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# HARVARD LAW REVIEW

## ARTICLE

### FAIR DRIVING: GENDER AND RACE DISCRIMINATION IN RETAIL CAR NEGOTIATIONS

*Ian Ayres\**

*The struggle to eradicate discrimination on the basis of race and gender has a long history in American law. Based on the widely held belief that such discrimination will occur only in markets in which racial or gender animus distorts competition, regulatory efforts have been limited to areas in which interpersonal relations are significant and ongoing, such as housing and employment. In this Article, Professor Ayres offers empirical evidence that seriously challenges faith in the ability of competitive market forces to eliminate racial and gender discrimination in other markets. His Chicago-based research demonstrates that retail car dealerships systematically offered substantially better prices on identical cars to white men than they did to blacks and women. Professor Ayres details the nature and startling degree of the discrimination his testers encountered and evaluates various theoretical explanations for their disparate treatment. Based on his conclusions, Professor Ayres explores routes by which "fair driving" plaintiffs might bring suits against dealerships and mechanisms through which regulators might effectively rid the retail car market of such discrimination.*

THE civil rights laws of the 1960s prohibit race and gender discrimination in the handful of markets — employment, housing, and public accommodations — in which discrimination was perceived to be particularly acute.<sup>1</sup> In recent years, lawsuits have increasingly

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\* Research Fellow, American Bar Foundation; Associate Professor, Northwestern University School of Law. I would like to thank Kathie Heed and Patti Steeves for their substantial contributions to this Article. Lynn Baker, Bob Bennett, Paul Brest, Jay Casper, John Donohue, Dan Farber, Bill Felstiner, Mayer Freed, Mark Grady, John Jefferies, Mark Kelman, Al Klevorick, Lewis Kornhauser, Niki Kuckes, Ruth Marcus, Bob Mnookin, Dan Ortiz, Tom Palay, A. Mitchell Polinsky, Marty Redish, Deborah Rhode, Carol Rose, Len Rubinowitz, George Rutherglen, Stewart Schwab, Roger Shechter, Peter Siegelman, Bill Turnier, David Van Zandt, and seminar participants at the University of Chicago, Duke, George Mason, Georgetown, Harvard, North Carolina, Northwestern, Stanford, and Virginia law schools provided helpful comments. George Comer, Calita Elston, Darrell Karolyi, and Rebecca Mitchells provided excellent research assistance.

<sup>1</sup> See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (1988); Fair Housing Act of 1968, *id.* § 3601.

presented claims of more subtle and subjective forms of discrimination within these protected markets.<sup>2</sup> Both legislators and commentators, however, have largely ignored the possibility of discrimination in the much broader range of markets left uncovered by civil rights laws.<sup>3</sup> Housing and employment may be the two most important markets in which people participate, but women and racial minorities may also be susceptible to discrimination when spending billions of dollars on other goods and services.<sup>4</sup> Of these unprotected markets, the market for new cars is particularly ripe for scrutiny because, for most Americans, new car purchases represent their largest consumer investment after buying a home.<sup>5</sup> In 1986, for example, more than \$100 billion was spent on new cars in the United States.<sup>6</sup>

This Article examines whether the process of negotiating for a new car disadvantages women and minorities. More than 180 independent negotiations at ninety dealerships were conducted in the Chicago area to examine how dealerships bargain. Testers of different races and genders entered new car dealerships separately and bargained to buy a new car, using a uniform negotiation strategy.<sup>7</sup> The study tests

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<sup>2</sup> See, e.g., *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (considering a gender discrimination claim that an employment decision was based on a mixture of legal and illegal criteria); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion) (considering an employment discrimination claim arising under discretionary or "subjective" promotion system); *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (upholding a fetal protection policy against a claim of gender discrimination), *cert. granted*, 110 S. Ct. 1522 (1990).

<sup>3</sup> Academics have debated whether the scope of classes protected under the law is adequate, see, e.g., Note, *Redefining Race in Saint Francis College v. Al-Khazraji and Shaare Tefila Congregation v. Cobb: Using Dictionaries Instead of the Thirteenth Amendment*, 42 VAND. L. REV. 209, 228-31 (1989), but not whether the scope of markets covered by law is adequate. In other words, analysis has focused on "protected classes," not "protected markets."

<sup>4</sup> Gender and race discrimination have been uncovered in a variety of markets. For example, several Washington, D.C., dry cleaners have discriminated against female customers by charging higher prices for women's blouses than for men's shirts. See Matlack, *Experts on Call*, 21 NAT'L J. 2549, 2549 (1989). Historically, blacks have been discriminated against in the sale of many goods and services. For example, in 1959 black consumers and businesses associated with the NAACP were at times unable to buy such goods as milk, bread, groceries, gas, credit, fertilizer, seed, insecticides, and farm machinery. See AMERICAN FRIENDS SERV. COMM., NAT'L COUNCIL OF CHURCHES OF CHRIST & S. REGIONAL COUNCIL, INTIMIDATION, REPRISAL, AND VIOLENCE IN THE SOUTH'S RACIAL CRISIS (1959), reprinted in *Civil Rights — 1959: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. 1573 (1959); see also *Perry v. Command Performance*, 913 F.2d 99 (3rd Cir. 1990) (involving the refusal by a beauty salon hairdresser to serve a black woman).

<sup>5</sup> See BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, THE NATIONAL INCOME AND PRODUCT ACCOUNTS OF THE UNITED STATES, 1929-82, at 105 (1986) (table 2.3) (showing annual personal expenditures on cars consistently to be one of the largest categories of expenditures).

<sup>6</sup> See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 412 (108th ed. 1988).

<sup>7</sup> Since the Fair Housing Act of 1968 outlawed discrimination in the sale and rental of housing, numerous studies have tested whether minorities and whites are treated differently in

whether automobile retailers react differently to this uniform strategy when potential buyers differ only by gender or race.<sup>8</sup>

The tests reveal that white males receive significantly better prices than blacks and women. As detailed below, white women had to pay forty percent higher markups than white men; black men had to pay more than twice the markup, and black women had to pay more than three times the markup of white male testers. Moreover, the study reveals that testers of different race and gender are subjected to several forms of nonprice discrimination. Specifically, testers were systematically steered to salespeople of their own race and gender (who then gave them worse deals) and were asked different questions and told about different qualities of the car.

At the outset it is difficult to choose how, linguistically, to characterize the results that black and female testers were treated differently from white male testers using the same bargaining strategy. The term "discrimination," although surely a literal characterization, unfortunately connotes to many the notion of animus (even though in antitrust, for example, "price discrimination" is not taken to imply

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the housing market. See sources cited *infra* note 138. The empirical analysis in this Article broadly borrows the methodology of "fair housing" tests. In the classic fair housing test, a black tester and a white tester separately approach a real estate agent or seller and express an interest in the same type of housing. The test of discrimination is simply whether they are treated similarly — are they shown the same houses, in the same neighborhoods, for the same price?

<sup>8</sup> This study is the first to focus on whether sellers discriminate on the basis of race or gender when customers bargain similarly. Other studies, in contrast, have focused solely on the existence of race- or gender-based differences in bargaining techniques. See, e.g., Pruitt & Carnevale, *Gender Effects in Negotiation: Constituent Surveillance and Contentious Behavior*, 22 J. EXPERIMENTAL SOC. PSYCHOLOGY 264 (1986); Sampson & Kardush, *Age, Sex, Class, and Race Differences in Response to a Two-Person Non-Zero-Sum Game*, 9 J. CONFLICT RESOLUTION 212 (1965). In 1959, Professor Allen F. Jung of the University of Chicago Business School studied whether testers who utilized different bargaining processes obtained different price quotations from identical new car dealers. See Jung, *Price Variations Among Automobile Dealers in Chicago, Illinois*, 32 J. BUS. 315 (1959). In a five-page article based on the same study, Jung argued that women were not treated significantly differently from men. See Jung, *Interviewer Differences Among Automobile Purchasers*, 10 APPLIED STATISTICS 93, 96–97 (1961). However, Jung's own explanation of the equal bargaining results belies his interest in carrying out a controlled test: "The natural business acumen of the men and the beauty and charm of the ladies must be considered offsetting factors as far as obtaining lower automobile prices." *Id.* at 96. Jung made no attempt to test for racial discrimination.

More recent testing has focused on whether the knowledgeability or aggressiveness of consumers affects the outcome of car negotiation. Guenter Mueller and Withold Galinat's field experiment found that consumers fared better when they initiated the bargaining processes with a "tough" strategy. See Mueller & Galinat, *Bargaining Efficiency in Real-Life Buyer-Seller Interaction: A Field Experiment*, in ASPIRATION LEVELS IN BARGAINING AND ECONOMIC DECISION MAKING 80, 85 (R. Tietz ed. 1982). Christina Taylor and Sharon Dawid sent testers to Ford dealerships in Connecticut and New York and found that testers who appeared knowledgeable obtained lower prices than testers who seemed naive. See Taylor & Dawid, *Bargaining for a New Car: The Knowledgeable Versus the Naive Consumer*, 59 PSYCHOLOGICAL REPS. 284, 285–86 (1986).

any hatred by sellers). "Disparate treatment," in contrast, connotes to others a strictly technical legal meaning developed in civil rights case law. For the moment, the terms "discrimination" and "disparate treatment" are both used to refer to the result that sellers' conduct was race- and gender-dependent; sellers took race and gender into account and treated differently testers who were otherwise similarly situated.<sup>9</sup> These terms are not meant to imply that salespeople harbored any animus based on race or gender.

In recent years, the Supreme Court has struggled in the employment context to enunciate workable evidentiary standards to govern claims of subtle and possibly unconscious forms of discrimination.<sup>10</sup> Although the 1960s civil rights laws do not reach retail car sales, the finding that car retailers bargain differently with different races might give rise to disparate treatment suits under 42 U.S.C. §§ 1981 and 1982,<sup>11</sup> which originated in the 1866 Civil Rights Act.<sup>12</sup> The test results, by focusing on an unexplored manifestation of disparate treatment, push us to define more clearly what constitutes discrimination generally.

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<sup>9</sup> Paul Brest has similarly defined race discrimination in terms of "race-dependent decisions and conduct." Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976).

<sup>10</sup> In the 1988 Term, the Court departed from past precedent and created shifting burdens of persuasion in disparate treatment cases when an employment decision is motivated at least in part by intentional discrimination. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1786 (1989). The Court held that in such "mixed-motives" cases, the plaintiff must first establish that an unlawful motive was a motivating factor, after which the defendant employer bears a burden of persuasion that "it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 1788. The year before, in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), a plurality held that disparate impact analysis was applicable to subjective hiring practices, but required plaintiffs establishing a prima facie case to identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* at 994. Although in both cases a divided Court recognized that subjective and mixed-motives discrimination are actionable, it had difficulty allocating the evidentiary burdens.

The Court is not alone in its effort to develop workable standards for novel civil rights claims. More than 150 members of Congress have entered into this debate by sponsoring the Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S1018 (daily ed. 1990). Among other things, the Act would have prohibited any employment practice if "race, color, religion, sex or national origin was a motivating factor for [that] employment practice, even though such practice was also motivated by other factors." See *id.* § 5(a)(1). President Bush successfully rejected Congress's efforts. See Lewis, *President's Veto of Rights Measure Survives by 1 Vote*, N.Y. Times, Oct. 25, 1990, at A1, col. 3. Academics as well have been increasingly interested in the outer reaches of subjective and mixed-motives discrimination. See, e.g., Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (examining subtle and unconscious forms of racism); Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989) (same).

<sup>11</sup> See 42 U.S.C. § 1981 (1988) (prohibiting racial discrimination in contracting); *id.* § 1982 (prohibiting racial discrimination in the sale of personal property).

<sup>12</sup> 14 Stat. 27 (1866).

Furthermore, the results highlight a gaping hole in our civil rights laws regarding gender discrimination. Although sections 1981 and 1982 prohibit racial discrimination in contracting and the sale of real and personal property, no federal laws bar intentional discrimination on the basis of gender in the sale of most goods or services. The civil rights laws of the 1960s fail to fill this gap, leaving unregulated a legion of markets in which women contract. Put simply, car dealers can legally charge more or refuse to sell to someone *because* she is a woman.<sup>13</sup> Intentional gender (or race) discrimination of this kind might alternatively be attacked as an “unfair or deceptive” trade practice under state and federal consumer protection laws. In the end, however, courts might perceive that the quintessentially individualized and idiosyncratic nature of negotiation places such disparate treatment entirely outside the purview of either the civil rights or consumer protection laws.

The goal of Congress in passing the Civil Rights Act of 1866<sup>14</sup> was to guarantee that “a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”<sup>15</sup> The standard argument against enacting civil rights laws has been grounded in the conviction that the impersonal forces of market competition will limit race and gender discrimination to the traditionally protected markets, in which there is significant interpersonal contact.<sup>16</sup> Yet the results of this study give lie to such an unquestioning faith in competition: in stark contrast to congressional objectives, this Article indicates that blacks and women simply cannot buy the same car for

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<sup>13</sup> State civil and human rights statutes also fail explicitly to protect either women or blacks from discrimination in the sale of consumer goods and services. *See, e.g.*, Human Rights Act, ILL. REV. STAT. ch. 68, paras. 1-101 to 5A-102 (1989) (prohibiting discrimination in employment, real estate transactions, financial credit, public accommodations, and higher education). Some state statutes might prohibit such discrimination by construing the retail sale of goods or services to be a “public accommodation.” *See* IDAHO CODE § 18-7301(2) (1987) (guaranteeing “full enjoyment” of any public accommodation); *id.* § 18-7302(c) (defining “full enjoyment” to include the right to purchase any “article of personal property offered or sold on, or by, any establishment to the public”).

<sup>14</sup> 14 Stat. 27, *reenacted by* Enforcement Act of 1870, § 18, 16 Stat. 144 (codified at 42 U.S.C. §§ 1981, 1982 (1988)).

<sup>15</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

<sup>16</sup> The increasingly accepted conception of “relational contract,” I. MACNEIL, *THE NEW SOCIAL CONTRACT* 10 (1980), runs counter to the notion that all unprotected markets are discrete exchanges and therefore immune to animus-based discrimination. Indeed, it is difficult, at a theoretical level, to see why retail purchases of personal property involve less personal contact than many public accommodations. Although the uniform pricing of many consumer goods eliminates the possibility of price discrimination, the ongoing relational nature of exchange may allow gender-based or racial animus to be reflected along other dimensions of product or service quality. *See infra* note 149. Moreover, studies in markets with more discrete exchanges indicate that women and minorities can be disadvantaged when there is gender- or race-based product differentiation. *See sources cited supra* note 4.

the same price as can white men using identical bargaining strategies. The price dispersion engendered by the bargaining process implicates basic notions of equity and indicates that the scope of the civil rights laws has been underinclusive. The process of bargaining, already inefficient in many ways,<sup>17</sup> becomes all the more problematic when it works to the detriment of traditionally disadvantaged members of our society.

Part I of this Article describes how the tests of race and gender discrimination were conducted. Part II reports the results of the tests. An analysis of disparate treatment in price, sales tactics, and steering is combined with a regression analysis focusing on the determinants of final offers. Part III explores theoretical explanations of the results. Animus-based theories of disparate treatment are compared with theories of statistical discrimination and tested against the results of the study. Particular attention is paid to the role of competition at both the wholesale and retail level in limiting and channeling the form of race and gender discrimination. Finally, Part IV explores the legal implications of the study. This Part considers whether and how "fair driving" plaintiffs could legally challenge this disparate treatment under consumer protection laws and sections 1981 and 1982. The Article concludes by considering the need for legal reform.

## I. METHODOLOGY OF THE TEST

To test whether there is disparate treatment by car retailers on the basis of race or gender, pairs of consumers/testers (for example, a white male and a black female) used the same bargaining strategy in negotiating at new car dealerships.<sup>18</sup> A white male tester was included

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<sup>17</sup> For example, the necessity of bargaining dramatically increases the search costs of buying a good and may therefore engender transactional inefficiencies as well. The social utility of bargaining is generally addressed in Ayres & Miller, *"I'll Sell It to You at Cost": Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U.L. REV. 1047, 1062-70 (1990).

<sup>18</sup> The testers did not inform the salespeople that they were participating in a test. This lack of disclosure raises significant ethical concerns — as the salesperson's time is spent without chance of a sale. The study has several features designed to mitigate the problem of wasting the salespersons' time during the negotiation process. Most important, the testers visited the dealerships during the least busy times of the week (from the hours of 9-12 and 1-5 Monday to Friday). During these times few people shop for cars, and there are often several salespeople without customers to serve. In addition, testers were instructed that if all the salespeople of a dealership were busy, they should return to the dealership at another time. In only one of more than 180 visits did the testers have to discontinue the test because of crowding. Steps were also taken to minimize the time that the testers spent with the salespeople. The test itself was designed to be completed in 10 to 15 minutes and the testers were instructed to spend no more than an hour at a dealership.

The Federal Judicial Center Advisory Committee on Experimentation in the Law has proposed guidelines for limiting the use of deception in legal experimentation. The committee concluded that "[d]eception requires (1) that the concealment itself be indispensable to the validity

in each pair of testers. The white male results provide a bench-mark against which to measure the disparate treatment of the non-“white-male” tester. Three consumer pairs (black female and white male, black male and white male, and white female and white male) conducted approximately 180 tests at ninety Chicago dealerships.<sup>19</sup>

Each tester followed a bargaining script designed to frame the bargaining in purely distributional terms: the only issue to be negotiated was the price.<sup>20</sup> The script instructed the testers to focus quickly on buying a particular car,<sup>21</sup> and testers offered to provide their own financing.<sup>22</sup> The testers elicited an initial price from the

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of experimental results, and (2) that the burden of justification for the practice concealed not merely be met, but met by a clear and convincing margin.” ADVISORY COMM. ON EXPERIMENTATION IN THE LAW, FED. JUDICIAL CENTER, EXPERIMENTATION IN THE LAW 46 (1981). The first requirement is easily met: asking salespeople if they could be tested for race and gender discrimination would certainly change their behavior. Whether the study meets the secondary burden of justification is a closer question. As reported below, blacks in this study were often forced to pay two to three times the markup of white males. If this amount of discrimination holds for all sales in the United States, blacks annually would pay \$150 million more for new cars than do white males. The benefits from documenting such potentially significant discrimination seem to meet the burden of justification. The tests have been given approval by the Human Subject Research Committees of both the American Bar Foundation and Northwestern University. See Letter from Northwestern University Institutional Review Board (June 12, 1989); oral approval from American Bar Foundation (May 1988).

Deceptive tests of new car sales have been conducted by other researchers. See *supra* note 8. In other fields, social scientists have feigned to be, among other things, cancer patients in hospitals and potential buyers in shoe stores. See, e.g., Schaps, *Cost, Dependency, and Helping*, 21 J. PERSONALITY & SOC. PSYCHOLOGY 74 (1972) (involving accomplices posing as shoe store customers). The Supreme Court itself has condoned similar deception by giving fair housing testers standing. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

<sup>19</sup> The study randomly determined the order in which members of a tester pair bargained at a dealership so that the white male tester was at times the first tester and at times the second tester to bargain at a dealership. The paired testers usually visited the dealership on the same day (and at least within four days of each other).

The dealerships were randomly selected from the population of Chicago dealerships selling the particular cars, and the tester pairs were randomly assigned to the dealerships.

<sup>20</sup> This distributional context removes collaboration and problem solving as measures of effective bargaining. See R. FISHER & W. URY, *GETTING TO YES* 73-79 (1981) (noting examples of problems that arise in negotiation). For example, the bargainers could not structure the timing of payment to enhance the gains from trade. In many real-world bargaining contexts, collaborative or “win-win” solutions do not exist. See White, *The Pros and Cons of “Getting to Yes”* (Book Review), 34 J. LEGAL EDUC. 115, 116 (1984). The bargaining instead resembles the classic “split-the-dollar” game in which two contestants can split a dollar if they can agree on how to divide it between them. See E. RASMUSEN, *GAMES AND INFORMATION* 227-29 (1989).

<sup>21</sup> If the salesperson showed the tester more than one car, the script instructed the tester: “within two or three minutes focus your attention on the car with the lowest sticker price. This will be the car that you will then bargain over. You should indicate this by saying: ‘I’m interested in buying this car.’” Tester Script 4 (Nov. 8, 1990) (on file at the Harvard Law School Library).

<sup>22</sup> Testers were instructed to respond to questions such as “will you need help with a loan?” by saying, “No, I can provide my own financing.” *Id.* at 11.



dealers<sup>23</sup> and then, after waiting five minutes, the testers responded with an initial counteroffer that equalled an estimate of the dealer's marginal cost.<sup>24</sup> After the tester's initial counteroffer,<sup>25</sup> the salesperson could do one of three things: (1) attempt to accept the tester's offer, (2) refuse to bargain further, or (3) make a lower offer. If the salesperson attempted to accept the tester's offer or refused to bargain further, the test was over (and the tester left the dealership). If the salesperson responded by making a lower offer, the script instructed the tester to wait five minutes and to split the difference.<sup>26</sup> After the tester split the difference, the salesperson again had the same three choices, and the rounds of bargaining continued until the salesperson accepted a tester offer or refused to bargain further. Testers jotted down each offer and counteroffer, as well as options on the car and the sticker price. Upon leaving the dealership, the testers completed a survey recording information about the test.<sup>27</sup>

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<sup>23</sup> If the salesperson failed to quote an initial price, testers would ask, "How much would the car cost me to buy it [sic] today, including taxes and other fees?" *Id.* at 5.

<sup>24</sup> Because sellers will seldom sell below their marginal cost, the marginal cost counteroffer established an initial position that approximated the seller's reservation price (the minimum amount for which seller should sell to make any profit). Estimates of dealer cost were obtained from Consumer Reports Auto Price Service (Mar. 2, 1990) (computer printout) and EDMUND'S 1989 NEW CAR PRICES (Nov. 1989).

<sup>25</sup> It should be noted that the testers did not make legally binding counteroffers. The testers were carefully trained not to sign anything so that they would be protected by the statute of frauds. *See* U.C.C. § 2-201 (1987) (invalidating oral contracts for more than \$500). Moreover, the testers did not make actual counteroffers but merely invited additional offers by saying: "Would you sell me this car today for \$ . . . ?" Tester Script, *supra* note 21, at 6.

<sup>26</sup> Consider, for example, a seller who initially offers to sell a car for \$13,000. The tester counters at \$10,000 (an estimate of the car's marginal cost). If the salesperson lowered the initial offer to \$12,000, the tester would wait five minutes and split the difference by offering \$11,000 [ $(12,000 + 10,000) \div 2$ ].

<sup>27</sup> In addition to the types of factors described above, the script also controlled ancillary aspects of the bargaining. For example, testers parked their cars away from the dealerships, walked onto the dealership lots, and waited in the center of the showroom to be approached by a salesperson. Significantly, the script allowed the testers to be steered to different cars and different salespeople. Forcing the second tester to seek out the same car or the same salesperson as the first tester would have introduced non-uniformity in the testers' bargaining strategies. Moreover, the study was designed to test for disparate treatment using the car dealership as the unit of analysis. Allowing testers to bargain with different salespeople afforded a test of whether dealerships engage in more sophisticated forms of discrimination by steering classes of testers to particular kinds of cars or particular kinds of salespeople. *See infra* pp. 833-34.

For ethical reasons, the testers did not tape-record the bargaining sessions. Because the individual testers were the only observers of the field bargaining sessions, there are two potential types of experimental error in the results. First, the testers may have failed accurately to observe and describe their own behavior; second, the testers may have failed accurately to observe and describe the behavior of the salesperson. The training and initial tester observation were used as prophylactics to minimize both types of errors.

As with fair housing studies, the testers were aware that the research was intended to determine whether race and gender disparate treatment exists. This methodology introduces the possibility that the testers' expectations or motives affected the results. However, subsequent

This design produced results that permit two tests for discrimination. The first, "short test" of discrimination simply compares the dealer's response to the testers' initial question, "How much would I have to pay to buy this car?" The "long test" of discrimination, on the other hand, compares instead the final offers given to testers after the multiple rounds of concessionary bargaining. By focusing on the initial offer, the short test is well controlled because salespeople had little information from which to draw inferences. By focusing on the final offer, the long test isolates more closely the price a real consumer would pay, but it increases the risk that individual differences among the testers influenced the results.

In order to minimize the possibility of non-uniform bargaining, particular attention was paid to issues of experimental control. A major goal of the study was to choose uniform testers and to train them to behave in a standardized manner. Testers were chosen to satisfy the following criteria for uniformity:

1. *Age*: All testers were twenty-four to twenty-eight years old.
2. *Education*: All testers had three or four years of college education.
3. *Dress*: All testers were dressed similarly during the negotiations. Testers wore casual "yuppie" sportswear: the men wore polo or button-down shirts, slacks, and loafers; the women wore straight skirts, blouses, minimal make-up, and flats.
4. *Economic Class*: Testers volunteered that they could finance the car themselves.
5. *Occupation*: If asked by a salesperson, each tester said that he or she was a young urban professional (for example, a systems analyst for First Chicago Bank).
6. *Address*: If asked by the salesperson, each tester gave a fake name and an address for an upper-class, Chicago neighborhood (Streeterville).
7. *Attractiveness*: Applicants were subjectively ranked for average attractiveness.

The testers were trained for two days before visiting the dealerships. The training included not only memorizing the tester script, but also participating in mock negotiations designed to help testers gain confidence and learn how to negotiate and answer questions uniformly. The training emphasized uniformity in cadence and in-

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"double blind" testing, conducted so that neither the sellers nor the buyers/testers knew that the study tested for race or gender discrimination, yielded similar results. *See infra* note 36. Those testers in the subsequent study were told only that the study concerned how sellers negotiate car sales.

flection of tester response. In addition to spoken uniformity, the study sought to achieve tester uniformity in non-verbal behavior.<sup>28</sup>

The tester script was also designed to promote tester uniformity through silence. The testers volunteered very little information and were trained to feel comfortable with periods of silence. The script anticipated that the sellers would ask questions and gave the testers a long list of contingent responses to questions that might be asked.<sup>29</sup> The study sought to let the salespeople completely control the bargaining process without letting them know they had such control.<sup>30</sup>

At the beginning and end of the testing process, project coordinators accompanied the testers to dealerships and observed how the testers bargained to determine whether they were following the script and accurately reporting the bargaining process.

The most significant methodological weakness concerns the number of testers per tester type (that is, race/gender category). Only six testers were hired: one white female, one black female, one black male, and three white males. Thus, for example, the results demonstrating discrimination against black females are based on tests conducted by an individual black female (paired with one of three white males). Additional tests involving several black and female testers have just been completed, however, and confirm the basic results of this study.<sup>31</sup>

Despite these attempts to control for uniform tester behavior, at some level of abstraction the non-verbal behavior of the testers must have inevitably diverged. Salespeople may have offered certain testers a higher price not because of their race or gender, but because they blinked more often or opened the car door more quickly. In the end, the results need to be discounted by this residuum of non-uniformity.

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<sup>28</sup> Testers were sensitized to issues of body language and nonverbal cues. For example, they were told to avoid eye contact and not to cross their arms.

<sup>29</sup> The script provided an all-purpose default or residual response for questions not otherwise anticipated. For example, if the salesperson asked the tester a detailed question about the tester's career or personal background, the tester was instructed to respond: "I don't mean to be rude, but I'm kind of pressed for time, and would rather just talk [about] buying a car." Tester Script, *supra* note 21, at 12.

<sup>30</sup> This aspect of the script can be analogized to the party game in which one person is told to leave the room so that the group can make up a story about him or her. When the person returns to the room, he or she asks yes or no questions in order to construct the story. The trick to the game is that the group never constructs a story, but simply decides to answer "yes" to any question ending in a vowel (and "no" to any question ending in a consonant). The questioner in the party game thus effectively constructs the story, thereby revealing what's on his or her own mind.

<sup>31</sup> The additional testing involved 36 testers (eight black females, five black males, six white females, and 17 white males) conducting over 400 tests. See *infra* note 36. This larger study indicates that individual bargaining effects cannot explain the disparate treatment: different black female testers, for example, were treated similarly — that is, sellers consistently treated them worse than they did white males. See *infra* note 38.

Readers should focus, therefore, not merely on statistical significance but also on the *amount* of the reported discrimination.<sup>32</sup> Although perfect control of such complex bargaining is impossible, the amounts of discrimination reported in the next Part cannot be plausibly explained by idiosyncratic divergence from uniform bargaining.

## II. RESULTS OF THE TEST

The results from the tester surveys provide a rich database for investigating how salespeople bargain and whether they treat testers of a different race or gender differently. This Part presents the results of these tests in three sections. The first section reports disparate treatment regarding the prices that dealerships were willing to offer the testers. This section includes an analysis of both initial and final offers as well as refusals to bargain and differences in the bargaining paths (the sequence of offers made in succeeding rounds). In the second section, nonprice dimensions of the bargaining process are analyzed. The tests reveal that salespeople asked testers different types of questions and used different tactics in attempting to sell the cars. Finally, the third section uses multivariate regression analysis to analyze the determinants of the final offers. The regressions reveal a fairly sophisticated seller strategy. In particular, the size of final offers is sensitive not only to the race and gender of both the tester and the salesperson, but also to the information revealed by the tester in the course of bargaining.

### A. Price Discrimination

1. *Final Offers.* — The final offer of each test was the lowest price offered by a dealer after the multiple rounds of bargaining.<sup>33</sup> By comparing these final offers with independent estimates of dealer

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<sup>32</sup> Statistical significance measures whether discrimination could result from random chance. To say, for example, that the average final offers sellers made to black and white testers are statistically different at a five percent significance level means that the differences would only be produced randomly five percent of the time (one out of 20 times). If a sample size is large enough, even small absolute differences in price (of, say, five dollars) will be statistically significant. Cf. 29 C.F.R. § 1607.4(D) (1990) (generally defining adverse impact for purposes of EEOC finding of employment discrimination as existing only when disparities are both statistically significant and proportionally large).

<sup>33</sup> The lowest price offered by a dealer could come either when the dealer attempted to accept a tester's final offer or when a dealer refused to lower his last offer. See *supra* p. 824.

cost,<sup>34</sup> it was possible to calculate the dealer profit associated with each final offer (final offer minus dealer cost). For a sample of 165 tester visits,<sup>35</sup> the average dealer profits for the different classes of tester are presented in Table 1.

Black female testers were asked to pay over three times the markup of white male testers, and black male testers were asked to pay over twice the white male markup.<sup>36</sup> Moreover, race and

White Male	\$ 362
White Female	504
Black Male	783
Black Female	1237

<sup>34</sup> The cost estimate, obtained from *Consumer Reports* and *Edmund's*, see *supra* note 24, is one of marginal cost, in that the dealer's fixed and overhead costs are not included. These cost estimates ignore "hold backs," "incentives," and other types of manufacturer refunds that reduce the dealer's net marginal cost. Domestic car manufacturers traditionally (and foreign car manufacturers recently) have periodically refunded approximately three percent of the dealer's original cost as a so-called "hold back." See R. SUTTON, DON'T GET TAKEN EVERY TIME 23 (1986). In addition, manufacturers at times will institute "dealer incentives" — additional refunds to dealers for sales. See, e.g., *Weekly Incentive Survey*, AUTOMOTIVE NEWS, Mar. 5, 1990, at 38. Because the exact size of these hold backs and incentives is not public knowledge, the cost estimates were not discounted to reflect these amounts.

<sup>35</sup> The data from some early negotiations were discarded because testers' initial counteroffers overestimated the dealers' marginal cost (because of recently announced rebates), so that dealers were accepting the inflated counteroffers.

<sup>36</sup> Over 400 additional tests, similarly conducted, have just been completed in the Chicago area. Thirty-six testers (five black males, eight black females, six white females, and 17 white males) bargained over nine different car models. After controlling for the type of car and the type of bargaining strategy, see *infra* note 42, the final average offers sellers made to white females were \$211 higher than those made to white males; final offers to black females were \$397 higher than to white males; and final offers to black males were \$1022 higher than to white males. (These differences were each statistically significant at least at the five percent level.) Again, the findings confirm the major conclusion of this study: black consumers are offered significantly higher prices than white males. As in the original test, sellers consistently offered white male testers the lowest prices and white female testers the second lowest prices. In the additional testing, however, black males fared worse than black females. This suggests that individual characteristics of the testers may have influenced the results. *But see supra* note 31 and *infra* note 38. The black male tester in the initial experiment, for example, was himself a former car salesperson and is currently a law student. It is possible that the lower offers he received in the initial experiment were by-products of his overly aggressive deviations from the script. This possibly idiosyncratic aggressiveness should, however, have biased the initial study *against* finding discrimination and thus further strengthens the credibility of the results.

Ancillary tests of discrimination also buttress the results reported in this Article. Three

gender discrimination were synergistic or "superadditive": the discrimination against the black female tester was greater than the combined discrimination against both the white female and the black male tester.<sup>37</sup>

research assistants joined the author in a "beat the boss contest" in the actual purchase of an automobile. The research group consisted of one white male (the author), one black male, one white female, and one black female. Members of the group individually bargained for a specific car model at Chicago dealerships. I offered my research assistants a prize of \$50 or half the amount by which they could undercut my best offer, whichever was greater. This "contest" lacked the controls of this Article's study but had other advantages: the testers were bargaining for a real sale and had real financial incentives to get the best deal.

The results of the contest are largely consistent with the results of the larger study:

RESULTS OF RESEARCH GROUP CONTEST		
Tester type	Dealership Profits	
	Best Offer	Average Offer
White Male	\$139	\$ 548
White Female	439	806
Black Male	879	1051
Black Female	878	1185

The contest produced the same ordinal ranking of discrimination, but there seem to be returns to the greater sophistication of the bargainers who were not constrained to follow a script.

A controlled phone survey of dealerships was also conducted. A white male tester and a black female tester each called more than one-hundred dealerships and, following a uniform script, bargained for cars over the phone. The results of the phone survey disclose a different form of disparate treatment. The black female tester had greater success in eliciting initial offers (95% versus 79%) and on average received *lower* final offers. These results, however, may have been caused by the dealers' greater willingness to quote "low-ball" prices to the female tester over the phone. Dealers make low-ball or below-cost prices to induce potential customers onto the car lot, where it may then be possible to "bump" the price quoted over the phone. When dealers quoted prices below cost, they quoted lower prices to the female tester. When they quoted prices above cost, they quoted higher prices to the female tester:

DEALERSHIP PROFITS BASED ON TELEPHONE SURVEY		
Tester type	Average Dealership Profits	
	Offers Above Cost	Offers Below Cost
Female Tester	\$940	-\$732
Male Tester	290	-383

Thus, it seems that dealers implement one of two strategies against female customers — either quoting them large markup prices or very low "low-ball" prices.

<sup>37</sup> If the dealer offer to white males is used as the bench-mark, the "gender effect" — white female offer minus white male offer — was approximately \$150. Similarly, the "race effect" — black male offer minus white male offer — was approximately \$400. Sellers asked black women,

The reliability of these results is buttressed by an analysis of the relative unimportance of individual effects. The average dealer profits on the non-“white male” testers were statistically different from the average profits on the white males at a five percent significance level. The average profits for the three individual white males were, however, not significantly different from each other. This last result lends support to the proposition that the idiosyncratic characteristics of at least the white male testers did not affect the results.<sup>38</sup>

To determine whether the final offer discrimination stemmed from disparate treatment in sellers’ initial offers or from disparate treatment in the sellers’ subsequent concession rates,<sup>39</sup> we calculated the average offers testers received in each round of bargaining.<sup>40</sup> Graphically, the differences in final offers can be decomposed into differences in the intercept and differences in the slope: different intercepts represent disparate initial offers; different slopes represent disparate rates of concession. We found that the concession rates do not significantly differ across tester type or across bargaining rounds. The average dealer offers in the initial and subsequent rounds of bargaining, however, differed significantly. For example, the average dealer offers made to black females were significantly higher than those made to white males, but the rate of concession was virtually the same. These results indicate that discrimination in early rounds tends to be perpetuated in later rounds: final offer discrimination is caused by disparate initial offers and not by disparate concession rates. Sellers quoted testers disparate initial offers and then made roughly equal concessions.

Arguably, this perpetuation effect may be an artifact of the testers’ “split the difference” bargaining strategy. In particular, the script instructs testers, in calculating their second counteroffer, to split the difference between dealer’s cost (the testers’ first counteroffer) and the

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however, to pay nearly \$900 more than white men, a figure 50% greater than the combined isolated race and gender effects. Because the discrimination against black females cannot be nonarbitrarily allocated to race or gender discrimination, this superadditivity makes it impossible to say whether blacks as a class did worse than women as a class.

<sup>38</sup> The proposition is also supported by the results of the additional tests discussed above. See *supra* note 36. Analyzing the effects of individual testers bargaining for specific cars demonstrated that only 10 individual testers out of 126 tester/model combinations were statistically different from the group average.

<sup>39</sup> The seller’s rate of concession is the amount by which a seller lowers the previous offer.

<sup>40</sup> In calculating these averages, it was important to disaggregate bargaining of different lengths because a seller’s offer in any particular round might depend on whether the seller intended to bargain into further rounds (if necessary).

It is important to note the possibility that averaging together the round-by-round offers of different types of testers may disguise heterogeneous seller strategies. For example, if sellers had two ways of bargaining with white males, averaging the two different strategies would mask this heterogeneity.

dealer's second offer.<sup>41</sup> Dealer discrimination in early rounds will cause disparate concessions by testers<sup>42</sup> that may preclude equal treatment in final rounds. The possibility that early offers matter, however, is not an embarrassment of design. Bargainers engage in time-consuming initial rounds of bargaining because they individually believe that these rounds will affect the final price. The tests provide strong evidence that if consumers use the same "split the difference" strategy, they will receive different final offers that are determined by their race and gender.<sup>43</sup>

2. *Initial Offers.* — This study also constructed a test of disparate treatment on the basis of the initial offers sellers made to the testers. As noted above, this "short test" offers more experimental control because the testers asked only a single question. The average dealer profit on initial offers are presented in Table 2.

The average dealer profit on offers made to white female testers was not significantly different from the average profit on offers made to white male testers. Sellers, however, offered both black males and black females significantly higher prices: sellers asked black males to pay almost twice the markups they charged white males, and they asked black females to pay two and one-half times that markup.

3. *Willingness to Bargain.* — Another potentially important form of disparate treatment concerns the sellers' willingness to bargain. Consumers are hurt if the sellers either refuse to bargain<sup>44</sup> or force

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<sup>41</sup> As described above, the tester elicits an initial offer from the salesperson and then makes an initial counteroffer at an estimate of dealer cost. After the dealer's second offer the tester splits the difference for the first time. The "split the difference" strategy cannot perpetuate initial offer discrimination in the second round, because the testers counter at marginal cost regardless of the dealer's initial offer.

<sup>42</sup> For example, second-offer discrimination by sellers forced black female testers to raise their initial counteroffers by an average of \$866, whereas white male testers raised their initial counteroffers by only \$218. Because black females had already conceded such a large amount, sellers may have been more likely to advance disparate offers in subsequent rounds.

To investigate further whether a "split the difference" strategy perpetuated initial-offer discrimination, some testers in the additional testing used instead a "fixed concession" bargaining strategy. This group of testers began by making an initial offer equal to dealer cost. In subsequent rounds they increased their offer by 10% of the difference between the dealer's last offer and the car's sticker price. Because these fixed concessions were independent of the magnitude of initial-offer discrimination, this strategy should have been more resistant to the perpetuation effect. The additional testing found, however, that fixed concessions did not significantly reduce the perpetuation of initial-offer discrimination. Black and women testers received higher final offers regardless of whether or not they used a split-the-difference strategy.

<sup>43</sup> There is a difference between claiming that the script does not establish disparate treatment and claiming that it does not establish a "relevant" form of disparate treatment. If few consumers employ a split-the-difference strategy, critics could plausibly argue that the results have little relevance in establishing that race and gender discrimination takes place in real-world negotiation. After all, if testers uniformly stuck their tongues out, findings of disparate treatment would lack relevancy. But at least for those consumers who do split the difference, the results reveal a relevant form of disparate treatment.

<sup>44</sup> In the sale of housing, for example, sellers generally discriminate in order to discourage



TABLE 2:  
AVERAGE DEALER PROFIT FOR INITIAL OFFERS

White Male	\$ 818
White Female	829
Black Male	1534
Black Female	2169

the consumers to spend more time bargaining to achieve the same price.<sup>45</sup> An analysis of the number of bargaining rounds reveals that the average number of rounds for different types of testers did not differ significantly, as shown in Table 3. The amount of time black male and white female testers spent bargaining (both total and per round) was not statistically longer than the amount spent by white male testers. Although black female testers clearly had to pay the most for cars, it was not because dealers refused to spend time bargaining with them.<sup>46</sup>

Indeed, the sellers' willingness to bargain longer with black men (or for more rounds with black women) may be an indirect attempt to enhance their market power by reducing their potential competition. If the hourly costs to consumers of searching for a car increase with the time spent searching, then the longer a dealership keeps customers bargaining in its showroom, the smaller the possibility that the consumers will visit additional dealerships. In other words, dealers may intentionally try to bargain for more rounds with certain types of

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blacks from purchasing. See R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 42-46 (1969). Refusals to bargain and the steering of black consumers are the classic methods of achieving this end. Even in the sale of housing, however, there are numerous cases detailing discrimination with the intent to sell at a higher price, and such discrimination was explicitly outlawed by the Fair Housing Act, 42 U.S.C. § 3604(b) (1988). See, e.g., *United States v. Pelzer Realty Co.*, 484 F.2d 438, 442-43 (5th Cir. 1973) (finding illegal a realtor's requirement that black home-buyers either bring the realtor additional business or pay higher prices). See generally R. SCHWEMM, HOUSING DISCRIMINATION LAW 155-56 (1983) (summarizing the requirements of § 3604(b)'s prohibition on discriminatory terms).

<sup>45</sup> Critics might argue that the black and female testers would not have received a higher price if, at the end of the test, they had given the dealership a "take it or leave it" price. But why should black and female consumers expend additional effort to gain a lower price? It may be that black and female testers could also have received the white male price if they had executed twenty push-ups during the course of bargaining. If so, that white male testers did not have to execute the push-ups to receive the better price would clearly constitute discrimination.

<sup>46</sup> The relatively brief period of time spent per round with black female testers (11.2 minutes) may indicate that salespeople were not bargaining seriously with them. See *infra* note 69 (discussing qualifying a customer as a prerequisite for "serious" bargaining).

TABLE 3:  
DIFFERENCES IN ROUNDS

	Average Number of Rounds	Average Length of Test (Minutes)	Average Length per Round (Minutes)
White Male	2.43	35.8	14.8
White Female	2.21	32.9	14.9
Black Male	2.32	49.1	21.2
Black Female	3.08	34.6	11.2

consumers, if doing so is particularly likely to reduce the chance that they will visit other dealerships.<sup>47</sup>

### B. Nonprice Discrimination

The study also examined other ways in which sellers may have treated the testers differently. Although these other types of disparate treatment do not directly concern the sales price, they could facilitate price discrimination. Moreover, these comparisons suggest something about the racial and sexual perceptions that determine the behavior of salespeople.

1. *Customer Steering.* — As designed, the script allowed dealerships to steer testers to different types of salespeople or different types of cars. The script instructed testers to go to the center of the showroom and wait for a salesperson to approach them. The salespeople chose the tester, so that the testers could be steered to salespeople of a particular race or gender. In the sample of 119 encounters, sellers paired with testers as reported in Table 4.

The salesperson's race and gender was not randomly distributed across testers. Instead, sellers steered testers to persons of their own race and gender: white male sellers were more likely to serve white male testers; white female sellers were more likely to serve white female testers; and black male sellers were more likely to serve black testers.

In addition, the study was designed to uncover a second type of dealer steering. Upon entering the dealership, the testers told the

<sup>47</sup> Using ordered statistics, one can estimate the expected gains that different testers would experience by searching for the minimum price at additional dealerships. The more prices vary from dealer to dealer, the more likely it becomes that a search will turn up better offers. See G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 173-75 (1968).

TABLE 4:  
STEERING TO PARTICULAR TYPES OF SALESPEOPLE

	Seller Type Percentages		
	White Male	White Female	Black Male
All testers	83.2%	7.5%	9.3%
White Male	89.5	3.5	7.0
White Female	71.4	19.1	9.5
Black Male	83.4	5.5	11.1
Black Female	82.6	4.3	13.1

salesperson that they were interested in buying a certain car model with certain options and then allowed the salesperson to show them specific cars. However, no statistically significant disparate treatment was found. The test results reveal that dealers did not systematically steer different types of testers to cars of different cost.<sup>48</sup>

2. *Disparate Questioning.* — The testers recorded how often they were asked specific types of questions. Statistical tests were then conducted to evaluate whether sellers asked non-“white male” testers particular questions significantly more or less often than white male testers. These tests indicate the following:

Sellers asked black female testers *more* often about their occupation, about financing, and whether they were married. Sellers asked black female testers *less* often whether they had been to other dealerships and whether they had offers from other dealers.

Sellers asked black male testers *less* often if they would like to test drive the car, whether they had been to other dealerships, and whether they had offers from other dealers.

<sup>48</sup> According to independent estimates, the average dealer cost of cars shown to different tester types was as follows:

AVERAGE DEALER COSTS OF CARS	
White Male	\$11,002
White Female	11,073
Black Male	11,000
Black Female	11,027

These numbers do not differ in a statistically significant way.

Sellers asked white female testers *more* often whether they had been to other dealerships. Sellers asked white female testers *less* often what price they would be willing to pay.

These differences may indicate ways that dealers try to sort consumers in order to price discriminate effectively. For example, the fact that salespeople asked black testers less often about whether they had been to other dealerships (or had other offers) may indicate that salespeople do not think that interdealer competition is as much of a threat with black customers as with white customers. Because the price that sellers are willing to offer any customer may be sensitive to that customer's responses,<sup>49</sup> the disparity among who is questioned may facilitate a seller's attempt to price discriminate.

3. *Disparate Sales Tactics.* — The testers also recorded the different tactics that the salespeople used in trying to sell the car. Test statistics were calculated to evaluate whether particular sales tactics were used significantly more or less often with white male testers than with non-“white male” testers. These tests indicate the following:

Salespeople tried to sell black female testers *more* often on gas mileage, the color of the car, dependability, and comfort, and asked them more often to sign purchase orders.

Salespeople tried to sell white female testers more often on gas mileage, the color of the car, and dependability.

With black male testers, salespeople *more* often offered the sticker price as the initial offer and forced the tester to elicit an initial offer from the seller. Salespeople asked black male testers to sign a purchase order *less* often.

These tests suggest that salespeople believe women are more concerned with gas mileage, color, and dependability than are men. The tests also indicate that salespeople try to “sucker” black males into buying at the sticker price by offering the sticker price or refusing to make an initial offer until asked.

4. *Cost Revelation.* — The script also elicited information about the dealers' willingness to reveal their marginal cost to consumers. In half of the bargaining sessions, the testers were told to ask the seller (at the end of the test) what the dealer had paid the car manufacturer. Thirty-five per cent of the sellers represented a specific dollar cost in response to the testers' inquiries. These disclosures, however, were not evenly distributed across the tester groups. Disaggregated by tester type, the disclosure rates indicate that salespeople were less willing to disclose cost data to black testers, especially black female testers, as presented in Table 5.

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<sup>49</sup> See *infra* p. 848.

TABLE 5:  
DISCLOSURE OF COST DATA

Tester Type	Percentage of Salespeople Disclosing Cost Figure
All Testers	35%
White Male	47
White Female	42
Black Male	25
Black Female	0

Instead of disclosing their cost information to black testers, the salespeople were more likely to dissemble and claim that they did not know the car's cost. To the extent that such cost disclosure is valuable,<sup>50</sup> the failure to disclose costs to black testers undermines their ability to bargain as effectively as white testers and thus facilitates price discrimination based on race.

Based on this sample, however, it is unclear whether such disclosure would actually put white testers at a competitive advantage. When the seller did reveal his cost, the represented cost was substantially higher than independent estimates of seller cost for the same models, as seen in Table 6. Thus, although salespeople are more likely to disclose cost figures to white testers, they systematically overstate their costs. The greatest misrepresentations were made to white female testers.

### *C. Determinants of the Final Offer: Regression Analysis*

Multivariate regression analysis was used to evaluate the determinants of the seller's final offer.<sup>51</sup> The regressions explain differences in the profits that dealers would have made from each of their final

<sup>50</sup> Consumers rationally value information concerning a seller's costs in "thin markets," in which the infrequency of transactions makes the competitive price hard to determine. See Ayres & Miller, *supra* note 17, at 1059-60.

<sup>51</sup> Multivariate regression analysis produces quantitative estimates of the effects of different factors on the same variable. For an excellent introduction to regression analysis, see Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980). See also Fisher, *Statisticians, Econometricians, and Adversary Proceedings*, 81 J. AM. STATISTICAL A. 277 (1986) (discussing the problems that arise and standards of behavior that should be employed when statisticians act as witnesses); Rubinfeld & Steiner, *Quantitative Methods in Antitrust Litigation*, 46 LAW & CONTEMP. PROBS. 69 (1983) (examining the use of statistics and econometrics in the study and practice of antitrust law).

TABLE 6: SELLER MISREPRESENTATION OF COST DATA	
	Average Misrepresentation
White Male Tester	\$ 849
White Female Tester	1046
Black Male Tester	752
Black Female Tester	—

offers. A group of characteristics describing the individual bargaining tests served as explanatory variables. These independent variables concerned the race and gender of both the tester and the salesperson and the demographic characteristics of the dealership neighborhood.

The tester and seller variables take the value of one for observations with testers and/or sellers of a particular race or gender:

TWF	= 1, if tester is white female; = 0, otherwise;
TBM	= 1, if tester is black male; = 0, otherwise;
TBF	= 1, if tester is black female; = 0, otherwise;
SWF	= 1, if seller is white female; = 0, otherwise;
SBM	= 1, if seller is black male; = 0, otherwise. <sup>52</sup>

Additional variables captured potential interaction effects between testers and buyers of different types. For example:

TWFSWF	= 1, if tester is white female and seller is white female; = 0, otherwise.
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Variables describing the dealership neighborhood were included to capture any difference in profits that the location of the dealership might cause:

SUB	= 1, if the dealership was located in a suburb; = 0, if located in the city;
WHITE	= Proportion of the neighborhood that is white;
RENT	= Average rent in the neighborhood;

<sup>52</sup> Variables that take on values only of zero or one are often referred to as "dummy" variables. The coefficients associated with a dummy variable indicate the average difference associated with the dummy characteristic (for example, tester type), controlling for other multivariate effects. The variables TWM and SWM have been suppressed to avoid linear dependence in the data matrix. Interaction terms including these variables were also suppressed. The intercept term of the regression equation expresses the average offer that a white male received from a white male salesperson. The race and gender dummies reflect deviation from this bench-mark result contingent on the race and gender of tester and salesperson.

HOUSE = Average house value in the neighborhood;  
 INCOME = Average income in the neighborhood;  
 AGE = Average age in the dealership's neighborhood.<sup>53</sup>

Finally, two variables were included to gauge the reliability of the test:

PAIR = 1, if the tester was the first member of the two testers to bargain at a particular dealership; = 0, otherwise;  
 TEST = the total number of tests that a particular tester had completed.

If the dealers were not aware that a test was being conducted, the order of the testing should not affect bargaining and the PAIR coefficient should be zero. Similarly, if the testers were faithful to the script, increased experience in bargaining should not affect the final offer and the TEST coefficient should be zero.

The full linear specification of the model then becomes:

$$\begin{aligned} \Pi = & \beta_0 + \beta_1 \text{TWF} + \beta_2 \text{TBM} + \beta_3 \text{TBF} + \beta_4 \text{SWF} + \beta_5 \text{SBM} \\ & + \beta_6 \text{TWFSWF} + \beta_7 \text{TWFSBM} + \beta_8 \text{TBMSWF} + \beta_9 \text{TBMSBM} + \\ & \beta_{10} \text{TBFSWF} + \beta_{11} \text{TBFSBM} + \beta_{12} \text{SUB} + \beta_{13} \text{WHITE} + \\ & \beta_{14} \text{RENT} + \beta_{15} \text{HOUSE} + \beta_{16} \text{INCOME} + \beta_{17} \text{AGE} + \beta_{18} \text{PAIR} \\ & + \beta_{19} \text{TEST}, \end{aligned}$$

where  $\Pi$  equals the profits that a dealership would have made if its final offer had been accepted.<sup>54</sup>

Table 7 reports the coefficients ( $\beta_i$ ) for three nested versions of this regression. In Model One, only the tester's race and gender were regressed on observed profits. The regression shows that black female, black male, and white female markups differed from the white male markups, at least at an eight percent significance level.<sup>55</sup> In this

<sup>53</sup> Information on neighborhood characteristics was taken from CITY OF CHICAGO, CHICAGO STATISTICAL ABSTRACT (1984).

<sup>54</sup> Formally, the linear regression would also include error terms that are assumed to be independent and normally distributed. Because the same testers visited more than one dealership it might be possible alternatively to model the error structure and test for individual tester effects. See *supra* note 36.

<sup>55</sup> The dummy coefficients in Model One represent the sample means for different tester types; for example, the average markup for white female testers was equal to  $\beta_0 + \beta_1$  ( $294.54 + 219.51 = \$514.05$ ). These average markups differ from those reported above, see Table 2, *supra* p. 832, because a smaller sample size of 119 was used. The smaller sample size was chosen to restrict the data to paired sets of observations. The means for this smaller sample reveal more discrimination against white women and black women but less discrimination against black men than in the larger sample. The discrimination against black male testers is still statistically significant, but the amounts of discrimination are not completely robust to changes in sample size.

TABLE 7:  
THREE NESTED REGRESSIONS ON FINAL OFFER PROFITS

Regressors	Model One		Model Two		Model Three	
Intercept	294.54	(4.43)	603.90	(1.17)	778.29	(1.44)
<i>Tester-Salesperson Type:</i>						
TWF	219.51	(1.71)	196.66	(1.37)	237.10	(1.42)
TBM	282.77	(2.08)	280.18	(1.84)	292.43	(1.77)
TBF	1013.49	(8.18)	1029.67	(7.16)	995.83	(6.43)
SWF			83.21	(.41)	-140.42	(-.37)
SBM			99.49	(.53)	194.49	(.67)
<i>Interaction Effects:</i>						
TWFSWF					116.00	(.23)
TWFSBM					-260.56	(-.51)
TBMSWF					27.44	(.04)
TBMSBM					-81.85	(-.16)
TBFSWF					1118.96	(1.66)
TBFSBM					-152.98	(-.35)
<i>Dealership Characteristics:</i>						
SUB			-84.59	(-.44)	-111.67	(-.57)
WHITE			-271.53	(-.62)	-315.01	(-.71)
RENT			.83	(.42)	1.28	(.62)
HOUSE			-.002	(-.98)	-.003	(-1.14)
INCOME			.013	(.97)	.01	(.81)
AGE			-10.6	(-.75)	-14.70	(-1.01)
<i>Reliability Tests:</i>						
PAIR			-66.80	(-.67)	-89.52	(-.88)
TEST			.36	(.06)	.28	(.05)
R-squared	.369		.388		.408	
Adjusted R-squared	.353		.312		.295	
Standard Error	501.55		516.67		523.17	
Degrees of Freedom	115		105		98	

(t-statistics are in parentheses)



simple model, the race and gender of the testers by itself was able to explain more than thirty-seven percent of the total variation in observed profits.

To improve these results, seller dummies, neighborhood characteristics, and test reliability variables were added in Model Two.<sup>56</sup> The resulting regression indicates that both white female and black male sellers tended to offer higher prices than white male sellers, but these tendencies were not statistically significant. Both test reliability variables were also not significantly different from zero — indicating that dealers did not treat the second tester differently from the first tester, and that the testers' bargaining skills did not change as they gained experience testing.

Model Two also indicates that the location of the dealership did not influence the course of bargaining: the coefficients expressing the effect of the neighborhood characteristics were not statistically different from zero.<sup>57</sup> Indeed, the joint hypothesis that the coefficients for the additional variables of Model Two are equal to zero could not be rejected at a ninety-five percent confidence level. The additional ten regressors can only explain an additional two percent of profit variance (and the adjusted R-squared actually dropped to .312).

Model Two assumes, however, certain linear restrictions among the tester and seller dummies. For example, it assumes that the white female seller effect will be the same whether she is selling to a white male or to a black female tester. Model Three relaxes these linear constraints by taking such interaction effects into account. For example, in Model Three, it is possible to test whether black male sellers gave different final offers to each of the different tester types.

The tester-salesperson interaction effects are important as a group. Although the individual interaction variables are not statistically significant, the regressions indicate that the linear constraints in Model Two are binding.<sup>58</sup> Analyzing the interaction effect variables leads to the surprising result that testers did not receive the best deals from salespeople of the same race and gender. In fact, just the opposite is true:

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<sup>56</sup> The intercept coefficient expresses the seller white male dummy variable (SWM) and its effect. There were no black female sellers in the sample.

<sup>57</sup> Several of the dealership characteristics are highly multicollinear. For example, rental and housing value variables are closely correlated. The failure of individual characteristics to be statistically significant may be an artifact of this multicollinearity. An alternate way to deal with the problem of multicollinearity would be to test the joint hypothesis that the set of dealership characteristic variables are statistically significant.

<sup>58</sup> The dummy coefficients in constrained and unconstrained regressions are significantly different. Model Three indicates that a white female buying from a white male should pay \$1015 (778 + 237), whereas Model Two indicates only \$799 (603 + 196). Conversely, Model Three indicates that a white female buying from a black male seller should pay \$949 (778 + 237 + 194 - 260), whereas Model Two would predict she would pay \$898 (603 + 196 + 99).

White male testers received best deals from white female sellers.  
White female testers received best deals from black male sellers.  
Black male testers received best deals from white female sellers.  
Black female testers received best deals from white male sellers.

The social psychology literature would not suggest this result to be expected. Several studies, for example, have shown that parties tend to bargain more cooperatively with an opponent of their own race and gender than with a person of a different race or gender.<sup>59</sup> The interaction effects revealed in Model Three (although not statistically significant) suggest, however, that salespeople may try to take strategic advantage of consumers' perceptions. This result is especially plausible when combined with the earlier finding that testers were systematically steered to salespeople of the same race and gender.<sup>60</sup> The data thus paints a clear picture: sellers steered testers to salespeople of their own race and gender, who then proceeded to give them the worst deals.<sup>61</sup>

### III. TOWARD A THEORETICAL EXPLANATION

The preceding Part detailed race and gender discrimination that was not only statistically significant but also surprisingly pronounced. This Part explores possible explanations for why dealers would discriminate in this manner. Only with an accurate understanding of the reasons for dealer behavior can regulators hope to determine what, if any, governmental intervention can effectively protect black and female customers. With this goal in mind, this Part examines two broad theories of discrimination: animus-based theories and theories of statistical discrimination.

#### *A. Animus-Based Theories of Discrimination*

Animus theories of discrimination posit that a certain group is treated differently because that group is disliked or hated. A variety of market participants can interject animus into a market. A dealership, for example, might charge blacks more because the dealership dislikes blacks, because the dealership's employees dislike blacks, or because the dealership's other customers dislike blacks. As originally formulated by Gary Becker, these sources of bigotry could force sellers to charge blacks higher prices as an animus-compensating tax.<sup>62</sup>

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<sup>59</sup> See, e.g., J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 163 (1975).

<sup>60</sup> See *supra* pp. 833-34.

<sup>61</sup> For a tentative explanation, see *infra* p. 847 & note 84.

<sup>62</sup> See G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 14-15, 39-54 (1957).

The source of bigotry might partially determine the specific form that animus-based discrimination takes. For example, in the fair housing context, consumer animus has led to steering and refusals to bargain.<sup>63</sup> In the “fair driving” context, employee animus against blacks or women might cause salespeople to bargain frivolously. Because testers visited the dealerships during the least busy times of the day, bigoted dealers — with nothing better to do with their time — might have gained satisfaction in frustrating or wasting the time of women or blacks.<sup>64</sup> Finally, the testers also might have experienced “role-based” bigotry: dealers might have discriminated against buyers who acted in ways that diverged from the dealer’s expectation. Female testers could have faced prejudice for speaking with “a male voice”;<sup>65</sup> black testers could have faced prejudice for not “staying in their place.” In sum, the animus of various market participants can manifest itself as disparate treatment not only in the prices offered but also in other aspects of seller behavior.<sup>66</sup>

### *B. Statistical Theories of Discrimination*

Theories of statistical discrimination predict that disparate treatment will stem not from distaste for particular consumer groups, but rather from a seller’s desire to maximize profits.<sup>67</sup> Applied to these results, a theory of statistical discrimination would posit that salespeople treat people of different races or gender differently only because salespeople make *rational* statistical inferences about average differ-

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<sup>63</sup> For a discussion of refusals to bargain in the sale of houses, see *supra* note 44.

<sup>64</sup> In addition, consumer animus might cause salespeople to encourage blacks to leave the dealership quickly to cater to bigoted white customers. The testing indicates, however, that such refusals were rare.

<sup>65</sup> Cf. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (discussing the differences between male and female moral reasoning and expression). The possibility of role-based prejudice calls into question the appropriateness of using a uniform buyer strategy to test for discrimination. Different consumer types may have “different paths” to the same price. As a theoretical matter, comparing the treatment of uniform testers might therefore overstate the overcharge for most black consumers who may adopt different but equally efficient bargaining strategies. Partly for this reason, it would be useful to combine the results of this study with uncontrolled studies of actual sales. In future research, Peter Siegelman and I plan to survey recent car purchasers to test this “different paths” hypothesis. Even if this hypothesis were correct, however, forcing black or female consumers to conform to a particular societal stereotype represents a form of discrimination.

<sup>66</sup> The commission structure of car sales might mitigate the effects of employer animus. Non-bigoted salespeople would not want to sacrifice their commissions just to satisfy an employer’s bigoted preferences. Conversely, profit-maximizing employers, eager for their employees to generate sales, would have incentives to prevent employees from indulging their bigotry.

<sup>67</sup> See Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972) (arguing that individuals may discriminate based on their previous statistical experience with a group — such as blacks or women — rather than judge people on an individual basis).

ences among the groups. Statistical theories of discrimination can be divided into those which are cost-based inferences and those which are revenue-based.<sup>68</sup>

Cost-based statistical discrimination in the car market would stem from sellers' inferences that certain types of consumers tend to impose additional costs on a dealership. For example, sellers might treat consumer groups differently if they perceive that certain groups are greater credit risks. By charging high-risk groups a higher markup, the dealership would seek to cover its higher default risk with a higher average profit per customer.<sup>69</sup> Profit-maximizing dealers would also make inferences about the ancillary costs and profits that are likely to flow from a particular sale. For example, dealers might offer different prices to consumer groups that have different tendencies to service their car at the dealership. If post-sale servicing is profitable, and female buyers were more likely to have servicing done at the original dealerships, then dealers might rationally give better offers to women.<sup>70</sup>

In addition to such cost-based inferences, dealers may also have incentives to make inferences about the potential revenue from different types of consumers. Revenue-based statistical discrimination results when dealers make inferences about how much consumer groups on average are willing to pay for a car. Revenue-based price discrimination is found in a variety of markets. Airlines, for example, do not charge businesspeople higher fares because of animus or higher costs; the difference in fares is an attempt to charge higher-valuing

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<sup>68</sup> Richard Posner makes this distinction when he suggests that either revenue-based or cost-based statistical discrimination may cause disparate pay for male and female employees. See Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1319-20 (1989).

<sup>69</sup> In the study, however, this basis for disparate treatment was removed, because the testers volunteered that they could finance their own purchases, thereby relieving the dealers of any default risk. If the dealers did not believe the testers' representations that they could finance the purchases, however, statistical discrimination based on inferred default risk might exist. If salespeople distrust a tester's stated interest in "purchasing a car today," they may be unwilling to enter into serious negotiations.

The inferences sellers draw from customer representations may vary with the context. For example, federal agents have charged Maryland car dealerships with knowingly aiding the drug trade by accepting cash payments for cars — indicating that at least one dealership took buyers who claimed they could "buy a car today" very seriously. See Duke, *U.S. Seizes 48 Cars in P.G. Raid*, Wash. Post, July 22, 1989, at A1, col. 2.

<sup>70</sup> Similarly, if warranty service were unprofitable, statistical discrimination would dictate that dealerships prefer those consumer groups that made fewer warranty claims. Dealers may also discriminate between consumer groups because of statistical inferences that one group is more likely to make repeated purchases or more likely to refer other consumers to the same dealership. Inferences about the profits from such ancillary sales of other cars or services might alternatively be characterized as cost-based statistical discrimination because the disparate treatment stemming from those inferences will not be eliminated by dealership competition in the new car market.

consumers a higher price.<sup>71</sup> In the retail car market, the dealer's ultimate goal is to maximize profits by charging each consumer his or her reservation price — the maximum amount the consumer is willing to pay. Under this theory, race and gender serve as proxies to inform sellers about how much individual consumers would be willing to pay for the car.<sup>72</sup>

Initially, a revenue-based theory seems to be at odds with the revealed pattern of discrimination. Given current class conditions in Chicago, it is difficult to believe that dealers would infer that women and blacks had a greater ability to pay for a car.<sup>73</sup> Yet, to understand a more refined version of revenue-based discrimination, it is necessary to differentiate between a consumer's general willingness to pay and his or her willingness to pay at a specific dealership.<sup>74</sup> For example, last summer I purchased a subcompact car. As a general matter, I would have been willing to pay up to \$15,000 to acquire such a car. A number of factors — such as my transportation needs and the price of alternative goods — established my market-wide reservation price. This price may have been especially sensitive to my ability to pay, which in turn depended on my wealth and credit opportunities. The amount I was willing to pay at a particular dealership, however, depended much more on what I believed competing dealerships would offer. Even though I thought having a car was worth \$15,000, I would not pay \$11,000 if I believed I could buy from another dealership at \$10,500.

From the perspective of a dealer trying to implement revenue-based statistical discrimination, the crucial variable is the consumer's firm-specific reservation price — that is, how much the consumer is willing to pay for a car from a particular dealership. A consumer's firm-specific reservation price is more sensitive to competitive characteristics of the market than to his or her general willingness to pay.

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<sup>71</sup> Revenue-based price discrimination persists in other consumer markets as well. For example, universities force undergraduate and graduate students to assist financial aid offices in estimating their ability to pay tuition. See Ayres, *Colleges in Collusion*, NEW REPUBLIC, Oct. 16, 1989, at 19, 19.

<sup>72</sup> Revenue-based statistical discrimination is a form of what Pigou call "third-degree" price discrimination. A. PIGOU, *THE ECONOMICS OF WELFARE* 240-56 (1920). Under regimes of third-degree price discrimination, the seller divides "customers into two or more independent groups, each of which has its own continuous demand function reflecting quantities sold to that group at alternative prices." F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 316 (2d ed. 1980) (footnote omitted).

<sup>73</sup> A consumer's willingness to pay cannot be larger than his or her ability to pay.

<sup>74</sup> The distinction between market demand and firm-specific demand is common to law-and-economic analysis. See, e.g., Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 947-52 (1981) (discussing the relationship between market demand, firm-specific demand, and market power). For individual consumers, this is the distinction between a market reservation price and a firm-specific reservation price.

In particular, both the consumer's costs of a search for a better price and the knowledge of the market play a larger role in determining the price a consumer is willing to pay at a particular dealership. As the costs of bargain-hunting increase, a consumer's firm-specific reservation price approaches his or her market-wide valuation. Revenue-based statistical discrimination against women and blacks may still be possible (notwithstanding their relative poverty), because the price a consumer is willing to pay at a particular dealership is at times substantially below his or her ability to pay.

Thus, revenue-side statistical discrimination seeks to discover not the consumer's general valuation of a car, but how much he or she would be willing to pay a particular dealership. If a dealership can infer that a black or a woman is less likely to search at other dealerships, it may rationally attempt to charge him or her more. If a consumer's cost of searching at more than one dealership is prohibitively expensive, the dealership may realize that, as far as that consumer is concerned, it has a virtual monopoly.<sup>75</sup> Thus, profit-maximizing dealers may rationally make not only higher initial offers, but also lower concessions when bargaining against members of consumer groups who the dealer believes cannot afford to shop elsewhere.<sup>76</sup>

### C. A Tentative Explanation

1. *Statistical Discrimination as an Explanation for Dealer Behavior.* — The preceding discussion presented three broad theories of discrimination: animus-based, cost-based, and revenue-based. The fair driving tests, like their fair housing analogues, were designed primarily to identify the existence of disparate treatment — not to determine its cause. As a result, ancillary evidence must be used to determine which of the three competing theories best explains seller behavior. Although more study is warranted, it appears that the revenue-based theory best explains the discrimination that the testers encountered.

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<sup>75</sup> The process of bargaining may reveal information to dealers about a particular consumer that facilitates revenue-based discrimination. For example, if a consumer's distaste for bargaining is correlated with his or her willingness to pay, the process of bargaining could allow low-valuing consumers to "signal" their lower reservation prices by bargaining longer. In the language of game theory, this signal can be "credible" because the high-valuing consumers face, by assumption, larger costs of signalling. See E. RASMUSEN, *supra* note 20, at 205; Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1304-05 (1990). Such signalling does not, however, require sellers to treat one class of buyers differently from another. A seller could choose a uniform concession rate and then let the different-valuing consumers separate themselves by the way in which they bargain.

<sup>76</sup> Game-theory models of bargaining suggest that a seller will charge higher prices to groups with higher bargaining costs. See E. RASMUSEN, *supra* note 20, at 234; Sutton, *Non-Cooperative Bargaining Theory: An Introduction*, 53 REV. ECON. STUD. 709, 711 (1986).

The cost-based theories of statistical discrimination are perhaps the weakest. The testers' script was explicitly structured to eliminate cost-based differences among the testers. The testers volunteered that they did not need financing<sup>77</sup> — a potentially major source of disparate dealer cost. Notwithstanding these uniform representations, it is possible that the dealers inferred residual differences among the tester types.<sup>78</sup> As an empirical matter, however, differences in net dealership cost simply do not explain why black female testers paid over three times the markup of white male testers.<sup>79</sup> Moreover, on a cost-based theory, the observed seller inferences about profits from ancillary sales might predict a different pattern of disparate treatment.<sup>80</sup>

Animus theories find more support in the data. The testers, for example, recorded several instances of overtly sexist and racist language by sellers.<sup>81</sup> Nonetheless, animus theories do not appear to explain the magnitude of the discrimination. For example, under a theory of salesperson animus, the seller required a higher price from black females as compensation for having to deal with a black customer whom the seller disliked. The data would then imply that the dealer-required compensation must have been an implausible \$900 per hour.<sup>82</sup>

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<sup>77</sup> See *supra* note 22.

<sup>78</sup> See *supra* note 70 and accompanying text (discussing warranty service or repeat or referred sales).

<sup>79</sup> George Stigler has considered whether price dispersion in cars could be attributed to cost-based differences in the provision of service. He concluded: "it would be metaphysical, and fruitless, to assert that all dispersion is due to heterogeneity." G. STIGLER, *supra* note 47, at 172.

<sup>80</sup> For example, dealers should give better prices to customers who are more likely to refer other customers to the dealership. If white males are more likely to buy their next car or send their friends to buy from the dealership, profit-maximizing dealers should give them a lower price. In recent testing, see *supra* note 36, an effort was made to mitigate discrimination based on "post-sale servicing" and "referral." Testers affirmatively told salespersons that they were moving out of state (to California) within a month. However, having more than one tester make this representation at a single dealership increased the likelihood that dealers would suspect a test and so was discontinued.

<sup>81</sup> In one extreme case a salesperson angrily told a black tester, "You should walk fast to your car because blacks aren't welcome here." Female testers were repeatedly referred to as "honey," "girl," "cutie," etc. Additionally, salespeople said things like, "You are a pretty girl, so I'll give you a great deal," or made explicit sexual references such as, "We can't drop our pants until it's paid for." Many of these sorts of comments were made following the conclusion of bargaining, after the salesperson had failed to make a sale.

<sup>82</sup> Nine hundred dollars compensation for bigotry seems implausible both because animus-compensating wage differentials in the (more rational) employment context are generally smaller and because slightly less bigoted dealers should be willing to charge less.

This \$900 represents a total "compensation" for animus that is split between the salesperson and the dealership owner. Consider, for example, a scenario in which the salesperson's compensation is  $900c$  per hour, where " $c$ " ( $0 < c < 1$ ) is the salesperson's commission rate. If the disparate treatment is exclusively predicated upon salesperson animus, the animus compensation for the salesperson is determined by this commission rate. Yet even for values of  $c$  as low as

Consumer-based animus also fails to explain adequately disparate treatment by sellers. First, each class of testers received its best treatment from salespeople of a different race and gender and, in many cases, the worst treatment from salespeople of the same race and gender.<sup>83</sup> For example, although all salespeople discriminated against black male testers, black salesmen gave them their worst deals. This result runs counter to the standard notion that a person's bigotry is usually directed at another race.<sup>84</sup> Second, the amount of price discrimination black testers encountered at all dealerships did not vary with the racial makeup of the dealership's customer base.<sup>85</sup> One-third of Chicago dealerships are located in neighborhoods with a greater than ninety percent black population, yet the offers these dealerships made to black testers did not differ from offers black testers received elsewhere. If disparate treatment were caused by white consumers' dislike of blacks, there should be less discrimination by sellers in neighborhoods where most consumers are black. Because the data do not confirm this prediction, the animus theory seems an unlikely explanation for the disparate treatment. Finally, consumer animus is inconsistent with observed salesperson behavior: salespeople did not attempt to reduce the length of bargaining sessions with the non-"white male" testers.<sup>86</sup> If disparate treatment of black consumers were caused by sellers' concern for white consumers' desire not to associate with blacks, dealerships should have discouraged black consumers from bargaining for lengthy periods.

Although any conclusions based on this evidence must remain tentative, the case for revenue-based statistical discrimination is strongest. Despite the large amount of randomness (or unexplained variance) in bargaining outcomes,<sup>87</sup> the dealerships seem to display a

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o.10, it still seems unlikely that the salesperson would demand \$90 per hour more for selling to (associating with) a black female than a white male.

<sup>83</sup> See *supra* pp. 840-41.

<sup>84</sup> Theories of intraracial bigotry do not explain why white male testers would receive their worst deals from white salesmen. That is, those theories do not explain why animus would affect relations within the dominant class. However, the bigotry of white consumers might be one reason black male testers were quoted higher prices by black salesmen. If white consumers are reluctant to buy from black salesmen, to "make their profit quota" black salesmen may be forced to try to earn higher profits from sales to blacks. An economic system of discrimination may thus enlist the victimized class to participate in the discriminatory behavior.

<sup>85</sup> See Table 7, *supra* p. 839.

<sup>86</sup> See *supra* pp. 831-33. Although salespeople might enjoy wasting the time of women or blacks, it is implausible that consumer preferences could have caused salespeople to bargain longer with black males.

<sup>87</sup> The multivariate regressions explained only about one-third of the variance in final offer profits. See Table 7, *supra* p. 839. Although these results are standard for cross-sectional regressions, see, e.g., W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 222 (1987) (reporting that regressions explain only two percent of dependent-variable variance), the unexplained variance indicates either that salespeople use a partially random — what game



great deal of sophistication in bargaining. The systematic steering of customers to salespeople who charge them higher markups<sup>88</sup> may be evidence of revenue-based statistical discrimination. Salespeople of the consumer's race and gender may, for example, be better able to infer that consumer's willingness to pay — and thus more finely tune the price discrimination.<sup>89</sup>

A revenue-based explanation of disparate treatment based on race and gender is also supported by the dealers' general practice of making revenue-based inferences about *any* customer's willingness to pay and adjusting the offer to that particular customer accordingly. Disparate treatment may stem from the fact that dealers are using race and gender as the basis from which to draw inferences about willingness to pay and, in particular, from which to draw inferences regarding the amount of potential or actual dealer competition for black and female customers.<sup>90</sup>

The most compelling evidence of dealers' interest in assessing potential competition (to fine-tune revenue-based discrimination) comes from an analysis of the contingent responses given by testers. Following the script, testers would give uniform responses to particular questions asked by sellers. When other variables are controlled,<sup>91</sup> the data show that revealing certain types of information dramatically affected the seller's strategy. For example, revealing that a tester had already taken a test drive reduced the seller's final offer by \$319, and revealing that a tester did not own a car increased the final offer by \$337.<sup>92</sup> Testers that provided dealers with explicit evidence of com-

theorists call "mixed" — strategy when bargaining or that relevant variables have been omitted from the regression.

<sup>88</sup> See *supra* pp. 840-41.

<sup>89</sup> Alternatively, salespeople of the consumer's race and gender may be able to play on the consumer's mistaken belief that salespeople of the consumer's race and gender are more trustworthy.

<sup>90</sup> Consumers who "fall in love" with a particular car signal the dealership that it has a monopoly with regard to their business and can charge accordingly. Consumer advocates stress the importance of being able to conceal interest in a particular car. See R. SUTTON, *supra* note 34, at 84-87.

One dealer, interviewed informally, espoused a desire to close his showroom in the evening, if his competitors would follow suit. Although forcing consumers to purchase at inconvenient times would seem to reduce the demand for cars, the dealer felt that restricting showroom hours would also reduce the amount of search that buyers undertake. Thus, the dealer believed that although he might not get as many people in his showroom, he would have less competition for those who did arrive. The Federal Trade Commission in fact has recently ruled that "an agreement among car dealers in the Detroit metropolitan area to close dealer showrooms on Saturdays and on three weekday evenings is an unlawful restraint of trade." Detroit Auto Dealers Ass'n, No. 9189 (F.T.C. 1989) (1989 FTC LEXIS 10, \*84).

<sup>91</sup> Statistical analysis was completed by adding dummy variables for instances of the contingent responses to the earlier regressions (Models Two and Three). See Table 7, *supra* p. 839.

<sup>92</sup> The test-drive coefficient was statistically significant at the two percent level, and the car

petition (by revealing a prior test drive) received significantly better deals. Testers who indicated higher costs of search, less sophistication, and a greater need for a car (by revealing they had no car) received significantly worse deals. Although these results do not constitute direct evidence that sellers used race and gender as proxies for inferences about consumers' firm-specific willingness to pay, the results do suggest that dealers were sensitive to a number of other proxies for willingness to pay.

Yet the conundrum persists as to why race and gender would be proxies for consumers' firm-specific reservation price that disfavor women and blacks. Even accepting that firm-specific willingness to pay is more a function of search costs than of ability to pay, why would blacks and women be disfavored? George Stigler has predicted that consumers with high opportunity costs will search less for a particular good than those consumers with lower opportunity costs.<sup>93</sup> Because white males earn more on average than other tester types,<sup>94</sup> under Stigler's theory a dealer should rationally infer that white males search less than members of other race and gender classes. If race and gender serve as proxies for dealer-specific willingness to pay, these proxies would seem to lead sellers to charge *higher* prices to white males, and not the lower prices revealed by this study.

Nevertheless, group differences in search costs, information, and aversion to bargaining may explain why profit-maximizing dealers charge white males less. The caricatured assertion that white males have higher opportunity costs (because they forgo higher wages when searching) ignores other effects that on balance may make it more difficult for blacks and women to search for a car. For example, white males may have a greater ability to take time off from work or family responsibilities to search for a car. Moreover, blacks are less likely to have a trade-in car with which to search when purchasing a new car.<sup>95</sup> If, on net, blacks and women experience higher search

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ownership coefficient was statistically significant at the eight percent level. The R-squared for the revised regression was 44% with 93 degrees of freedom.

<sup>93</sup> See G. STIGLER, *supra* note 47, at 175-76.

<sup>94</sup> See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 409 (110 ed. 1990).

<sup>95</sup> See Conversation with Cliff Winston, Senior Research Fellow, Brookings Institution (Nov. 26, 1990); Mannering & Winston, Brand Loyalty and the Decline of Automobile Firms, table E (Nov. 1990) (unpublished manuscript) (presenting the results of a regression regarding duration between car purchases). For a general discussion of consumer demand, see C. WINSTON & ASSOCIATES, *BLIND INTERSECTION? POLICY AND THE AUTOMOBILE INDUSTRY* (1987), discussing how government policies for evening the competitiveness of the U.S. automobile manufacturers have affected consumer demand; and Mannering & Winston, *A Dynamic Empirical Analysis of Household Vehicle Ownership and Utilization*, 16 RAND J. ECON. 215 (1985), which found that U.S. households have maintained preferences for American cars and have retained strong brand loyalties.

costs than do white males, revenue-based statistical discrimination might lead dealers to make lower offers to white males. Knowing that blacks and women tend to incur higher search costs, a dealer could “safely” charge members of those groups higher prices, because the dealer would effectively have less competition for members of those groups from other dealers. White men may also have superior access to information about the car market. A large proportion of white men know that automobiles can be purchased for less than the sticker price,<sup>96</sup> and white men may more easily be able to discover the customary size of negotiated discounts from the sticker price.

Finally, revenue-based statistical discrimination might be based on an inference by dealers that some consumer groups are averse to the process of bargaining. If black or female consumers are more likely than white males to make bargaining concessions, revenue-based disparate treatment may ensue: profit-maximizing dealers would exploit such differences by charging more to members of those groups that tend to dislike bargaining. The process of negotiation at a given dealership is in a sense a consumer’s “intra-dealership” search for the best price. If dealers believe that blacks and women have a greater aversion to bargaining (and thus experience higher “intra-dealership” search costs) than white males, dealers might believe they could generate additional revenues by making higher offers to blacks and women.<sup>97</sup> A higher consumer aversion to bargaining is analogous to a higher bargaining cost. Inferences about different bargaining costs (including different aversions to bargaining), like inferences about different search costs, can analogously lead dealers to treat groups of consumers differently. This argument is extended below to show how dealership competition could perversely reinforce seller bargaining behavior and how profit-maximizing sellers might charge blacks higher prices even if the average black consumer has a lower willingness to pay.

In testing theories of statistical discrimination, it is important to distinguish between *rational* statistical inferences and *irrational* or *stereotypical* inferences. Beliefs that are based on erroneous stereotypes may not be tested by the market equilibrium. If market experience does not teach sellers that their preconceptions are false, disparate treatment that is both inequitable and inefficient will persist. For example, if sellers refuse to bargain seriously with blacks because they believe that blacks generally are too poor to purchase cars, then in equilibrium blacks will continue to fail to purchase cars — because

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<sup>96</sup> See *infra* p. 856.

<sup>97</sup> Steve Salop and Joseph Stiglitz have shown that this form of price dispersion may turn on how costly it is for consumer groups to gather information. See Salop & Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493, 493–95 (1977).

of inflated, nonbargained prices. That failure will only reaffirm the sellers' original mistaken belief.<sup>98</sup>

The uniformity of disparate treatment in different neighborhoods suggests that salespeople may bring many of their racial conceptions to the job and that these beliefs are not learned through their bargaining experiences. Salespeople in segregated white suburbs exhibited similar forms of race discrimination even though those dealerships are rarely exposed to black customers. When training sales personnel, car dealerships may be legally or morally constrained not to explicitly counsel disparate treatment, but dealerships may believe that they have a financial interest not to disabuse salespeople of racial stereotypes that they bring to the job.

A comparison of initial offer and final offer discrimination also provides a weak test of whether statistical discrimination is rational. When testers first begin bargaining, sellers have little information on which to base inferences about the testers, aside from race and gender. As the bargaining continues, however, the seller's information set should contain a greater proportion of individual data gained during the bargaining process itself. If sellers are rationally updating their prior beliefs, the amount of disparate treatment should decrease as the number of bargaining rounds increases. Even if the seller starts off with a higher offer to a black woman than a white man in the first round, after an hour of hearing the woman use the same words and make the same revelations as the white man, the seller should tend to treat the two more similarly.<sup>99</sup>

The data for black males and black females provide some modest confirmation of a hypothesis of *rational* statistical discrimination, because the disparity between offers decreased as bargaining progressed.<sup>100</sup> The data for white females relative to white males, how-

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<sup>98</sup> Similarly, a strong belief that white males will walk away from high offers might not be tested in equilibrium because salespeople would not want to chance starting the negotiation with a high offer. Deborah Rhode has argued analogously in the employment context: "Once jobs become 'typed' as male or female, socialization processes tend to perpetuate those labels." Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1219.

It will be difficult to differentiate animus-based discrimination from statistical discrimination when sellers' inferences are systematically mistaken. When sellers' inferences are erroneous, cost- or revenue-based relationships with race or gender will not appear, and research may need to depend on attitudinal studies to distinguish animus from irrationality as the cause of disparate treatment. Indeed, the line between animus and irrationality may blur as animus or fear may at some level cause the irrational inferences. Irrational stereotyping may analytically serve as a bridge between rational statistical discrimination and animus. Empirically, it may prove impossible to distinguish animus-based conduct from irrational stereotyping: both types of conduct are inconsistent with profit maximization.

<sup>99</sup> Sellers might need more than a single negotiation session to modify gender- and race-specific bargaining strategies developed over long periods of time. Therefore, that the data do not show a decrease in the magnitude of discrimination between the initial and final offers cannot by itself establish seller irrationality or stereotyping.

<sup>100</sup> The following table illustrates the average differences between initial and final offers

ever, are inconsistent with this simple story of statistical discrimination. Sellers offered white males and females almost identical initial prices, but, by the final round, the offers made to white females were \$142 higher than offers to white males.<sup>101</sup> This increasing disparity over time might indicate that the discrimination against white female testers and black testers have distinct causes.

The argument that revenue-based discrimination best explains the data thus remains impressionistic. In sum, the results of this study can be described as a set of facts in search of a more complete causal theory. Indeed, it may be that simple causal theories of discrimination fail to capture the mutually enforcing nature of multiple causes. To take just one example, greedy but unbigoted salespeople may rationally decide to parrot the discrimination of bigoted salespeople. Thus, if the majority of salespeople in a geographic market charge blacks higher prices because of bigotry, a non-bigoted salesperson might be able profitably to increase his or her commission by matching (or only slightly undercutting) the discriminatory overcharge.

In the end, it may prove impossible to parse out the various elements of animus and rational inferences from irrational stereotypes. No single causal theory may be adequate to explain discrimination against both blacks and women. Whatever its causes, however, the discrimination revealed in this study stands squarely in the face of earlier analysis that rejected the need for discrimination laws concerning the sale of goods. The search for a causal theory, therefore, is not merely an academic exercise. Finding an answer is important because effective governmental intervention should ideally grow out of an accurate theory of market failure.

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made to black males and white and black females. The dollar figures in each column represent the amount in excess of the corresponding figures for white males:

AVERAGE DIFFERENCES BETWEEN INITIAL AND FINAL OFFERS		
	Initial Offer	Final Offer
White Female	\$ 11	\$142
Black Male	716	421
Black Female	1351	875

In contrast to the white female results, the offers to black testers are consistent with rational statistical discrimination, because the amount of discrimination decreased from the initial to the final offer. As sellers make rational inferences from larger samples of information (acquired through the process of further bargaining), there should be a reduction in variance in later rounds of bargaining as well as a reduction in the amount of disparity between final offers to white males and final offers to the other groups. This is similar to Steven Jay Gould's explanation for the decline of the .400 hitter in baseball. See S. GOULD, *THE FLAMINGO'S SMILE* 218-21 (1985).

<sup>101</sup> See *supra* note 100.

2. *The Reinforcing Role of Dealer Competition.* — Many commentators have argued that competition among sellers will tend to eliminate certain forms of race and gender discrimination against buyers.<sup>102</sup> The following discussion examines how market competition among dealerships may in fact reinforce the opportunities for statistical discrimination.

As a first intuition, competition should quickly eliminate revenue-based statistical discrimination, slowly eliminate animus-based discrimination, and never eliminate cost-based statistical discrimination. Competition should quickly eliminate revenue-based discrimination because rival dealers would immediately move to undercut any supra-competitive prices offered to high-valuing car buyers.<sup>103</sup> Competition should slowly eliminate animus discrimination because bigoted sellers would be at a competitive disadvantage and so would eventually be driven out of the market. By contrast, competition should not eliminate cost-based statistical discrimination because no dealer would have a market-based incentive to offer prices that fall below the best estimates of that dealer's actual costs.<sup>104</sup>

The preceding analysis, however, tentatively suggested just the opposite causal ordering. Cost-based statistical discrimination is the least plausible explanation, and revenue-based statistical discrimination is the most plausible. The simple competitive story thus poses a major challenge to the assertion that revenue-based statistical discrimination caused the disparate treatment. In a large city such as Chicago, with hundreds of car dealerships, how could rival dealerships successfully charge individual consumers significantly more than dealership marginal costs?

Intuitively, it seems that the first dealership to advertise fixed prices with reasonable markups should increase its profits because its

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<sup>102</sup> See, e.g., G. BECKER, *supra* note 62, at 38, 70–71 (arguing that competition drives inefficient, bigoted producers from the market). For an enlightening exchange on whether civil rights laws tend to enhance or retard these competitive forces, see Donohue, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987); and Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987) [hereinafter Donohue, *Further Thoughts*].

<sup>103</sup> Competition should generally cause sellers to charge a uniform price equal to their cost. Price dispersion and supra-competitive pricing has been observed as a persistent phenomenon in some markets with multiple sellers. See Kelman, *Trashing*, 36 STAN. L. REV. 293, 316–17 (1984) (noting that similar Palo Alto gas stations charged disparate prices for full service and that similar Washington, D.C., photographers charged disparate prices for passport photos).

<sup>104</sup> Even if car dealers found it to be more “expensive” on average to enter into transactions with black customers (because, for example, of a higher default risk), it might be socially inefficient to allow dealers to discriminate in that cost-based manner. Cost-based statistical discrimination imposes a “tax” on all black consumers regardless of their actual individual characteristics and might discourage blacks from efficiently investing in credit-worthiness. See Donohue, *Further Thoughts*, *supra* note 102, at 533–34; Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 233 (1986).

sales volume should dramatically increase; that dealership should have a competitive advantage. By advertising its (relatively low) fixed prices, the dealership should attract the customers who were (or were about to be) victims of revenue-based statistical discrimination.<sup>105</sup> However, although a few “mail order” dealerships (such as the National Auto Brokers<sup>106</sup>) sell cars by advertising fixed prices at reasonable markups, local dealerships almost universally prefer bargaining methods of sale.

The incentives for dealers to opt for a high volume, standard “stated” price strategy may be discouraged by an important phenomenon: dealership profits tend to be concentrated in a few sales. Price dispersion in new car sales necessarily concentrates dealer profits in a few car sales.<sup>107</sup> Anecdotal evidence suggests that at some dealerships up to fifty percent of the profits can be earned on just ten percent of the sales.<sup>108</sup> Profit concentrations of this magnitude are crucial in understanding why competition does not eliminate revenue-based price discrimination. From a dealer’s perspective, bargaining for cars is a “search for suckers” — a search for consumers who are willing to pay a high markup for whatever reasons.<sup>109</sup> Notwithstanding standard competitive theory, the dealerships are willing to force the majority of consumers to endure frustrating and socially wasteful bargaining in hopes of finding those few high-profit sales that disproportionately contribute to their bottom line.<sup>110</sup> For the dealers, the competitive incentive to move away from bargaining to a stated-price system simply may not be compelling because dealerships would thereby lose the profits from sucker sales. As long as the expected profits from the additional sales at a low markup are less than the profits from high-markup sales, dealers will prefer the bargaining regime.

Even if individual dealers could profitably replace bargained sales with stated price sales, manufacturers may prefer a sales process that

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<sup>105</sup> Consumers might also prefer going to a dealership with “stated prices” because they could avoid the costs of bargaining for a car.

<sup>106</sup> See, e.g., EDMUND’S 1989 NEW CAR PRICES, *supra* note 24, at 188–89 (reprinting an advertisement).

<sup>107</sup> If homogeneous products are sold without price dispersion, a seller’s profits are distributed equally across goods sold. Price dispersion implies, however, that some products are sold for a higher profit. Price dispersion causes a seller’s profits to be disproportionately concentrated in its high mark-up sales.

<sup>108</sup> This evidence comes from confidential conversations with car dealers and salespeople.

<sup>109</sup> The term “sucker” does not imply that high-markup buyers are irrational or even uninformed. As argued above, *see supra* p. 849, a willingness to pay a high markup may be rational given high search costs or a high aversion to bargaining. Echoing the explicit sexual language they used to address female customers, some salesmen use the sexual term “lay-downs” to refer to women who are willing to pay the sticker or near sticker price. See Brown, *Sexism in the Showroom?*, Wash. Post, Feb. 12, 1989, at H1, col. 1.

<sup>110</sup> See Ayres & Miller, *supra* note 17, at 1068–70.

allows their dealers as a class to extract the most money from consumers.<sup>111</sup> The manufacturer can powerfully discourage individual dealers from moving to stated-price competition simply by limiting that dealership's supply of cars. Such limitations destroy dealer incentives to commit to a fixed, low-profit markup because stated-price competition is more profitable than the alternative only if a dealership can significantly increase its sales volume.<sup>112</sup>

The dealers' reliance on high-markup buyers lends additional credibility to the notion that dealership disparate treatment of consumers might be a form of revenue-based statistical discrimination. The dealers' search for high-markup buyers may be tailored to focus on specific racial or gender groups. In their quest to locate high-markup buyers, dealers are not guided by the amount that the *average* black woman is willing to pay. Rather, they focus on the proportion of black women who are willing to pay close to the sticker price.<sup>113</sup> Even a small difference in the percentage of high-markup buyers represented by consumers of any one race or gender class may lead to large differences in the way dealers treat that entire class.<sup>114</sup> Thus, the previous

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<sup>111</sup> This is especially true if the additional stated-price sales are drawn from the manufacturer's other dealers. In general, manufacturers should prefer the dealer sales process that extracts the largest amount of consumer surplus, because manufacturers should be able to capture those dealership profits through higher wholesale car prices and higher franchise fees. Although it would seem that manufacturers charging a fixed price to dealers would want to encourage dealers to sell a high volume of cars, manufacturers may find that they can reap higher overall profits by charging higher prices to dealers under a relatively low volume bargaining regime than under a higher volume stated-price regime.

<sup>112</sup> The reaction of rival dealerships could also reduce the profitability of advertising a stated price. Dealerships that "will not be undersold" could simply match their rivals' advertised price. The first dealership to advertise lower prices might be providing a public service, but if consumers merely use its advertisements to receive matching offers at other dealerships, the first dealership's advertising strategy might not generate a sufficient increase in sales volume to be profitable for that dealership.

<sup>113</sup> Although statistical theories of discrimination are often couched in terms of inferences about group means, inferences can also be made about aspects of the probability distribution for a group that can rationally affect behavior. Pedestrians' aversion to young male drivers, for example, need not be based on a belief that the average male youth drives recklessly; the recklessness of merely five percent of such drivers would make pedestrians rationally leery of all. This "search for suckers" analysis is similar to models in which seller behavior turns on the proportion of comparison shoppers in the population. See, e.g., Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 647-51 (1979).

<sup>114</sup> The sensitivity of sellers to the characteristics of a small percentage of high-markup consumers is analogous to the results of game-theory models. See, e.g., Kreps, Milgrom, Roberts & Wilson, *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 J. ECON. THEORY 245, 245-47 (1982) (explaining that a firm might be rationally sensitive to a low probability that rivals will adopt an irrationally competitive stance). As Eric Rasmusen has summarized:

The beauty of [this] model is that it requires only a little incomplete information: a small probability [of irrationality]. It is not unreasonable to suppose that a world which contains



explanations of racial- or gender-based differences in search costs, information, or aversion to bargaining need not be true for the *average* members of a consumer group in order for those differences to generate significant amounts of revenue-based disparate treatment. The Consumer Federation of America recently completed a survey which revealed that thirty-seven percent of consumers do not understand that the sticker price is negotiable.<sup>115</sup> These responses varied greatly across both race and gender. Sixty-one percent of black consumers surveyed did not realize that the sticker price is negotiable, whereas only thirty-one percent of white consumers made this error.<sup>116</sup> This fact by itself could easily explain dramatic disparate treatment by sellers. Profit-maximizing dealers may rationally quote higher prices to blacks even if the average black consumer in fact has a lower willingness to pay.

In sum, although simple economic theory suggests that dealer competition should quickly eliminate price dispersion, dealers in the market for new cars nevertheless sell the same car for different prices. Highly concentrated profits give dealers incentives to search for high-markup buyers through the process of bargaining.<sup>117</sup> In particular, the dealers' search for high-markup buyers may reinforce incentives to discriminate on the basis of race or gender. The concentration of

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Neo-Ricardians and McGovernites contains a few mildly irrational tit-for-tat players, and such behavior is especially plausible among consumers, who are subject to less evolutionary pressure than firms.

E. RASMUSEN, *supra* note 20, at 118.

<sup>115</sup> See Consumer Fed'n of Am., U.S. Consumer Knowledge: The Results of a Nationwide Test 8 (1990) (on file at the Harvard Law School Library). Similarly, during interviews conducted in confidential litigation research unrelated to this study, prospective jurors were asked whether "most people pay sticker price for their cars." Twenty percent of those surveyed responded "yes."

<sup>116</sup> Telephone interview with Stephen Brobeck, Executive Director, Consumer Federation of America (Oct. 15, 1990). The study also revealed that women were 7.2% more likely to answer questions about automobile purchases incorrectly. See Consumer Fed'n of Am., *supra* note 115, at 9.

A belief among black consumers that the sticker price is not negotiable would not be erroneous if black consumers have found that dealers are actually unwilling to bargain with them. The tests conducted in this study, however, indicate that dealers were willing to make at least some price concessions to black testers.

<sup>117</sup> The pattern of discrimination uncovered in this Article also creates an opportunity for a different kind of competitive response: entrepreneurs might profitably offer to negotiate on behalf of consumers who might otherwise be forced to pay high markups. This study suggests, for example, that a white male consumer would have a competitive advantage in attaining a lower offer. Several types of transaction costs, however, inhibit the viability of such negotiation services. Consumers may not know the extent to which they may be subject to high markups. Entrepreneurs attempting to market their negotiation services may have a hard time credibly communicating both that a problem exists and that their service provides a solution. After all, a consumer using the service would have difficulty verifying that he or she received a competitive price.

profits is a central pathology of retail car sales and one to which we will return below.

#### IV. LEGAL IMPLICATIONS

The results of the bargaining tests show that car dealerships treat black and female testers differently than they do white men who use the same bargaining strategy. Whether these findings constitute actionable racial or gender discrimination in a traditional legal sense, however, is a separate matter. The differential treatment of consumers might be seen as a natural consequence of any bargaining process. Market economies sanction such treatment by allowing sellers to pursue high-markup sales through a variety of bargaining methods. The pre-contractual interplay between a potential buyer and seller may seem, in some sense, outside the purview of the law.<sup>118</sup>

This Part argues, however, that the findings presented in this Article constitute compelling evidence of unlawful racial and gender discrimination under both the civil rights and consumer protection laws. In particular, the following section explores whether the car sellers' dealings with black testers constitute unlawful disparate treatment violative of sections 1981 and 1982.<sup>119</sup> Such a claim does not necessarily imply that sellers dislike black or female customers — only that sellers take their customers' race and gender into account when deciding how to bargain. Section B then proposes legal reforms to strengthen sections 1981 and 1982 and to extend their coverage to currently unprotected groups.

##### *A. Liability Under Sections 1981 and 1982*

Sections 1981 and 1982 mandate that all people shall have the same rights "to make and enforce contracts" and to "purchase . . .

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<sup>118</sup> The process of bargaining does not necessitate the disparate treatment of bargainers. A seller could make uniform initial offers followed by uniform concessions — and let the consumers sort themselves at different accepted prices. Sellers could still adopt tough bargaining strategies by refusing to make concessions some proportion of the time. Avoiding disparate treatment would merely require that sellers adopt what game theorists call a uniform "mixed strategy." See E. RASMUSEN, *supra* note 20, at 69. A mixed strategy for bargaining would specify the probability that a seller would make a particular type of concession. Under this scenario, the process of bargaining would still have a disparate impact on different consumers — less savvy customers or those averse to bargaining would accept the higher initial offers — but there would not be disparate treatment.

<sup>119</sup> As stated earlier, §§ 1981 and 1982 do not address discrimination based on gender. See *supra* p. 821.

personal property," respectively, "as is enjoyed by white citizens."<sup>120</sup> Although a racial discrimination suit has never been brought against a retail car dealership under section 1981 or section 1982, there seems little doubt that one or both these laws covers discrimination relating to retail car price bargaining between private parties. In *Jones v. Alfred H. Mayer Co.*,<sup>121</sup> the Supreme Court emphatically stated that section 1982 (and by implication section 1981) applies to acts of *private* discrimination.<sup>122</sup> Since *Jones*, courts have applied these sections' prohibitions of private discrimination to contexts similar to retail car price bargaining.<sup>123</sup>

Even if car dealership bargaining falls within the scope of sections 1981 and 1982, a fair driving plaintiff would have a number of hurdles to overcome in winning a claim under these statutes. The substantive legal standard under sections 1981 and 1982 is straightforward: plaintiffs claiming disparate treatment must prove that the defendant intentionally discriminated against them and caused them an identifiable injury.<sup>124</sup> Although the Supreme Court has stated that intentional

<sup>120</sup> 42 U.S.C. §§ 1981, 1982 (1988). Although not identical, §§ 1981 and 1982 both originated in § 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27. See *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 384 (1982). More important, courts generally treat the two sections identically, at least with respect to the requirements for establishing a claim of intentional discrimination. See *Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 43 n.5 (2d Cir. 1984). This Article treats the two sections as interchangeable.

<sup>121</sup> 392 U.S. 409 (1968).

<sup>122</sup> See *id.* at 437.

<sup>123</sup> Section 1982's prohibition on discrimination in the sale or purchase of property "includ[es] discrimination in modes of negotiation." *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 416 (S.D. Ohio 1968). Moreover, although § 1982 is not often used in the context of the sale or purchase of *personal* property, the text of the statute covers such sales or purchases. See, e.g., *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1113 (9th Cir. 1975) (finding that § 1982 covers the "attempted purchase of caskets"). Section 1981's prohibition on discrimination in the making of contracts is more extensive, covering "offer[s] to make a contract only on discriminatory terms." *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372 (1989) (emphasis added). *Patterson's* lasting significance, of course, lies in its holding that § 1981 does not prohibit discrimination in *post*-formation relations. See *id.* at 2373. Thus it seems that fair driving plaintiffs could sue under either § 1981 or § 1982.

Defendants in the present context might try to escape § 1981 or § 1982 liability by distinguishing preliminary offers meant as the starting point for negotiations from later, more authoritative offers. This argument is untenable, however, because earlier offers help determine subsequent offers (and in turn the ultimate terms of the contract). Salespeople must believe that their actions in the initial rounds of bargaining affect the final contract price; they would hardly be willing to take the time to bargain for several rounds if they thought otherwise.

<sup>124</sup> See, e.g., *Patterson*, 109 S. Ct. at 2377; *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 664, 669 (1987); *General Bldg. Contractors*, 458 U.S. at 389, 391; *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 187 (7th Cir. 1982). Disparate treatment claims are distinguishable from disparate impact claims under title VII. Accordingly, the Supreme Court in *General Building Contractors* rejected disparate impact claims under § 1981 as uncognizable. See 458 U.S. at 390-91. Disparate impact claims cover facially neutral (employer) practices that have discriminatory effects. They require no showing of intent to establish a *prima facie* case. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

discrimination "can in some situations be inferred from the mere fact of differences in treatment,"<sup>125</sup> no civil rights case has ever concluded that a showing of disparate treatment was insufficient to establish intentional discrimination.<sup>126</sup> Thus, it appears that courts will find intentional discrimination whenever the defendant's conduct was conditioned on the plaintiff's race.<sup>127</sup> To establish liability in this context, the typical fair driving plaintiff would need to show that the specific car dealer with whom he or she had bargained considered the plaintiff's race in deciding how to bargain.<sup>128</sup>

On the other hand, because of the difficulties in obtaining direct proof that a defendant's conduct was race-dependent,<sup>129</sup> the law has developed a method for allocating the burdens of proof under sections 1981 and 1982 that in effect allows intent to be inferred from indirect evidence. In particular, courts hearing section 1981 or 1982 claims have imported from the title VII context the shifting burdens of proof scheme articulated in *McDonnell Douglas v. Green*.<sup>130</sup>

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<sup>125</sup> *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis added).

<sup>126</sup> In a recent title VII case, a plurality of the Supreme Court found that a prima facie case of disparate treatment is made out whenever "gender played a motivating part in an employment decision" and defined this standard to "mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1790 (1989) (plurality opinion).

More recently, Judge Posner addressed the state of mind requirement in a fair housing disparate treatment case. See *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990). Judge Posner defined disparate treatment as "treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool." *Id.* at 1529-30; see also *id.* (defining conditions when a person would be "guilty of intentional discrimination, or what is the same thing, of disparate treatment").

<sup>127</sup> This standard of intent covers not only differential treatment caused by a defendant's animus toward blacks, but also the conscious use of race as a proxy to further some other legitimate goal. *Price Waterhouse*, for example, explicitly rejected the use of gender as a proxy for legitimate employment traits, such as aggressiveness: "an employer who acts on the basis of a belief that a woman cannot be aggressive . . . has acted on the basis of gender." 109 S. Ct. at 1790-91.

<sup>128</sup> If the actual black testers from this study were to bring suit, they would face the additional hurdle of establishing standing under §§ 1981 and 1982 because they lacked a bona fide intent to purchase. In the fair housing context, however, the Supreme Court has stated that testers need not intend to buy to have standing to bring civil suits under title VIII. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75 (1982). The Eleventh and Third Circuits have extended this standing doctrine to fair housing claims brought under § 1982. See *Watts v. Boyd Properties, Inc.*, 758 F.2d 1482, 1485 (11th Cir. 1985); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 898 (3rd Cir. 1977). At least in the Eleventh and Third Circuits, fair driving testers would have a strong argument for standing to sue under § 1982.

<sup>129</sup> An example of such rare, direct evidence would be an internal memorandum from the defendant-dealer to his manager explaining that he considered the prospective buyer's race before offering an initial price.

<sup>130</sup> 411 U.S. 792 (1973). The *McDonnell Douglas* allocation of the burdens of proof has been

Applying the *McDonnell Douglas* reasoning to fair driving suits, the plaintiff bears the initial burden of establishing disparate treatment: that sellers took race into account when deciding how to bargain.<sup>131</sup> If the plaintiff can establish a prima facie violation of section 1981 or section 1982, a burden of production shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its differential behavior.<sup>132</sup> Finally, if the defendant can offer such a reason, the burden shifts back to the plaintiff to show that the defendant's response is a mere "pretext."<sup>133</sup>

A black tester from the present study who wanted to make out a successful prima facie case against a particular dealership would have to persuade the court of two things. First, she would have to persuade the court that the study was sufficiently controlled — that is, that she and the white tester visiting the defendant's car dealership appeared similar in every objective respect except for the color of their skin. If courts' attitudes in housing cases under sections 1981 and 1982 are any indication,<sup>134</sup> the fair driving tests conducted in this study were

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applied in subsequent title VII cases. *See, e.g.,* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252–56 (1981); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (reiterating the underlying rationale of the *McDonnell Douglas* scheme that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"). The Supreme Court recently distinguished this type of title VII case from that in which there is direct evidence of subjective discriminatory intent, but there is also direct evidence of other, more legitimate motives (the "mixed motives" case). *See Price Waterhouse*, 109 S. Ct. at 1787–88. Justice O'Connor explicitly distinguished between the two types of cases in her concurrence. *See id.* at 1801 (O'Connor, J., concurring in the judgment). The allocation of the burdens of proof are significantly different in the two types of cases.

The Supreme Court has ruled that "the *McDonnell Douglas/Burdine* scheme of proof should apply in § 1981 cases." *Patterson v. McClean Credit Corp.*, 109 S. Ct. 2363, 2378 (1989). For examples of lower federal courts' applying the *McDonnell Douglas/Burdine* standard to both § 1981 and § 1982 claims, see *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 551 (9th Cir. 1980) (§ 1982 claim); and *Chauhan v. M. Alfieri Co.*, 707 F. Supp. 162, 165–66 (D.N.J. 1988) (§ 1981 claim), *rev'd*, 897 F.2d 123 (3d Cir. 1990).

<sup>131</sup> As applied to the fair driving context, the plaintiff would have to show that she belongs to a racial minority; that she was as ready, willing, and able to buy a car as similarly situated whites; that despite this fact, the defendant offered her higher prices than those offered similarly situated whites; and that the defendant continued to offer lower prices to similarly situated whites. *See McDonnell Douglas*, 411 U.S. at 802. Courts have allowed plaintiffs flexibility in demonstrating disparate treatment. *See, e.g.,* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977); *McDonnell Douglas*, 411 U.S. at 802 n.13. For example, in fair housing cases, testers need not seek actual purchase. *See Havens Realty*, 455 U.S. at 373–75.

<sup>132</sup> *McDonnell Douglas*, 411 U.S. at 802. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), makes clear, however, that the defendant only bears a burden of production. *See id.* at 252–56.

<sup>133</sup> *McDonnell Douglas*, 411 U.S. at 804.

<sup>134</sup> *See, e.g.,* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) (finding a prima facie inference of discrimination "where a black rental applicant meets the objective

more than sufficiently controlled. Although the typical fair housing test is similarly controlled with respect to timing of the tests, it is less controlled with respect to verbal and nonverbal conduct than was the testing in this study.<sup>135</sup>

Second, fair driving plaintiffs would have to persuade the court that the instances of differential treatment are sufficiently numerous so that the results can not be explained by chance.<sup>136</sup> Again, analogy to the fair housing context suggests that the results of one pair of well controlled testers should suffice.<sup>137</sup> Under this standard, the present study could theoretically give rise to dozens of actionable instances of discrimination against individual dealers.

Although comparisons with the fair housing context are generally apposite, courts may be much more reluctant to find the existence of prima facie cases in the fair driving context because society has differing presumptions about the pervasiveness of the two kinds of discrimination. The long and ongoing history of housing discrimination in the United States is so well known and well documented<sup>138</sup> that courts may require relatively less proof. Discrimination in car negotiations may have a similarly long and deep-seated history, but the

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requirements of a landlord, and the rental would likely have been consummated were he or she a white applicant"); *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 417 (S.D. Ohio 1968) (finding a prima facie inference of discrimination "[w]here a Negro offeror . . . meets the objective requirements of a seller-developer . . . and shows further that a substantial number of lots have been sold and none of the buyers is a Negro").

<sup>135</sup> See *supra* pp. 823-24. When a black man or woman suspects that he or she has been the victim of housing discrimination, he or she typically complains to a local fair housing organization. The organization may then dispatch a white tester to observe whether the seller treats him or her differently. Fair housing organizations conduct "audits" in which pairs of trained testers target a particular area or seller. The advance preparation for such audits makes them relatively controlled, but fair housing organizations seldom train and control their testers as rigorously as did this study. Interview with Ellen Shogan, Executive Director, Fair Housing Council of Greater Washington (Nov. 26, 1990).

<sup>136</sup> One might argue that more instances of discrimination are necessary in the car buying context because differences in seller behavior are more subjective than the outright refusals to deal or steering that is prevalent in fair housing cases. On reflection, however, this argument cannot be sustained. Quoting two different prices is just as objective a measure of disparate treatment as disparate willingness to deal.

<sup>137</sup> See, e.g., *Metro Fair Hous. Servs. v. Morrowood Garden Apartments*, 576 F. Supp. 1090, 1093 (N.D. Ga. 1983) ("Where a white tester is given substantially different information from that given an otherwise similar black tester, an inference that race was a factor can be drawn."), *rev'd sub nom. Watts v. Boyd Properties, Inc.*, 758 F.2d 1482 (11th Cir. 1985). Of course, a genuine fair driving plaintiff — one not part of a controlled test — will have a harder time showing that he or she was treated differently from similarly situated whites.

<sup>138</sup> See, e.g., Galster, *More Than Skin Deep: The Effect of Housing Discrimination on the Extent and Pattern of Racial Residential Segregation in the United States*, in HOUSING DESEGREGATION AND FEDERAL POLICY 119 (J. Goering ed. 1986); Massey & Denton, *Trends in the Residential Segregation of Blacks, Hispanics, and Asians: 1970-80*, 52 AM. SOC. REV. 802 (1987); Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881 (1986).

size and nature of such discrimination may be masked by the processes of bargaining. As a result, a court hearing a fair driving claim may require that the tests be that much more controlled, that the disparity of treatment be that much greater, or that there be that many more instances of disparate treatment by the same dealer.<sup>139</sup>

Once a court finds that a fair driving plaintiff has made out a prima facie case of disparate treatment, the burden shifts to the defendant-dealer to articulate a legitimate, nondiscriminatory explanation for why it treated white buyers and black buyers differently.<sup>140</sup> If the defendant does not directly rebut the plaintiff's evidence of disparate treatment,<sup>141</sup> it might put forward two distinct arguments that the disparate treatment was not "intentional" discrimination. First, the dealer may argue that the disparate treatment was unintentional because the dealer's motive was to make money, not to harm black people. Under this theory, the dealer might openly admit that its behavior flowed from consciously drawn, economically rational inferences based on the race of prospective buyers — revenue-based inferences, for example, about the proportion of blacks willing to pay a higher markup. It is, however, precisely these sorts of inferences — inferences based on the color of a person's skin — that sections 1981 and 1982 do not countenance. As Judge Posner recently held, "[d]iscrimination may be instrumental to a goal not itself discriminatory, just as murder may be instrumental to a goal not itself murderous (such as money); it is not any less — it is, indeed, more clearly — discriminatory on that account."<sup>142</sup>

Alternatively, defendants might claim that their disparate treatment was unintentional in the sense that they were not conscious of

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<sup>139</sup> Assuming §§ 1981 and 1982 could be expanded to include women, this attitude might be particularly prevalent in cases in which the victims of dealership discrimination are women. In my discussions with other academics, I have noted greater resistance to the idea of gender than of race discrimination in car sales. When I used racial examples in presenting my results, my interlocutors more often accepted the conclusion of discrimination; when I used gender examples, my interlocutors more often challenged whether the testers were uniform.

<sup>140</sup> The Supreme Court has clearly indicated that the defendant bears only a burden of production, not persuasion, in rebutting the plaintiff's prima facie case. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

<sup>141</sup> The defendant might also directly rebut the plaintiff's evidence of disparate treatment by putting forth evidence that the test was not controlled in all relevant respects and that sellers gave different offers not because of race but because of some other uncontrolled characteristic on which testers differed. Sellers might persuasively argue, for example, that the higher offers received by black women in this study do not violate § 1981: because black women were paired with white males, sellers could argue that they were discriminating on the basis of the unprotected characteristic of gender and not the protected characteristic of race.

<sup>142</sup> *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990). Or, to quote another court in a slightly different context: "it is now understood that under § 1982 . . . there cannot in this country be markets or profits based on the color of a man's skin." *Contract Buyers League v. F & F Inv.*, 300 F. Supp. 210, 216 (N.D. Ill. 1969), *aff'd sub nom.* *Baker v. F & F Inv.*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

it. The D.C. Circuit rejected this argument in *Hopkins v. Price Waterhouse*:<sup>143</sup>

[Plaintiff demonstrated] that she was treated less favorably than male candidates because of her sex. This is sufficient to establish discriminatory motive; the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it.<sup>144</sup>

Once a plaintiff has proven that a defendant has treated blacks differently from 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. Such a legal inference conforms with our common moral intuition that a dealer who must consciously decide what initial price to offer every customer who walks through the door must be aware of the skin color of those to whom it consistently offers a higher initial price.<sup>145</sup> Thus, so long as the fair driving plaintiff can persuade the factfinder that sellers treated similarly situated blacks differently from whites, the disparate treatment discussed in this Article violates sections 1981 and 1982.

### B. Legal Reform

1. *Modernizing Civil Rights Laws.* — Lawmakers could respond to bargaining discrimination by expanding the current coverage of the civil rights and consumer protection laws. Most important, Congress could amend sections 1981 and 1982 to extend to women (and other protected classes) the right to be free from discrimination in contracting to buy and sell services as well as goods. Modernized versions of sections 1981 and 1982 could also allow plaintiffs to bring disparate impact suits, currently actionable under title VII, which require no showing of intent.<sup>146</sup> Disparate impact litigation would allow suits to challenge the bargaining practices of sellers that are facially neutral (in the sense that they do not consciously take a buyer's race or gender

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<sup>143</sup> 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989).

<sup>144</sup> *Id.* at 468-69. Paul Brest has similarly rejected reading a mens rea requirement into a standard for discrimination: "Race-dependent decisions need not be race-conscious, but may reflect unconscious racially selective indifference. Such indifference violates the antidiscrimination principle when its effect is to deny benefits to minority persons, or impose burdens on them, which would not be denied or imposed if they were white." Brest, *supra* note 9, at 14 (footnote omitted).

<sup>145</sup> *But see Dwivedi*, 895 F.2d at 1532 (stating that "since few of the defendants' customers were white, the defendants had little experience with white customers and may therefore have treated the white testers differently out of ignorance rather than design").

<sup>146</sup> *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); cases cited *supra* note 124.



into account) but have significant discriminatory effects.<sup>147</sup> In sum, creating an additional roman numerated civil rights “title” to cover the sale of goods and services would provide a remedy for the kinds of discrimination examined in this Article.

Although this Article has argued that the sellers’ search for high-markup consumers causes sellers to discriminate against blacks and women, the proposal to extend civil rights protection to the sale of all goods and services is based on the notion that racial and gender-based disparate treatment may well exist in a broader variety of markets. The problem of disparate treatment in new car sales has been perpetuated by the fact that the bargaining process conceals from black and female consumers the prices received by their white male counterparts. Without such information, blacks and women cannot directly learn of disparate treatment.<sup>148</sup> Black and female consumers may also be deprived of this crucial bench-mark in retail markets in which bargaining does not occur. Although uniform stated-pricing eliminates the potential for gender or race discrimination in pricing for most goods, such discrimination may still exist along such different dimensions as product or service quality.<sup>149</sup> Again, although blacks and women can gather information about how other retailers treat them, they face difficulty in learning how retailers treat white men.

The 1960s civil rights laws outlawed discrimination in those markets — most notably housing and employment — in which conspic-

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<sup>147</sup> An example of such a facially neutral practice would be dealers’ giving discounts to any customer, black or white, who lived in areas designated as low-maintenance-cost zones. To the extent that poorer neighborhoods tend to have worse roads that wear down cars, blacks would be disproportionately denied discounts.

Although the practices revealed in this study are anything but facially neutral, fair driving plaintiffs may have more difficulty establishing disparate treatment than disparate impact. In the title VII context, the Supreme Court has extended disparate impact analysis to subjective hiring decisions because plaintiffs face similar difficulties in establishing “subconscious stereotypes and prejudices.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (plurality opinion). The Court explained:

[E]ven if one assumed that [subjective] discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. . . . If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply.

*Id.* at 990–91.

<sup>148</sup> Disadvantaged consumers need bench-mark information in order to realize that they have been harmed. See Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631, 633–35 (1980–81). In the fair housing context, by contrast, black consumers can more directly infer disparate treatment when advertised apartments are suddenly unavailable.

<sup>149</sup> To illustrate, a tailor may find it difficult to advertise disparate suit prices for whites and blacks, but he or she may be able to produce a poorer product for black customers or to delay the suit’s delivery. Of course, because cars are mass-produced and homogenous, nonprice discrimination in the context of car sales would more likely manifest itself in terms of service.

uous, accessible bench-marks disclosed disparate treatment. But the absence of a manifest bench-mark does not imply the absence of discrimination; there is no reason to think that animus or statistical causes of discrimination manifest themselves only in markets in which interracial comparisons of treatment can be readily made.<sup>150</sup> Indeed, as various overt forms of discrimination have become illegal, more subtle and covert manifestations have often replaced them. This Article seeks fundamentally to expand the domain of the civil rights inquiry.<sup>151</sup>

2. *Reinvigorating Consumer Protection Laws.* — State and federal governments might also attempt to enforce more rigorously consumer protection laws to reduce the type of discrimination revealed in this Article. Indeed, recent Supreme Court decisions hostile to civil rights suits suggest the wisdom of pursuing a remedy under consumer protection laws. In *Patterson v. McLean Credit Union*,<sup>152</sup> for example, the Court, although refusing to apply section 1981 to what it considered “postformation conduct,”<sup>153</sup> suggested instead that the victims of discrimination turn to traditional contractual remedies.<sup>154</sup> To the extent that consumer protection laws codify common law remedies such as fraud and duress, they may provide a viable alternative to civil rights remedies. Thus, although consumer protection laws have not yet been used to attack racial disparate treatment as a “deceptive” misrepresentation, this history does not preclude more extensive governmental intervention in the future.

The Federal Trade Commission (FTC) Act<sup>155</sup> and the numerous baby FTC acts passed by the individual states<sup>156</sup> outlaw the use of “unfair or deceptive” trading practices.<sup>157</sup> Utilizing such acts to reach discrimination in bargaining for a new car purchase will require a

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<sup>150</sup> Reinier Kraakman has argued analogously that there is no reason to believe that discounts from fundamental value only occur in those few securities (open-ended mutual funds) for which a bench-mark comparison exists. See Kraakman, *Taking Discounts Seriously: The Implications of “Discounted” Share Prices as an Acquisition Motive*, 88 COLUM. L. REV. 891, 902 (1988).

<sup>151</sup> Another potential target might be race or gender discrimination in intercorporate transactions. Many corporate transactions are individually negotiated because of their idiosyncratic nature. A corporation arguably violates § 1981 if it bargains differently with the agents of other corporations based on the agents’ gender or race. Race or gender discrimination against the agents of a corporation may give those agents a cause of action against that corporate “person.” Even if such disparate treatment is actionable under current constructions of the civil rights laws, the idiosyncratic nature of corporate transactions makes it difficult for the victims of disparate treatment to infer discrimination.

<sup>152</sup> 109 S. Ct. 2363 (1989).

<sup>153</sup> *Id.* at 2374.

<sup>154</sup> See *id.* at 2376.

<sup>155</sup> 15 U.S.C. § 45(a)(1) (1988).

<sup>156</sup> See, e.g., MASS. GEN. L. ch. 93A (1988).

<sup>157</sup> See S. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECHTER, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 701-04 (1983).

reconceptualization of what we consider unfair or deceptive. Attacking sellers' disparate treatment in bargaining as being "deceptive" strikes at closely held beliefs about what is appropriate in the normal course of negotiations. The complexity of these beliefs is demonstrated by contrasting the effect of seller misrepresentation in the context of car sales with seller misrepresentation in housing sales. Fair housing cases often gain their moral authority from the egregious nature of seller misrepresentations such as "the apartment is no longer available."<sup>158</sup> In the retail car bargaining context, however, some forms of misrepresentation are broadly accepted. Few would believe, for example, that a seller would be held liable for misrepresenting "I can't reduce the price any further" — even if the seller did reduce the price for another consumer.<sup>159</sup> Seller misrepresentation is present in both the housing market and in the new car market. The distinction in our response turns, if at all, on which types of misrepresentation we deem acceptable.

Nevertheless, consumer protection laws do provide a framework for attacking disparate treatment in bargaining. Courts have construed consumer protection statutes to prohibit implied as well as express misrepresentation.<sup>160</sup> Courts could attack disparate treatment in negotiations for new cars by finding an implied representation that the dealer would not treat black consumers differently from white consumers. In other words, courts may preserve the "essence" of bargaining — by conceding that all consumers should expect inconsistent and unpredictable treatment at the hands of car dealers — but refuse to sanction "discrimination" by rejecting regimes in which the unpredictable behavior is in fact predicated on race or gender.<sup>161</sup>

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<sup>158</sup> See, e.g., Mariano, *Housing Bias Settlement Sets Record*, Wash. Post, Apr. 13, 1990, at B1, col. 2 (describing a settlement by a development company that offered white testers apartments but told black testers that "no apartments were available").

<sup>159</sup> The degree to which such statements are accepted as a normal aspect of car sales is reflected in cases involving salesperson "puffing." Puffing, or the making of excessive representations by salespeople during their attempts to sell cars, is often treated by courts as inactionable. See RESTATEMENT (SECOND) OF TORTS § 402B comment g (1965) (stating that "puffing," such as the statement that "an automobile is the best on the market for the price," is not a misrepresentation by the seller).

<sup>160</sup> See, e.g., *Kalwajtys v. FTC*, 237 F.2d 654, 656 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957); see also Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1276 (1988) (noting that the Postal Service and the FTC prohibit implicit misrepresentation).

<sup>161</sup> Legislative or judicial rules could go beyond such a default rule to establish immutable rules against disparate treatment in bargaining on the basis of gender or race. See Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88-89 (1989). Immutable rules may seem superior, but they are unnecessary because few sellers would contract around a "no-discrimination" default rule by expressly reserving the right to discriminate. If lawmakers instead choose a "discrimination-allowed" default rule for implicit representations, it is possible that some sellers would contract around this presumptive

Such a finding would be completely consistent with freedom of contract. Sellers could avoid making this implicit representation by expressly reserving the right to bargain differently with customers of different races. A judicial or legislative finding of an implicit representation of no racial disparate treatment would simply be "filling a gap" in the parties' contract. Finding an implied representation of no racial disparate treatment is at least as reasonable as finding an implied representation that sellers reserve the right to treat different races differently: few explicit contracts would ever opt for the latter provision.<sup>162</sup> Once lawmakers established a default rule of no disparate treatment, plaintiffs bringing implied misrepresentation cases would then face the same burden as traditional section 1981 plaintiffs: the burden of demonstrating disparate treatment.

The Supreme Court's decision in *Patterson v. McLean Credit Union*<sup>163</sup> strongly supports this analysis. In restricting civil rights protection under section 1981 to discrimination in the formation of a contract, the *Patterson* Court suggested that victims of discrimination should turn to traditional contractual remedies: racial harassment "amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover. That is because, in such a case . . . the plaintiff is free to enforce the terms of the contract in state court."<sup>164</sup> Although the contract at issue was silent as to whether post-formation discrimination was permissible, the court implied that nondiscrimination provisions could be read into state contract remedies. Following the *Patterson* rationale, finding an implicit representation not to treat consumers differently in bargaining because of their race or gender would offer a free market alternative to civil rights interventionism.

3. *Structural Reforms.* — The expansion of traditional civil rights and consumer protection laws is unlikely to completely eliminate disparate treatment in bargaining based on race or gender. Victims of disparate bargaining treatment will most likely be restricted to suing individual dealerships — instead of manufacturers or groups of dealerships.<sup>165</sup> Even if plaintiffs bring class actions and courts consistently

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rule in their advertisements by holding themselves out as equal-opportunity sellers. Indeed, this process may be at play in dealership advertisements that proclaim that a particular dealership will not mistreat female customers. See, e.g., Advertisement for Silver Lake Dodge & Leasing, BOSTON WOMAN, Winter 1990, at 7a ("Where you don't have to bring a man along to be treated like a customer."). At a minimum, sellers that opt for such explicit representations should be held liable under existing consumer protection laws for any disparate treatment that contradicts the advertisement's representation.

<sup>162</sup> Contractual theorists have traditionally argued that contractual gaps should be filled with provisions for which the parties would have bargained. See Ayres & Gertner, *supra* note 161, at 89–90.

<sup>163</sup> 109 S. Ct. 2363 (1989).

<sup>164</sup> *Id.* at 2376.

<sup>165</sup> Proof of discrimination would most likely be attributable to individual dealerships unless

grant testers standing to sue, the piecemeal approach of such suits, combined with the protracted nature of litigation, is unlikely to be sufficient to deter race- and gender-dependent behavior.

In light of these conditions, policymakers might consider structural reforms to improve the workings of the market. Structural changes should grow out of specific causal theories of disparate treatment in order quickly and effectively to erase such treatment. For example, if animus is inducing price discrimination, a law that outlawed price discrimination might induce some sellers to refuse to bargain. However, if the disparate treatment is caused by inferences about different consumer demand, then outlawing price discrimination should not generate such refusals.<sup>166</sup> Simply put, to formulate effective intervention, policymakers must understand why sellers discriminate.

The earlier analysis of competition suggested that high-markup customers (and the ensuing concentration of profits) are a central cause of dealer price discrimination. As a result, if policymakers can find a way to reduce significantly the profits on these sucker sales, the manner in which dealerships conduct the retail sale of *all* cars would become dramatically more competitive. Without the pathological effects of highly concentrated profits, dealers would no longer have an incentive to force consumers to expend real and psychic resources in bargaining.

Policymakers could use three different strategies to eliminate high-markup sales. Most directly, courts could strengthen current notions of substantive unconscionability to prohibit high-markup sales.<sup>167</sup> This strategy, however, is unlikely to occur: courts in the past have shown extreme reluctance to distinguish conscionable from unconscionable markups. Although courts voided contracts for unconscionable markups in two well-known cases, *Frostifresh Corp. v. Reynoso*<sup>168</sup> and *American Home Improvement v. MacIver*,<sup>169</sup> few courts since the early 1960s have reached similar holdings.<sup>170</sup> The

plaintiffs can find "horizontal" collusion among dealerships or "vertical" pressure from manufacturers to discriminate. Disparate treatment by employees would be attributable to the firm under traditional notions of agency. See, e.g., *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979).

<sup>166</sup> After all, airlines would not stop selling to businesspeople if price discrimination on the basis of inferences about willingness to pay were prohibited.

<sup>167</sup> Under the common law, unconscionable contracts are unenforceable. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); U.C.C. § 2-302 (1988). Academics have distinguished between procedural and substantive unconscionability. See, e.g., Epstein, *A Critical Reappraisal*, 18 J.L. & ECON. 293, 301 (1975).

<sup>168</sup> 52 Misc. 2d 26, 27, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (Sup. Ct. App. Term 1967).

<sup>169</sup> 105 N.H. 435, 439, 201 A.2d 886, 889 (1964).

<sup>170</sup> See, e.g., S. MACAULEY, J. KIDWELL, W. WHITFORD & M. GALANTER, *CONTRACTS: LAW IN ACTION* 613 (forthcoming 1991).

likelihood of courts taking the dramatic step of expanding this rarely used doctrine becomes even smaller in light of the special nature of bargaining for retail cars and society's solicitude toward such bargaining.<sup>171</sup>

As a second regulatory strategy, policymakers might restrict the amount of price dispersion permissible in the car market. Regulators might, for example, allow dealerships to engage in bargaining, but void sales with markups that are more than twenty percent above the average markup. Unlike direct unconscionability regulation, firms would retain the freedom to set the average markup for any one model as high as the market would bear but would be prohibited from selling similar cars at significantly different prices. At its most extreme, this form of regulation would prohibit bargaining and mandate that dealerships sell at advertised prices.<sup>172</sup> Restraining price dispersion is an attractive form of regulation because it might benefit all would-be car buyers. If the number of high-markup sales is reduced, sellers may find that bargaining (and the transaction costs that it imposes on all consumers) is no longer profitable. Once high-markup consumers are protected, sellers may no longer subject their low-markup consumers to costly and unpleasant bargaining.

Finally and least intrusively, regulators might reduce the number of sales with disparately high markups by mandating various types of disclosure from dealerships to consumers. Dealerships, for example, might be required to reveal the average price for which each make of car is sold.<sup>173</sup> Knowing that the dealership is attempting to charge \$3000 more than the average price would allow high-markup consumers to protect themselves. Alternatively, regulation might force dealerships to reveal the size of the markup on each individual transaction. Clay Miller and I have argued elsewhere that markup disclosure could improve both the equity and efficiency of retail car sales:<sup>174</sup> "markup revelation would truncate the bargaining process at each dealership. The possibility of hoodwinking uninformed buyers into purchasing at a high markup would diminish as the excessive profits would be directly revealed."<sup>175</sup>

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<sup>171</sup> See *supra* p. 857.

<sup>172</sup> Currently, similar regulations mandate that common carriers contract at filed rates. All common carriers subject to the Interstate Commerce Act, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.), are required to sell at the rates filed with the Interstate Commerce Commission. See Palmer & DeGiulio, *Terminal Operations and Multimodal Carriage*, 64 TUL. L. REV. 281, 312-13 (1989). The Robinson-Patman Anti-Discrimination Act, 15 U.S.C. § 13 (1988), similarly restrains price dispersion among common carriers.

<sup>173</sup> Information about other aspects of how car prices are distributed might also reduce price dispersion. Knowing, for example, the lowest price paid by a consumer (or the prices paid by the lowest 10% of consumers) would alert consumers to any overcharging.

<sup>174</sup> See Ayres & Miller, *supra* note 17, at 1063-64.

<sup>175</sup> *Id.* at 1048. Such a regulatory system would significantly reduce the costs of search for all consumers:

In sum, mandating disclosure and restraining price dispersion are plausible strategies to reduce the importance that dealerships place on high-markup sales. A central prediction of this Article is that at some point reducing the concentration of dealership profits would rationalize dealership competition by giving individual dealerships an incentive to opt for high-volume, stated-price selling strategies. The relatively unintrusive nature of disclosure and price-dispersion regulation makes them politically and administratively more viable.<sup>176</sup>

Before choosing a strategy to eliminate price dispersion, policy-makers should determine whether a single price equilibrium is “sustainable”: that is, whether competitive dealerships that charge a single price could break even and thus survive price dispersion. In markets with high fixed costs, if sellers were required (directly or indirectly through disclosure) to charge a single price, competition might drive that price to a level below sellers’ average cost. Such markets have “hollow cores” (because the “core” set of viable single-price equilibriums is empty or “hollow”).<sup>177</sup>

If the retail car market has a hollow core, government intervention to eliminate price dispersion would tend to drive dealerships from the market. In such markets, high-markup sales help dealers cover their fixed costs. In the airline industry, for example, the high-markup sales to business travelers may be necessary to meet industry fixed costs. Indeed, business travelers may benefit from the presence of lower-price tourist fares because “cheap” seats defray part of these fixed costs. If regulation eliminated price dispersion and mandated a single fare per route, business travelers might have to pay higher prices than under the current regime. Tourist travelers would stop buying, and the airline would then pass its fixed costs along to the smaller group of business travelers.

Regulator concerns should be allayed, however, because the retail car market does not resemble hollow core markets. Retail car dealerships do not experience significant high fixed costs (especially when compared to many other single price markets such as the market for electronic appliances and stereo equipment). Moreover, it is implausible that white males would (like tourist travelers) stop purchasing

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[B]uying a new car would be easier and more equitable in a world where retailers revealed their true costs. Consumers armed with information about the retailer’s markup would not need to search at as many dealerships — for the simple reason that consumers would have a much better idea when they were getting a good deal. Markup information can thus serve as a dramatic substitute for consumer search.

*Id.*

<sup>176</sup> Regulating markup disclosure, after all, would be nothing more than a government-mandated *Edmund’s* service that would more systematically give all consumers the information that many already discover.

<sup>177</sup> See Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 558 (1987).

in a single price equilibrium. Mandating a single fare for airlines might lead to an inflated price that only businesspeople could afford, but mandating a single price for automobiles would not leave blacks and females alone to shoulder even higher proportions of the retailers' fixed costs.<sup>178</sup>

Although this discussion of potential regulatory strategies is impressionistic, at the very least it suggests that regulators have a variety of choices beyond traditional civil rights and consumer protection remedies to attack the inequalities uncovered in this Article. Naturally, implementing one of these structural interventions would impose enforcement costs that must be weighed against the benefits of regulation. Dealers may attempt to circumvent such regulations in several ways.<sup>179</sup> Nevertheless, in evaluating the efficacy of structural changes, policymakers should pay particular attention to the concentration of profits and the prevalence of high-markup sales.

## V. CONCLUSION

The negotiation of contracts occupies a mysterious and somewhat mythical position in the law and in our society. In *The Wealth of Nations*, Adam Smith opined that people have a natural propensity to "truck and barter" over the sale of goods.<sup>180</sup> Law-and-economic scholars at times extend this insight, suggesting that people will tend to negotiate whenever resources are misallocated: if I want to sit on a crowded subway, I will negotiate with the other passengers for a seat.<sup>181</sup>

Common experience indicates, however, that many people in the United States are averse to bargaining.<sup>182</sup> The frustration that many

<sup>178</sup> Similar arguments might be resurrected at the manufacturing level. Although retailers do not incur large fixed costs in selling cars, manufacturers' fixed costs are substantial. Manufacturers may need to extract the profits from retail price dispersion in order to break even. Manufacturers may be able to extract these dealership high-markup profits through lump sum franchising fees, credit, or warrantee arrangements. These lump-sum revenues combined with the variable revenues that manufacturers earn on selling additional cars constitute what economists call a two-part tariff.

<sup>179</sup> Most notably, they might attempt to make up for the loss of concentrated high profits with lower trade-in prices or higher interest fees.

<sup>180</sup> A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 25 (R. Campbell & A. Skinner eds. 1981) (1st ed. 1776).

<sup>181</sup> Cognoscenti will recognize such bargaining as an application of the Coase theorem. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). However, even Coase recognized that transacting is not costless and that bargaining would not always occur. See Donohue, *Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells*, 99 YALE L.J. 549, 549 n.2 (1989); Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 612-13 (1989).

<sup>182</sup> The vast majority of goods cannot be bargained for: retailers compete for consumers through a "stated price" that they can change from day-to-day but over which they will not bargain.



consumers experience in bargaining for a car is largely attributable to the ludicrously inefficient manner in which cars are marketed. Although Smith and others attach almost mythic qualities to the process of bargaining, this Article has thrown the equity and efficiency of car negotiations into question. The process of retail car negotiations becomes even more problematic when traditionally disadvantaged members of our society effectively pay a bargaining tax whenever they purchase a new car.

Earlier this year, I asked a car dealer during an interview whether the bulk of his profits were concentrated in a few sales. He told me that his dealership made a substantial number of both "sucker" and "non-sucker" sales. He added: "My cousin, however, owns a dealership in a black neighborhood. He doesn't sell nearly as many [cars], but he hits an awful lot of home runs. You know, sometimes it seems like the people that can least afford it have to pay the most."<sup>183</sup> Although it is dangerous to extrapolate from the results of a single study, the amounts of discrimination uncovered, if representative of a larger phenomenon, are truly astounding. A \$500 overcharge per car means that blacks annually pay \$150 million more for new cars than they would if they were white males. There are substantial reasons to uncover and eliminate such discrimination.

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<sup>183</sup> Interview with a Chicago car dealer (May 1989).