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The Many Ways to Prove Discrimination

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A Book Review by Vikram David Amar[*]

For those who believe the debate concerning anti-discrimination law and policy has become stale, Ian Ayres' book, *Pervasive Prejudice?: Unconventional Evidence of Race and Gender Discrimination*, is a breath of fresh air.[1] As the title of the book itself suggests, some of the evidence Professor Ayres adduces is unusual. But his evidence is not the only thing that is unconventional – much of Ayres' analysis is new, creative and quite stimulating. Indeed, for a generalist like me who thinks about anti-discrimination principles as they relate to broader areas of law like constitutional law, Ayres' analytic frameworks and suggested reforms are as important as is the powerful empirical documentation of existing discrimination that he reports.

The book is broken up into three major Parts. Part I involves disparate treatment on account of race or gender, i.e., situations in which person A treats person B differently because of person B's race or gender. The race- or gender-consciousness on the part of person A can be either intentional or subconscious, but either way person B's race and/or gender is influencing person A's actions.

Professor Ayres focuses on covert disparate treatment in the retail sector. He properly points out that many people assume that a profit motive makes disparate racial or gender treatment unlikely in the retail setting, and he does a good job of analyzing why those assumptions may not be well founded. More importantly, his work in the first Part begins to address the large void in existing empirical work, to test whether retail racial and gender discrimination continue to exist in today's world.

Drawing largely on studies he and others have done in retail car markets in the Chicago area, Ayres adduces overwhelming evidence that dealerships consistently and significantly discriminate, in the way they negotiate terms of a deal, against women and racial minority customers. In particular, Ayres shows that dealerships offered white males significantly

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1. IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001). Ian Ayres is the William K. Townsend Professor of Law at Yale Law School.

lower prices than blacks and women. The average prices offered to white women in the experiments were more than $200 higher than the prices offered to white men, and the offers to black women were $400 higher than those given to white men. The offers made to black men were highest of all, more than $900 higher than the offers made to white men.

The studies' methodologies were simple enough, but meticulous. Pairs of testers (one of whom was always a white male) were specifically trained to pursue a uniform bargaining strategy when dealing with the salespeople. They were then sent out to negotiate for the purchase of new cars at randomly selected dealerships located throughout the Chicago metropolitan region. Professor Ayres' objective, of course, was to have the testers differ only by race and/or gender. In other words, aside from their race and gender, the testers were to present a uniform appearance and uniform consumer behavior. All the testers were drawn from the same age range, had similar educational backgrounds, wore to the dealerships similar clothing, drove to the dealerships in similar cars, told the dealers they would self-finance the purchase, told the dealers they had the same occupations, provided the dealers with addresses in the same neighborhoods, and even were chosen to be of similar physical attractiveness. Moreover, each tester was told to focus quickly on a particular car, elicit an offer by the dealer, wait exactly 5 minutes before responding with a counteroffer that was slightly more than the dealer's marginal cost on that car (thus signaling to the dealer a knowledgeable purchaser) and then see what counteroffer the dealer came back with. Because the testers were essentially following a scripted course of negotiating strategy (i.e., the testers were told exactly what price to ask for, exactly how to respond to counteroffers, etc.), any systematic differences in the way they were treated by the dealers (i.e., the best and final offers made by the dealers) could be attributed only to race or gender. In short, the evidence Professor Ayres adduced in this Part is devastating to those who think women and minorities are not treated worse in the marketplace.

Moreover, because the differential treatment of white men versus other customers was so pronounced, Professor Ayres argues convincingly that any other variables that cannot easily be controlled for (such as how often each tester blinked during the test, or how gracefully each tester sat down in the driver's seat, etc.) cannot by themselves explain the results. It is quite clear that race and gender do matter to the dealers.

Why they matter to the dealers is another question altogether. Ayres speculates about possible causal explanations for the race- and gender-consciousness, ranging from racial animus to "rational" statistical inferences based upon a profit-maximizing goal. This section of the book (the chapter entitled "Toward Causal Explanation") is a bit less helpful than most of the others. While Ayres' deconstruction of possible causal mechanisms is very intriguing and educational, his bottom line is that "[i]n

the end, it may prove impossible to parse out the various elements of animus and rational inferences from irrational stereotypes."[2] Ayres may well be right here (and his evidence does point in conflicting directions), but if he is correct, then one wonders what to make of his introductory comment at the beginning of the chapter to the effect that "[o]nly with an accurate understanding of the reasons for dealer behavior can regulators hope to determine what, if any, governmental intervention might effectively protect black and/or female customers."[3] I myself am not entirely convinced that we do need to know *why* race and gender are being used in order to effectively stop them from being used, but if Ayres believes this, his punch line of indeterminacy comes up a tad short.

The final piece of Part I – Ayres' refutation of the idea that victims can protect themselves from retail discrimination by selecting their own bargaining strategies and choosing the dealers they visit – does not come up short at all. Richard Epstein, for example, has argued that "[i]f blacks or women know that they are apt to get a good deal from some small fraction of the market, then they can avoid other, less receptive dealerships and their unattractive offers."[4] As Professor Ayres points out, "[t]he audit tests themselves provide powerful evidence that African Americans cannot protect themselves from the effects of discrimination by merely searching for and shifting their consumption to non discriminating dealers,"[5] because one key finding of the studies is that discrimination was pervasive across all the dealerships tested. Even by avoiding suburban neighborhoods or dealerships located in areas with very few minorities, African Americans could not escape the widespread discrimination in the car retail sector.

Moreover, even if (as may be true to some extent) minorities could reduce (but not eliminate) the effect of discrimination against them by employing different bargaining strategies than those used by the testers, forcing minorities to use a particular type of bargaining strategy itself

> [R]epresent[s] an important type of race discrimination. This is especially true if the alternative path to a good deal [is] significantly more onerous. If whites need only bargain for four hours to negotiate a low markup, but blacks must negotiate for eight hours, then a finding that blacks in equilibrium did not pay more [than whites] for cars would not mean that blacks were

2. *Id.* at 85.

3. *Id.* at 45.

4. *Id.* at 88; *see also* Ian Ayres, *Alternative Grounds: Epstein's Discrimination Analysis in Older Market Settings*, 31 SAN DIEGO L. REV. 67, 81 (1994) (quoting RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 52 (1992)); Richard A. Epstein, *Standing Firm, on Forbidden Ground*, 31 SAN DIEGO L. REV. 1, 52-53 (1994).

5. AYRES, *supra* note 1, at 90.

uninjured by the dealerships' disparate treatment.[6]

Part II of *Pervasive Prejudice?* focuses not on disparate treatment, but rather on disparate impact, the other major analytic vehicle used by plaintiffs under the nation's anti-discrimination laws. To make out a claim of disparate impact, a plaintiff must show that a particular device or practice by the defendant has an uneven racial or gender effect – a disparate racial or gender impact – that burdens minorities or women more than whites or men. Once a disparate impact has been shown, the question becomes whether the impact is justified by reference to some legitimate objective the defendant is trying to accomplish that is unrelated to race or sex bias. If so, the disparate impact is tolerated; if not, the disparate impact dooms the defendant's practice or device.

Professor Ayres illustrates and documents the disparate impact theory using two unusual factual backdrops – kidney transplants and bail setting. As for kidney transplants, Ayres adduces studies to demonstrate that the federal government's rules for allocating kidney transplants – rules that focus on antigen matching – disproportionately disqualify potential black recipients. Such disparate impact, the federal government had traditionally argued, was the unfortunate but unavoidable side effect of a policy that otherwise made good medical sense in that antigen matching was the most reasonable available method for identifying recipients whose bodies were most likely to physiologically accept (rather than reject) the transplanted kidneys. It turned out, though, as Professor Ayres demonstrates, that the antigen point matching system used by the government did not reduce rejection rates any more than did a *modified* antigen point system (in which antigen matching was still relevant but downplayed) that had a much less pronounced racially disparate impact would have. Thus, Professor Ayres' studies showed, much of the disparate impact under the original antigen point system was unjustified by any medical benefits.

As Professor Ayres himself acknowledges, the disparate impact analysis undertaken in the kidney studies is quite methodologically conventional – a "traditional empirical approach" that looks at two sets of data to make out a disparate impact claim: One set of data which documents the racially disparate impact itself (which shows that absent the antigen matching program, a higher percentage of blacks would qualify for transplants); and a second set of data that shows that the impact is not justified by any medical upside (a study of the antigen matching program and rejection rates). This conventional analysis is performed by Ayres quite well – but it is conventional nonetheless. Indeed, the two most remarkable aspects of the kidney discussion are the compelling real-life implications of the study, and the fact that the study actually influenced the federal government to alter its policies to ameliorate the needless disparate

6. *Id.* at 91.

impact. This Part of the book is a helpful reminder to all of us in the academy that scholarship can influence important policy.

The bail setting study in Part II, by contrast, not only makes for good real-life drama, but also contains important methodological innovation as well. Professor Ayres analyzes the bail setting practices used by state judges in criminal cases in New Haven, Connecticut. As Professor Ayres explains: "The traditional way to statistically test for discrimination in bail setting is to estimate in a regression how factors that are both permissible (that is, related to a defendant's flight risk) and observable (that is, seen by the judge at the time of bail setting) affect the size of bail, and then to determine whether, after controlling for these factors, race is still a significant determinant of the bail amount."[7] In other words, one looking at the amount of bail set in all cases would try to control for things like how serious the alleged crime is, whether the defendant had ever fled before, whether the defendant has a job, etc., and inquire whether – after all these factors are held constant – there is still a racially disparate impact, i.e., within each small group of defendants who share all relevant characteristics, bail rates set for blacks are higher.

The problem with this traditional approach – and it is a problem for all traditional disparate impact methodology – is that critics will always charge that some important factor was not adequately controlled for. For example, in the hypothetical above, someone might say, "You didn't control for whether a defendant had family in the area – something a judge could legitimately take into account in setting bail – and the fact that blacks in your study had higher bail rates *may* just mean they had fewer family members in the area." Ayres refers to this problem as the "omitted variable" problem. This methodological difficulty has made it "exceedingly difficult to use regression analysis to demonstrate racial discrimination."[8]

To get around this problem, Ayres makes use in the bail arena of what he calls an "outcome test." Rather than focusing on the bond amounts set for blacks to see if they are higher (which they are, but perhaps for reasons unrelated to race), Ayres focuses on the *outcomes* of the bond setting – the actual flight rates.[9] If, at the end of the day, bail bond setting decisions

7. *Id.* at 238.

8. *Id.* at 239. This omitted variable problem can plague some disparate treatment methodology as well. For example, critics who disbelieve the auto dealer tests described earlier may claim that some important tester variable, such as whether the tester seemed confident or not, was omitted from the testing methodology.

9. Actually, Ayres says there is no clear empirical data as to real flight rates broken down by race, so Ayres uses what he says is the next best thing – the prices charged by bail bondsmen to black and white defendants. Because the bail bondsman market functions well, prices charged by bail bondsmen should correspond to the flight risks and rates presented by various groups of defendants. Ayres points out that bail bondsmen effectively charge less to black than to white defendants, which means that the bail amounts set for blacks are unjustifiably high.

produce *higher* court appearance rates for minority defendants than for whites (that is to say, a higher percentage of whites on bail flee and forfeit the bond), then we may infer that the bond setting decisions have an unjustified disparate impact on minority defendants. Ayres' data indicates that bail reduced the probability of flight for minority defendants below the flight probability for white defendants. In other words, judges are setting bail rates so as to demand a lower probability of flight for minorities than for whites – they are setting bail in such a way as to tolerate more white flight than black flight.

As I will explain below, this "outcome test" methodology is quite interesting and potentially quite powerful. This feature alone quite literally makes Part II a must-read.

Part III of the book discusses affirmative action, or at least a particular kind of affirmative action: Programs by the federal government that give women- and minority-owned broadcasting stations a major subsidy in the competitive bidding auction process for licenses allocated by the Federal Communications Commission (FCC). In particular, minority- or women-owned businesses are required to pay about only *half* of what they bid in order to obtain the licenses in the auction. The FCC's objective, in making race and gender relevant, is to increase broadcast diversity; the race or sex of the license owner may affect the content of the programming aired under the license.

In addition to being attacked as "reverse discrimination," such programs have been criticized as huge giveaways of federal resources. Counter-intuitively enough, Professor Ayres in this Part of the book demonstrates that the overall revenue to the federal government for the sale of the licenses *increased* by more than 12% under the minority- and women-owned business preference program.

As Ayres explains, "[a]lthough at first blush it seems that allowing designated bidders to pay fifty cents on the dollar would necessarily reduce the government's revenue,"[10] in fact subsidizing some bidders created extra competition in the auction and drove up the successful bid prices for the remaining, unsubsidized, slots. The unsubsidized firms bid more than they would have absent the subsidy program because there were fewer licenses for which they could actually compete (once the subsidy effectively set aside a number of licenses for women and minorities).

Two points about Professor Ayres' affirmative action parable bear quick mention. First (as he acknowledges), the phenomenon he describes would occur if *any* slots were effectively set aside for *any* group of applicants – the fact that the subsidy was allotted on the basis of race and gender was irrelevant to the auction effect he describes. Second, a desire to increase revenue could not, by itself, ever justify government race

10. AYRES, *supra* note 1, at 316.

consciousness, and Professor Ayres never suggests otherwise. Nonetheless, his surprising economic punch line about affirmative action provides, as I suggest below, a lot of food for thought.

Making one's way through the detail of the three Parts of the book is no mean feat. Let me be clear. The book is quite carefully and well written. But it nevertheless does demand a lot of attention and a fair level of sophistication on the part of the reader. The subject matter is complicated, and some of the ideas are nuanced. A background in, or at least a feel for, basic microeconomic reasoning and statistical analysis definitely helps. So too does a familiarity with the fundamental framework of anti-discrimination law. The people (both lawyers and non-lawyers) who will derive the most from the book are people who like to think hard as they read, and who don't mind stopping every five pages or so to reflect upon what they have just read.

But if you are that kind of person, you will surely benefit from reading this book. The different kinds of proofs of discrimination are interesting in themselves. In fact, Professor Ayres proves race- or gender-consciousness in many different ways: He focuses on the overt text of some policies (like the FCC's); he employs testers to demonstrate disparate treatment; he uses traditional multi-variable regression analysis to examine unjustified disparate impact; he devises "outcome tests" to uncover other unjustified disparate impacts, and he also makes use of "principal audits" – a device whereby an agent who is discriminating on behalf of a principal can be induced into admitting the discriminatory instructions given by the principal.

It is where the book goes, prescriptively, however, that makes it even more deeply worthwhile. In the few pages I have here I can't come close to doing justice to this aspect of the book, but let me raise a few possibilities.

IMPLICATIONS

One big suggestion Professor Ayres makes is to extend anti-discrimination law to protect against gender-consciousness in the retail sector. Professor Ayres correctly points out that housing, education and employment – and not retail sales – have been the primary domain of anti-discrimination statutes. Moreover, one of the major federal statutes that may reach retail sales – section 1981, which prohibits discrimination in the making and enforcing of contracts – speaks only to race and not to gender.

I think Professor Ayres is undoubtedly correct that extension of anti-discrimination laws in the ways he suggests is a step in the right direction. But will such extension do much? That, of course, depends upon the ease with which the rights embodied in any extension of law can be vindicated in courts.

To address that enforcement problem, Professor Ayres encourages

broader use of the kind of tester studies he utilized in the Chicago auto dealerships. Like the extension of the laws themselves, an increase in the number of well-designed testing studies is undeniably a good thing.[11] But even these studies are going to be of limited use in actual court cases, for a few reasons.

First, as Professor Ayres concedes, many testing studies will be criticized for not adequately constraining the discretionary conduct of the testers. If two testers are not in all relevant respects absolutely identical (except for race and/or gender), then a defendant who treats them differently might not be doing so because of race- or gender-consciousness.

Second, as Professor Ayres hints but does not thoroughly discuss, a plaintiff who is *not* a tester (but rather who is a bona fide woman or minority customer) may have difficulty using even a well-designed test to prove that s/he was discriminated against. Just because a defendant discriminated against black or women testers does not mean s/he discriminated against a non-tester black or woman plaintiff. A non-tester plaintiff who, say, was offered a car deal s/he didn't like cannot point to a white or male who necessarily got a better deal for the same car on the exact same day, etc.

One way around this dilemma for a plaintiff would be, as Ayres suggests, to use a pattern or practice class action device. But such devices, whereby statistical evidence of a pattern of discrimination can be used by *any* plaintiff who is a member of the same racial or gender group, is quite constrained.[12]

Finally, even if a pattern or practice class action or other device enabled an individual non-tester plaintiff to use the pattern or practice of discrimination established by the test, such a device would be available *only* against actual retailers who had been tested and failed. A pattern or practice of discrimination by one retailer surely couldn't be used to prove discrimination against *another* retailer who happens to sell the same kinds of goods or services. And because each test is complicated to design and expensive to administer, even a significant expansion of testing will not result in very many retailers being snagged.[13]

11. Professor Ayres does note, however, that there may be ethical considerations that limit some kinds of tester studies. *See id.* at 401.

12. For example, in a case that Ayres mentions, *McClesky v. Kemp*, 481 U.S. 279 (1987), the Supreme Court did not allow a criminal defendant to use statistical evidence of race discrimination by juries in general to prove that his jury acted discriminatorily. *Id.* at 294. In so deciding, the Court said that every jury is different and that juries act for many different reasons. *Id.* The Court also said that employment was one of the few areas where statistical evidence should be allowed. *Id.* I suspect that the retail sector could easily be analogized to the employment sector, and distinguished from the criminal procedure setting, but these are questions Professor Ayres' suggestions raise but do not answer. *See* AYRES, *supra* note 1, at 239.

13. It is possible, of course, that if more testing were done, the fear of being tested and caught would deter large numbers of retailers from violating the law in the way that, say, the

The difficulty of proving disparate treatment leads Ayres to suggest that perhaps more anti-discrimination laws be styled so as to make disparate impact actionable. For example, Professor Ayres suggests that a retailer's decision to allow its salespeople to negotiate at all might have a disparate impact along racial and gender lines, which should cause us to ask whether much is really served by permitting negotiation to take place. Do retailers really need to be able to negotiate, or instead should they be encouraged (or perhaps, as Ayres suggests, required by regulation) to abandon negotiation discretion and move to the Saturn car model for pricing?

Ayres' discussion here, like his discussion elsewhere, prompts a lot of thoughts. My own thoughts here drifted to the similar question being waged in the affirmative action debate pending in the Supreme Court. In papers filed in the current University of Michigan cases,[14] the Solicitor General has argued that the university's affirmative action program is not narrowly tailored, and thus not constitutional, because there were "race neutral" alternatives that the university should have pursued, but did not. In particular, Michigan should, the Solicitor General says, have made use of plans like those in effect in California or Texas, where admissions criteria that have racially disparate impacts, like SAT scores, are de-emphasized so that more people of color are admitted. I have written elsewhere that such plans, which sacrifice criteria that schools otherwise believe contribute to academic excellence, may not be the best idea in the world.[15]

The question there is analytically similar to the question here: What do we lose by abandoning a practice that has a disparate impact? I admit that my instincts about what we lose when we change admissions criteria differ from my intuitions about how much is lost when we get rid of automobile negotiations, but these divergent gut senses may be due to the fact that I make my living in education rather than in the car marketplace. Certainly the abstract question of whether negotiation itself has any social or economic utility is a large one that Professor Ayres only begins to explore in this book.

Since I just mentioned the University of Michigan cases, this is a good place to make note of another thought Professor Ayres' intriguing analysis triggered concerning educational affirmative action. Professor Ayres shows how government revenue actually went *up* because of the FCC

Securities and Exchange Commission uses high-profile prosecutions to ensure more general compliance.

14. Grutter v. Bollinger, 288 F.3d 732 (6th Cir.), *cert granted* 123 S. Ct. 617 (2002); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *cert. granted* 123 S. Ct. 602 (2002).

15. Vikram D. Amar, *The Bush Administration and the Supreme Court's Michigan Affirmative Action Cases: Narrow Tailoring and Alternative Methods of Ensuring Diversity* (Feb. 7, 2003), *at* http://writ.news.findlaw.com/amar/20030207.html.

license set-aside programs. I wonder whether perhaps race-based affirmative action in education has had a similar effect. In other words, are the grades and scores of the white admittees *higher* today than they were before race-based affirmative action, because there are fewer (non-affirmative action) slots to compete for than there used to be?[16] Of course, a company can increase the size of its bid for a license so long as it has money, whereas presumably a white university applicant doesn't have an unlimited capacity to increase his grades or scores. But to the extent that many students don't always push themselves to perform to the full extent of their capabilities, the question should be asked: Has affirmative action actually increased the overall academic quality of student bodies (putting aside the quite real but hard-to-quantify benefit that comes from diversity itself) by ratcheting up the competition (and thus the work ethic) among white applicants? I'd love to see Professor Ayres take up that empirical question.

Finally, I have a few thoughts/questions about Professor Ayres' extremely important idea that "outcome tests" should be employed more in anti-discrimination law. As Professor Ayres summarizes, "[t]he basic idea of the outcome test is to analyze whether the outcomes (about which the decisionmaker cares) are systematically different for minorities and nonminorities."[17] Professor Ayres correctly identifies the main virtue of such an approach – its elimination of the "omitted variable" problem that plagues traditional regression analysis in disparate impact and disparate treatment cases. By focusing on one set of data – the outcome success rates – we avoid quarrels about whether we have controlled for all other relevant variables in doing the regression analysis to see if the seemingly disparate treatment can be explained or the disparate impact justified. The New Haven bail setting case is a great example. If judges are setting bail amounts that seem to do their job less effectively for whites than for blacks, judges must unjustifiably be concerned more with black flight than white flight.

Professor Ayres identifies a few limitations on the use of outcome tests; they may not always catch discrimination that does exist because of the so-called "inframarginality problem" and they may sometimes falsely suggest improper discrimination because of something called the "subgroup validity problem."[18]

I believe, however, that there is a related, but larger limitation, on the outcome test approach, namely, that it works only when we all agree that

16. Even if slots aren't formally reserved for minorities (as the *Bakke* decision says they cannot be), the competition between non-minorities for admission heats up whenever there is race-based affirmative action. *See* Regents of the Univ. of Cal. v. Bakke, 483 U.S. 265 (1978).

17. AYRES, *supra* note 1, at 404.

18. *Id.* at 408, 412.

there is only one main objective that the decisionmaker is trying to accomplish, and we can therefore test the outcome by reference to that objective. For example, in the bail setting context, we infer that the judges' differential bail rates for whites and blacks are unjustified only because we agree that the *only* thing bail is supposed to do is deter flight, and because we have racially-disparate flight rates. But the more objectives the decisionmaker is trying to accomplish, the more outcomes we must examine, and the more an outcome test begins to suffer the problems of a multiple regression analysis.

To see this, consider the following two outcome findings that Ayres says may indicate racial problems:[19]

> 1. If editorial acceptance decisions produce higher citation rates for articles written by minorities than by whites, we might infer that acceptance decisions have an unjustified disparate impact in excluding qualified minority articles; and
>
> 2. If police search decisions are systematically less productive in yielding evidence with regard to minorities than with regard to whites, we might infer that search decisions have an unjustified disparate impact in subjecting undeserving minorities to being searched.

Both of these assertions are plausible if, but *only* if, we believe that the decisionmaker in each case had a single objective whose outcome success can be easily measured.[20] In the editorial illustration, for instance, suppose the editor of the journal cares about more than how many times the articles he accepts are cited. Suppose he cares about where they are cited, and by whom they are cited, and for how many years in the future they are cited, etc. It may be that minority-authored articles are cited more often, but in less well-regarded journals, and by less prominent academics, etc.

More provocatively, suppose the editor wants the pieces he publishes to be cited by other scholars who do not personally know the cited authors, and suppose further that minority scholars are a relatively closely knit group, who keep in better touch with each other than non-minority scholars. It might be, then, that minority scholars are being cited more by other minority scholars (some of whom they know), but are being cited less by scholars whom they do not personally know.[21]

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19. These examples are drawn verbatim from Ayres. *See id.* at 405-06.

20. I am struck here by an analogy to constitutional law equal protection rationality review, and the problem of calling a law "irrational" when it is designed to achieve multiple purposes. *See* Vikram D. Amar, *Some Questions About Perfectionist Rationality Review*, 45 HASTINGS L.J. 1029 (1994); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

21. In the same vein, if the bail bondsmen in Professor Ayres' studies had been offering lower rates to black defendants because of personal acquaintance, or because the bondsmen

In the search and seizure context, suppose police conduct searches *not* only to yield evidence, but to let criminals suspected of certain crimes know that they are being watched as well. Suppose police conduct many searches of suspected drug dealers in part because they want to shake up drug dealers, even if the police themselves are not always confident that their searches will turn up anything.[22] In other words, it might be that police do not search each and every time they have satisfied some minimum "probable cause" Fourth Amendment threshold, but rather choose to search only a subset of searchees as to whom they have probable cause, and make that choice taking into account the crimes for which the individuals are suspected. If minorities are overrepresented among drug dealers, then searches of minorities are going to be "less productive" than searches of whites, even if there is no race consciousness (i.e., even if police are not setting different thresholds for conducting searches based on race), and even if there are good policy reasons (i.e., keeping drug dealers on edge) to justify the disparate impact.[23]

To see my point from another perspective, imagine that Asian law students have lower law school GPAs than white law students. Under an outcome test reasoning, someone might try to infer that *either* the school is taking race into account at the admissions stage against white applicants, *or* that white applicants are suffering an unjustified disparate impact by some aspect of the admissions criteria.[24] To my mind, such an inference would be unwarranted. Perhaps the school is making a concerted effort to have more science majors, because it wants to build a strong alumni network in the law and technology and intellectual property areas. And perhaps Asians are overrepresented among science major law school applicants (which may well be, at least in some states). If you suppose further (as also may be the case) that science majors might have lower law school GPAs than their non-science counterparts (perhaps because they have less experience writing essays), then the *outcome* we observe is neither the product of race consciousness, nor is it unjustified. But the outcome test failed to work here because law school grades are not the only outcomes

themselves were engaging in race-based affirmative action to help defendants of color (as opposed to being driven by a profit motive), the outcome test methodology would have been less powerful.

22. Let us assume, of course, that such searches – designed to keep criminals off guard and not just to gather evidence – are not unreasonable within the meaning of the Fourth Amendment.

23. Professor Ayres himself uses the drug dealer context to illustrate his "subgroup validity" problem. While related, this problem is, I think, distinct from the "multiple purpose" problem I am raising here.

24. There is, of course, the possibility that Asian law students are themselves being victimized in law school *grading* by disparate treatment (which would be unlikely because of blind grading) or by an unjustified disparate impact in grading criteria. But for purposes of my hypothetical, let us assume neither of those is true.

about which law schools can and do legitimately care.[25]

If I keep coming back to the educational affirmative action setting, it is only because that is the great anti-discrimination question of the day. And it is a good sign that although Professor Ayres' book does not specifically address the topic at any length, his ideas are *extremely* relevant to this momentous question. That kind of universal thought-provocation is, I would say, a sign of classic work.

25. Again, this is why a context in which only one outcome is relevant to the decision maker – like bail setting – is the best illustration for Professor Ayres of the power of the outcome test idea.

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