from doing too many bench presses or sipping too much sherry), and even slow aging in general.¹¹ And prevention of many diseases in the first place may often rely on common “wellness” habits like eating less unhealthy fat, exercising, and so on. So, too, the best way to quiet prejudice and promote socially healthy attitudes of acceptance may rely on quite general approaches. This may make it less necessary to debate which particular diseases deserve the most attention.¹² As

8. One could tie such avoidance to quite abstract philosophical theories, such as Rawls’s notion of an overlapping consensus for society’s basic institutions that simply avoids contested philosophical, political, and even religious questions. See JOHN RAWLS, *POLITICAL LIBERALISM* 155 (1993) (arguing that an overlapping consensus allows individuals to agree on just institutions even though they may draw on different substantive ideologies to deem them just).

9. Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 15 (1995) [hereinafter Lawrence, *Color Blindness*] (“[A]nti-semitism, like . . . racism, is best understood as a societal disease.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) [hereinafter Lawrence, *Unconscious Racism*] (“[R]acism is both a crime and a disease.”).

10. MayoClinic.com, *Strep Throat*, at <http://www.mayoclinic.com/invoke.cfm?objectid=7A8C6CBF-246F-423C-9D9F889E25F2EE05#Treatment> (Sept. 5, 2002) (“If your child has strep throat, your pediatrician will likely prescribe an oral antibiotic such as penicillin, a brand of cephalosporin (Ancef, Keflex, Cefaclor) or clindamycin (Cleocin.”); MayoClinic.com, *Syphilis*, at <http://www.mayoclinic.com/invoke.cfm?id=DS00374> (Jan. 28, 2003) (“Early diagnosis and treatment with penicillin or another similar antibiotic can kill the organism that causes syphilis . . .”).

11. MayoClinic.com, *Aspirin: From Pain Relief to Preventive Medicine*, at <http://www.mayoclinic.com/invoke.cfm?objectid=7DDC7853-AE9C-4A0D-ABE2A331C2181A47> (Jan. 30, 2002) (“Aspirin helps prevent heart attacks and strokes and reduces your risk of some cancers. It may even help prevent the recurrence of migraines and slow the mental decline of old age.”).

12. The CRT editors’ response in this Symposium worries that the turn to social science often represents an “evasion of the challenge critical race theory poses.” Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2446 (2003). In part, the editors think the turn to social science may demand “overwhelming statistical evidence” before action occurs. *Id.* at 2445. In large part, the prevention effort presented here does exactly the opposite. It largely says that prevention efforts should often focus on quite generalized approaches because such approaches will work best for a wide range of possible sources and variation of discrimination. It therefore largely avoids the

we'll see below, both much psychological science and much commercially available training suggest the best approach to combating prejudice will *often* be a *large share* of such general approaches to promote acceptance rather than narrower attacks on what might be seen as particular "isms." Also, using general prevention strategies may sometimes avoid the equivalent of painful diagnoses of physical illnesses: We may avoid painful debates, such as what "kind" of discrimination hurts the most, or whether the suffering of members of this or that group is enough like the suffering of African Americans to let them participate in meetings of critical race theory.¹³ (Most of the papers in the CRT collection grew out of the Yale CRT meeting, the first large CRT meeting open to people of color as well as "whites."¹⁴) Of course, as with physical illnesses, general treatments may not always work best: Some diseases may respond better to specific treatments. And this may lead to competition for what can seem like scarce resources, for example, debates over funding for treating men's diseases like prostate cancer versus women's diseases like breast cancer.¹⁵

The CRT editors' response to this Review may also be understood to raise similar concerns: How much should we try to prevent the various contagions in our society from infecting individuals; how much should we prevent the infections from ripening into more discriminatory acts; and how much should we try to change society itself. The editors ask whether this Review's call for more prevention "ask[s] the subjects of history and current subordination to accept the basics of society as they are."¹⁶ To use malaria as a metaphor, one could try to develop inoculations, one could try to treat those infected, or one could try to limit the existence of standing water so the bugs that carry malaria go away. The CRT response seems to favor more changes to society itself so the diseases do not arise. I suggest here only that we might spend *more* time preventing discrimination even while we may also work for other reforms.

insistence on extensive conceptual debate and extensive empirical studies that others might demand.

13. See, e.g., CROSSROADS, pp. 401-02 (discussing how endless debates over sameness and difference may prevent common work in transforming society to end all forms of subordination).

14. On the difficulty of defining "white" and "color," see, for example, CROSSROADS, p. 178 (discussing the "race" of Jews and Arabs); CRITICAL WHITE STUDIES (Richard Delgado & Jean Stefancic eds., 1997) (describing evolution of critical theories of whiteness). By emphasizing differences of color, "whiteness" may overlook the burdens of those marked as different in other ways, such as concepts of physical and mental ability. Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 349 n.132.

15. Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 104 n.179 (1998) ("Funding has now increased, however, to the point where the National Institutes of Health (NIH) is spending four times as much per life lost investigating breast cancer as the agency spends on prostate cancer.") (citing Marcia Angell, *Caring for Women's Health—What is the Problem?*, 329 NEW ENG. J. MED. 271, 271 (1993)).

16. Culp et al., *supra* note 12, at 2451.

From a historical point of view, many who want a more inclusive society need to look to some new perspectives—if not prevention—because older, once promising alternatives seem less viable. Courts and California-style popular initiatives formally limit affirmative action.¹⁷ So, too, voter initiatives seek repeal of laws that add sexual orientation to other lists of forbidden discrimination.¹⁸ In part, prevention deserves a serious look for the same reasons that many looked to state courts when federal courts seemed less open to civil rights claims.

Apart from these theoretical debates, and current political realities, the scope of prevention is quite simply a crucial—and recent—practical question. Under two relatively recent United States Supreme Court cases, organizations accused of discrimination can avoid any liability, or at least avoid punitive damages, by showing that they deployed programs to prevent discrimination.¹⁹ This alone would give employers and others the incentive to overcome their fear that training itself might somehow create records that could lead to liability. Further pressure to seek out some kind of training—broad or narrow—comes from the recent decision by many insurers to stop offering coverage for discrimination.²⁰ Such decisions represent dangers, opportunities, and, as we'll see, newly pressing questions for both CRT and law and economics.

Others have sounded the alarm over the danger of the prevention wave clearly enough. In a word, it's a cover-up: Prevention may give license for "investigators" and others to script potential witnesses and paper the file.²¹ On

17. See, e.g., CAL. CONST. art. I, § 31(a) (proposition 209) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."). Voters added this section to the state constitution through the passage of Proposition 209.

18. Colorado's Amendment 2, which was originally approved by more than 53% of the state's voters in November of 1992, forbade any governmental entity from prohibiting discrimination against any persons on the basis of sexual orientation. See, e.g., Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1058 (1994); Deb Price, *Nothing Fair About Anti-Gay Referendums Living*, S.F. EXAMINER, OCT. 25, 1994, at B7 (reporting that similar initiatives have been proposed in Michigan, Arizona, Florida, Missouri, Montana, Nevada, Ohio, and Washington).

19. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

20. Cf. Lori Litchman, *Insurance Indemnification Nixed in Discrimination Case: Court Says Policies Preclude Recovery for Emotional Distress, Discrimination*, PA. L. WKLY., May 20, 2002, at 3 (reporting on local court ruling that insurers do not have duty to indemnify discrimination claims when policies use language that covers only "bodily injury or property damage").

21. See, e.g., Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 163 (2001) ("[A] seminar that indicates that sexual harassment is an underreported phenomenon may give some employees the message that

this take, for example, women who get frozen out of firefighting have to battle not just prejudice but choreographed witnesses to their supposed ineptitude and bulging files documenting "problems." This is a powerful critique, and it gives still another reason why this Review, and other efforts, need to probe closely exactly what type of prevention programs deserve development—and the blessing of courts.

The CRT editors' response raises more profound alarms.²² Alarm one: Prejudicial attitudes and institutions already pervade society, and they have survived many assaults. Alarm two: These attitudes already infect us all. One may quibble about the degree of progress, but the central point is perhaps *understated*. From the prevailing psychological point of view, every individual, and every society—even the society that CRT would try to build—will include to some degree an automatic tendency to prefer some and overlook others.²³ (And many societies will often include hostility towards those who seem less like us, but this is less clearly inevitable.) The same is likely true of diseases in general: We will all get sick, and we will all die. Diseases are all around us, and we face numerous risks of infection and accidents daily. Indeed, the sources of our demise, like cancerous cells, may live deep within us. Still, every society can still strive to be well more often, and to be less ill when ill.

So, too, even if sources of prejudicial attitudes lay all around us, and within us, prevention efforts offer two hopes. First, just as doctors may work to strengthen our immune systems in general, we may construct societies, institutions, and programs that promote more inclusive attitudes and, perhaps, weaken prejudicial attitudes. We may all learn to be more comfortable, even happy, with those who seem somehow "different" at first. Second, just as doctors may work to limit the harm when diseases do arise, we may work to prevent our prejudicial attitudes from ripening into prejudicial action. Even if we still feel somewhat less comfortable with those who seem different, we may

'the likelihood is good that they can get away with harassing' others"); Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers, Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GENDER & L. 323 (1996); Lauren B. Edelman, Susan E. Petterson, Elisabeth Chambliss & Howard S. Erlanger, *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73 (1991) (stating that some affirmative action officers seek to represent historically disadvantaged groups, some see themselves as genuinely neutral, and some try to protect the employer).

22.

[I]t is simply too late for prevention. Critical race theory begins with the premise that subordination is a historical fait accompli, and indeed that white supremacy and Euroheteropatriarchy have proven remarkably supple, resistant to the bromides and panaceas of each era. It is too late to prevent either the transplantation of Euroheteropatriarchy across the globe's oceans or its cultural inculcation across the continents and generations. It is even too late to remove it from the interstitial places in our own lives as academics . . .

Culp et al., *supra* note 12, at 2451.

23. See *infra* text accompanying note 119.

learn still to rent them housing, to let them into our schools, and to let them into our workplaces and boardrooms.

Others already recognize some of this potential. Some already note that effective prevention may lead to less discrimination in the first place.²⁴ Because there is so little law on just what qualifies as an effective prevention program, and so little data for employers to sort through to determine what may really reduce discrimination (or at least liability), prevention offers a rare opportunity to shape uncharted law—rather than simply level another criticism at some familiar target, like the requirement to prove intentional (as opposed to unconscious) discrimination.

The less obvious opportunity may be that prevention allows one way to put into effect the hopes for a generally inclusive and fair society that the CRT reader calls for so consistently.²⁵ When companies look for ways to prevent discrimination they'll find a cottage industry of consultants already stocked with materials on how to include all sorts of employee differences.²⁶ So, too,

24. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (advancing a structural and “judicially de-centered” approach—effective internal problem solving processes—in preventing bias in the workplace); cf. Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41 (2001) (discussing the need for internal problem solving processes rather than liability avoidance by legal actors). But see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-88 (1995) (noting the inability of decisionmakers to effectively prevent discrimination if their cognitive biases and stereotypes are not changed).

25. See *supra* note 5.

26. ANTHONY PATRICK CARNEVALE & SUSAN CAROL STONE, *THE AMERICAN MOSAIC: AN IN-DEPTH REPORT ON THE FUTURE OF DIVERSITY AT WORK* 92-93 (1995) (describing the shift in diversity programs from earlier programs that focused on specific kinds of differences, particularly women, African Americans, Latina/os, Asian Americans, and Native Americans to a broader “managing diversity” perspective “to tap the potential of all employees”); JOY LEACH, *A PRACTICAL GUIDE TO WORKING WITH DIVERSITY: THE PROCESS, THE TOOLS, THE RESOURCES* 3 (1995) (“[D]iversity refers to differences in race, gender, ethnic or cultural background, age, sexual orientation, religion, and physical or mental capability . . . [and] the myriad ways we are different in other respects, such as personality, job function, class, educational level marital status, whether or not one has children, where one lives, the region in which one was raised, and how one was raised.”); Linda Brimm & Mandakini Arora, *Case: Diversity Management at Hewlett-Packard, Europe*, in *INTERNATIONAL HRM: MANAGING DIVERSITY IN THE WORKPLACE* 108, 113 (Maryann H. Albrecht ed., 2001) [hereinafter *INTERNATIONAL HRM*] (stating that “[d]iversity is about creating an all-inclusive work environment that values and benefits from different human attributes, experiences and skills” including such “dimensions of diversity” as “age, sexual orientation, nationality/ethnicity, culture, gender, religion, physical abilities, language, economic status[, and] ways of thinking”); Lewis Brown Griggs, *Valuing Diversity: Where From . . . Where To?*, in *VALUING DIVERSITY: NEW TOOLS FOR A NEW REALITY* 1, 6 (Lewis Brown Griggs & Lente Louise Louw eds., 1995) (“Not only does diversity include differences in age, race, gender, physical ability, sexual orientation, religion, socioeconomic class, education, region of origin, language and so forth but also differences in life experience, position in the family, personality . . . and other such characteristics that go into forming an individual’s perspective . . .”).

attempts to promote tolerance and even acceptance parallel recent public health efforts to go beyond combating illness and instead to promote wellness. Exactly how that industry developed in such a way deserves far more attention than this Review can provide. What's quite clear, as we'll see, is that the best psychological research on preventing discrimination and many practicing diversity consultants and managers often endorse some kind of general approach. (Perhaps with no such awareness, the conclusion to the popular film *My Big Fat Greek Wedding*,²⁷ released in 2002, illustrates one such approach. The Greek father, who felt no non-Greek should marry his daughter, compares his family name and the family name of his WASP son-in-law. He starts off with a familiar habit of tracing the words to Greek and then concludes that one means apple, the other orange, so "we're all fruit.").

So, too, prevention offers a far less obvious opportunity to backfire. As we'll see below, both relatively narrow anti-ism efforts and relatively broad diversity programs may provoke various kinds of conscious and unconscious backlash.²⁸ In short, like any disease, prejudice may mutate,²⁹ and the wrong balance of narrow and broad approaches to prevention might well make inequality worse.

Part I takes a first look at the ways that both CRT and Ayres have already moved toward prevention and some obstacles to a further embracing of any form of prevention. Part I also explores how both include tensions between often quite general strategies to prevent all forms of unfairness, on the one hand, and periodic quite narrow language and analysis directed only at "racism," "sexism," and other somehow "distinct" forms of discrimination. Against the backdrop of this tension between narrow and general strategies, Part II explores recent psychological research that shows, on balance, that prevention efforts will often succeed better when they focus on quite general approaches to promoting acceptance, and that the kind of narrow approaches *often* embraced by Ayres, CRT, and some diversity consultants may well backfire. Part III then shows how the psychological research, Ayres, and CRT complement each other in some ways, but also underscores some important limits and internal tensions within each.

I. AYRES AND CRT AS HEALERS

This Part is an act of reconstruction. If you've read both these books, don't worry if you didn't see the comprehensive statement about how each would prevent discrimination. Neither is a twenty-first century grand theory like

27. *My Big Fat Greek Wedding* (IFC Films 2002).

28. See *infra* text accompanying note 112.

29. Cf. CROSSROADS, p. 406 ("'[D]ifferent' forms of hegemony or supremacy may combine to produce mutually reinforcing vectors of oppression that mutate in myriad ways . . . to oppose or co-opt any effort toward material transformation.").

Posner's *Economic Analysis of Law*³⁰ or MacKinnon's *Toward a Feminist Theory of the State*³¹ were to the twentieth century. To return to the medical metaphor, both collections let us glimpse master healers³² at work. Both work with the tools and instincts they know best to understand what went so wrong with the social patient that widespread discrimination still exists. Perhaps it would be easy enough to set these two sets of healers up in opposition. After all, with other costly and recalcitrant disorders like depression, don't we want to cut to the chase: Does talking to a therapist or popping Prozac banish the blues better? Many now recognize these as false dichotomies in medicine. Research has long shown that people recover better from depression with both talk therapy and medication rather than either alone, and more recent research suggests they work on different parts of the brain.³³ And the National Institutes of Health now speaks of different healing approaches not as rivals or even alternatives but as varieties of complementary medicine.³⁴

A. *Prevention's First Step: Complementary Methods of Awareness*

As with so many health crises, both these healing traditions start with the first step of awareness. Surveys show that many of us feel we have been

30. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

31. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

32. See Steven Keeva, *Into the New Millennium: Re-Envisioning the Practice of Law*, 63 TEX. B.J. 40 (2000) (advancing law as a "healing profession"); see also FETZER INST., PROGRAMS: HEALING AND THE LAW, available at http://www.fetzer.org/programs/prog_heal_law.htm (last visited May 23, 2003). The Fetzer Institute sponsors programs that explore the relationship between meditation, legal education and practice.

33. See Arthur L. Brody, Sanjaya Saxena, Paula Stoessel, Laurie A. Gillies, Lynn A. Fairbanks, Shervin Alborzian, Michael E. Phelps, Sung-Cheng Huang, Hsiao-Ming Wu, Matthew L. Ho, Mai K. Ho, Scott C. Au, Karron Maidment & Lewis R. Baxter, Jr, *Regional Brain Metabolic Changes in Patients with Major Depression Treated with Either Paroxetine or Interpersonal Therapy: Preliminary Findings*, 58 ARCH. GEN. PSYCHIATRY 631 (2001); Stephen D. Martin, Elizabeth Martin, Santoch S. Rai, Mark A. Richardson & Robert Royall, *Brain Blood Flow Changes in Depressed Patients Treated with Interpersonal Psychotherapy or Venlafaxine Hydrochloride*, 58 ARCH. GEN. PSYCHIATRY 641 (2001) (showing increased activity in brain areas involved in regulating emotion when depressed subjects underwent psychotherapy only); Richard A. Friedman, *Like Drugs, Talk Therapy Can Change Brain Chemistry*, N.Y. TIMES, Aug. 27, 2002, at D5 (reporting findings that both talk therapy and medication may lead to similar changes in brain chemistry, but drugs may work more effectively with illnesses like schizophrenia and talk therapy may affect parts of the brain that drugs do not).

34. The federal government appropriated for the 2001 fiscal year an estimated \$89 million towards the research of alternative medicine and the education and training of health practitioners in that field. Nat'l Insts. of Health, Nat'l Ctr. for Complementary and Alternative Med., *NCCAM Funding: Appropriations History*, available at <http://nccam.nih.gov/about/appropriations/index.htm> (last modified Mar. 4, 2003); see Nicholas Gonzalez, *Alternative Medicine Comes of Age*, TOTAL HEALTH, Jan. 1, 2001, available at 2001 WL 19534551.

limited by discrimination.³⁵ At the same time, many of us feel hopeless about overcoming such inequality; we're far more likely to make a fuss about a fender-bender than to tell anyone if we think we've been sexually harassed or otherwise wronged by discrimination.³⁶ Second, we often feel prejudice happens to us, rather than seeing how we ourselves may sometimes harbor prejudices or act, even accidentally, in ways that discriminate. Partly, prejudice resembles other crises in health, like "mental"³⁷ health: Much of the problem is that people do not see a problem.³⁸ And partly, as with mental health, the silence and stigma surrounding prejudice makes it hard to understand the scope of prejudice. People who may face real discrimination may instead beat themselves up, asking, "Am I just being too sensitive?" What should someone do if an interviewer tells them they cannot get a job because there are too many Asians? *The New York Times* columnist "The Ethicist" opined: "There is a chance that I—and you—are mishearing; maybe you failed to get the job on your merits, and the interviewer grabbed the first, albeit odious, excuse that came to mind."³⁹ The trouble with such advice is that it has no sense of proportion.

Together, Ayres and CRT offer a fuller perspective. Neither book would let one think discrimination is like the plague—a once dangerous and prevalent ailment "we" cured even if it still threatens some "thems" out there (be they the Indian villagers still exposed to the literal plague,⁴⁰ or Muslim women still

35. Randall Samborn, *Many Americans Find Bias at Work*, NAT'L L.J., July 16, 1990, at 1 (reporting that 25% of Americans surveyed reported they had experienced job discrimination at some point).

36. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 561 (1980-1981) ("Discrimination problems generate an unusually low number of claims . . .").

37. As I've suggested elsewhere, there is often no easy distinction between mental and physical health. Many older women may be diagnosed with the "physical" illness of "dementia" and abandoned as beyond hope, but research shows many may often have treatable "depression," which we often think of as "psychological." Clark Freshman, *Re-Visioning the Dependency Crisis and the Negotiator's Dilemma: Reflections on the Sexual Family and the Mother-Child Dyad*, 22 LAW & SOC. INQUIRY 101, 121-22 (1997).

38. See Surgeon Gen., U.S. Dept. of Health and Human Servs., *Mental Health: A Report of the Surgeon General* (1999) ("For too long the fear of mental illness has been profoundly destructive to people's lives. In fact mental illnesses are just as real as other illnesses, and they are like other illnesses in most ways. Yet fear and stigma persist, resulting in lost opportunities for individuals to seek treatment and improve or recover."), available at <http://www.mentalhealth.org/features/surgeongeneralreport/home.asp>.

39. Randy Cohen, *Indiscrimination*, N.Y. TIMES, June 16, 2002, § 6 (Magazine), at 16.

40. See, e.g., Communicable Disease Surveillance & Response, Disease Outbreaks Reported, at <http://www.who.int/disease-outbreak-news/n2002/february/20february2002.html> (last modified Feb. 20, 2002) (reporting a recent outbreak of pneumonic plague in India); Ctrs. for Disease Control & Prevention, CDC Travelers' Health Information on Plague, at <http://www.cdc.gov/travel/diseases/plague.htm> (last modified Feb. 25, 2002) (describing the Plague and where it can still be found).

trapped behind a veil⁴¹). Rather, prejudice is more like some ever mutating disorder—or set of disorders—seemingly eradicated in one form only to pop up pervasively in another. CRT has long catalogued the various “microaggressions”⁴² and indignities that outsiders face. The collection here includes some excellent pieces in this tradition, such as Devin Carbado’s insightful and artful catalogue of the easily overlooked ways that (most) men and (most) heterosexuals benefit from sexism and heterosexism.⁴³ This method resonates with many, much as narrative accounts of celebrities suffering from depression—celebrities like Winston Churchill or celebrated writers. Let us see depression as a disease, not some personal weakness of will or other flaw of character.⁴⁴ This is an important point because our societal indifference (sometimes even contempt) for those who claim prejudice so often rests on an ideology that people get what they deserve.⁴⁵

For all the power of CRT, Ayres offers a complementary, not merely additive, account. No one would mistake his prose accounts of car sales negotiations for the vivid, even lyrical glimpses at the hells of discrimination provided by powerhouse CRT writers like Patricia Williams or Jerome Culp, or a rising star like Carbado. As much as many, including myself, found such accounts so compelling, others have long wondered how much they represent individual misfortunes, however beautifully written, rather than widespread ailments.⁴⁶ This leaves some room for Ayres’s carefully documented and cleanly reported statistical studies of discrimination to complement CRT’s vivid and detailed reports—much as statistical accounts of the horrifying levels of depression complement more literary and case study accounts of depression. Read Ayres’s careful experimental and statistical accounts of discrimination, and discrimination looks less like something we “imagine” and more like a kind of immune disease that exposes some to hosts of disadvantages.

41. On the condition of Muslim women, see Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT’L. L.J. 311, 322 (1995) (“The image of creating Eve from one of Adam’s ribs reinforces the concept of women as subordinate to men.”).

42. See Peggy C. Davis, *Law as MicroAggression*, 98 YALE L.J. 1559 (1989) (considering how the legal system views minorities and examining minorities’ perception of the system as biased).

43. CROSSROADS, p. 221.

44. See, e.g., ANDREW SOLOMON, *THE NOONDAY DEMON: AN ATLAS OF DEPRESSION* 367 (2001).

45. See, e.g., Christian Crandall & Monica Biernat, *The Ideology of Anti-Fat Attitudes*, 20 J. APPLIED SOC. PSYCHOL. 227, 240 (1990) (“[D]isliking fat people is a manifestation, along with disliking other less fortunate out-groups . . . [that] can be summarized with one central ideological tenet: ‘You are responsible for everything that happens in your life.’ This belief provides a ‘logical’ basis for the denigration of those less fortunate.”).

46. Richard A. Posner, *Response to Clark Freshman, Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1610, 1612 (1995) (clarifying that Posner thinks CRT pioneer Patricia Williams is an excellent writer).

Even when Ayres has people negotiate from scripts in nearly identical ways, salespeople quote initial offers to African-American men that reflect nearly twice the profit dealers would make on whites—and the final offers represent four times as much profit.⁴⁷ African-American women were quoted initial prices that reflected sixty-five percent more profit than that obtainable from white men and a final markup that reflected nearly twice as much profit.⁴⁸ Reconstructed records of actual car sales also show that African-American men and women pay more.⁴⁹

Under rules for assigning kidneys that were only recently changed, African Americans waited nearly twice as long as whites for their first transplant.⁵⁰

Based on a complex and novel comparison, Ayres concludes judges in Connecticut set bail higher for African Americans and Hispanics.⁵¹

Ayres's methods also complement the CRT approaches in another, subtler sense: Ayres may have room to document subtle biases CRT might not report. It's telling that Ayres includes few individualized reports of transparent prejudice.⁵² Although the results leave no doubt that *something, somewhere, somehow* happened that resulted in very different prices for African-American men than others, it's not at all clear that any of the individual testers would have noticed being treated differently. Ayres includes no reports of flagrant rudeness or refusals to approach African-American customers.⁵³ Perhaps this represents a stylistic decision to stick more closely to aggregate numbers. But it may also reflect that even African Americans and women themselves may not recognize different treatment. As Ayres notes, this in part reflects the limited ability of all of us to know how others are treated in one-on-one encounters. But it also reflects the way that statistical methods may capture subtle—but significant—differences. Of course, this applies to other areas as well. Recent emotion research shows that even sophisticated negotiators, like Stanford MBA students, get much better deals when exposed to pleasant scents, funny videos, or other things linked to mildly positive moods.⁵⁴ Without such

47. AYRES, p. 32.

48. AYRES, pp. 32-33.

49. AYRES, p. 120.

50. AYRES, p. 182 (reporting the average wait time as 13.9 months for African Americans, but only 7.6 months for whites) & n.66 (reporting that in 1998, African Americans waited 39.5 months on average, but whites waited only 20 months).

51. AYRES, p. 263.

52. One notable exception: A nanny service told Ayres it could get him whatever race of nanny he wanted. AYRES, p. 403.

53. Ayres does report some differences in the way salespeople treated different kinds of customers. When the testers asked about what cars cost, the dealers told many African-American males—but not any African-American females. AYRES, p. 40. On the other hand, it's unclear what effect this had since the numbers salespeople volunteered were demonstrably false! AYRES, pp. 40-41.

54. For a review of studies involving psychology and business school students, see Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist:*

statistics, many might never contemplate the idea that even quite mild shifts in mood lead to statistically significant differences in outcomes. And even if people did contemplate such possibilities, they might fear the doubts others might have if they voiced them: It may seem flaky or “New Age” to speak of positive psychology—just as women and other outsiders may fear being labeled too sensitive or downright paranoid to speak of “subtle racism” or “unconscious sexism.”

B. *The Potential Applications to Prevention*

By and large, both Ayres and CRT devote the lion’s share of their resources to documenting discrimination and suggesting how one may remedy such discrimination through various formal means like suing wrongdoers in court, changing laws, and so on. Neither has terribly much to say about efforts to prevent discrimination by trying to educate individuals in the ways that business and the Supreme Court have embraced. Despite this relative inattention, both Ayres and CRT have far more potential contributions to preventing discrimination than simply raising consciousness.

For starters, CRT has much to share about its own successes—and obstacles—in overcoming prejudices and inequalities within its own ranks. Anyone who hasn’t followed CRT writings over the years could easily think all CRT pieces always included the kind of statements about the interlocking nature of seemingly different isms that nearly every piece here includes. Instead, as a string of articles has documented, CRT struggled for years about how Latina/os, Asians, and Native Americans could fit—literally—in CRT conferences. How much did “race” in CRT include “other” people of color besides blacks?⁵⁵ So, too, many lesbians and gays, both black and of other colors, questioned how welcome they felt. Ultimately, CRT has evolved as a kind of AFL-CIO of much critical theory: Many attend not only CRT conferences but also conferences by LatCrit, queer theory, and critical feminism.⁵⁶ As we’ll see in the next section, this identity with subidentities is reminiscent of the kind of dual/multiple identity that many psychological theories (and some research) suggest best reduces prejudice. As it stands, some could try to juxtapose the existing published accounts of this experience with

What We Know and Don’t Know About How Mood Relates to Successful Negotiation, 2002 J. DISP. RESOL. 1.

55. CROSSROADS, p. xvii. CRT pioneer Lawrence notes: “We [at CRT meetings] have struggled to teach one another about the intersections that gender and race and heterosexism make and to confront our own internalization and participation in those subordinations.”

56. CROSSROADS, p. xvii. CRT pioneer Lawrence states: “I also believe it is not necessarily a bad thing that, as we grow in number, we form smaller, more intimate groups of younger and older Lat-Crits and queer-race-Crits and Midatlantic-women-of-color-Crits . . . [because] I do not experience them as excluding or divisive . . . [because] [m]any of us move freely among them and identify with more than one.”

existing theory.⁵⁷ While memories are still relatively fresh, however, it would be helpful to have those with such memories juxtapose them with contemporary psychological accounts.⁵⁸ So, too, it would be helpful to offer in one place an account of other specific ways used to reduce prejudice, including the LatCrit method of rotating centers, where people agree to let the experiences of some dominate discussion for some time, shifting in turn to other experiences.⁵⁹

For his part, Ayres has much skill in systematic, quantitative methods to test precisely what prevention and investigation programs really work. In his last chapter, Ayres sees great potential in tests of unconscious discrimination. Such tests compare how quickly one associates certain good words with “European-American” and certain bad words with “African-American”; the faster the association of white with good, the more unconscious in-group sympathy (or white supremacy,⁶⁰ as CRT might call it, or “favoritism” as psychologists call it⁶¹). With perhaps more faith in courts’ embrace of novel

57. Cf. SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 171-77 (2000) (applying contemporary theories of prejudice reduction to the historic Robbers Cave study that examined how campers split into groups stereotyped each other—and overcame some of their stereotypes and prejudices). See generally CROSSROADS, p. 245 (describing CRT narratives as “tools for teaching Others not only how to be and how to behave, but also how it is possible to be and to behave”).

58. Some classic work in CRT, including Lawrence’s argument that the Constitution should reach unconscious prejudice, drew heavily on psychological theories and experiments. See Lawrence, *Unconscious Racism*, *supra* note 9. With notable exceptions, like Armour’s description of one approach to prejudice reduction, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994), more recent CRT work, particularly as captured in this Symposium, has made less use of psychological research. *But cf.* CROSSROADS, p. 188 (“Critical theorists have long found psychological theory useful for analyzing racism and its legal implications.”).

59. Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination*, 5 MICH. J. RACE & L. 787, 795 (2000).

In practice, this effort [rotating centers] has entailed both individual and group embrace of coalitional methods in critical and self-critical ways that continually (re)ground both theory and praxis in the objectives of intra- and inter-group justice. These practices include programmatic initiatives that periodically shift the substantive focus of critical and self-critical inquiry among and between various groups or identities, as well as individual research projects that explicitly center marginal identities within outsider groupings.

Id.

60. See Bell Hooks, *Theory as Liberatory Practice*, 4 YALE J.L. & FEMINISM 1, 4 (1991) (defining white supremacy as “alliances between white women academics and white male peers [that] seemed to have been formed and nurtured around common efforts to formulate and impose standards of critical evaluation that would be used to define what is theoretical and what is not.”).

61. See Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 386 n.283. Psychologists often use the term ingroup “favoritism,” but this implies a conscious, intentional decision to favor when the research suggests more that individuals may automatically prefer those seen as more like themselves.

evidence than current doctrine might warrant,⁶² Ayres suggests one might impeach witnesses by their scores on the tests.⁶³ Ayres also sees some prevention potential: Employers might screen out employees with scores of unconscious prejudice.⁶⁴ He also notes more generally how they could be used in “racial sensitivity programs.”⁶⁵ Whatever the value of these other suggestions, Ayres could also use such tests to examine how well such prevention programs work. One might look at the unconscious prejudice scores of persons before and after various trainings. One might also look carefully months later to see how well any reductions in prejudice last. This could address a crucial practical question of how frequently one should include prejudice reduction trainings.

Apart from these quite different contributions each might make, both CRT and Ayres also have potential to check that prevention measures do not fall unfairly (or inefficiently, as Ayres might say⁶⁶) on various outsiders. Some of CRT’s suspicion of prevention runs deep, drawing on its fear, like much feminist theory, that informalism would either water down formal rights or impose various indignities and unpleasanties on outsiders.⁶⁷ As we’ll see

62. It’s hard to see how something as relatively novel as unconscious tests of discrimination would make it over the *Daubert* wall when most courts still exclude lie detector testimony. See *United States v. Scheffer*, 523 U.S. 303, 317 (1998) (holding that a per se rule excluding all evidence resulting from a polygraph test does not violate the Constitution); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (imposing heightened standards by which the judge, as gatekeeper, may exclude expert testimony if the expertise of the field is not sufficiently established). But cf. John E. Theuman, *Admissibility in Federal Criminal Case of Results of Polygraph (Lie Detector) Test—Post-Daubert Cases*, 140 A.L.R. FED. 525 (1997) (“The results of polygraph or “lie detector” tests were once generally excluded from evidence in federal criminal cases under the rule that held that scientific evidence was admissible only if the principle or discovery on which the principle was based had gained general acceptance in the relevant scientific field. Since [*Daubert*], however, some federal courts have concluded that a general exclusion of polygraph evidence is invalid and such evidence may be admitted in particular cases if the evidence meets the requirements of various provisions of the Federal Rules of Evidence.”).

63. AYRES, p. 422 (suggesting that if defendants claimed they “could refrain from treating blacks differently than whites,” then “the counsel for the plaintiff might then attempt to have the defendant complete the IAT [(Implicit Association Test)] on the stand”).

64. AYRES, p. 424.

65. AYRES, p. 424.

66. A small point: Ayres does dress up much of his analysis in relatively conventional economic language of efficiency. On the margins, however, Ayres allows more room for an explicit role for normative values than many law and economics scholars might once have admitted. For instance, in his analysis of rules to allocate kidneys, he notes that the efficiency data may be so imprecise, and the standards for what one should maximize so varied, that a large role goes to how one assigns the burden of proof on rules that may disadvantage African Americans. AYRES, p. 200 (“Ultimately, the absence of clear empirical results may make the allocation of burdens of proof the most important normative decision of all.”).

67. See, e.g., Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985). Feminists have been far more divided in their

below, this is a quite real concern with how prevention in practice may function. Outsiders must fit in and change; outsiders must give up their culture and habit; outsiders must justify why they deserve to be in a given school/profession/organization even when those privileged by money, athletic skill, or powerful relatives need not. Early on, Patricia Williams's "diary" of her experiences as a law school professor documented how she felt pressured to be civil rather than criticize how the exams of other professors included racial stereotypes.⁶⁸ So, too, Carbado, in this CRT volume documents how lesbians, gay men, and women may feel pressure to make others feel comfortable: Gay men may not discuss their weekend plans, and women may not discuss families, lest they be relegated to a mommy track.⁶⁹

Again, Ayres complements this approach with an economic analysis. He confronts head-on the potential objection that African Americans might get the same car prices as whites if they just negotiated differently. "Even if women and other minority members *could* avoid 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."⁷⁰

C. *Barriers to Prevention*

Given all the potential contributions to preventing discrimination, why have Ayres and CRT not done more thus far? The first set of barriers involves the relative lack of attention to prevention at all. There are many generic reasons, like the general way that legal scholarship values formal solutions (doctrine and legislative reform) over relatively⁷¹ informal solutions (like negotiation), but there are more specific explanations as well. Be it copyright or civil rights, law and economics or feminist legal theory, neglect of

attitudes towards informal dispute resolution. Compare Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (arguing that mediation may disadvantage women at divorce), with Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) (reconsidering an earlier view that negotiation would benefit women because women may have better negotiation skills).

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

69. CROSSROADS, p. 229 (asserting that male privilege includes "I do not have to choose between having a family or having a career").

70. AYRES, pp. 50-51.

71. The solutions are relatively informal to the extent that certain formal laws may favor negotiation directly, such as privileging settlement discussions, *see, e.g.*, FED. R. EVID. 408, or indirectly, by using such vague legal standards that parties find negotiation preferable to the uncertainty of court, *see generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (arguing that parties will settle, in part, based on what they perceive a court might do).

prevention often reflects a mix of under-confidence in prevention and over-confidence in litigation.⁷²

Surely some of these generic explanations apply here as well, but so do more specific explanations. CRT may be more under-confident⁷³ that “they” will never “get it,” and Ayres may be overconfident that “we” don’t need to “get it” if we tweak the few imperfect markets well enough. It’s a leitmotif of CRT that many simply cannot see unfairness—and not just potentially self-absorbed academics who cannot see the stereotypes in their own exams.⁷⁴ As one contribution to this CRT reader notes with exasperation, most whites *still* don’t see how they have benefited from the legacy of slavery.⁷⁵ And if they just will not get it, why waste time with trying to persuade them? And even if they could get it, why bother if we will have to pay the price in terms of wasting our time educating them about their problems?⁷⁶

It’s surprisingly unclear from this book alone exactly where Ayres fits into this under-confidence aspect. There’s some evidence Ayres thinks prejudicial attitudes cannot be changed—nor prevented from souring into discrimination—when he suggests employers simply not hire people who score high on tests of unconscious prejudice.⁷⁷ And yet he also suggests many principled people could overcome their unconscious prejudices if they were brought to their attention.⁷⁸ The idea that one cannot change attitudes about prejudice, or any attitude, would easily fit the neoclassical economic view that one can’t change prejudicial attitudes any more than one can change “tastes” for other things, be they ice cream or some other commodity.⁷⁹ But that neoclassical position would be oddly retro for Ayres to take given the explosion of “law and norms” work on the way that law and society can indeed shape tastes/norms—and particularly odd since Ayres lauded one recent book on law and norms

72. See generally Sandra R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271 (1999) (finding men and women do equally well on a negotiation, but men express more confidence, raising the question whether women are under-confident or men over-confident).

73. I use “under-confident” with some trepidation. To the extent under-confident suggests a lack of confidence in one’s own abilities, stereotypically associated with women, see *supra* note 72, it is not implicated here since the lack of confidence is in the ability of whites.

74. See, e.g., WILLIAMS, *supra* note 68 (describing many experiences of teachers who did not see their own use of stereotyping, including a professor who used examples on an exam that resonated with stereotypes); Delgado, *supra* note 7.

75. CROSSROADS, p. 88 (discussing the “widely held belief among [w]hites that race has little if any effect on one’s life chances”).

76. See *supra* text accompanying note 70.

77. AYRES, pp. 424-25.

78. AYRES, p. 419.

79. See, e.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

generally.⁸⁰ Then again, Ayres has elsewhere shied away from endorsing any single strand within law and economics, suggesting instead that the best approach will simply differ given different problems.⁸¹ And so, too, as he suggests here that discriminatory pricing may function for different reasons for African-American women (a belief they dislike negotiation) than for African-American men (some kind of pleasure in inconveniencing them), Ayres may indeed have more particular views on what kinds of prejudice may be prevented—and by what means.

More clearly Ayres's lingering,⁸² habitual faith in a super-tweaked market may interest him more than changing attitudes or behaviors. The faith has two cornerstones. First, information will set us free(r). After documenting how much more African Americans pay for cars, one of Ayres's main suggestions is simply old-fashioned market-tweaking: Just legislate disclosure of more information about car prices, and people will get better bargains.⁸³ The second cornerstone of the faith is that most existing markets may not need so much tweaking. Ayres asserts that most retail markets, unlike car sales, do not have room for negotiation.⁸⁴ This is clearly open for debate! As the popular press has reported, and as many negotiation teachers have our students learn, one can negotiate for everything from hotel rooms to magazine subscription rates to underwear prices at Macy's.⁸⁵

While this first set of barriers may explain part of the lack of attention to prevention of discrimination, a distinct set of barriers is the habitual pull to relatively narrow approaches to preventing "different" kinds of discrimination. In particular, both Ayres and CRT often seem tugged towards approaches that

80. Harvard Univ. Press, *Book Review* (2002) (reviewing ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000)), available at http://www.hup.harvard.edu/reviews/POSLAS_R.html.

Eric Posner has written a bold and provocative thesis about one of the most important and fastest developing areas of legal scholarship. He has a powerful structure that states his thesis elegantly, acknowledges alternative views, applies his theories to a host of legal fields, and collects normative legal implications. *Law and Social Norms* should become one of the standard references to norm theory.

Id.

81. Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503, 519 (1997) (stating that "the best work . . . is willing to openly consider the most plausible theories regardless of disciplinary dressing").

82. AYRES, p. 125 (expressing doubt about the way that "[c]apitalist economies often valorize bargaining by conceiving of . . . negotiations as the market's working in its purest form"); see also *supra* notes 66, 68.

83. The faith should not be caricatured. Ayres also suggests making litigation more possible and available, and mandating more increased disclosure of car prices. AYRES, p. 126. However, he acknowledges evidence that merely disclosing information will not always change behavior.

84. AYRES, p. 160 n.118 ("The vast majority of goods cannot be bargained for: retailers compete for consumers thorough a 'stated price' that they can change from day to day but over which they will not bargain.").

85. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2000).

are relatively narrow and atomized (against some seemingly “natural” particular form of discrimination such as “racism” or “sexism”).⁸⁶ In addition, both often seem pulled towards fighting discrimination as if it were targeted *against* individuals in these narrow atomized groups rather than reflecting sympathy towards individuals in some groups that just happen not to include many outgroups. In principle, one could distinguish these two tendencies: One could imagine adopting a larger view, but taking an affirmative stance (such as opposing all forms of subordination, as some CRT texts sometimes do); one could also imagine adopting a narrower view, but adopting a positive approach (such as recent efforts to give some nonhuman animals, including dolphins and certain “great apes,” the rights of humans). Overall, though, attention to preferences for a relatively privileged group (usually some subset of the white population) implies quite general categories of insiders and outsiders, rather than splintering outsiders into various categories. In practice, therefore, attention to preferences suggests quite generalized⁸⁷ notions of discrimination.

While popular culture and social discourse generally sound in quite atomized approaches across the board, Ayres and CRT reflect a far more complicated mix, both including some features of generalized language and analysis at times. In particular, both acknowledge at times that discrimination may often result from preferences for some narrow ingroup (such as white men). CRT does this most frequently with two recurring concepts of whiteness (which makes skills and qualities associated with whites the measure of value).⁸⁸ Ayres makes this distinction in a careful footnote in his introduction.⁸⁹ Again, in his conclusion, he notes that tests of unconscious discrimination measure how people associate white (or black) with good, not how they associate either with bad.⁹⁰

86. See *supra* note 6 (defining atomized discrimination).

87. Generalized discrimination may take the form of some mix of outgroup hostility towards all those not like some narrow preferred group—such as those perceived as heterosexual white males—or ingroup sympathy towards a narrow preferred group, which necessarily disadvantages all others). See Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 322-23.

88. See, e.g., Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121, 125-26 (1993) (“[T]he [LSAT]’s narrative content of individual questions creates a discourse, a thematic content, for the whole test. That discourse has been one that favors the dominant social force in our society, white men.” (footnote omitted)).

89. AYRES, p. 21 n.4 (explaining that he is using the terms “discrimination” and “disparate treatment” to mean he believes dealers treated people of certain races and genders differently, not that “salespeople harbored any animus based on race or gender”).

90. AYRES, p. 421 (“[T]he results of [an Internet-based Implicit Association Test] data suggests the majority (62%) of subjects have a moderate to strong automatic preference for whites (a proportion that is six times greater than the just 10% that have a moderate to strong preference for African Americans.”); see also AYRES, p. 303 (explaining that data shows “only that courts use unjustifiable criteria that disproportionately burden minority males”). This particular example is less general in its application since it contrasts “European-American” and “African-American.” A more general test of preference for white would

To varying degrees, then, both Ayres and CRT sometimes take relatively generalized approaches. For CRT, this includes frequent assertions that one cannot attack one ism without taking on other isms.⁹¹ Though quite broad in other ways, Ayres largely does not address the relative breadth of discrimination with brief exceptions in the introduction (“[t]he process of bargaining, already inefficient in many ways, becomes all the more problematic when it works to the detriment of traditionally disadvantaged members of our society”⁹²) and conclusion (many who discriminate on one basis will discriminate on others⁹³). It’s particularly noteworthy that the lengthy discussion of racial and gender bias in car negotiations, for example, does not address whether discrimination might reflect biases involving other kinds of groups, such as older people, Asians, and so on. On the other hand, Ayres turns in some instances to quite generalized responses to phenomena, such as adopting rules that require dealer costs be revealed to all customers, not just African Americans.

Even though Ayres and CRT include these generalized aspects, both their language and their underlying analyses often pull in quite narrow, atomized directions. In Ayres’s case, this shows up most clearly in several aspects of his analysis of car bargaining. Consistently this analysis reflects a pull towards specific categories. Based on tests of how car dealers negotiated with people he sent of different races and genders, Ayres says “*discrimination*” and “*disparate treatment*” simply means “sellers took *race and gender* into account and treated differently testers who were otherwise similarly situated.”⁹⁴ Ayres also leans towards specificity for the ways race and gender were considered in different ways: “No single causal theory may be adequate to explain discrimination *against* both blacks and women.”⁹⁵ Ayres also insists on finding a complete “causal theory” because “effective governmental intervention should ideally grow out of an accurate theory of market failure.”⁹⁶ That’s an odd statement if the required “causal theory” includes identifying different sources for different kinds of discrimination. Ayres largely does not propose different solutions for these seemingly different kinds of problems, but instead suggests the same combination of requiring more information about dealer costs and sales prices, to enhance bargaining, and establishing a clear right to sue for discrimination in retail transactions.⁹⁷

simply test the association of white with good, including neither “European-American” nor “African-American.”

91. See *supra* note 5.

92. AYRES, p. 22 (footnote omitted).

93. AYRES, p. 425 n.49 (“[P]eople who discriminate on one ground (say, against homosexual) are more likely to discriminate on others (say, against African Americans)”).

94. AYRES, p. 21 n.4 (emphasis added).

95. AYRES, p. 85 (emphasis added).

96. AYRES, p. 85.

97. To be complete, however, Ayres does not shy away from explicitly race-conscious solutions. He explicitly suggests a criterion for assigning kidney transplants because it

More subtly, the tendency to see hostility for an outgroup rather than sympathy for an ingroup shows up in his otherwise quite methodical attempt to model why car dealers charge African Americans more. Ayres's raw data shows salespeople spend more time with African-American men but move little on price; he foregrounds the explanation and concludes this is consistent with wanting to disadvantage African-American men.⁹⁸ Surely such data would be consistent with such hostility. And it's also consistent with preferences: salespeople may want to spare African-American women the burdens of negotiation out of some sense of sympathy, perhaps growing out of societal images of African-American women as especially nurturing mothers (embodied in the Aunt Jemima stereotype).⁹⁹

The CRT reader also features the same tension between the often quite general rhetoric we saw above and a pull to atomized categories. Overall, the reader has moved far from the often quite insistent emphasis on race that characterized many earlier CRT works and conferences.¹⁰⁰ Still, the pull to

would favor African Americans, although it would incidentally favor others, like me, with relatively rare blood types. AYRES, pp. 183-210 (discussing the O rule which favors those with blood type O to the disadvantage of those with the rare blood type B). He even suggests in a footnote that it might be fair to make race an explicit criterion to the extent that higher rates of kidney disease stem from the conditions of African Americans during slavery. AYRES, p. 210 n.176.

98. AYRES, p. 48. I say Ayres "foregrounds" this explanation because he elsewhere acknowledges his preferred explanations are "impressionistic" and "[t]he results might best be described as a set of facts in search of a more complete causal theory" that might include "the mutually enforcing nature of multiple causes." AYRES, p. 85.

99. Ayres acknowledges others often see a simpler role for preferences in that people may prefer to advantage "their own group." AYRES, p. 49-50 & n.17 ("[T]he sellers' motive may not be to disadvantage other groups but to advantage their own group."). This is a more limited notion in two senses: It focuses on "one's own group" rather than preferences for some ideal which may not include oneself. See Freshman, *Beyond Atomized Discrimination*, *supra* note 6, at 244 (arguing ingroup sympathy is simply for a preferred group that may not include oneself); Jeffrey G. Noel, Daniel L. Wann & Nyla R. Branscombe, *Peripheral Ingroup Membership Status and Public Negativity Toward Outgroups*, 68 J. PERSONALITY & SOC. PSYCHOL. 127 (1995) (suggesting ingroup sympathy may arise strongest in those on the cusp of admission to a privileged group, be they fraternity pledges, African Americans who may "pass" as white, or gays who fit relatively traditional concepts like monogamous relationships). This is an important distinction because it may explain why various outsiders often act to advantage a privileged group even if it does not include them—potentially explaining, among other things, why one of the most discriminatory car salespeople in Ayres's account of actual car sales was himself African American! Second, the notion of preference, advantage, and rivalry reflects a relatively conscious and *relatively* hostile motive, whereas sympathy may include feelings for some that simply overlook anyone not in the preferred group. Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 393 n.316.

100. CROSSROADS, pp. xvii (describing controversies about who could attend CRT meetings and who felt comfortable there); CROSSROADS, p. 56 (suggesting that "CRT should approach calls to open itself . . . with caution [because] [u]ntil these larger forces [of white supremacy] are tamed, we believe, membership organizations of people of color will be needed").

specificity shows up clearly at times. From a prevention point of view, Carbado's carefully crafted chapter on the invisible privileges of "heterosexuals" and "men" is the most significant. Carbado notes the way that "coming out," once exclusively associated with declaring oneself gay, lesbian, or bisexual, has now become associated with any nonobvious aspect of self.¹⁰¹ People come out as Republicans, chocolate lovers, and, as the popular commercial suggests, lovers of Kellogg's Corn Flakes.¹⁰² In one sense, Carbado's analysis resonates with earlier CRT work that emphasized how some identities seemed so much more oppressive than others.¹⁰³ Say you're gay, and you may lose your job—often with no legal recourse.¹⁰⁴ Say you like chocolate, and you may get some Hershey's from your Secret Santa. In this sense, the words "coming out" are too thin in the way that "diversity" may be too thin as well, equating the diversity that an African American brings when many associate with no African Americans to the contribution a conservative or Republican faculty member makes when there really is no shortage of contacts with, and information about, conservatives or Republicans.¹⁰⁵

From a prevention perspective, though, this misses an opportunity. Using "coming out" more broadly may help many outsiders understand their similar burdens: For some, the coming out means coming out as any kind of outsider at all, like the Jew with an anglicized name or atypical Jewish looks,¹⁰⁶ the person with epilepsy who is not having an episode, the person with a learning disability, and so on.

In short, both CRT and Ayres stand ready to extend their analyses and methods to the emerging agenda of preventing discrimination. What remains to

101. CROSSROADS, p. 234.

102. CROSSROADS, p. 234.

103. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 408 n.36 (arguing that comparing severe forms of oppression to mild ones is like comparing chemotherapy to morning sickness); cf. Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1832-33 (1996) (suggesting that there might be negative reaction to analogies because they represent an attempt to appropriate the suffering of another).

104. Federal law does not explicitly prohibit discrimination on the basis of sexual orientation. See, e.g., *DeSantis v. Pac. Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (holding that federal protection against discrimination on the basis of sex does not extend to sexual orientation).

105. See, e.g., JEAN STEFANIC, RICHARD DELGADO & MARK TUSHNET, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (Temple Univ. Press ed., 1996); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2204 n.56 (1995) (taking account of the way that various "metanarratives" from popular culture create a "hierarchy of cultural representations and cultural values" such as the "western metanarrative . . . of progress, reason, and revolution, a public narrative of Darwinian evolution and class struggle").

106. In the 1950s research suggested that people could accurately identify people who were Jewish just by the way they looked in photos. See GORDON W. ALLPORT, THE NATURE OF PREJUDICE 133 (1954).

be seen, however, is how well their mix of relatively generalized and atomized categories, whatever their fit with their important work so far, will actually help prevent prejudice and discrimination. To put that in perspective, the next Part considers some quite tentative lessons and questions from academic psychology and the growing industry of diversity training.

II. THE EVOLVING SCIENCES AND INDUSTRIES OF PREJUDICE REDUCTION

While both Ayres and CRT have had relatively little to say about preventing discrimination, both professional consultants and academic psychologists have already said more. And yet the attention still leaves much room for economic and critical analysis. For their part, consultants have certainly produced large volumes of material for books, seminars, and web sites to offer businesses advice on reducing prejudice, promoting diversity and—not surprisingly—avoiding legal claims for discrimination.¹⁰⁷ For all the volume of the materials, however, there's surprisingly little information on quality. In all that I've read and seen of material from consultants, nothing shows any evidence that the trainings actually reduce prejudice or prevent discrimination.¹⁰⁸ As we'll see below, academic psychologists also have not devoted enormous resources to showing what actually works. Still the research discussed below does raise important warning signs about the frequent emphasis on very specific and atomized approaches to "different" forms of discrimination and attention to "differences" between individuals. This is particularly troubling both because *much* of popular diversity programs and *much* of the emphasis of Ayres and CRT involve such "difference" approaches. It's important to keep difference and other strategies, like promoting common identities as "Americans" or "people" or "IBMs" in perspective; neither this review nor the psychological approaches clearly shows that either the difference or sameness approach alone works best. As in many areas, some balance of the different approaches may well work best.¹⁰⁹ Overall, however, whereas we saw that Ayres and CRT often default to more specific, atomized approaches, much commercial training material and much academic research defaults towards more general and inclusive approaches. In setting out these other perspectives, the premise is not that some "experts" in either psychology or consulting somehow "got it right" while Ayres and CRT fall short, nor vice versa; rather the idea is to bring these various perspectives together to better

107. See sources cited *supra* note 21.

108. WALTER G. STEPHAN & COOKIE WHITE STEPHAN, *IMPROVING INTERGROUP RELATIONS* 99 ("In general, diversity trainers do not publish systematic evaluations of the effects of their efforts.").

109. See, e.g., Eliot R. Smith & Jamie DeCoster, *Dual Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 *PERSONALITY & SOC. PSYCHOL. REV.* 108, 108-09 (2000) (suggesting individuals may draw on both intuitive and nonintuitive ways of processing information).

shape a prevention policy that really works.¹¹⁰ What follows here, then, are relatively preliminary lessons and hypotheses.

A. *Lesson One: Popular Diversity Strategies May Backfire Through Conscious and Unconscious Backlash*

The worst news: Psychological research suggests that “difference” talk, typical of both many popular diversity trainings and much of the rhetoric of CRT and Ayres we saw above, may backfire in several ways. Before exploring those ways, it is helpful to have in mind the range of diversity programs. As with Ayres and CRT, many popular programs may also include a mix of emphasis on common goals and identities, on the one hand, and “cultural” or other differences on the other. And much as some chapters in Ayres and CRT may focus quite decidedly on particular differences, like Ayres’s chapter on African Americans and car negotiations, or the CRT chapters on Native Americans or people with disabilities, so, too, some trainings may target differences involving African Americans, Hispanics, Asians, gays or lesbians, Arab Americans, and so on. Others, like the popular print and video series on penguins and other birds, use penguins as a stand-in for insiders, and portray various other birds as stand-ins for outsiders.¹¹¹ In terms of values, some programs emphasize how diverse groups (or individuals) may bring different skills to organizations, while others emphasize other different business-related reasons, such as targeting customers from diverse backgrounds.¹¹² All the variations rest on a seemingly quite simple and plausible rationalist assumption: Give people more information, and factually unjustified stereotypes fall away; give people self-serving reasons to overcome their prejudices, and people can change; let already well-meaning people see how they may accidentally (or unconsciously) be unfair, and they will be fairer;¹¹³ let even authoritarian,

110. See generally Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 359-60 (rejecting the idea that legal scholarship should simply defer to some other academic expertise because each field may have its own potential contributions and own ideological and professional biases).

111. See BARBARA “B.J.” HATELEY & WARREN H. SCHMIDT, *PIGEONHOLED IN THE LAND OF PENGUINS: A TALE OF SEEING BEYOND STEREOTYPES* (2000), a popular diversity training book, with accompanying video, that uses an allegory of different birds who often find themselves stereotyped in a world run by penguins.

112. See, e.g., Allan Edward Barsky, *CONFLICT RESOLUTION FOR THE HELPING PROFESSIONS* 54 (2000) (asking readers to evaluate how their cultural groups shape their responses to various issues that arise in conflict resolution); Rajesh Kumar, *Affect, Cognition, and Decision Making in Negotiation: A Conceptual Integration*, in *MANAGING CONFLICT: AN INTERDISCIPLINARY APPROACH* 185, 193 (M. Afzalur Rahim ed., 1989) (theorizing that, in response to the stress of negotiations, Japanese negotiators may withdraw from negotiation, but Americans may become more aggressive).

113. See, e.g., Patricia G. Devine & Margo J. Monteith, *The Role of Discrepancy-Associated Affect in Prejudice Reduction*, in *AFFECT, COGNITION, AND STEREOTYPING:*

fairly narrow-minded people see that their employers want them to be tolerant, and they may be more tolerant.¹¹⁴

Before turning to the more subtle problems with training that emphasizes differences, consider three relatively straightforward potentials for backlash. First, emphasis on particular forms of difference might simply perpetuate certain stereotypes. Suppose a diversity consultant tries to address the way supervisors say certain Asian employees do not speak up enough.¹¹⁵ It may be tempting simply to suggest that Asian culture sometimes involves conformity, so Asians may not speak up as frequently. This eliminates any fear that Asian employees somehow lack commitment, but it perpetuates an idea that they somehow “naturally” or “culturally” will fall short in tasks that call for speaking up more. Second, emphasis on particular forms of difference may make inequality seem more acceptable if it is linked to some “different” culture. Focusing narrowly on (arguably) patriarchal Asian cultures may make limiting opportunities for women seem acceptable¹¹⁶ just as listening sympathetically to the particularities of some Evangelical Christians may make homophobia seem acceptable.

The third relatively straightforward problem involves *conscious* backlash. Diversity strategies may easily trigger quite conscious backlash against “special rights” and “special treatment.”¹¹⁷ At the macropolitical level, this includes levels of explicit retrenchment on many fronts: initiatives like the California initiative to prohibit race-conscious programs in schools and universities, court decisions invalidating affirmative action, or legislation.¹¹⁸ All of this at least is visible. Less visible backlashes occur, too, on a microlevel when outsiders

INTERACTIVE PROCESSES IN GROUP PERCEPTION 317, 329-30 (Diane M. Mackie & David L. Hamilton eds., 1993).

114. See Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, in CLAREMONT SYMPOSIUM ON APPLIED SOCIAL PSYCHOLOGY 93, 107 (1999) (one of the conditions when contact reduces prejudice may be when authority figures indicate toleration and acceptance is valued and prejudice not valued). See generally BOB ALTEMEYER, *RIGHT-WING AUTHORITARIANISM* (1981) (noting that those who scored highest in a measure of prejudice against a variety of groups showed reductions in their prejudice after being told, truthfully, that they showed above-average negative attitudes).

115. See generally, e.g., Allan Barsky, David Este & Don Collins, *Cultural Competence in Family Mediation*, 133 *MEDIATION Q.* 167 (1996) (suggesting Asian women may not speak up as much in mediation as an important “cultural” feature).

116. For an extended discussion of this problem, see Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 *UCLA L. REV.* 1687, 1711 (1997).

117. See, e.g., Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1361-62 (1988) (“The most prevalent threat was not that the ideology would be exposed as fraudulent and that whites would attack the ideology, but that there would be a white backlash against Blacks and against institutions perceived as sympathetic to Black interests.”).

118. See *supra* text accompanying note 17.

cannot break into organizations or through glass ceilings, or when fellow employees sabotage their work—or simply fail to include them in the metaphorical circle of family and friends.¹¹⁹

The most subtle and pernicious of all the effects stem from various forms of unconscious or automatic backlash. Discrimination—in the simple sense that equally qualified persons face different opportunities—might exist for many reasons. Sometimes this involves conscious hostility towards individuals from some particular group, sometimes more generalized outgroup hostility. But a slew of academic psychology research, based on self-reports of individuals, experiments in which individuals judge others, and experiments designed to test unconscious prejudice all suggest that much discrimination is automatic or unconscious, rather than conscious.¹²⁰ A similar combination of methods suggests discrimination most often involves preferences for people “like us”—or at least people like we would like to be!—rather than hostility.¹²¹ To simplify somewhat, when individuals look at a resume, they do not merely analyze the words; instead, they look at the resume through the lens of various sets of beliefs and assumptions about the world. Such “schemas” or “perceptual filters” may include ideas like men negotiate better than women,¹²² or women relate better to other people,¹²³ or white men can’t jump. Often, like some kind of virus, these schemas may lay dormant. Once activated by some trigger, however, these limiting schemas alter the way we see and understand the world. The trouble, then, with diversity programs is that the emphasis on “difference” may make differences like gender or, race—even the search for other differences!—serve as such a trigger, making differences all the more salient, thereby activating the schemas and perceptual filters that limit the way

119. See *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556 (D.C. Cir. 1997) (finding insufficient evidence of discrimination in same case based partially on the Court’s rejection of significance of lack of “substantive evaluation” of employee); PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 4-5 (1999) (reporting that many African-American lawyers “said that minority associates sometimes stumble because they are excluded, consciously or unconsciously, from important relationships. Even well-intentioned white partners and their white clients typically feel more comfortable on a personal level with associates who look like them.”).

120. For concise reviews, see GAERTNER & DOVIDIO, *supra* note 57, at 17-29; see also Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 438 (1999); Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 384-85, 396-406.

121. See sources cited *supra* note 120.

122. See, e.g., Laura J. Kray, Leigh Thompson & Adam Galinsky, *Battle of the Sexes: Gender Stereotype Confirmation and Reactance in Negotiations*, 80 J. PERSONALITY. & SOC. PSYCHOL. 942, 942 (2001) (“[W]idely held gender stereotypes . . . lead some people to speculate that men fare better than women in negotiations” and two recent meta-analyses of experiments confirm that men “indeed . . . behave more competitively and reap better outcomes than women [do].”).

123. See, e.g., Menkel-Meadow, *supra* note 67 (examining evidence claims that female lawyers relate to others differently than do male lawyers).

all of us see outsiders.¹²⁴ In short, the more people think women are from one planet, and men from another, the more that men's and women's similar behaviors may be experienced and labeled differently. According to difference advocates, this should lead people to undervalue skills and forms of work that women might prefer, like negotiation and problem-solving, and to overvalue men's work preferences, such as litigation and irrational escalation of conflict.¹²⁵ As Mary Anne Case has suggested, however, the causation can run in the other direction instead: Once we emphasize how "they" have certain skills, those skills become less valued in "our" society.¹²⁶ In Russia, for example, where many women are doctors, it is not that women are valued more, but that doctoring is valued less.¹²⁷

This unintended backlash may affect success in negotiating car prices—and other negotiations Ayres and CRT have addressed. Some of the backlash follows from predictable, selfish responses of sellers to the research itself. What will car salespeople do when they read that dealer after dealer, salesperson after salesperson, quotes much higher prices to African Americans? Like Saturn, some may target African Americans with claims that they charge everyone one set of prices. But other salespeople, who typically base their offers on competitors' prices,¹²⁸ may be more likely to offer worse prices to African Americans.

Although Ayres notes in his response to this Review that this may raise new considerations about exactly how he and others publicly disclose their research,¹²⁹ my concern is with a more subtle and specific problem. I am less

124. See Marilynn Brewer, *The Social Psychology of Intergroup Relations: Can Research Inform Practice?*, 53 J. SOC. ISSUES 197, 207 (1997) ("[I]nstitutionalizing cultural differences in the political arena reduces opportunities for common group identification and individuation, both of which have repeatedly been demonstrated to reduce ingroup bias and discrimination."); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998) (noting ways that affirmative action may make certain identities, like race and gender, more salient, thereby contributing to automatic/unconscious discrimination).

125. See, e.g., Menkel-Meadow, *supra* note 67, at 87-89.

126. 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, 33-34 (1995).

127. *Id.* at 34.

128. Cf. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 105 (2d ed. 1991) (suggesting negotiators should base their behavior on what they think is the best alternative that their opponent has).

129. The dangers that potential discriminators will abuse information hardly means that one should not investigate bias, nor even shy from publicizing key findings. As Ayres's response to this Review usefully suggests, however, it may mean balancing the exact details one provides the public at large. Ayres suggests government might test for biases and propose reforms "but try to keep the public from learning about the underlying bases for the interventions." Ayres, *supra* note 2, at 2431. At times, there may be a range of alternatives between disclosing nothing and disclosing all underlying details. As all of us who use computers know, computer companies may warn about "vulnerabilities" of software, and give us protection against them—but not give us enough details to exploit the vulnerability to

concerned about disclosing the fact of discrimination than with focusing the attention too narrowly on “race” and “gender.” Bringing attention to “race” and “gender” might hamper how effectively women, African Americans, and other outsiders negotiate. A recent study found that women MBA students did much worse in negotiations with other MBA students when all the students were told different types of people negotiate differently depending on group differences, including gender.¹³⁰ Women did noticeably worse when negotiators were simply told women did differently—not necessarily better or worse!

Also, more subtle attention to differences may spread to “other” differences and “other” groups as well. In one study, for example, those who heard an antiblack comment went on to rate overweight white job candidates as less qualified for a therapy graduate program.¹³¹ In terms of negotiation, any attention to differences may activate at least two sets of disadvantaging beliefs. Attention to how some outsider negotiates differently may activate the belief that all of “them” are ignorant, weak,¹³² or otherwise disadvantaged in negotiations; or such attention may remind us how comfortably and easily we can deal with people like “us.”¹³³

In one sense, none of this is news to either Ayres or CRT, but in another sense it is quite remarkable. Both Ayres¹³⁴ and CRT emphasize unconscious stereotyping here. And CRT pioneers, like Charles Lawrence, famously emphasized the dangers of unconscious stereotyping in law and everyday life.¹³⁵ But neither tradition, as exemplified in these most recent books at least, acknowledges how narrow approaches to “race” and “gender” *may* themselves contribute to unconscious discrimination. As we saw, Ayres embraces tests of unconscious white-good and black-bad attitudes, and he shares that the test

hack into someone else’s computer! So, too, with discrimination testing: Perhaps one could publicize the different results without giving details about the exact strategy used. I agree with Ayres that the exact balance of sufficient disclosure to provoke reform and too much disclosure is often difficult. *Id.* This can be difficult. Just as any attention to a vulnerability may tempt some people to try to figure out how to exploit it, any attention to the fact of discrimination may hurt, too. In particular, those prone to authoritarian thinking will be less likely to express prejudiced attitudes if they think that others, particular powerful others, have more tolerant attitudes. ALTEMYER, *supra* note 114.

130. Kray et al., *supra* note 122, at 947.

131. Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 402-05

132. See STRENGTH AND WEAKNESS: THE AUTHORITARIAN PERSONALITY TODAY 4 (William F. Stone, Gerda Lederer & Richard Christie eds., 1993) (“[T]he authoritarian personality syndrome’s essential core is that the person fawns before admired authority (representing strength) and loathes weakness—in Jews, women, homosexuals, or other outgroups.”).

133. See Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 404.

134. See, e.g., AYRES, p. 133 (“Once a plaintiff has proved that a defendant has treated [a group of] blacks differently from [a group of] identically situated whites, it is fair and reasonable to conclude as a matter of law that the dealer at some level of consciousness must have been aware of the testers’ race.”).

135. See, Lawrence, *Unconscious Racism*, *supra* note 9.

showed he had higher than average “moderate” to “strong” associations of both white-good and black-bad.¹³⁶ But Ayres does not tie this back to anything about his own relatively narrow rhetoric of race and gender.

This brings us now to a delicate point: The Ayres text itself includes at least one such link of white with good and black with bad: “[G]iven that virtually no other quantitative evidence about the causes of discrimination in this or any other market exists, . . . [estimates of such causes] may shed some additional light on a relatively dark corner of the civil rights landscape.”¹³⁷ Notice this phrasing itself echoes some of the very automatic and unconscious beliefs that may disadvantage people of color: Dark is ignorant, and light is informed.¹³⁸ This simple, automatic association can itself explain unequal opportunities in bargaining: The seller may think darker people know less, and lighter people know more; darker people will pay more because they do not know what the dealer really pays for cars, or how little other buyers may pay. A better phrasing could simply substitute other evocative phrasing for the same point, such as, “following discrimination to its source takes us into uncharted waters.” Such language would be more efficient (conveying similar information without unintended side-effects). This efficiency has simply nothing to do with Ayres’s subjective intent in crafting that particular sentence.¹³⁹

As Ayres well knows—or he would not have so candidly shared his general scores on such associations—the use of the phrase does not reveal some deep, personal flaw of Ayres’s sensitivity or motivation.¹⁴⁰ Rather, as both CRT and academic psychologists have so frequently and so carefully explained, these unconscious stereotypes may most often reflect instead such impersonal features as popular culture and, to some, “normal” psychological tendencies to favor anyone who seems like us in even the most minimal sense.¹⁴¹

136. AYRES, p. 427.

137. AYRES, p. 48.

138. Cf. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 472 (1993) (“[I]n the Christian tradition, white refers to innocence or wisdom (or both) and blackness is tied directly to sin.” (footnotes omitted)).

139. Indeed, after Ayres wrote the book, and as I was working on this Review, Ayres stated in email correspondence that he had thought about this sentence. And the book elsewhere displays a careful sensitivity to similar issues of language. See, e.g., AYRES, p. 321 n.20 (noting that it would be a “disabling type of stereotype” to refer to women and minorities as weak, but the language “weak bidder” is intended only to mean that such bidders, including women and minorities, might simply be in positions to offer less or have lower expected reservation prices (possibly because of discriminatory credit practices of others)).

140. See GAERTNER & DOVIDIO, *supra* note 57, at 14 (“[A]s a function of pervasive cultural influences and repeated racial associations, [some people] . . . may not be fully aware that they harbor negative racial feelings.” (footnotes omitted)).

141. Within CRT, see GAERTNER & DOVIDIO, *supra* note 57, at 14 (“[I]n contrast to the traditional emphasis on the *psychopathological* aspects of prejudice, [modern accounts] . . .

But it *may* reveal something about the dangers of using narrow rhetoric like “race” and “gender”—or even writing about automatic associations. As much general psychological research shows, it is hard to simply suppress thoughts, whether they be saying something like “pay no attention to the pink elephant” or “stop associating white with good and black with bad.”¹⁴² Indeed, the very attempt to suppress any particular thoughts may make the thoughts come back more forcefully.¹⁴³

Apart from this irony of thought suppression, it is also true that all of us often fall short of our intended goals, whether about discrimination or some other value. Though no one but my word processor and my ever-watching cats might otherwise know, earlier drafts of this Review also included rhetoric that could reflect, and perpetuate stereotyping: An early draft described the potential of CRT and Ayres to “shed much needed light on the relatively haphazard practices of diversity trainings”! And I wrote that particular line after writing these surrounding paragraphs about Ayres’s own (mis)use of “light” rhetoric! Elsewhere I wrote, “This is blind to the danger that . . .” As written, this suggests that those without vision simply cannot function as well, neglecting the way that many highly productive and insightful writers, like my colleague, Bruce Winnick, may have severe vision impairment.¹⁴⁴ In each

suggest[] that biases related to *normal* cognitive, motivational and sociocultural processes may predispose a person to develop negative racial feelings.” (footnotes omitted)); CROSSROADS, p. 222 (“All of us, through the ways in which we negotiate our identities, play a role in entrenching a variety of social practices, institutional arrangements, and laws that disadvantage other(ed) people.”). For a review and critique of the social psychological perspective that evaluating people through certain biased schemas and stereotypes is a “normal” cognitive process, see Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 396-98 (arguing that preferring people who seem like ourselves may be automatic, but labeling it “normal” may partially reflect the professional and ideological incentives of academic psychologists).

142. See, e.g., John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 30 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (“Trying to inhibit negative reactions not only produces primarily perfunctory and tokenistic behaviors, but it also can result in rebound effects, which subsequently amplify the negative reactions that were initially suppressed.” (footnote omitted)). See generally Joseph Forgas, *Introduction to FEELING AND THINKING AND FEELING: THE ROLE OF AFFECT IN SOCIAL COGNITION* 8 (Joseph P. Forgas ed., 2000) (providing historical context to idea that suppressing emotion does not work); Leslie S. Greenberg, *Emotion and Change Processes in Psychotherapy*, in HANDBOOK OF EMOTIONS 499, 502 (Michael Lewis & Jeannette M. Haviland eds., 1993) (“Trying to stop emotion is like trying to stop a stream; a flood may be the result.”).

143. See sources cited *supra* note 142.

144. See CROSSROADS, pp. 258, 265 (“[W]e started noting with more critical awareness the recurrent, and often inadvertent, examples of ableism in the very language of critical discourse: Think of the ways in which the terms ‘visible’ and ‘invisible’ are used as metaphors . . . [and] how these metaphors privilege seeing.” (internal quotations omitted)). Also, in another draft of this Review, I referred to “Black Plague” rather than merely Plague.

In other work, as Harlan Dalton pointed out, an earlier draft of my Review on similarities between different types of discrimination referred to “radical” perspectives as if

instance of such language, by Ayres, myself, and others, the explanation remains unclear: Perhaps we would have had even more such mistakes, or failed to edit them out, if we had not set our intentions differently!¹⁴⁵

The danger that overly atomized approaches lead to unconscious backlash is all the more dangerous because the methods of countering such unconscious backlash often lead to yet more backlash. As I myself once hoped, Ayres states, "It may be easier to reduce disparate treatment by bringing unconscious predispositions for discrimination to the attention of potential discriminators—especially when these potential discriminators simultaneously espouse sincere commitments against discrimination."¹⁴⁶ And yet the experience of critical race theory and others gives mixed support. In one of the most widely cited law review articles,¹⁴⁷ Angela Harris, one of the editors of the CRT collection, argued that pioneering feminist theorist Catharine MacKinnon based her theories of "women" too much on the experience of white women and neglected the experience of women of color.¹⁴⁸ MacKinnon rejected the criticism then,¹⁴⁹ and—even when invited to be a plenary speaker at the conference associated with the new reader—*still* found the criticism unhelpful.¹⁵⁰ So, too, when I suggested that Richard Posner's critique of CRT and feminist writers resonated with various stereotypes,¹⁵¹ he also found the

CRT authors were outside the mainstream. Likewise, for several years, I periodically practiced the Tibetan meditation of Tonglen. The classic instructions often ask one to visualize breathing in dark, sooty air as symbolic of the suffering, and breathing out white smoke as symbolic of relief from suffering. Recently, at a meeting to promote various contemplative practices among lawyers, someone taught this practice, and a prominent African-American law professor noted that the imagery of good, white smoke and bad, black smoke made him uncomfortable. One of the country's leading meditation teachers, Joseph Goldstein, then suggested the teacher could also use the imagery of inhaling something thick and exhaling something more luminous.

145. There is some psychological evidence that, at least for persons committed to treating people fairly, the attempt to recognize and correct stereotypical thinking may be effective. See, e.g., Devine & Monteith, *supra* note 113. For a particularly well-written and well-thought-out application of this research to the law of jury arguments, see Armour, *supra* note 58.

146. AYRES, p. 419.

147. See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 425 (2000) (naming Angela Harris as one of the "[m]ost-cited very young scholars").

148. Harris, *supra* note 2, at 585.

149. See Catharine A. MacKinnon, *Feminism in the 90's: Bridging the Gap Between Theory and Practice: From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 18 (1991) ("This only supports my suspicion that if a theory is not true of, and does not work for, women of color, it is not really true of, and will not work for, any women, and that it is not really about gender at all.").

150. Cf. CROSSROADS, p. 393, 396 (noting that criticism of MacKinnon may be unfair since her "work is true in theoretical terms").

151. Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568, 1590-91 (1995) (suggesting that Posner's treatment of prominent female professors resonates with stereotypes that question the basic ability of

critique unhelpful. Indeed, he suggested that criticisms of this order would lead so few to take people of color seriously that their scholarship would wind up ghettoized.¹⁵² On the other hand, many in CRT, including voices in the CRT collection,¹⁵³ suggest that internal critiques of biases within CRT helped lead the movement from a narrow focus on race to an expanded attention to fairness more generally.

Still, it is important to keep the potential for various kinds of backlash in perspective. Just as any potential medical treatment may involve benefits and potential side effects, so, too, may any attempt to promote social justice involve potential side effects. This is true whether the goal is antidiscrimination or, as CRT prefers, antisubordination. Often, the very best medical treatments may involve quite substantial side effects—as anyone who has witnessed the ravages of chemotherapy for various cancers well knows. In other cases, the side effects may be so extreme, or the benefits so weak, or both, that some other approach makes sense. To say specific approaches may trigger various kinds of backlash does not end our inquiry. Instead, it is worth examining other alternatives and examining their own potential benefits and side effects. For prevention, and for antisubordination and antidiscrimination alike, this means looking at more general approaches considered next.

B. *Lesson Two: General Acceptance Strategies Reduce Prejudice and Negotiation Inequality*

Given how diversity and difference approaches alone may backfire, it is comforting that research shows promise for more general approaches that promote acceptance in general. Growing academic research shows particular promise for strategies that try to expand our senses of who “we” are so that “we” includes people who might otherwise seem like “others.” Several studies demonstrate that this “common ingroup identity model” reduces the kind of unequal outcomes Ayres and CRT find to plague outsiders so pervasively:

1. At sports stadiums, whites answer requests from African Americans far less than similar requests from whites.¹⁵⁴ This mirrors other studies that show “we” often refuse many such simple requests of

prominent women academics, and sometimes resembles pathological diagnoses that often degrade women’s experiences).

152. See Posner, *supra* note 46, at 1612 (“I wonder whether black and female scholars will be grateful to Professor Freshman for rushing to their defense against me. I suspect not. Freshman’s subtext is that any white male who criticizes a black, feminist, or lesbian scholar is presumed to be doing so in bad faith. The response of many white males will be to give those forms of scholarship a wide berth, thus ghettoizing them. I doubt whether they will benefit from that benign neglect.”).

153. See, e.g., CROSSROADS, p. 399, 401.

154. See GAERTNER & DOVIDIO, *supra* note 57, at 63 (noting that whites were more likely to answer questions from African Americans when the African Americans wore the same school insignia).

various "others." However, when African Americans wear the insignia of a particular school, like the Miami Hurricanes, and approach whites wearing a similar insignia, the requests meet much greater success, thus demonstrating the common ingroup solution.¹⁵⁵ Indeed, African Americans wearing the same insignia get more help than whites!¹⁵⁶

2. Research suggests "we" often are more likely to leap from particular negative behavior of "others" to broad generalizations about all such "others" or their "culture" (e.g., "we" are "loud at parties" but "they" are "loud people"). Northern and southern Italians generally stereotype each other in this way, but the gap in generalizations declined when experimenters emphasized their common differences with Swiss.¹⁵⁷
3. As we saw, when MBA students are told that different people negotiate differently,¹⁵⁸ women get worse results. When researchers instead tell a similar pool of students they are all successful business school students, men and women get similar results.¹⁵⁹

All this research suggests that prevention efforts should distinguish not between different kinds of discrimination based on what might seem like different objects of discrimination (African Americans, people with disabilities, lesbians and gays) but along a different dimension: ingroup sympathy ("we" just like people like "us") from outgroup hostility ("we" don't like "them"). Although different individuals today may be more motivated by either outgroup hostility or ingroup sympathy, most leading psychological theorists agree that ingroup sympathy, rather than outgroup hostility, explains most modern

155. *Id.* at 63.

156. *Id.* at 64. This increased acceptance is consistent with at least two quite distinct interpretations. A more optimistic take is that blacks simply benefited from the especially favorable treatment people generally give those seen as recent group members. *Id.* at 65. A less optimistic and more troubling take would be that people were especially helpful because they were trying to "avoid acting in a way that could be attributed to racial prejudice" even if persons actually do have such prejudice or discomfort at some level of consciousness. *Id.* at 64-65.

157. Anne Maass, Roberta Ceccarelli & Samantha Rudin, *Linguistic Intergroup Bias: Evidence for In-Group-Protective Motivation*, 71 J. PERSONALITY. & SOC. PSYCHOL. 512, 523 (1996).

158. Kray et al., *supra* note 122, at 947 (linking greater success to traits like assertiveness associated more with men and less success with traits like emotion associated with women, although the instructions did not indicate men and women negotiate differently).

159. *Id.* at 955 ("[A]ctivating a shared superordinate identity in a mixed-gender negotiation increased joint gain."). To create this shared condition, men and women were told, "Simply put, people who are in competitive, academic environments, like you, do exceptionally well in negotiation." *Id.* at 952.

prejudice and discrimination in the United States.¹⁶⁰ Simply put, if both a gay, white man and a straight, black man get passed over for promotion by a straight, white man, one might blame “racism” and the other “homophobia.” Research into prejudice suggests both, however, may have fallen victim to precisely the same phenomenon: The supervisor may simply feel more comfortable with straight whites, with relatively little hostility, conscious or unconscious, tied particularly to either blackness or homosexuality.

Expanding and changing the notion of ingroups may work well for several reasons. At the most basic level, expanding the ingroup works with one of the puzzling ways that prejudice arises from even the weakest senses of minimal “we” versus “they” identity. It is not simply, as narrow rhetoric of whiteness can suggest, that whites rate whites more favorably and interpret their activities less negatively.¹⁶¹ Split a room in half arbitrarily, and people in one half will rate “their” half more favorably than the “other” half. Also, at a more subtle level, the bias seems to flow from two distinct, seemingly automatic or “natural” phenomena: “We” think other “people like us” have more favorable qualities, *and* “we” (sometimes) think “they” have more negative qualities.¹⁶² Written surveys of positive and negative attitudes show most people have more positive associations with “white” rather than more negative associations with “black”;¹⁶³ electronic measures that test the speed with which one associates colors with qualities (designed to test unconscious and/or unarticulated bias)—in which Ayres placed so much faith—also show more positive association with “white” rather than negative associations with “black.”¹⁶⁴ Laboratory studies also show that many jurors extend sympathy to white defendants more than they are hostile to black defendants.¹⁶⁵

160. GAERTNER & DOVIDIO, *supra* note 57, at 19 (“[I]t seems more likely that these biases result from pro-ingroup rather than anti-outgroup orientations.”).

161. Until recently, legal scholarship concerning “whiteness” might largely seem narrowly focused on white versus black. More recently, “white” contrasts with a larger group of those who are Asian, Hispanic, African American, or Native American. *See generally* CRITICAL WHITE STUDIES, *supra* note 14, at xvii (referring not merely to “variability between the average white and the average black” but also to the “mobility of white and near-white immigrant groups” such as the Irish. *See also* Karen Brodtkin Sacks, *How Did Jews Become White Folks?*, in CRITICAL WHITE STUDIES, *supra* note 14, at 395 (describing how Jews came to be seen as white); Stephanie M. Wildman, *Reflections on Whiteness: The Case of Latinos(as)*, in CRITICAL WHITE STUDIES, *supra* note 14, at 323 (discussing how Latinos(as) may be seen as white).

162. *See* AYRES, pp. 420-21 (describing tendency to unconsciously associate black with bad qualities and white with good qualities).

163. GAERTNER & DOVIDIO, *supra* note 57, at 26 (“[E]mpirical studies . . . illustrate that evidence originally interpreted as indicating subtle anti-Black prejudice may instead represent pro-White bias.”).

164. *Id.* at 28.

165. *Id.* at 29.

The significance of ingroup sympathy, rather than outgroup hostility, is not that ingroup sympathy is somehow less harmful than outgroup hostility¹⁶⁶ but rather that it suggests why expanding the ingroup works so well. If one can somehow make “our” group include “them,” then *both* ingroup sympathy and outgroup hostility will decline. If “we” see “them” now largely as “us,” there is neither a “them” to dislike nor a separate “we” to prefer! In addition, by extending the ingroup to include “them,” one also extends not just thoughts but also the whole host of processes that accompany our sympathy to others like us: positive feelings, interpretations of ambiguous events, and other processes that translate ingroup sympathy into different results for insiders and outsiders.¹⁶⁷ In a sense, the greater sense of ingroup sympathy becomes like treatments, whether medical or psychological, that may bolster the immune system: People with HIV may seek treatments to bolster their immune system because they are getting a certain type of skin disease, but the strengthened immune system will also make them less likely to get a whole other range of disorders, from the common cold to other opportunistic infections.

Expanding the ingroup also reduces the chances for the kinds of conscious and unconscious backlashes that we saw may arise from emphasizing differences. Generally speaking, research shows that trying to suppress specific isms, like trying to suppress any thoughts, may make the thoughts arise all the more strongly. In general, psychologists have more success *replacing* thoughts with some other more functional or neutral thought.¹⁶⁸

C. *Lesson Three: Theoretical Tradeoffs and the Need for More “Theory” and More “Research”*

Given what many leading psychology professors write, it might be tempting simply to conclude that the “correct” answer is to try to promote larger ingroups, and not get stuck in endless discussions of differences and

166. See *id.* at 20 (“[I]n terms of ultimate consequences, the failure of minority applicants to obtain employment because someone else enjoyed ingroup ties to a personnel director is not that different from the personnel director refusing to hire minority applicants outright.”); Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 355-57.

167. GAERTNER & DOVIDIO, *supra* note 57, at 46-47 (noting that if shifting the ingroup definition to include outsiders works, then “the newly recategorized ingroup (formerly regarded as outgroup) members will become the beneficiaries of more generous reward allocations, more positive personal evaluations, more empathic, helpful, cooperative and generally more prosocial behaviors, more forgiving situational attributions to explain failure and more dispositional attributions to explain success, and information about them will be processed, stored and recovered differently than when they were regarded only as outgroup members”).

168. See generally Clark Freshman, Adele M. Hayes & Greg C. Feldman, *Adapting Meditation to Promote Negotiation Success: A Guide to Varieties and Scientific Support*, 7 HARV. NEGOT. L. REV. 67, 68-69 (2002) (arguing that different kinds of meditation and contemplative practices may reduce negative mood and promote positive mood by focusing on a variety of neutral objects from sounds to words to physical sensations).

diversity. A final complication involves some very recent and still relatively undeveloped research about potential tradeoffs between relatively atomized and relatively generalized responses to prejudice. By analogy, in the medical context, complementary remedies—like herbal remedies—may work for some people, but combining alternative remedies like herbs with conventional medicines may sometimes interact badly, even fatally.¹⁶⁹ In contrast, although many mental health practitioners similarly recognize that some therapeutic approaches may undermine each other, they also find that different therapeutic approaches can be combined or, to use an apt metaphor in the prejudice context, “integrated.”¹⁷⁰

First, inclusion approaches may be susceptible to their own kind of “backlash.” Enlarging an ingroup does avoid the backlash that diversity trainings may invite against the particular “others” they discuss. In a different way, general inclusion approaches may conceivably unleash general anti-PC backlash.¹⁷¹ Such generic backlashes may resemble the way overuse of broad antibiotics can lead to development of resistant diseases. Sometimes general inclusion may lead to its own kind of inattention to attempts to reduce prejudice; conceivably, it might even unleash prejudice against those particular others, unmentioned in the training, but somehow salient in a particular setting: “Once again, *they* want what *we* worked so hard for.”¹⁷²

169. See generally Janet Konefal, *The Challenge of Educating Physicians About Complementary and Alternative Medicine*, 77 ACAD. MED. 847, 848 (2002) (noting that many patients use complementary therapies like herbs, but do not tell their conventional doctors because they fear disapproval and think the risks associated with complementary therapies must be “minimal” because “some . . . have been around for thousands of years, or are ‘natural’”).

170. See *Journal Description*, J. PSYCHOTHERAPY INTEGRATION (website of a leading journal on psychotherapy integration which invites articles that “move beyond the confines of single-school or single-theory approaches to psychotherapy and behavior change”), available at <http://www.apa.org/journals/int/description.html> (last visited May 23, 2003).

171. See, e.g., James Boyle, *The PC Harangue*, 45 STAN. L. REV. 1457, 1460 (1993) (“He would have found, I think, that the attack on “political correctness” was quite clearly a politically motivated attack on liberal ideas in academic life. The attack was originally mounted by conservative writers such as Bloom, Bork, Kimball, and D’Souza. According to these writers, a small coterie of radicals has retreated from the losses of socialism worldwide, retiring to American universities, where they have proceeded to enforce a rigid, multicultural orthodoxy on academic life.”); Richard N. Lalonde, Lara Doan & Lorraine A. Patterson, *Political Correctness Beliefs, Threatened Identities, and Social Attitudes*, 3 GROUP PROCESSES & INTERGROUP REL. 317, 330-31 (2000) (those most likely to agree that there is too much political correctness scored high on scales of right-wing authoritarianism, which measures hostility to a variety of outgroups, including African Americans, women, lesbians, and gays).

172. To give relatively atomized antiprejudice trainings their due, it is also possible to theorize that debunking one set of prejudices may lead people to question other stereotypes and/or to seek more information about people in general. There is not much published research in this area, but at least some research does suggest that positive contact with members of one outgroup indeed may lead to less prejudice against other outgroups. Pettigrew & Tropp, *supra* note 114, at 101 (citing 14 tests showing that contact with

Second, subtype research also suggests inclusion approaches may lead to their own distinct and unintended backlash. Just as people may hold conscious or unconscious stereotypes of people in a certain group, (like women, or even older women), they may also hold substereotypes that make some members of the group seem relatively benevolent (such as the mother stereotype), and others relatively threatening (the iron maiden stereotype).¹⁷³ The new CRT reader is particularly vivid in capturing the many varieties of such phenomena, from the respectable African American¹⁷⁴ to the good “Indian.”¹⁷⁵ Attempts to set up a common ingroup may inadvertently make one subtype seem more like “us” even though another subtype seems even less like us. One example—the next Part includes many examples consistent with critical race theory—is that telling employees they are all workers may help career-oriented women and many gay men fit in, but may further marginalize mothers and other caretakers, including gay men, who care for older parents.¹⁷⁶ As with physical medicine, then, inoculating against one illness may sometimes increase the risks of another—and inoculations that help one group may spread a disease that endangers another group, as demonstrated by the Swine Flu inoculation troubles.¹⁷⁷ Or, less dramatically, treatments that work to reduce prejudice of one kind may simply not work as well with prejudices of another kind—much as Ayres documents with kidney disease: Some treatments that work well with whites may not work well with African Americans.¹⁷⁸ For example, research

members of one outgroup reduced prejudice against “outgroups not involved in the contact”); see also *id.* at 112 n.9 (citing another set of similar conclusions all based on one study). To put this research in perspective, however, a meta-analysis of how contact reduced prejudice included 746 tests compared to the 14 that looked at all at the question of effects on distinct outgroups. *Id.* at 101.

173. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 377 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th ed. 1998) (“[G]iven at least minimal knowledge and familiarity, people are probably capable of combining nearly any category with any other to create a subtype.”).

174. CROSSROADS, pp. 221, 231 (describing how Carbado, a black male, may appear less black by dressing “respectable,” buying expensive items, or “whistl[ing] Vivaldi [because] . . . [o]nly a good (safe, respectable) Black man would know Vivaldi or whistle classical music”).

175. CROSSROADS, pp. 274, 282 (“The harassment I have experienced is based on a gendered (or sexualized) construction of the “good Indian.”).

176. SEAN CAHILL, KEN SOUTH & JANE SPADE, THE POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE FOUND., OUTING AGE: PUBLIC POLICY ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS 41 (2000) (“Anecdotal evidence indicates that gay and lesbian children often serve as the primary caregivers for their elderly parents, as their heterosexual siblings are busy raising families of their own and gay siblings—sometimes closeted—are viewed as ‘single.’”), available at <http://www.ngltf.org/downloads/outingage.pdf>.

177. See, e.g., RICHARD E. NEUSTADT & HARVEY V. FINEBERG, U.S. DEP’T OF HEALTH, EDUC. & WELFARE, THE SWINE FLU AFFAIR: DECISION-MAKING ON A SLIPPERY DISEASE 2 (1978) (noting that the swine flu program was largely seen as a “fiasco” because of side effects of inoculations).

178. AYRES, pp. 196-97.

shows that certain kinds of positive contact with particular minorities reduces prejudice, but the effect varies: Contact with lesbians and gays has the strongest effect, contact with those of other races has a strong, but somewhat weaker effect, and contact with older persons has the least effect.¹⁷⁹

Third, even if common identity strategies do not lead to backlash, they may leave many individuals behind. Notice that the seemingly “successful” effort to get northern and southern Italians to treat each other better relied on introducing a common rival, the Swiss—which probably would not help Swiss get better deals on their next Venetian *pensione*!¹⁸⁰ This strategy may also work even when one does not explicitly rely on some common contrast. Creating a common ingroup based on some particular characteristic—we are all Miami Hurricanes or we all work for IBM—may benefit outgroups at one school or one organization, but may not spread to, say, African Americans at other schools, or Latina/os at other firms. Psychologist Thomas Pettigrew offers a tradeoff hypothesis: The more those in a given setting see themselves as part of one group, like IBM or the University of Miami, the less prejudice any given person of color (or other outgroup member) seen as part of IBM or the University of Miami will face. However, that inclusion strategy alone may not spread to African Americans or gays or other outgroup members elsewhere.¹⁸¹

Instead, some theories and some very limited research suggests that what best helps such spread in many cases will be a sense of dual identity like African and American.¹⁸² But the price of this spread is that the dual identity may reduce prejudice less because of the lingering effects of the outgroup identity.¹⁸³ This is an important tradeoff for CRT to consider because its practices, as we saw, often rely so heavily on dual identities.

All this raises the final set of lessons addressed in the next Part. As suggested below, some existing research on the dangers and promises of diversity and inclusion strategies raises questions for both CRT and Ayres. In particular, it is worth exploring how various dynamics within the theory and

179. Pettigrew & Tropp, *supra* note 114, at 107.

180. So, too, even efforts to see us all as “human” may denigrate nonhuman animals. Although one might draw a sharp distinction between “civil” or “human” rights from “animal” rights, it is notable that those with the most hostile attitudes towards what we think of as one human outgroup, such as African Americans, often have hostility towards other human outgroups, such as Jews or lesbians and gays—as well as nonhuman animals! See Sam G. McFarland, Vladimir S. Ageyev & Nadya Djintcharadze, *Russian Authoritarianism Two Years After Communism*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 210, 211 (1996) (showing that high scorers on authoritarianism scale tend to have more negative attitudes toward environmentalists); Hardeo Ojha, *The Relationship of Authoritarianism to Locus of Control, Love of Animals and People, and Preference for Political Ideology*, 42 PSYCHOL. STUD. 32, 33-35 (1997).

181. See GAERTNER & DOVIDIO, *supra* note 57, at 146-47.

182. See *id.* at 166-68.

183. See *id.* at 147.

culture of both approaches may sometimes pull against the inclusion strategies that research suggests hold such promise. On the other hand, it is also worth noting that CRT and Ayres may both have their own questions and lessons for this research from both critical and empirical perspectives. These contributions may parallel the contributions relatively critical and relatively empirical approaches have made in battles against other illnesses. Much earlier health research studied only a narrow part of the population, such as white men, implicitly assuming this would apply to other groups (or that other groups did not matter!). Critical perspectives led researchers to expand those studied. Subsequent empirical research showed that diseases might affect different groups in different ways, such as research Ayres discusses that shows kidney disease may affect African Americans in different ways, and the same treatment may have different effects on African Americans.¹⁸⁴ So, too, critical approaches of conventional medicine often emphasize “alternative” or “complementary” approaches. An early first step involved simply popularizing such approaches, and more recent steps include funding to test exactly which complementary methods work.

As of now, even as the Supreme Court has embraced prevention in principle, exactly what prevention works best remains an open question. Psychological theory suggests tradeoffs between various approaches, and some psychological experiments support the dual identity theory (that is, an identity such as “African” and “American”) but also confirm the tradeoffs. All this leaves much room for critical perspectives like CRT and law and economics to help shape the theory. So, too, both CRT and empirical research like Ayres’s may test just how well the theories work outside the laboratories of social psychologists.¹⁸⁵

III. OBSTACLES AND OPPORTUNITIES TO INCORPORATING PREVENTION

As we have seen, both Ayres’s and the CRT collection offer some creative moves toward prevention, and psychological research suggests some additional perspectives. The question next becomes how Ayres and CRT may have challenges and opportunities in light of this research. This last Part looks at the broad questions of why CRT and Ayres may both find themselves pulled too much towards relatively narrow, atomized approaches to different “isms” and how the opposite pull—in much psychology and training—towards general strategies may fall short in ways CRT and Ayres may both highlight.

184. Jonathan M. Eisenberg, *NIH Promulgates New Guidelines for the Inclusion of Women and Minorities in Medical Research*, 10 BERKELEY WOMEN’S L.J. 183, 184 (1995) (criticizing NIH guidelines for not requiring inclusion of female minority subjects in clinical research).

185. GAERTNER & DOVIDIO, *supra* note 57, at 160-61 (extending of research outside the laboratory includes questioning whether attempts to recategorize to a larger group “can overcome powerful ethnic and racial categorizations on more than a temporary basis”).

A. *The Puzzling Pull of Narrow Prevention Efforts: The Internal Tensions Within Experimental Law and Economics and Critical Theories*

For what it is worth, the psychological perspectives above make us look harder at the pull to relatively specific, relatively atomized approaches to discrimination and prejudice reduction that we find in both Ayres and CRT. As a simple textual matter, it may be interesting to note the internal tensions within each tradition and the way each often pulls towards relatively more specific and atomized approaches. But, the psychological literature makes such tendencies critical because it suggests that more general approaches will often reduce prejudice more effectively—and that the narrow approaches may even backfire, exacerbating the very prejudices and inequalities they condemn! As suggested in Part I, this pull to specificity may largely reflect the myriad popular and other sources in society that habitualize such narrow approaches. It may largely be enough simply to suggest that both would profit from the lessons in other healing contexts: General approaches to the ills of prejudice reduction, like broad-based antibiotics, may work even if those ills arise from different causes and manifest in different symptoms. Below, however, I suggest there may be reasons specific to each tradition that also explain this tendency. Exploring and naming these tendencies may help reach a better balance of general and atomized approaches in a way oddly analogous to the way both Ayres and CRT would reduce more pernicious forms of bias: One begins by exposing the bias and then attempting to correct for it.¹⁸⁶

One might start with the tensions in either book, but there is actually a rather specific reason for beginning with Ayres. As CRT, feminists, and others (including myself) have so often noted, our culture, including our academy and our legal discourse, more often challenges the “coherence” of outsiders than of insiders.¹⁸⁷ Law and economics, particularly as discussed by a star Yale law professor, like Ayres, is far more immune to such attacks. To disrupt such patterns, it makes sense to begin our questioning there.

186. As with correction for other biases, this may be a complex and dynamic process. Whether correcting for biases in evaluating someone, or correcting for the effect of one's own mood, one may readily under- or overcorrect. See Freshman et al., *supra* note 54, at 70-72 (noting that those attempting to correct for the way emotion affects decisionmaking may over- or undercorrect).

187. See, e.g., CROSSROADS, pp. 243, 244-45 (discussing how narratives of Jerome Culp show “what it feels like to be at once the impeccably credentialed insider and the unassimilable Outsider through color and phenotype”); Monture-Angus, *supra* note 175, at 283 (describing her experience as a Native American professor: “[M]y immediate response to the tenure denial was to accept that I was not as good as a white person and that there was absolutely no sense in trying to prove that I was. I, too, even as professor and privileged, carry with me the kernels of internalized oppression”).

1. *Ayres and "follow the data."*

The big pull towards specificity for Ayres and other empiricists comes from the pull to "follow the data." After all, there is nothing in economic theories of discrimination that pulls towards now atomized categories like "race" and "gender." Far from it: Becker's classic economic theory of discrimination explicitly stated prejudice would often reflect preferences for some ingroup (thereby disadvantaging all outsiders, not some narrow subset),¹⁸⁸ and Epstein's more recent economic treatment defends discrimination largely on the ground it is efficient for people to act on preferences and familiarity with people like themselves.¹⁸⁹

Despite the broad range law and economics principles afford, empirical contingencies to "follow the data" often pull towards older, established, and (coincidentally) narrow categories. Empirical approaches, including Ayres's, take two general tracks: (1) Conduct experiments, often called "audit methodology," such as Ayres's testing of how car dealers negotiate with testers that Ayres trained; or (2) working with existing data, often called regression methodology, such as Ayres's analysis of records of how hospitals assigned kidneys, how one dealer priced cars, or how judges and bail bondspersons set bail and sold bonds.¹⁹⁰ This second track has much general promise for promoting awareness of the disease of discrimination. Like any empiricist, Ayres faces a dilemma: The more he relies on experimental data, the more people may doubt it works in the real world. After Harvard Law Review published his initial findings that women and African Americans paid more for cars (based on Ayres's trained testers who went pretending to negotiate from dealer to dealer), many argued this result could be found in experimental settings, but not when people are actually negotiating.¹⁹¹ Partly to refute critics like this, Ayres published the present volume of records of actual "transactions,"¹⁹² including what people actually paid for cars, what bail judges set versus what bail bondspersons required, and how hospitals actually allocated kidneys. From one prevention sense, this broad range of real world data may go far to heighten awareness of the truly pervasive nature of inequality.

188. BECKER, *supra* note 79, at 15 n.3 ("[T]he social and economic implications of positive prejudice or nepotism are very similar to those of negative prejudice or discrimination.").

189. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* (1992).

190. See AYRES, pp. 238-40 (contrasting audit and regression methodology in general).

191. AYRES, pp. 88-89.

192. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1912 (1987) (considering various versions of the argument that it is wrong to treat everything as if it were merely some market commodity).

The trouble arises because it is so tempting in looking at real word data to rely simply on the data—and the categories of data—as one finds it.¹⁹³ Looking at kidney records sorted by race is relatively easy, and it may be equally as easy to look at some measures of economic class.¹⁹⁴ On the other hand, it might very well be interesting to see how well kidney survival rates might be explained by darkness of skin, but this may not be available in the existing data. One might also wonder how those perceived as gay or lesbian would be treated, but the existing data sets have not coded for this.¹⁹⁵ As it is, Ayres runs into some trouble trying to resurrect data about actual car sales because he relies on the recollections of car salespeople about races of customers—and those car salespeople are part of a lawsuit!¹⁹⁶ So, too, when Ayres turns to the studies of others, like the Internet-based test of associations of African-American and European-American with good or bad, it is tempting to stick with established computer programs even if they cling to atomized categories of “African” and “European.”¹⁹⁷ In the abstract, the pull to “follow

193. Ayres acknowledges empirical researchers like himself may often choose to work with data that exists even if it only lets them test certain hypotheses. Ayres, *supra* note 2, at 2424 (testing whether various subgroups face different kinds or degrees of discrimination may require certain amounts of data, but “sometimes the data is simply not there”).

194. In the process of writing this Review, Ayres and I corresponded, and he confirmed that ease of data was one explanation for why he chose the categories he did:

Sometimes the pre-existing data is raced and that it would be impossible/high cost to construct other categories of potential subordination. At other times (most clearly for my audit tests) the categories were ones that I imposed. I in part was motivated by legal categories (1981 and 1982 make race discrimination in contracting and sale of goods illegal) and in part by pragmatics of limited resources. [B]lacks instead of [H]ispanics).

E-mail from Ian Ayres to Clark Freshman (Aug. 22, 2002) (on file with author).

195. One may, however, use other data to reconstruct a proxy for these effects. Among other things, some methods to allocate kidneys give a preference to those with young children. AYRES, p. 180. These rules allocate scarce kidneys only to those with family narrowly construed by formal ties. They do not include the kinds of relationships that persons of color and lesbians and gay men may have, including caring relationships for older parents, children of other relatives, and so on. *See generally* CAHILL ET AL., *supra* note 176 (noting lesbians and gays are more likely to care for older parents); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (discussing the relatively narrow way American society and law thinks of “family”). This has a particularly disparate impact on lesbians and gays because many child placement agencies disfavor gays, formally and informally. *See, e.g.*, FLA. STAT. ANN. § 63.042(3) (West 2003) (“[N]o person eligible to adopt under this statute may adopt if that person is a homosexual.”); Lydia A. Nayo, *In Nobody's Best Interests: A Consideration of Absolute Bans on Sexual Minority Adoption from the Perspective of the Unadopted Child*, 35 U. LOUISVILLE J. FAM. L. 25, 27 (1996) (discussing various efforts to limit adoptions by lesbians and gays both by statutes and by internal administrative decisions).

196. AYRES, pp. 100-01.

197. See <https://implicit.harvard.edu/implicit/> for do-it-yourself demonstrations of the Implicit Association Test (IAT). Versions of the IAT of unconscious bias also exist for Hispanics. Anothony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995) (describing the IAT in general); Robert W. Livingston, *Bias in the Absence of Malice: The Phenomenon of Unintentional Discrimination* 49 (2001) (unpublished Ph.D. dissertation, Ohio State

the existing data” need not be particularly general nor particularly specific; it simply tends to recreate the categories of the past.¹⁹⁸

Much as the pull to specificity is important, it is best understood not personally, but institutionally. Here, critical race theory’s emphasis on institutional and cultural incentives, rather than personalizing, may be especially helpful. The pull to “follow the data” is not a matter of laziness—anyone who checks Ayres’s list of publications, scholarly or otherwise, knows far better than that. Instead, the pull to follow the data, as opposed to spending more time gathering more original data, flows from at least two tendencies. First, obtaining data takes time and money, and any given law professor has only so much of each.¹⁹⁹ This helps explain why there is generally not more original data gathering in legal scholarship—though there is no shortage of calls for more empirical scholarship—typically to be done by someone else in some other role.²⁰⁰ The second explanation concerns Ayres’s specific project of showing that there is much discrimination in many transactional markets to push his general idea that law should make discrimination in such markets just as illegal as discrimination in housing or employment. For that reason, it understandably makes sense to gather data in a variety of markets, and the more energy one spends gathering original data in any given market, the less time and resources will be available to show the kind of broad patterns that make legislation seem more appropriate.

The temptation to “follow the data” does not entirely explain the pull to specificity. In some ways, following the data, and doing experiments should tend towards larger and not smaller categories. The larger the category, the fewer examples one needs to generate statistically significant results.²⁰¹ Thus, it might well be easier statistically to include all of those who do not fit into a certain preferred group (all nonwhite males) rather than all those who fit particular groups. Of course, the reply may very well be that the larger category masks meaningful differences. After all, if Ayres did not treat African-American men and women distinctly, he would not have discovered that each faces both different *kinds* of different treatment and different *degrees*

University) (on file with author) (applying a version of the IAT designed to test for unconscious stereotyping of Latina/os).

198. For a similar perspective recently adopted by many leading law and economics scholars, see Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (arguing that “[t]oday’s road, dependent on the path taken” in the past, may be kept even if it would not be chosen today).

199. Only recently did John Donohue at Stanford and Ian Ayres himself get law school funding to hire a single person each to help with the management and interpretation of complex data sets like those analyzed in Ayres’s current volume. Interview with Ian Ayres, Professor of Law, Yale Law School, in Vancouver, Can. (June 1, 2002).

200. RICHARD A. POSNER, *OVERCOMING LAW* 99 (1995) (suggesting that law professors, not judges, like he, should do more empirical research).

201. Ayres implicitly acknowledges this point in his response to this Review. Ayres, *supra* note 2, at 2423-24.

of different outcomes. But this danger of too large a category applies to any level of analysis. For example, it might well be that even the level of African-American man masks the way that some African-American men, be they lighter-skinned²⁰² or more white-acting, receive better treatment than others.

Whatever the technical aspects, there is still room for more attention to different potential categories. If one is dealing only with following existing data to show that race matters to car sales, kidneys, and bail, why not mention that other categories may matter as well? Why not mention that questions may arise about all sorts of other insider-outsider distinctions? After all, it is commonplace in empirical scholarship to raise additional questions for research. And Ayres does indeed hint at such explanations in his conclusion, noting that many of those who discriminate against one group often discriminate against other groups as well.²⁰³ What keeps this broad view hidden may be the fear of opening up an entire Pandora's Box of other explanations for the data.²⁰⁴ As it is, Ayres has to fend off critics who suggest any number of other hidden variables may explain why African-American testers paid more for cars.²⁰⁵ Perhaps some may fear that opening up the idea that there may be any number of distinct patterns of discrimination—bias for or bias against, bias involving this or that smaller group, or this or that larger group, in any number of permutations—suggests that one cannot really be sure discrimination is the cause rather than some other complex explanation. Given the sometimes preposterous responses to evidence of discrimination,²⁰⁶ it is

202. See, e.g., 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 697 (1962); Ozzie L. Edwards, *Skin Color as a Variable in Racial Attitudes of Black Urbanites*, 3 J. BLACK STUD. 473, 477 (1973).

203. AYRES, p. 425 n.49.

204. In economic and statistical languages, such scholars would say some omitted "unobservable factor" must explain the results. AYRES, p. 8. Ayres is quite insistent that careful studies, like his study of car bargaining, control for most such "plausible" variables, including having testers of different races and genders use identical bargaining strategies and matching the testers for "speech, clothing, and physical attractiveness." AYRES, p. 9. At several points, Ayres mocks lingering doubts about such omitted variables. AYRES, p. 9 ("Of course . . . I cannot be sure that the testers blinked their eyes at the same rate, but I doubt that results are so fragile when it comes to controlling for other factors."). In contrast, Ayres fears that mere regression analysis of bail records may not establish unfair discrimination between bail rates for different racial groups because the data may not include "other characteristics we did not observe [that] indicated that . . . [some] defendants had a higher propensity to flee." AYRES, p. 9. Ayres again points to this potential critique in his response to other essays in this Symposium. Ayres, *supra* note 2, at 2423 (arguing that "the insistence on attention to intersections plays into the hands of the defendants" who may argue that decisions were explained not by race but by some intersection with some nonactionable characteristic).

205. See, e.g., Richard A. Epstein, *Standing Firm on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 33 (1994) (suggesting Ayres possibly has not proven anything because it could be "that blacks and women are not as good bargainers as white men").

206. WILLIAMS, *supra* note 68, at 51 n.5 (noting CRT pioneer Patricia Williams's report that people accused her of making up her famous story about not getting buzzed into a Benetton store).

impossible to say such criticism would not arise. But, when research shows larger categories may well reduce discrimination the most, though, this fear of criticism should not foreclose careful consideration of which categories we use.

2. CRT and "following the voices."

For CRT, the pull to specificity reflects a distinct set of histories and methodological pulls. In one sense, CRT stands fundamentally opposed to simply "following the data," including "existing categories." From its earliest inception, works celebrated by CRT often picked apart and unraveled the way that existing categories of sorting people made little sense but were largely habitual.²⁰⁷ But this examination of categories was not merely an academic exercise in deconstruction or trashing, as some might see various early works of postmodernism²⁰⁸ and Critical Legal Studies. Instead, CRT worked, and as the current volume illustrates, continually works, to craft categories that promote justice.²⁰⁹ As a practice, this has meant moving from narrow notions of black and white to broader notions of people of color,²¹⁰ and to still-broader notions of privileged and less privileged. To some within CRT, the broader

207. Within the current CRT collection, see CROSSROADS, pp. 159, 160 (describing the social construction theory of race, which proposes that race is not natural but a "cultural, an ethical, a legal, a political, a rhetorical, and a social construct").

208. Especially since the crises of September 11th, postmodernism has sometimes been associated simply with a destructive, nihilistic skepticism of any transcendent values. Although a full treatment of varieties of postmodernism would take more space than this Review allows, many note that postmodernism includes as well a relatively positive variant, committed to replacing outmoded categories and ideas with newer, more functional ones. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 15-16 (1996).

209. CROSSROADS, pp. 393, 396 ("I want to look at the effects of any given deconstruction, whether it's of the Black-white paradigm or of the notion of race itself. Is the effect of your deconstruction to give aid and comfort to the enemies of racial justice?").

210. Compare Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 10 LA RAZA L.J. 1, 18 (1998) ("An exclusive focus on the Black/White relationship, and the concomitant marginalization of 'other people of color,' can operate to prevent understanding of other racisms and to obscure their particular operation . . .") (quoting Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 127, 151 (1998)), with Jennifer Eberhardt & Susan T. Fiske, *Preface to CONFRONTING RACISM, THE PROBLEM AND THE RESPONSE*, *supra* note 142, at xii (noting that "white racism toward black targets" may be a "unique case," but declining to "prioritize this one form of oppression over other forms" and mentioning that "the principles of white-on-black racism provide important insights about other target groups, other perpetrators, and their various combinations"), and Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1104 (1997) ("Still, a potential danger lies in its possible elision of singular facts and histories that shape(d) the Black experience of slavery and subordination in this country. Therefore, LatCrit critiques of the Black/White paradigm must at once denounce its truncation of race relations discourse and avert the possibility that our critiques might undermine experiences and claims unique to African-Americans . . .").

categories make sense because they are better at facilitating change.²¹¹ As Patricia Williams noted early on, if one added up all those marked by various kinds of difference, one would have a majority.²¹²

This broad commitment to multiple flexible categories dovetails beautifully with psychological perspectives on preventing prejudice, but it also runs against another key CRT strand: listening to “voices from the bottom.”²¹³ The present volume vividly illustrates the tension between listening to “voices from the bottom” and trying to connect with others and new opportunities. One of the most senior scholars associated with CRT, Derrick Bell, offers one provocative “crossroad” in his closing afterward: “The desire for general acceptance—to have our writing read by many rather than the faithful few—is normal. But in striving for readership, the temptation is ever present to soften our critiques and rationalize rather than rant against the injustices in our midst.”²¹⁴ This is a powerful and provocative contrast. One of the editors, Francisco Valdes, offers a quite different spin. Rather than looking backward to different sources of discrimination and inequality, Valdes suggests CRT should go “beyond experience and struggle to include aspiration and hope.”²¹⁵ More specifically, he suggests CRT look not to “whether . . . out-group communities can travel together based first and foremost on present or past positions, but whether overlapping yet distinct out-groups can work together to arrive at a common destination.”²¹⁶ A prevention focus makes us ask the questions differently: How do we balance our sympathy for those subject to unfairness by trying to mirror their experience with our efforts to craft stories, concepts, metaphors, and materials that help reduce prejudice and prevent discrimination?

Like the empirical scholar’s pull to “follow the data,” the pull to “listen to voices from the bottom” does not neatly correspond to any particular category. But just as the pull to follow data often means following existing categories from the past, so, too, does listening to voices from below. Listening to voices from the bottom often meant listening to the distinct experiences of African-

211. This latest CRT volume itself makes such broad commitments to one of only three core commitments of CRT. See *supra* note 6. The CRT editors’ response to this Review makes this broad commitment just as clear. See Culp et al., *supra* note 12, at 2452 (committing to “no less than the establishment of substantive security and social dignity for all” (emphasis added)).

212. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987).

213. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26 (1987) (“Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”).

214. CROSSROADS, pp. 411, 412.

215. CROSSROADS, pp. 399, 402-03.

216. CROSSROADS, p. 403.

American women²¹⁷ (and more recently men).²¹⁸ When “we” listen to others like “us,” it is perhaps natural to think “our” problems really are quite different from and worse than others’.²¹⁹ I say this perhaps because it may also be possible to see “our” problems, at least partially, as related to “others’.”²²⁰ And the new collection of CRT work clearly shows a large shift toward seeing these connections.

It is still important to recognize that the pull to “follow the voices,” like the empiricist’s pull to follow the data, makes much sense at various times. Perhaps it is easiest to see how the following voices may function culturally and therapeutically. When CRT and similar projects, be they in feminism or queer theory, want to make outsider scholars and thinkers feel comfortable, to validate their experiences, and to empower them, this sympathetic listening makes sense.²²¹ And by making those deemed different more comfortable, this practice may help change the make-up of the profession,²²² and the different make-up of the profession may itself help reduce prejudicial attitudes.²²³

217. See, e.g., Harris, *supra* note 3 (criticizing white feminist theorists for neglecting the distinct concerns of African-American women).

218. Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 *CAP. U. L. REV.* 241, 252-53 (1994) (noting that African-American men may face a different combination of burdens and prejudices than African-American women).

219. Grillo & Wildman, *supra* note 103, at 402-03

220. Victoria Ortiz and Jennifer Elrod make one such connection:

The strength we gain from being Others who are connected to similar Others is diminished in relation to the degree of our concomitant isolation from dissimilar Others—and, indeed, even from those whose race, class, gender, sexual orientation, or physical ability are privileged by society. We are empowered by finding and nurturing our shared Otherness with all Others, even though or especially because their differences are different from ours.

CROSSROADS, pp. 258, 271.

221. CROSSROADS, p. xvii (prefacing, by CRT pioneer Lawrence, the new collection by noting that CRT meetings aimed “to create homeplaces: safe places among trusted friends to seek refuge and dress the wounds of battle and places for hard conversations, where differences can be aired and strategy mapped, where we can struggle with and affirm one another”).

222. See CROSSROADS, pp. 32, 41 (discussing the small number of minorities and women on one law school faculty); see also Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 *UCLA WOMEN’S L.J.* 249, 251 (2000) (presenting statistical evidence showing that “[l]aw schools started 1,094 new tenure-track professors between the fall of 1986 and the spring of 1991 [of which] [m]ore than one-half (53.1%) of these new hires were white men, 30.3% were white women, 9.0% were men of color, and 7.6% were women of color”); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *COLUM. L. REV.* 199, 238 (1997) (discussing a study at the top sixteen law schools showing that between 1986 and 1991, “white men obtained almost two-thirds (62.3%) of the entry-level positions awarded at the top sixteen schools; white women secured another quarter (27.9%) of those jobs; men of color filled just 8.2% of the posts; and women of color landed only 1.6% of those prestigious positions”).

223. See Pettigrew & Tropp, *supra* note 114 (discussing how positive contact may reduce prejudice).

From a therapeutic perspective, however, the first step of empathy with those suffering, like those of various outsiders, should not always be the last step. To return to the disease metaphor, if a patient complains of pain in the shoulder and fears he tore a rotator cuff, the doctor wants to treat the complaint with respect. At some point, however, if the doctor determines that the source of the pain is really radiating from the neck, then the doctor will suggest that the patient exercise with his neck in different ways. So, too, even if the doctor cannot identify the precise nature of a problem, such as the precise infection, the doctor may know that she knows enough to recommend the patient use an antibiotic that fights many different infections, regardless of their type and regardless of their source. (And, yes, of course, doctors will often themselves get diagnoses wrong, particularly when they involve people whom they see as unlike themselves, such as misdiagnosing older women with dementia and abandoning them rather than trying to treat them for depression.²²⁴) Or, to step back still further, even when a patient indicates he is quite comfortable, as many in CRT may be with narrower categories, the healing professional, doctor or lawyer,²²⁵ must note the potential problems from seemingly benign conditions—such as the potential failure of narrow prevention strategies. By analogy here, the part of CRT committed to eradicating inequality and subordination should take seriously the idea that attention to narrow categories, however comforting to discuss, may backfire through various forms of conscious and unconscious backlash—even if it resists the idea that the various forms stem from some general source, such as ingroup sympathy rather than racism in particular.

B. *But Which General Acceptance Category? “Salsa Outselling Catsup”:
Coalitions of Principle Versus Coalitions of Interest*

All the above does not mean we, including Ayres and CRT, should abandon all narrower approaches and simply adopt any generalized prejudice reduction approach. Now that we see that CRT and Ayres should perhaps think more carefully about general approaches to prejudice reduction, the question arises, “What should those general approaches be?” This raises a far tougher set of questions that the psychological research alone does not answer. Even as it reaches out, CRT still cautions that its work depends on coalitions of

224. Freshman, *supra* note 37, at 122 (“Evidence suggests that more than one in ten older persons who are diagnosed with dementia from irreversible brain damage . . . in fact have depression that is improperly diagnosed.”).

225. See Bruce J. Winnick, *Advance Directive Instruments for Those with Mental Illness*, 51 U. MIAMI L. REV. 57, 59-60, 90 (1996) (noting even if individuals do not think about death and illness, an attorney may want to counsel them about how advance planning may avoid future disputes over their care).

“principle” and not of mere “interest.”²²⁶ No doubt culture, such as dominant religious values, represent some outer limits: Much as Buddhist countries might have room to include a category of “all sentient beings,”²²⁷ including nonhuman animals, dominant Judeo-Christian values probably offer little room for such a broad approach in contemporary America.²²⁸ Instead, when the business of America so often remains business,²²⁹ popular generalized strategies often depend on some version of the market.

It’s tempting to embrace such market appeals to reduce prejudice because they seem so varied and seem so helpful. There are upside and downside variations to this practicality approach. The upside has many variations: If we hire “them,” then “we” benefit from “their” special skills.²³⁰ Even if “they” do not have special skills, they still have skills, and we lose if we do not harvest them.²³¹ Probably we think we’re pretty smart, but “they” may be more “creative” or “solve problems” better—or maybe we fail to see they are “creative” because we think they are only “organized.”²³² We may know what we want, but they have money—and we can find out what they want by hiring some of them. To put the latter in a common training slogan, “salsa outsells catsup.”²³³ There’s a down-side emphasis to diversity, too: Remember the lessons of trying to break into the Hispanic market when you sell a car that translates as “doesn’t go” (the Chevrolet Nova). In all its forms, the new

226. CROSSROADS, pp. 380, 385 (rejecting “common interest” coalitions); CROSSROADS, p. 390 (rejecting “alliances based solely on short-term common interests”).

227. Exactly what rights this would include for nonhuman animals is unclear—since some Buddhists will even *eat* nonhuman animals. See, e.g., JOSEPH GOLDSTEIN, *ONE DHARMA: THE EMERGING WESTERN BUDDHISM* 59 (2002).

228. See generally George P. Fletcher, *In God’s Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1611 (1999) (“If God has made *men* equal, then the implication must be that God has invested all *human beings* with sufficient value to entail a duty of government to accord to each *person* the same, or at least equivalent, rights and duties.” (emphasis added)).

229. See JOHN BARTLETT, *FAMILIAR QUOTATIONS* 859 (13th ed. 1955) (quoting President Calvin Coolidge in his address to the Society of American Newspaper Editors on January 17, 1925).

230. Edward T. Hall & Mildred Reed Hall, *Key Concepts: Underlying Structures of Culture*, in *INTERNATIONAL HRM*, *supra* note 26, at 24, 30-31 (suggesting that some cultures have people who may be good at “short term relationships” and other cultures “[h]ave a strong tendency to build lifetime relationships”).

231. FED. GLASS CEILING COMM’N, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL* at iv (1995) (“Narrowing the pool of talent from which . . . [businesses] draw is—among other things—a blunder in competitive tactics.”).

232. HATELEY & SCHMIDT, *supra* note 111, at 90 (parable of different birds in land dominated by penguin illustrates that some species of birds may have more in common with penguins than each other); *id.* at 104 (“Each of the other birds who worked on the team brought their own unique abilities to bear on the project. They did not limit themselves with assumptions based on style or status.”).

233. Interview with Sheryl Borg, Associate Director, Office of Equality Admin. Programs, Univ. of Miami, in Coral Gables, Florida (May 22, 2002).

business appeal of diversity pops up often from popular diversity trainings to publication of reports of the Federal Glass Ceiling Commission.²³⁴

From some economic perspectives, including parts of Ayres's approaches, the "salsa-sells" practicality makes good sense, even profound sense. *At least at times*, Ayres seems content (at least for now) tweaking "the" market²³⁵ and relying on the market for fairness.²³⁶ (Or, to be more precise, Ayres's proposals, though far more than market purists at Chicago would like, contrast sharply with the CRT call for "structural and social transformation: . . . no less than the establishment of substantive security and social dignity for all."²³⁷) As we saw, Ayres rests much of his approach to discrimination in car sales to correcting market "failures" by requiring dealers to give more information to purchasers. For example, Ayres suggests one might reduce discrimination by testing how well employment agencies express a willingness to meet discriminatory demands.²³⁸ Ayres offers the example of his own encounter with day care agencies: One offered to find him whatever type of nanny he wanted, telling him explicitly: "Tell me your prejudices. We'll only send you *pink* polka dotted nanny's if that's what you want. If you're not comfortable with a[n] older or a younger girl, we'll make sure that you only have to interview candidates that you like."²³⁹ From this, Ayres developed the notion one could try to send testers to employment agencies just as one now sends testers for housing discrimination or as Ayres did for discrimination in car buying. This is a very important innovation and one that may make a real difference beyond nannies: Many high-level employment settings, like large

234. See, e.g., FED. GLASS CEILING COMM'N, *supra* note 231.

235. The response of the CRT editors in this Symposium asserts Ayres "accepts the structure of the market as given." Culp et al., *supra* note 12, at 24346 (emphasis added). To speak of a single, monolithic thing called "the market," however, obscures real questions. There is no single set of institutions and laws that is the market; there are simply various configurations of laws and institutions. Nor do these laws and institutions vary on a single dimension.

236. Given Ayres's so evident sensitivity and awareness, including his sensitivity to even his own biases, see *supra* text accompanying note 140, readers may forget he still is happy to be compared to Posner, who shows more sensitivity to criticism of his sensitivity than sensitivity itself. See Ayres, *supra* note 81, at 504 (jesting that some may respond to his article by noting, "Ah-ha, I knew it. Scratch Ayres, and you find a Posner."). On Posner's sensitivity, see *supra* note 46.

237. Culp et al., *supra* note 12, at 2452 (noting that, while CRT "has yet to articulate a 'postsubordination' vision of an alternative future, . . . any such future vision necessarily includes structural and social transformation: . . . no less than the establishment of substantive security and social dignity for all"). See *supra* note 235.

Ayres's proposals go far beyond most other approaches to discrimination, and I certainly do not think that calls for wide-scale audit testing of discrimination, let alone novel methods for testing for discrimination, are "narrow and atomistic" as Ayres's response feared an earlier version of my Review implied.

238. AYRES, pp. 402-03.

239. AYRES, p. 403.

law firms, have remained relatively homogenous²⁴⁰ and often rely on recruiters to fill even top positions.²⁴¹

There are two troubles with the salsa-sells approach. First, as many in CRT would note, the salsa-sells mindset, left on its own, can help some and still leave others behind. Yes, color and other prejudice may blind us to the Asian debate star or the Jewish sports hero. The market emphasis imposes a different set of blinders. Salsa-sells training may well mean that the Pat Williamses of the world, and other stylish women of color, get attention at Benetton.²⁴² It does a lot less for Clare. Who's Clare? If you live or visit South Beach, you may know Clare as the woman of odor. Clare weighs lots more than the local personal trainers would suggest, she flips her matted hair over her head with some panache, but her clothes are not Benetton. When she wants food, she waits at the door of the local bookstore, and someone comes to the door to take her order. She cannot enter the store—even though she pays the same cash. Clare is part of the other side of "salsa outsells catsup." Yes, she has money to spend, and that still may not be enough. I can't pretend to know the exact reason why she does not/cannot go in, but one possibility bothers me. The bookseller may fear the rest of "us" prefer the delicate hints of freshly brewed espresso and steamed milk to those of Clare.

Worse, booksellers who leave Clare outside may partly be following the logic of some diversity programs. If "we" follow the money, "we" may find that some of "them" help us on our way—but some of "them" really won't fit well. If the bookseller confronts the latest advice on marketing, she might very well discover that pleasant scents make many people feel better, and people spend more when they feel better.²⁴³ Writ large, this could mean big trouble. As prominent law and economics guru Richard Epstein notes, it may be inefficient for different people to work together when similar people may just communicate and work more harmoniously.²⁴⁴

Even for those of us embraced by the salsa-sells tactic, there remains a second problem, namely the indignities of mere toleration. A personal

240. See, e.g., FED. GLASS CEILING COMM'N, *supra* note 231, at iii-iv; RICHARD L. ZWEIFENHAFT & G. WILLIAM DOMHOFF, DIVERSITY IN THE POWER ELITE: HAVE WOMEN AND MINORITIES REACHED THE TOP? 39 (1998) (noting that Jews remain underrepresented in some areas of corporate business, which remain relatively homogenous); Dovidio & Gaertner, *supra* note 142, at 20-21 (reporting that African Americans remain underrepresented among top levels of the military, the federal civil service, and large companies).

241. Sheryl L. Steinberg & David S. Machlowitz, *Working with a Headhunter*, 15 LEGAL ECON., Nov./Dec. 1989, at 43.

242. In one of the most famous and widely discussed "narratives" associated with critical race theory, Patricia Williams wrote of waiting to be buzzed into a Benetton store while a white employee just mouthed, "We're closed." WILLIAMS, *supra* note 68, at 44-45.

243. See, e.g., Robert A. Baron, *Environmentally Induced Positive Affect: Its Impact on Self Efficacy, Task Performance, Negotiation and Conflict*, 20 J. APPLIED SOC. PSYCHOL. 368 (1990).

244. See EPSTEIN, *supra* note 189.

example: My father, retired from Army Reserve and Defense Department Civil Service, remains active as a legislative monitor of sorts for various retiree and retired military types. At one meeting, people asked him about a proposal to include sexual orientation explicitly within the local human rights audience. He said he had no opinion since it wasn't a military issue. Some people still asked for his personal views. "Well, of course, I'm for it," he said. "What do you want, those people unemployed and then we'll be supporting them on relief?!"

At its most limited then, the salsa-sells idea suggests that whites tolerate those nonwhites who can buy their products²⁴⁵ and that heterosexuals hire gays to keep "them" off welfare, but does not suggest a full embrace of all of "them."²⁴⁶ Seen in its better light, the salsa-sells scheme may simply fail by omission, letting us help some and leaving others behind. In this sense, the salsa-sells approach falls short on the same count that many in CRT, including gays of color, felt appeals for gay marriage fell short. Yes, it might help sell gay marriage to suggest states adopting gay marriage could expect lots of tourism from gays with supposedly high levels of disposable income.²⁴⁷ But such appeals might overlook other kinds of problems, like the poverty and lack of health insurance of lesbians and gays with less money, including lesbians and gays of color.²⁴⁸ In a phrase, such appeals can easily become: "See, they are not *all* so bad." Seen in a worse light, salsa sells can hark back to the old distinctions between letting "them" work for us, maybe even with us, but not socializing with them, let alone letting them socialize with "our" families.²⁴⁹ In a phrase, "*They* are good for *some* things."

245. See Radin, *supra* note 192, at 1912 (1987) (exploring the criticism that some values should not be subject merely to market analysis).

246. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 107 (1996) ("The problem with the neutral case for toleration is . . . [that] it leaves wholly unchallenged the adverse views of homosexuality itself.").

247. See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 749 (1995) (arguing that certain states like Hawaii may "reap substantial economic benefits by being the first to solemnize same-sex marriages").

248. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 596 n.142 (1997).

The enormous attention paid this issue by gay and lesbian theorists underscores the class differences that exist among gays and lesbians and the class assumptions that underlie pro-same-sex marriage arguments. Only individuals with ample economic resources could leave their homes, travel to Hawaii for a wedding (and perhaps honeymoon), and return to their resident state to battle legal authorities for recognition of their marriages.

Id.

249. See generally RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001). As I first wrote this, searching for a nifty catch phrase for this phenomenon, I thought of naming this the "Shylock Strategy." After all, many of us may recall Shylock's speech in *The Merchant of Venice* that he would do business with non-Jews but not socialize with them. The trouble here is that the metaphor resonates too strongly with another general stereotype of various "thems": "They" are clannish, but "we" simply stick together. See Freshman, *Whatever Happened to Anti-Semitism?*, *supra* note 6, at 348.

All these contrasts between appeals to market values and appeals to more profound respect should not be exaggerated. Often, one might genuinely frame market appeals in quite broad terms. In one training exercise, people in one room look at photos of those in another room and try to imagine what they are like; it's easy for people to get caught up in stereotypes of various kinds in making such assumptions.²⁵⁰ The people from the photos then enter the room and share about their lives. In another training book and video cartoon about different types of birds, the story shows how the birds can get things done better when they look at each individual bird to see what it can do.²⁵¹ For customers and workers alike, those who run through such training may learn a "who knows?" approach. Who knows which people may really turn out to be big purchasers? Who knows which employees may really perform in which ways? In more philosophical terms, people might learn a paradox of marketing and management: One spots the best customers and employees by treating many people seriously and considering many potential customers and clients.²⁵²

CONCLUSION

Ultimately, in distinct ways, both Ayres and CRT have the opportunity not just to test the success of prevention jurisprudence but to shape the standards of prevention jurisprudence. As it stands, the Supreme Court's standards for what constitutes enough of a prevention program to shield employers remains vague. Perhaps some would celebrate prevention efforts so much that it seems best to let various methods grow rather than seeking to test which ones work effectively.²⁵³ Whatever its virtues elsewhere, such a hands-off approach to prevention raises the same dangers as merely celebrating any kind of alternative health methods: Just as it may be dangerous to let people continue using herbal remedies for depression if they don't work but conventional measures do, it may be dangerous to encourage discrimination prevention if it works less well than traditional litigation. So, too, just as herbal remedies may

250. Interview with Cheryl Borg, *supra* note 233.

251. HATELEY & SCHMIDT, *supra* note 111, at 104 ("Each of the other birds who worked on the team brought their own unique abilities to bear on the project. They did not limit themselves with assumptions based on style or status.").

252. *See generally* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 125-35 (1973) (suggesting that one might maximize happiness not by testing every action to see if it maximizes happiness but committing instead to projects about which one genuinely cares).

253. *Cf.* Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 723 (1992) ("Calling for evaluative standards in the case of young movements [such as outsider scholarship] . . . is misguided. It comes too early, is an odd thing to be concerned about, and could stunt the movement's growth.").

have powerful negative effects, such as the dangers of herbal ephedra,²⁵⁴ it is important to document the dangers of prevention measures, too. There's easily the danger that the defense will devolve merely into a question of good intentions and good efforts: An employer might defend against liability by offering prevention programs even if they don't work to reduce prejudice or discrimination—and even if they include the stigmatizing side effects that CRT may worry about. Ayres and CRT have direct and indirect opportunities to prevent this. In the most direct way, Ayres and CRT may make theoretical critiques of such a lesser standard, noting its inefficiency and its unfairness. Such critiques may fare relatively well, as have attempts by CRT to examine discrimination involving African-American women distinct from discrimination involving African-American men. But conservative courts may also reject such critiques, much as they have often rejected critiques of unconscious discrimination, or the social construction of race, despite much social science evidence and argument.²⁵⁵

Ayres and CRT may therefore have more opportunities by relatively indirect methods. Ayres and others may examine existing diversity and prevention programs—or develop others—to set standards that courts may apply to see whether existing programs really do work. Even if courts stick to a narrow focus on whether employers showed a good intention to reduce prejudice, the employers will find it harder to rely on relatively ineffective programs if Ayres and others develop tests that sift the effective from the ineffective. In similar ways, CRT may extend its own narrative and critical methods to explore how well prevention measures work and how much they may impose additional burdens, such as strengthening various stereotypes. There's no guarantee such indirect measures will work, either—after all, even after Ayres's showing that discrimination remains in many retail markets, federal law does not clearly ban such discrimination.

Still, whatever direct or indirect use they may be to courts, the Ayres books and CRT collections are real treasures. As they stand, they introduce new perspectives and new methods for thinking about discrimination—and scholarship more generally. Both treasures have many uses, and many readers may no doubt see many different kinds of value and applications. At least *one* important opportunity, however, remains: Mining both works to fashion new ways to prevent the discrimination that each documents so clearly.

254. See, e.g., Arlene Weintraub & John Carey, *Diet Pills and Pops: A Dangerous Mix*, BUS. WK., Sept. 2, 2002, at 40 (reporting that more than eighty-five consumer law suits seek damages against just one maker of products that use ephedra).

255. AYRES, p. 239 (noting that Supreme Court rejected evidence that imposition of death penalty was biased even after study considering 230 potential variables showed a racial disparity); CROSSROADS, pp. 159-60 (noting courts have generally rejected arguments based on the social construction of race).