

# UNHAPPY MEALS: SEX DISCRIMINATION IN TOY CHOICE AT MCDONALD'S

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This Essay reports on a commonplace form of sex discrimination that we unsuccessfully challenged in a lawsuit before the Connecticut Human Rights Commission. In a small-scale pilot study that we conducted 5 years ago (which was the basis of our initial complaint) and in a follow-up study conducted in 2013, we found that McDonald's franchises, instead of asking drive-through customers ordering a Happy Meal about their toy preference, asked the customer for the sex of the customer's child ("Is it for a boy or a girl?") and then gave different types of toys for each sex. Moreover, our 2013 visits found that franchises treat unaccompanied children differently because of their sex. In 92.9% of the visits, the stores, without asking the child about her or his toy preference, just gave the toy that they had designated for that sex. Moreover, 42.8% of stores refused to offer opposite-sex toys even after the child reapproached the counter and affirmatively asked for an alternative. In the most egregious instance, a girl, after twice asking for a "boy's toy," was denied, even though the store a moment later had the "boy's toy" in stock. These "fair counter" tests indicate that stores use discriminatory default, altering, and mandatory rules. They constitute strong *prima facie* evidence of disparate treatment on the basis of sex in the terms and conditions of contracting for a public accommodation. We also use our Happy Meal empiricism as a motivating example to explore the proper limits of civil rights law. While newspapers describing job listing as "male" or "female" have been found to be a *per se* civil rights violation, describing Happy Meal offerings as "boy's toys" or "girl's toys" may not, as a positive matter, offend courts' current notion of equality.

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## INTRODUCTION

In the Fall of 2008, one of us (Antonia Ayres-Brown, who was then 11 years of age), wrote to Jim Skinner, the Chief Executive Officer of McDonald's Corporation, and asked him "to change [his] policy regarding Happy Meals."<sup>1</sup> The letter stated, in part:

Every time I go to McDonalds [sic] and order a Happy Meal through [the] drive through, McDonald's employees ask me or my parents whether we want a girls [sic] toy or a boys [sic] toy. I believe that this could be potentially very hurtful to many kids, because it is a way of restricting kids to stereotypes of what kids of their gender should be interested in. It seems like kids would feel hurt if they felt like a specific toy was supposed to only be used by a different gender other than theirs. . . . Would it be legal for you to ask at a job interview whether someone wanted a man's job or a woman's job?

....

I have a request. Would you please ask your stores to stop asking the question "Would you like a boy's toy, or would you like a girl's toy?"<sup>2</sup>

On January 2, 2009, Anna received a response from a McDonald's Customer Satisfaction Representative suggesting that Anna's experience was counter to McDonald's express corporate policy: "when we offer a Happy Meal with two different themes, our employees have been specifically trained to ask customers which of the two toys offered that week they would like, and not whether they would like a 'girl' toy or a 'boy' toy."<sup>3</sup>

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1. Letter from Anna Ayres-Brown to Jim Skinner, Chief Executive Officer, McDonald's Corporation (undated) (on file with authors). McDonald's first introduced Happy Meals in 1979. Kayla Webley, *A Brief History of the Happy Meal*, TIME (Apr. 30, 2010), <http://content.time.com/time/nation/article/0,8599,1986073,00.html>, archived at <http://perma.cc/Z7YW-S9N7>; see also MCDONALD'S HAPPY MEALS TOYS A-Z, <http://web.archive.org/web/20101125160353/http://collectorsconnection.com/mcdon.htm>, archived at <http://perma.cc/TSY7-5YD3> (last visited Jan. 28, 2015) (listing past Happy Meal Toys).

2. Letter from Anna Ayres-Brown, *supra* note 1.

3. Letter from Donell M. Jaja, Customer Satisfaction Representative, McDonald's Corp., to Anna Ayres-Brown (Jan. 2, 2009) (on file with the authors).

We were unsatisfied with this response because the claim that employees were specifically trained not to ask customers “whether they would like a ‘girl’ toy or a ‘boy’ toy” was inconsistent with our experience as McDonald’s customers.<sup>4</sup> We undertook a small scale social science study involving more than a dozen visits to McDonald’s outlets in the greater New Haven area and ultimately sued McDonald’s before the Connecticut Human Rights Commission for discriminating on the basis of sex in its offering and sale of Happy Meals.<sup>5</sup>

The Human Rights Commission dismissed our allegations as “absurd” and “titillation or [a] sociological experiment.”<sup>6</sup> While we readily concede that there are many more pernicious forms of disparate treatment, our goal in this Essay is to show that McDonald’s practices then and now raise important questions about discrimination in contracting and about what the scope of our civil rights laws is and ought to be.

The Essay is divided into five Parts. Part I reports the results of our initial store visits in 2009. Part II describes the history of our unsuccessful attempt to challenge McDonald’s conduct as disparate treatment on the basis of sex. Part III reports the results of our 2013 store visits, including evidence of McDonald’s disparate treatment of unaccompanied young boys and girls. Part IV relates these issues to our nation’s history in ending gendered “help wanted” newspaper sections (e.g., labeled Help Wanted—Male and Help Wanted—Female). Finally, Part V considers the propriety of “sex-segregated” marketing in a variety of market settings.

## I. THE 2008 STORE VISITS

In 2008, we visited the drive-through windows of ten New Haven-area McDonald’s when the stores were offering either a Digi Sport™ electronic soccer game or a Hello Kitty™ electronic wrist watch as toys.<sup>7</sup> Through a speaker, Ian would order a Happy Meal with Chicken

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4. *Id.*; see also *infra* Part I.

5. See *infra* Parts I, II.

6. Ayres, CHRO No. 0930361, at 2 (Conn. Comm’n on Human Rights and Opportunities 2009) (final agency action)[hereinafter Ayres, CHRO No. 0930361].

7. These drive-through visits represent the fourth time one of the authors has engaged in “fair driving” empiricism (or what might be called, economists in cars testing for discrimination). See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817 (1991) (finding disparities in negotiated purchase price) [hereinafter *Fair Driving*]; Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified*, 95 CAL. L. REV. 669, 696–98 (2007) (finding disparities in automobile finance charges); Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1616 (2005) (finding disparities in taxicab tipping); see also FAST FOOD TOYS & MORE,

McNuggets and a Diet Coke. If the McDonald's employee taking the order asked a gendered question, Ian would respond by asking, "Why do you ask?" This question provoked revealing reactions. In one case, for example, an employee asked Ian, "Is it for a boy or for a girl?" and after Ian posed this response question, the McDonald's worker stated, "We have two different toys for two different genders."

Overall, we found at the drive-through that nine of the ten stores asked whether the meal was "for a boy or for a girl." One of the ten stores asked whether we wanted "a boy's toy or a girl's toy." None of the visited McDonald's followed the professed corporate policy of describing the toys themselves—as in asking, "Would you like a Digi Sport soccer game or a Hello Kitty watch?"<sup>8</sup>

At three of the McDonald's, Anna also executed a complementary "counter" test. While Ian was purchasing a Happy Meal at the drive-through eleven-year-old Anna would approach the counter unaccompanied and order a Happy Meal. At each of these McDonald's, Ian was asked at the drive-through whether the meal was "for a boy or a girl," but Anna, while placing the same order, was not asked for a toy preference and given the Hello Kitty watch.

To gather more evidence, Ian also posted an item on the New York Times *Freakonomics* blog, requesting information from readers on their experiences ordering Happy Meal toys from McDonald's.<sup>9</sup> According to seventy nine reader responses, approximately one-fifth of the time McDonald's employees did not ask a toy-related question.<sup>10</sup> But when employees did ask a toy-related question:

- 47.7% Asked "Is It for a Boy or Girl?"
- 31.8% Asked "Do You Want A Boy's Toy or a Girl's Toy?"
- 15.9% Described the toys in non-gender terms.<sup>11</sup>

The blog responses were broadly consistent with our personal experience in that only a small proportion of the respondents reported being asked a non-gendered question, and in that the child's sex was asked more often than whether the child wanted a boy's or girl's toy.<sup>12</sup>

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[www.fastfoodtoys.net/mcdonalds%20hello%20kitty%20watches%202009%20digi%20sports.htm](http://www.fastfoodtoys.net/mcdonalds%20hello%20kitty%20watches%202009%20digi%20sports.htm), archived at <http://perma.cc/Q4PJ-3REA> (last visited Jan. 28, 2015).

8. See FAST FOOD TOYS & MORE, *supra* note 7.

9. Ian Ayres, *Our Daily Bleg: Happy Meal Toys*, FREAKONOMICS BLOG (Feb. 11, 2009, 10:07 AM), <http://www.freakonomics.com/2009/02/11/our-daily-bleg-happy-meal-toys/>, archived at <http://perma.cc/9XSF-2TZE>.

10. Ian Ayres, *Print, Persuade and Post*, FREAKONOMICS BLOG (Apr. 22, 2014, 11:32 AM) <http://freakonomics.com/2014/04/22/print-persuade-and-post/>, archived at <http://perma.cc/RN3L-JHPA> [hereinafter *Print, Persuade and Post*].

11. *Id.*

12. *Id.*

## II. LITIGATION

### A. Three Alleged Violations

In 2009 we filed a complaint before the Connecticut Commission on Human Rights and Opportunities, claiming that McDonald's restaurants violated our civil rights by engaging in sex discrimination in public accommodations in violation of Connecticut law.<sup>13</sup> While there is no federal statute prohibiting sex discrimination in public accommodations, Connecticut, like many other states, prohibits such discrimination.<sup>14</sup> The Connecticut Human Rights statute and regulations promulgated pursuant to the statute make it illegal to be denied "the full and equal enjoyment of goods, services or facilities offered to the general public because of . . . sex . . . ."<sup>15</sup> In our complaint, we claimed that we had encountered three types of Happy Meal discrimination.<sup>16</sup> We claimed that McDonald's restaurants were

(1) discriminating in counter service by giving different toys (without asking customer preference) based solely on the sex of the customer or the customer's child; (2) discriminating in drive-thru service by asking whether the toy is for a boy or girl, and giving a different toy based on the answer, and (3) discriminating in drive-thru service by asking whether the customer prefers a boy's toy or a girl's toy.<sup>17</sup>

The first claim merely concerns a default disparate treatment by the store if the children customers can have the alternative toy by just asking.<sup>18</sup> In fact, Anna at times found that "just asking" was insufficient. In one instance, after Anna had expressly asked a counter employee for a "boy toy," another employee nonetheless gave Anna the

13. Complaint, Ayres CHRO No. 0930361 (Conn. Comm'n on Human Rights and Opportunities 2009) (on file with authors) [hereinafter Ayres-Brown Complaint].

14. As of 2000, there were 40 states that prohibited at least some forms of sexual discrimination in public accommodations. Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate Over Single-Sex Health Clubs*, 52 ME. L. REV. 97, 118-19 (2000); see also Paula J. Finlay, *Prying Open the Clubhouse Door: Defining the "Distinctly Private" Club After New York State Club Association v. City of New York*, 68 WASH. U.L.Q. 371, 382-83 (1990).

15. Public Accommodations/Service, CONNECTICUT COMM'N ON HUMAN RIGHTS AND OPPORTUNITIES, <http://www.ct.gov/chro/cwp/view.asp?a=2524&Q=315888&chroPNavCtr=%7C>, archived at [perma.cc/SY5N-LAQ7](http://perma.cc/SY5N-LAQ7) (last visited Jan. 28, 2015); accord CONN. GEN. STAT. ANN. § 46a-64 (West 2012).

16. Ayres-Brown Complaint, *supra* note 13, at 3.

17. *Id.*

18. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989) (explaining that the 'would have wanted' approach to default selection is incomplete)[hereinafter *Filling Gaps*].

Hello Kitty watch, saying to Anna, "I almost made a mistake and gave you a boy's toy." If Anna had reiterated that she wanted the other toy, she probably could have succeeded in securing her preferred toy. But the complaint also raised the factual question of whether McDonald's employees also adopted discriminatory "altering rules."<sup>19</sup> An altering rule specifies the necessary and sufficient conditions for contracting around a default.<sup>20</sup> An altering rule can be discriminatory if these conditions make it harder for girls than for boys to contract around a default choice.<sup>21</sup>

The second and third claims relating to McDonald's drive-through policies raise more vexing problems of characterization. Unlike the discriminatory counter default, the drive-through toy policy is a kind of affirmative-choice rule.<sup>22</sup> By default, McDonald's resists including any toy unless the customer affirmatively responds to a toy-choice question.<sup>23</sup> Unlike the counter claim, the drive-through claims are not about a discriminatory default.<sup>24</sup> Instead, the drive-through claims force us to question whether aspects of McDonald's drive-through menus can give rise to civil rights concerns.<sup>25</sup> Contract theory describes a menu as the disclosure of simultaneous offers.<sup>26</sup> The three different kinds of toy questions are oral menus that they represent different degrees of specificity in disclosing the toy alternatives:

#### FIGURE 1: SPECIFICITY SPECTRUM IN TOY CHOICE MENUS

"boy or girl?"      "boy's toy or girl's toy?"      "Digi Sport or Hello Kitty?"

Low

High

19. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2032 (2012) [hereinafter *Regulating Opt-Out*].

20. *Id.* at 2036.

21. We return to these issues in Part III where we more directly test for the existence of discriminatory default and altering rules. See *infra* Part III.

22. *Regulating Opt-Out*, *supra* note 19, at 2099 (explaining affirmative choice rules).

23. Ian has tested this by responding to drive-through toy questions with sentences such as "I'm not comfortable answering that kind of question." Drive-through employees tend to insist on customers making some kind of an affirmative choice before they complete an order. The "affirmative-choice" default is a kind of penalty default that induces the production of information. *Filling Gaps*, *supra* note 18, at, 97.

24. *Regulating Opt-Out*, *supra* note 19, at 2045 (distinguishing between discriminatory default and discriminating altering rules).

25. *Id.* at 2111.

26. See Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3, 3 (2006) [hereinafter *Menus Matter*]; see also *Regulating Opt-Out*, *supra* note 19, at 2049–50.

### 1. Degree of Specificity in Describing Default Alternatives

The question “Is it for a boy or for a girl?” is the least specific in describing the substantive alternatives. The question explicitly calls for a specific piece of information, but the question on its face does not indicate that the store’s toy selection is contingent upon the answer. The “Do you want a boy’s or girl’s toy?” question is more specific because it makes clear that a toy selection is contingent on the answer. The “Do you want a Digi Sport soccer game or Hello Kitty wrist watch?” question is the most specific of the three because it most clearly describes the menu alternatives being offered. The level of specificity in describing the toy alternatives also impacts the level of consumer control.<sup>27</sup> The high-specificity question gives the consumer the most control, while the “girl’s toy” question cedes to McDonald’s the control over which toy is for, or more preferred for, children of a particular gender.<sup>28</sup> The “boy or girl” question is the least suggestive of consumer control, as it implies that McDonald’s makes the choice of toy contingent on the child’s gender.<sup>29</sup>

The toy questions also differ in suggesting different means for consumers exercising their toy choice. Given that altering rules function as the means to select default alternatives, the different menus of toy questions implicitly suggest different altering rules.<sup>30</sup> When a consumer is asked whether she wants the soccer game or wrist watch, the natural means of indicating choice is to give a responsive answer mirroring the words of the question.<sup>31</sup> Similarly, when a drive-through employee asks whether the Happy Meal is “for a boy or for a girl,” the employee is suggesting (at least to drivers who understand that Happy Meals come, at times, with gendered toys) the verbal means that patrons can use to opt for an alternative to the no toy default.<sup>32</sup> This toy question also suggests that “for a boy” and “for a girl” are the expected responses.

Does the “for a boy or for a girl” question represent actionable discrimination?<sup>33</sup> On the one hand, the question on its face is not

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27. Cf. *Menus Matter*, *supra* note 26, at 10 (explaining that the layout of menu choices affect consumer choice).

28. *See id.*

29. *See id.*

30. *See Regulating Opt-Out*, *supra* note 19, at 2036; *see also* Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. EMPIRICAL LEGAL STUD. 279, 284 (2009) (analyzing altering menus in the context of corporate bylaws).

31. Willem J. M. Levelt & Stephanie Kelter, *Surface Form and Memory in Question Answering*, 14 COGNITIVE PSYCHOLOGY 78, 78 (1982).

32. The absence of a toy is the default rule such that a customer must answer the question in order to receive a toy, the alternative. *See Regulating Opt-Out*, *supra* note 19, at 2032 (explaining the term ‘altering rules’).

33. *See id.* at 2111–13 (explaining the elements required for actionable discrimination).

about toy choice, but is simply asking for the sex of the consumer. If some customers, perhaps unaware of the toy choice convention, provide naively truthful answers, then McDonald's will treat these naïve truth-tellers differently because of the sex of their children. The framing of the oral menu exacerbates the risk of customer error because customers are not adequately informed of what turns on their response. An apartment rental agent who sought out online applicants' race and then treated reported races differently would straightforwardly violate the Fair Housing Act, even if the applicants were free to report any race initially.<sup>34</sup>

Even more sophisticated McDonald's customers, who understand that their answer will determine the included toy, may bear extra costs because of the form of the altering rule.<sup>35</sup> The suggestion is that the parent of a boy must say that the Happy Meal is "for a girl" in order to receive the Hello Kitty toy. Parents who have qualms about misrepresenting the truth or are disinclined to assume the additional burden of saying "It is for a boy, but I'd like the girl's toy" will be more likely to accept the gender-specific toy choice. The altering rule is thus likely to disparately impact customers who want to choose gender non-compliant toys.<sup>36</sup>

The third claim challenging the "boy's toy or girl's toy" question raises perhaps the most challenging civil rights question. Here the menu and suggested altering rules expressly concern toy choice, and on their face, do not make toy selection contingent on the sex of the consumer. Neither the menu nor the altering rules constitute traditional disparate treatment if customers understand that a girl can order a boy's toy (and vice versa).<sup>37</sup> Nonetheless, the gendered framing of the question raises serious civil rights concerns.<sup>38</sup> As before, it is possible that such altering rules create disparate impacts on account of sex.<sup>39</sup> This could happen, for example, if girls were disproportionately likely to order non-conforming toys when asked to use a gendered altering rule (relative to altering rules that describe the toy choice in non-gendered terms).<sup>40</sup>

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34. Fair Housing Act, 42 U.S.C.A. § 3604(b) (West 2014).

35. See *Regulating Opt-Out*, *supra* note 19, at 2032 (explaining altering rules); see also *infra* Part III.

36. See *Regulating Opt-Out*, *supra* note 19, at 2032; see also *infra* Part III.

37. There may be customers who might think that it would be lying to request a boy's toy if the consumer is a girl. For example, at some restaurants it would be lying to say one wanted the child-size portion when the consumer is an adult because the child-size portions are limited to consumers under a certain age.

38. See *Regulating Opt-Out*, *supra* note 19, at 2111–12 (discussing civil rights concerns regarding gender).

39. See *id.* at 2032; see also *infra* Part III.

40. See *Regulating Opt-Out*, *supra* note 19, at 2032; see also *infra* Part III.



But even without a disparate impact showing, one can imagine challenging the menu and altering rules because they induce a kind of cognitive disparate treatment in the customers themselves.<sup>41</sup> Altering rules force customers to think in terms of sexual categories because individuals must comply with the suggested altering rule by characterizing their preference as wanting a “boy’s toy” or “girl’s toy.”<sup>42</sup> In Anna’s initial letter to the McDonald’s CEO, she asked, “Would it be legal for you to ask at a job interview whether someone wanted a man’s job or a woman’s job?”<sup>43</sup> Most law professors and law students might think that such a question would violate Title VII.<sup>44</sup> But it is harder to pin down exactly why. Imagine a hypothetical where Sears is accepting applications for salesmen and secretaries. Applicants of either sex are free to apply for either type of job and would have equal merit-based opportunity to receive either job. But imagine that the application sought an applicant’s preference by asking whether the applicant was interested in a “man’s job” or a “woman’s job.” The employer’s form does not itself engage in disparate sexual treatment because the same form (that is, menu) is given to all applicants and because the pool of applicants interested in a particular job is hired independent of sex.<sup>45</sup> The defendant would argue, as in the McDonald’s case, that any applicant regardless of his or her sex could apply (and be fairly considered) for either type of job.<sup>46</sup>

A strong tradition in the common law is to view the offeror as “master of [her] offer,” meaning that the offeror is free to place any pre-conditions for acceptance that she wishes.<sup>47</sup> Thus, an offeror is free to specify that acceptance can only be accomplished by skywriting in fifty-foot letters, “I accept.”<sup>48</sup> But Anna’s question suggests that Title VII may limit the altering rule conditions that offerors might place on their offers.<sup>49</sup> An offer that can only be accepted by saying

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41. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161, 1247 (1995) (discussing the cognitive element of discrimination that leads to disparate treatment).

42. See *Regulating Opt-Out* *supra* note 19, at 2032 (explaining altering rules); see also *infra* Part III.

43. Letter from Anna Ayres-Brown, *supra* note 1.

44. See *infra* note 137; see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (West 2014).

45. See *infra* Part V.

46. See *infra* note 137 (discussing McDonald’s possible arguments).

47. RESTATEMENT (SECOND) OF CONTRACTS § 30 (1981).

48. *Id.*

49. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (West 2014).

"Women do not deserve the right to vote" is troubling because it forces accepting offerees to think and speak in gendered terms as a condition of contracting.<sup>50</sup>

The man's job/woman's job application form might easily be challenged under disparate impact law, if plaintiffs could show that the gendered altering rules produce unjustified disparate impacts in job choice relative to more traditional job descriptions.<sup>51</sup> But the more interesting question is whether plaintiffs could challenge the form (menu and associated altering rules) under a disparate treatment theory.<sup>52</sup> In fact, we will see below in Part III that several human rights commissions and courts—including the Connecticut Supreme Court—have done just that with regard to an analogous form of advertisements.<sup>53</sup> These tribunals found newspaper advertisements that characterized job openings as "Help Wanted Male" and "Help Wanted Female" as *per se* civil rights violations.<sup>54</sup>

### *B. McDonald's Response*

The Foxon Restaurant named in the complaint responded by answering and sending the Commission a "Position Statement"<sup>55</sup> that presented three legal arguments why the complaint should be dismissed. First, the respondent characterized the complaint as "frivolous, [and] an improper and irresponsible use of this agency's resources."<sup>56</sup> Its argument focused on Ian's academic background:

This Complaint appears to be nothing more than an exercise in intellectual curiosity by a Yale Law School professor . . . . As part of his academic career, Mr. Ayers [sic] publishes articles on the social experiments he conducts. . . . [I]t is clear that Mr. Ayers' new social experiment involves free toys. Mr. Ayers' experiment is, however, an improper and irresponsible use of this Agency's resources. Had Complainant asked for a Digisports toy when she

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50. See RESTATEMENT *supra* note 47 (explaining that the offeror can specify the manner of acceptance).

51. See *infra* Part IV.

52. *Fair Driving*, *supra* note 7, at 820 (explaining disparate treatment).

53. See *infra* Part III.

54. *Evening Sentinel v. Nat'l Org. for Women*, 357 A.2d 498, 503-504 (1975); see also *infra* Part III.

55. Respondent's Position Statement, Ayres, CHRO No. 0930361 (Conn. Comm'n on Human Rights and Opportunities 2009). In turn, Anna Ayres-Brown filed a document entitled, "Complainant's Comments on Respondent R&K Spero McDonald's Answer and Position Statement." Complainant's Comments on Respondent R&K Spero McDonald's Answer and Position Statement, Ayres, CHRO No. 0930361, (Conn. Comm'n on Human Rights and Opportunities 2009)[hereinafter Complainant's Comments].

56. Position Statement, *supra* note 55, at 4.

allegedly ordered the Happy Meal, Respondent would have given her a Digisports toy. Or, had Mr. Ayers or Complainant walked into the Foxon Restaurant and asked for a Digisports toy after allegedly receiving a Hello Kitty toy, Respondent would have given them a Digisports toy. . . . Mr. Ayers conveniently stopped his experiment short to concoct this case. Instead of taking two minutes to ask for a different toy, Mr. Ayers now has this Agency spend countless hours sorting through a frivolous Complaint to indulge his intellectual curiosity.<sup>57</sup>

Second, respondent claimed that “complainant was never denied any good,” and the complaint is, “therefore, legally deficient.”<sup>58</sup> This argument turned on a close reading of Connecticut’s public accommodations statute:

Even accepting Complainant’s allegations as true, which Respondent does not, the Complaint itself demonstrates that Complainant was never denied any good. The claims are, therefore, legally deficient. Connecticut’s public accommodations statute reads:

(a) It shall be a discriminatory practice in violation of this section:

(1) To *deny* any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of . . . sex . . .

See Conn. Gen. Stat. § 46a-64(a)(1) . . . Respondent could not have denied Complainant a Digisports toy because Complainant admits that she never requested a Digisports toy. Had Complainant initially asked Respondent for a Digisports toy or asked to exchange the Hello Kitty toy for a Digisports toy, Respondent would have happily given her the toy she requested.<sup>59</sup>

Finally, Respondent claimed that the alleged actions of its employees would not constitute a “denial of goods based on gender.”<sup>60</sup> In discussing this claim, the Respondent went furthest in elaborating its theory of the scope of discrimination in public accommodations:

Complainant asks this Agency to interpret Connecticut’s public accommodations statute as prohibiting businesses from making

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57. *Id.* Respondent failed to mention that Anna also has published social science experiments. See Ian Ayres, Antonia Ayres-Brown & Henry Ayres-Brown, *Seeing Significance: Is the 95% Probability Range Easier to Perceive?*, 20 CHANCE 11, 11 (2007).

58. Respondent’s Position Statement, *supra* note 55, at 5.

59. *Id.* at 5–6 (emphasis omitted) (emphasis added).

60. *Id.* at 6 (emphasis omitted).

any assumption about a customer's potential preferences based on gender.

Not only is this interpretation divorced from the plain reading of the statute (which only prohibits the denial of goods based on gender), but it makes no sense practically. Under Complainant's proposed reading, department stores would run afoul of the law by keeping dresses and skirts only in women's sections or carrying blouses only in women's sizes.

Cosmetic companies could be sued if their employees failed to offer a splash of perfume (marketed specifically to women) to men passing by in the mall. Clothing retailers could no longer organize their websites to differentiate between men's and women's apparel. In each of these scenarios, a business makes an assumption about which products its customers may prefer based on his or her gender. Yet, none of these assumptions prevents a customer from asking for or receiving any good based on their gender. Just as department stores do not prohibit young women from purchasing jeans kept in the men's clothing section, the Complaint never alleges that Respondent prevented Complainant from asking for or receiving a Digisports toy. . . .

For operational efficiency, among other reasons, businesses make assumptions about gender preferences based on consumer behavior and purchasing trends. For example, men typically do not purchase dresses. Therefore, separating women's dresses from men's slacks saves clothing stores from expending resources to help female customers locate dresses among racks full of clothing marketed to men. Mr. Ayers acknowledges this much in his [blog post]: "McDonald's has to balance giving detailed information about toy promotions that change every few weeks against the difficulties of training and wanting to keep the line moving." Making an assumption about a customer's potential preferences (by, for example, designating one toy a "boy" toy or a "girl" toy) based on general consumer behavior and purchasing trends does not violate Connecticut's public accommodations statute. The statute prevents businesses from denying a customer a good based on his or her gender. Complainant makes no such allegation and, accordingly, the Complaint must be dismissed.<sup>61</sup>

A comment Anna filed in response to McDonald's "Position Statement" argued that the restaurant had interpreted the Connecticut Public Accommodation statute too narrowly:

Connecticut law protects me not only from being denied a good on the basis of sex (as [Respondent] argues), the statute also protects

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61. *Id.* at 6–7 (emphasis omitted).

me from being denied “full and equal accommodations . . . because of sex.” When [the store] gave me a “girl” toy at the counter on February 6 solely because of my sex, it denied me full and equal accommodations because of sex. And when [the store] forced my father to state my toy preference in terms of sex (“for a boy”) in order to receive the Digisports toy, it again denied me full and equal accommodations because of sex. It is not necessary that [the store] denied me a good or service altogether in order to have violated the public accommodation statute. By needlessly highlighting gender when it ought to have nothing to do with Happy Meal toys, [the store] conditioned a public accommodation on sex, and this violates the Connecticut statute.<sup>62</sup>

Our comment at best indirectly responded to the store’s discussion of department stores, cosmetic companies and clothing retailers, by asking the Commission to imagine an alternative hypothetical:

If the Foxon restaurant classified Diet Coke as a “white person’s beverage” and Iced Tea as a “black person’s beverage” based on marketing and sales data, this practice would be offensive and would deny customers full and equal accommodation because of race—even if [the restaurant] allowed white customers to request a “black person’s beverage” in order to get an iced tea, or African-American customers to request a “white person’s beverage” in order to get a diet coke. According to [the restaurant’s] misreading of the statute, however, this race-based practice would not violate the statute because African-Americans would be free to obtain diet cokes—they would just have to resist [the restaurant’s] race-based classification and ask for a diet coke by name or use [the restaurant’s] race-based terms and ask for a “white person’s beverage.” [The restaurant’s] would not be *denying* African-American customers the ability to purchase diet cokes, but they would be imposing race-based classifications on their customers, and this would deny their customers full and equal accommodation. When [the restaurant] describes Happy Meal toys in terms of gender (“boy toy” or “girl toy”) rather than the actual character of the toy (“Digisports” or “Hello Kitty”), [the restaurant] needlessly imposes a sex-based classification on its customers, just as it would impose a race-based burden if it characterized soft drinks in terms of race. Either practice violates the Connecticut public accommodation statute.<sup>63</sup>

With the issues thus joined, the matter went next to the Commission for a decision to investigate or dismiss.<sup>64</sup>

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62. Complainant’s Comments, *supra* note 55, at 3.

63. Complainant’s Comments, *supra* note 55, at 3; *see also* CONN. GEN. STAT. § 46a-64 (2012).

64. Ayres, CHRO No. 0930361, *supra* note 6, at 1.

### C. *The Commission's Decision*

On September 15, 2009, the Connecticut Commission on Human Rights and Opportunities summarily dismissed our complaint without an investigation.<sup>65</sup> The Commission's unpublished decision letter accepted several of the Respondent's factual claims and legal theories.<sup>66</sup> It was also, in more than one sense, dismissive:

It is not the business of the Commission to engage its resources for the purposes of titillation [sic] or sociological experiment.

Complainants' assertion that respondent violated complainants' civil rights or denied complainants public accommodation or services on the basis of sex is absurd. Respondent did not deny complainants a Happy Meal toy. Respondent offers its customers two Happy Meal toys. Respondent did not require complainant to accept the Happy Meal it offered complainant. All complainants had to do was exchange the Happy Meal toy that respondent gave to Anna Ayres-Brown for the one Anna wanted. . . .

. . . .

. . . Respondent also acknowledges in its response to the Complainants' Commission complaint that to the extent any respondent employee asked complainants whether the Happy Meal toy was for a boy or for a girl, it was contrary to respondent's policies and training. To require any more of respondent or the Commission under the facts complained of is not reasonable or necessary.<sup>67</sup>

Although the statute gave us leave to appeal the decision and receive *de novo* review from a state trial court,<sup>68</sup> we were somewhat chastened by our decisive defeat before the Commission, and we chose to pursue other endeavors during the intervening years, including junior high.

### III. THE 2013 STORE VISITS

With the passage of time, our defeat became less stinging. In the late summer of 2013, it occurred to us that by visiting some more stores, we could improve the quality of our empiricism in two important ways. First, with the help of four family friends, ages seven to eleven, we visited fifteen McDonald's restaurants and conducted more traditional tests of disparate treatment—that is, those more akin to

65. *Id.*

66. *Id.* at 2–3.

67. *Id.*

68. See CONN. GEN. STAT. §§ 46a-83(f), 46a-104a (2014); see also *Mehdi v. Comm'n on Human Rights & Opportunities*, 74 A.3d 493, 495 (Conn. App. Ct., 2013) ("The court conducted a *de novo* review of the defendant's determination to dismiss the plaintiff's complaint.").

“fair housing” or “fair driving” tests of discrimination.<sup>69</sup> Before entering the store we would flip a coin to determine whether a boy or girl would enter first. This child would go to the counter and order a Happy Meal to go. The child would take note of whether the employee asked them a question concerning what type of toy he or she would like, and if so, how the question was phrased. A second child of the opposite sex would enter the store either two minutes later or after two to three customers entered the store.<sup>70</sup> The second child would repeat the same procedure. This would allow a direct test of default discrimination.<sup>71</sup> Instead of testing whether McDonald’s treated a father at a drive-through differently than a daughter at the counter, we tested whether McDonald’s restaurants treated similarly situated customers differently because of their sex. More specifically, we could test whether, without asking, stores simply gave boys and girls different types of toys or asked them different types of questions.

Second, we improved the quality of our empiricism to respond to one of McDonald’s earlier criticisms.<sup>72</sup> The Respondent’s 2008 Position Statement criticized our complaint allegations for failing to proactively ask for an alternative toy.<sup>73</sup> As noted earlier, in describing our earlier visits, McDonald’s argued that “Mr. Ayers [sic] conveniently stopped his experiment short to concoct this case. Instead of taking two minutes to ask for a different toy, Mr. Ayers now has this Agency spend countless hours sorting through a frivolous Complaint to indulge his intellectual curiosity.”<sup>74</sup>

Our 2013 visits directly respond to this concern by having the children more affirmatively attempt to secure the toy which McDonald’s designated for the opposite gender. Thus, for example, if one of our boys was asked for his toy preference, he would respond by asking for the “girl’s toy.” More importantly, if the second child to enter the store failed to initially receive his or her preferred opposite-gender toy, he or she would return to the counter and ask, “Do you have any other types of toys?” and attempt to obtain the toy for the opposite gender. By proactively “taking two minutes to ask for a different toy,”<sup>75</sup> our

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69. *Fair Driving*, *supra* note 7, at 845, 859–60; see also Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1128 (1995).

70. The purpose of the delay was to reduce the chance that employees would be alerted to the test. An adult known to the children would also enter the store or keep visual eye contact on the children during the store visit, but the children were trained not to acknowledge the presence of each other or of the adult.

71. *Fair Driving*, *supra* note 7, at 820, 859–60.

72. Position Statement, *supra* note 55, at 6.

73. *Id.*

74. *Id.* at 4.

75. *Id.*

children could directly test whether McDonald's altering rules were discriminatory—that is, whether McDonald's artificially impeded the ability of children to receive the kind of toy that McDonalds' has designated for the opposite sex.<sup>76</sup>

We visited stores during a time when two branded groups of toys were being offered: "Power Ranger" (Megaforce) toys that were frequently designated by drive-through employees as "for boys" and Justice clothing store toys that were frequently designated by drive-through employees as "for girls."<sup>77</sup> Fourteen of the fifteen stores we visited had both types of toys in stock. The Power Ranger toys included sharks, tigers and snakes that could be transformed, if combined together, into "Mechazords."<sup>78</sup> The Justice toys included friend bracelets, mini-locker clips, and fashion designer notebooks.<sup>79</sup>

Here is what we found in 2013:

### 1. Fair Counter Testing

In our thirty counter tests, only twice (once for a boy and once for a girl) were the children asked whether they wanted a "boy's toy" or a "girl's toy." For the other twenty eight purchases, the children were not asked any question about toy preference. The Foxon store was one of the stores that failed to ask both the boy and the girl about their toy preferences. This omission of a toy preference question contradicts the 2009 claim that "[the manager] trains Foxon Restaurant employees to ask customers whether they want a 'boy' toy or a 'girl' toy, regardless of whether the customer orders the Happy Meal at the drive-thru or inside at the restaurant counter."<sup>80</sup>

Excluding the one store that was out of Power Ranger toys, we found pervasive evidence of default discrimination. 92.9% of the time (twenty-six out of twenty-eight purchases) where the store had in stock both toy types, the store, without asking, simply gave the child the type of toy that McDonald's had designated for that child's gender: girls, without being asked, were given a Justice toy, and boys, without being asked, were given a Power Ranger toy. Default discrimination by itself might violate the "full and equal accommodation" statutory

76. See CONN. GEN. STAT. § 46a-64; *Fair Driving*, *supra* note 7, at 817, 859–60.

77. Antonia Ayres-Brown, *McDonald's Gave Me the "Girl's Toy" With My Happy Meal. So I Went to the CEO*. SLATE MAG. (Apr. 21, 2014, 8:37 AM) [hereinafter Ayres-Brown, *Went to the CEO*] [http://www.slate.com/blogs/xx\\_factor/2014/04/21/mcdonald\\_s\\_and\\_me\\_my\\_fight\\_to\\_end\\_gendered\\_happy\\_meal\\_toys.html](http://www.slate.com/blogs/xx_factor/2014/04/21/mcdonald_s_and_me_my_fight_to_end_gendered_happy_meal_toys.html), archived at <http://perma.cc/27S3-UT2U>.

78. *Power Rangers & Justice*, HAPPY MEAL TOYS COLLECTION FAN SITE, <http://hm.toysaffair.com/2013/08/happy-meal-toys-power-rangers-megaforce-justice.html>, archived at <http://perma.cc/ZEU8-VTVP> (last visited Jan. 28, 2015).

79. *Id.*

80. Position Statement, *supra* note 55, at 5.



mandate<sup>81</sup>: for children who prefer a Power Ranger toy, girls would be forced to exert more effort than boys to acquire one because of their sex. And among children who are similarly situated in preferring a Justice toy, boys would have to exert more effort than girls because of their sex.

But still we imagine that McDonald's would argue that the harm of this disparate default treatment is *de minimis* because any child could, by simply asking, receive the toy that McDonald's had designated for the opposite gender.<sup>82</sup> This "just ask" defense is buttressed by the presence of visual displays with examples of that month's Power Ranger and Justice toys (without gender designations) in thirteen of the fifteen visited stores. In these stores, customers had some notice that another type of toy was being offered. But in the other two stores—at which no child was asked for his or her toy preference and there was no display—it is more unreasonable to require the customer to proactively ask for an unoffered toy because the customer has less reason to know that an alternate toy is available.

To respond to McDonald's argument that our 2008 visits "conveniently stopped [the] experiment short to concoct this case,"<sup>83</sup> we had one child at each store approach the counter again if the child found the store initially gave the toy McDonald's had designated for that child's toy—so our boys would reapproach the counter if they were initially given a Power Ranger toy and our girls would reapproach the counter if they were initially given a Justice toy. As noted above, this default discrimination occurred in the vast majority of visits.<sup>84</sup>

In nine of these counter reapproaches (by five girls and four boys), the child held out the toy (still wrapped in plastic) he or she had initially been given and asked, "Do you have any other toys?" At two of these stores, an employee declined to offer any other toys in response to requests from two boys.

At two other stores, an employee offered toys that included opposite-sex toys in response to requests from one boy and one girl. At the remaining five stores, an employee offered additional toys, but he only included toys that McDonald's had designated for the sex of the requesting child in response to requests from one boy and four girls.

At these five stores, the children asked a follow-up question. Three of the children (two girls and one boy) reiterated the "do you have any other toys?" question. Employees refused to offer any other toys to these children. Two of the girls followed up their initial

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81. See CONN. GEN. STAT. § 46a-64 (2012).

82. See, e.g., *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004) (describing *de minimis* treatment).

83. Position Statement, *supra* note 55, at 4.

84. One store did not have Power Ranger toys.

question by asking if the store had a “boy’s toy” and were offered opposite-sex toys.

In five separate visits (by five girls), the child in the first re-approach to the counter asked if the store had any “boy’s toys” rather than “do you have any other toys?” In four of these cases, a McDonald’s employee offered a Power Ranger toy to a girl. However, in one of these five cases, which we discuss more fully below,<sup>85</sup> the McDonald’s employee refused to offer a Power Ranger toy.

We can assess the extent to which the stores impeded the ability of children to opt out of McDonald’s default discrimination.<sup>86</sup> As summarized in Table 1, the children’s preference for opposite-gender toys was frustrated in two different ways. First, 42.8% of the children were unable to obtain their desired opposite-gender toy. The refusals to the follow-up question “are there any other toys?” were telling. Most often the final answer was simply “no.” An example of a more detailed response was “no, that’s the only kind we have,” offered despite the fact that the store had in stock opposite-gender toys. In one case, the worker offered the opaque excuse, “No, we don’t because we only open one box per Happy Meal.”<sup>87</sup>

Second, some children faced the frustration of having to make repeated requests. 35.7% of the children were forced to expend extra effort by asking twice. These children were shown additional toys after their initial request, but they were additional same-gender toys, which, under our protocol, prompted the children to ask again whether there were any other toys available. To be clear, 21.4% of children experienced both types of frustration in having to ask twice and then being denied (71.4% of our children experienced at least one of these forms of frustration).

TABLE 1: TWO DIMENSIONS OF HARM: REFUSED ACCESS AND ADDITIONAL EFFORT BY GENDER

	Store Visits with Counter Returns	Refusals	Forced to Ask Twice
Girl	10	30%	60%
Boy	4	75%	25%
Total	14	42.8%	50.0%

85. See *infra* text accompanying note 105.

86. See *Fair Driving*, *supra* note 7, at 866–67.

87. Under some interpretations, this answer may constitute a misrepresentation. In one instance when a girl asked “May I have a boy’s toy please?” the worker returned with a boy’s toy as well as another girl’s toy.

Table 1 also shows that boys were more likely than girls to have their request refused, but girls were more likely than boys to have to ask a second time. Store employees refused requesting boys 75% of the time, while they refused requesting girls 30% of the time. In contrast, stores forced 60% of girls to ask a second time (before refusing or granting their request), but only forced 25% of boys to ask a second time.

Another way to analyze the results is to examine McDonald's response to specific kinds of requests. In visits where children never made an explicitly gendered request, the probability that children would ultimately be offered their desired opposite-gender toy was only 28.5% (two out of seven store visits). But in visits where children made an explicitly gendered request (either on the first or second time), the probability that children would be offered their desired opposite-gender toy was 85.7% (six out of seven store visits).

These numbers suggest that for girls to expressly ask for a "boy's toy" is often sufficient to be offered that kind of toy.<sup>88</sup> Is it reasonable for McDonald's to de facto require children to ask gendered questions before they can receive their desired toy? If so, how are children supposed to know that this is the necessary language? The hackneyed query "What does a person have to do to get a drink in this place?" (which itself is sometimes expressed in a cruder and more gendered form) is centrally a request to learn about the establishment's altering rules, the minimal necessary conditions for opting around the no-drink default.<sup>89</sup>

Sometimes we even found that a girl expressly asking for a "boy's toy" was insufficient. Our most egregious visit occurred at the McDonald's store on 250 Whalley Avenue in New Haven. In New Haven a girl who initially ordered a Happy Meal was asked by a McDonald's employee, "Would you like the girl's toy?" The girl responded, "No, could I have the boy's toy?" The employee took the girl's money and handed her a Happy Meal container. When the girl a moment later opened the container, she learned that an employee had, notwithstanding the girl's explicit request, given her a Justice toy. The girl went back to the counter with the unopened Justice toy and requested, "May I have a boy's toy please?" The same McDonald's employee took the girl's Justice toy, then came back and said, "There are only girl's

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88. It is possible that the children could have asked another kind of question (for example, explicitly asking for a Justice or Power Ranger toy), but this too would have required the children to have knowledge of the toys currently being offered. As noted above, about 13% of the stores failed to have in store displays. Moreover, in our drive-through tests, discussed *infra*, we found that 38.5% of McDonald's employees could not accurately describe both types of toys when asked.

89. See *Regulating Opt-Out*, *supra* note 19, at 2032 (describing altering rules).

toys." We then immediately sent an adult male into the store to check to see if there were in fact no more Power Ranger toys. This adult consumer on ordering a Happy Meal was asked by a McDonald's employee, "Is it for a boy or for a girl?" The adult responded "for a boy" and was given a Power Ranger toy.

The experience of this girl is inconsistent with the statutorily mandated "full and equal accommodations."<sup>90</sup> She twice expressly asked for a boy's toy to no avail. It is likely in this example that a McDonald's employee intentionally lied to a young girl because of her sex. A bit like the Seinfeld Soup Nazi, this employee effectively decided, "No boy's toy for you!"<sup>91</sup>

Overall, the findings of our 2013 store visits are at least strongly suggestive of three kinds of discrimination. First, the store used discriminatory defaults with impeding altering rules.<sup>92</sup> In 92.9% of the visits, the stores, without asking the child about her or his toy preference, just gave the toy that they had designated for that sex. Thus, in the vast majority of the counter visits, the stores by default discriminate on the basis of sex in the provision of Happy Meal toys. The McDonald's Position Statement suggested that such disparate treatment might be non-cognizable because the subjects of the discrimination could, by simply asking, opt for the other kinds of toys.<sup>93</sup> But at the counter, our children visitors often found that simply asking was insufficient in that they were refused with a 42.8% probability and were forced to ask multiple times with a 50.0% probability. More than 70% of the time, simply asking wasn't insufficient to obtain an opposite-gender toy.

Second, the store used discriminatory altering rules.<sup>94</sup> Table 1 also suggests that the stores applied different altering rules to children of different sexes.<sup>95</sup> Boys who asked, "Are there any other toys?" were more likely be denied. On the other hand, girls were more likely to be offered additional "same-sex" toys and thus would be forced to ask repeatedly for an opposite-gender toy.

Lastly, the store used discriminatory mandatory rules.<sup>96</sup> The egregious example in which the girl was twice refused after twice

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90. CONN. GEN. STAT. § 46a-64 (2012).

91. "The Soup Nazi," SEINFELD QUOTES, <http://www.pkmeco.com/seinfeld/nazi.htm>, archived at, <http://perma.cc/8MX2-9TY5> (saying "no soup for you!").

92. *Regulating Opt-Out*, *supra* note 19, at 2111-13.

93. This argument is similar to an argument advanced by Bernie Black that sophisticated actors can easily contract around corporate law defaults. Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 562 (1990); see also Position Statement, *supra* note 55.

94. *Regulating Opt-Out*, *supra* note 19, at 2036.

95. See *supra* Table 1.

96. *Regulating Opt-Out*, *supra* note 19, at 2084 (describing mandatory rules).

asking for a “boy’s toy” implies that there is some chance—in our sample, 14.3%—that even if a child expressly requests a “boy’s toy” or a “girl’s toy,” McDonald’s employees will still refuse the service of offering the child the kind of toy it gives, by default, to boys. Of course, there might have been as yet undiscovered magic words that would have been sufficient to secure the opposite-gender toy. But at some point, it is more reasonable to describe the experience not merely as a discriminatory default with impeding altering rules but rather as a discriminatory mandatory rule.<sup>97</sup>

Taken together, the comparative experience of our thirty purchases at just fifteen McDonald’s stores is probative of a troubling pattern—one of disparate treatment on the basis of sex in the counter sales of Happy Meals to unaccompanied children.

## 2. Drive-Through Tests

At the same fifteen stores, an adult male would do a complementary test at the drive-through. In one instance the employee did not ask a question that implicated toy choice at all. In the other fourteen drive through visits, the employee on the electronic voice transmission system always asked for the sex of customer’s child either by asking “Is this for a boy or for a girl?” or “Boy or girl?” And in all but two of these child-gender questions, “boy” came before “girl.” In no instances did the employee, after taking the order, initially describe the toys in gender-neutral terms (as was the claimed policy in the original response from McDonald’s Customer Satisfaction Representative),<sup>98</sup> nor did the employee ever ask whether the adult wanted a “boy’s toy or girl’s toy” (as was the claimed policy in the 2008 Position Statement).<sup>99</sup> The stark prevalence of the “boy or girl” query is consistent with our 2008 experience in which 90% of visited stores asked the more extreme customer gender question to allocate toys.

In our drive-through protocol, the adult would respond to the employee’s gender question (“For a boy or for a girl?”) by asking, in response, “Why do you ask?” The employee responses often related choice of toy explicitly to the child’s gender:

“’cause we have toys for girls and toys for boys”; “sir, because we have a girl’s toy and a boy’s toy”; and “because we have both toys.” One employee suggested that asking the question was a condition of employment (“It’s my job.”).

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97. At some point, the difference between a discriminatory default with an impeding altering rule and a discriminatory mandatory rule is academic. See *Regulating Opt-Out*, *supra* note 19, at 2113.

98. Letter from Donell M. Jaja, *supra* note 3.

99. See Position Statement, *supra* note 55, at 3.

The drive-through protocol then had the adult customer ask, "Can you describe the actual toys?" In the thirteen cases in which this question elicited an on-topic response, the boy's toy was accurately described. In only nine of these cases, however, was the girl's toy accurately described. Example of this disparity included: "Some kinds of Power Rangers, some kinds of things" and "We got a Power Rangers, or the other one."

Overall, the description of the girl's toy was less specific in five cases, while the description of the boy's toy was never less descriptive. Furthermore, in three of the five cases in which the girl's description was less specific, the drive-through infrastructure also lacked a display that showed the current toys. In these cases, it would be impossible for McDonald's customers to know anything about the toy intended for girls even if they expressly ask for a description of the offered toys. We also found that when describing both toys, the boy's toy (Power Ranger) was always described before the girl's toy (Justice).

Finally, at the pick-up window, we would ask why the toy was meant for the gender it was allotted to. For instance, we asked, "Why is the Justice toy meant for girls?" Of the fourteen times we had a chance to ask this question, six of them were met with a refusal to answer or an avoidance of giving a reason. An example of this response is "Actually, I don't know." Two responses included reasons unassociated with gender, such as "That's just the way they come; they send them." Some of the explanations arguably deployed gender stereotypes: "cause it's pink"; "cause it has girl's stuff, like bracelets"; and referring to Power Rangers: "they're more mechanical; they separate."

Overall, the results of 2008 and 2013 drive-through visits tell a consistent story. Despite the stated policy of McDonald's and the Position Statement of its franchisee, McDonald's drive-through employees frequently fail to ask customers any explicit toy preference question.<sup>100</sup> Instead, employees ask to learn the identity of the customer's child's gender. The store's provision of a toy type, in short, is contingent on the sex of the child reported by the customer.

#### IV. SEX-SEGREGATED ADVERTISING AS PER SE DISCRIMINATION

The results of the 2013 counter tests described provide compelling evidence of potentially actionable disparate treatment in public accommodations.<sup>101</sup> Even the current practice of eliciting information about the sex of the customer's child at the drive-through, as discussed above,<sup>102</sup> raises serious questions of sex-based treatment—both because uninformed consumers who do not understand that the question

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100. *Contra* Position Statement, *supra* note 55, at 3.

101. *See* CONN. GEN. STAT. § 46a-64.

102. *See supra* Part III.

concerns toy choice will be treated differently based on the sex of their children, and because even those customers who know that the question relates to toy choice might not know how to ask for the other toy (without misrepresenting their child's sex). Even though we did not uncover current evidence of stores asking whether drive-through customers preferred a "boy's toy" or "girl's toy," the past and possible future use of this kind of question raises the same issue: does the prohibition of sex discrimination include the prohibition of this kind of gendered framing?<sup>103</sup>

In this Part, we take the first step toward answering the "gendered framing" question by discussing a context where an analogous question was litigated.<sup>104</sup> Anna's question of whether using "men's" or "women's" descriptors for jobs violates civil rights law was, in fact, repeatedly and definitively litigated before a number of human and civil rights commissions during the early 1970s.<sup>105</sup> At issue in these cases was whether newspapers could run advertisements under "sex-segregated employment headings."<sup>106</sup> For example, in 1969, the National Organization of Women filed a complaint with the Commission on Human Relations for the City of Pittsburgh, charging the Pittsburgh Press with violating the city's human relations ordinance by allowing employers to place advertisements under "Help-Wanted Female" and "Help-Wanted Male" columns.<sup>107</sup> The Commission found that there was a "necessary implication of the segregated columns . . . that men are given preference for jobs in one set of columns, and women are given preference for jobs in the other set."<sup>108</sup> It joined other commissions in finding "gender-segregated column[s] unlawful per se."<sup>109</sup>

The Commission held that sex-segregated framing constituted discrimination, even though the Pittsburgh Press printed the following disclaimer:

Notice to job seekers. Jobs are arranged under male and female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and federal, prohibit discrimination in employment because of sex, unless sex

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103. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 287 A.2d 161, 174 (Pa. Commw. Ct. 1972).

104. See *id.* at 171.

105. See Note, *Discrimination in Classified Advertising—Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 38 ALB. L. REV. 847, 862–63 (1974).

106. See Elizabeth Boyer, *Help-Wanted Advertising—Everywoman's Barrier*, 23 HASTINGS L.J. 221, 223–24 (1971).

107. Note, *supra* note 105, at 847.

108. *Pittsburgh Press*, 287 A.2d at 174 (Crumlish, J., dissenting).

109. *Id.*

is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination.<sup>110</sup>

Thus, while the disclaimer suggested that job seekers could apply for any job, the mere gendered framing of some jobs that "generally appeal more to persons of one sex than another" was deemed to be discrimination *per se*.<sup>111</sup>

The trial and appellate courts reviewing the Commission's decision took for granted that the segregated headings constituted discrimination,<sup>112</sup> relying in part on a 1968 Equal Employment Opportunity Commission guideline that announced a similar characterization:

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of advertisements in columns . . . headed "Male" or "Female" will be considered an expression of preference, limitation, specification, or discrimination based on sex.<sup>113</sup>

While there was social science evidence suggesting that sex-segregated advertisements had a disparate impact,<sup>114</sup> the courts and especially the human rights commissions were comfortable prohibiting the gendered framing independent of its discriminatory effects.<sup>115</sup> In

110. *Id.* at 165.

111. *Id.*

112. *See id.* at 175 (Crumlish, J., dissenting) ("The Commission's opinion and findings of fact do not substantiate their position that gender-segregated advertising is an unlawful employment practice.").

113. Boyer, *supra* note 106, at 224.

114. Dr. Sandra Bem, from the Carnegie-Mellon University Department of Psychology, testified before the Pittsburgh Commission on Human Relations about a study she conducted indicating that "segregated want ads discourage women from seriously considering those jobs which are classified as Male-Interest." *See Note, supra* note 105, at 860. As Dr. Bem noted:

When the jobs were segregated and labeled on the basis of sex only 46% of the women were as likely to apply for the Male-Interest jobs as for the Female-Interest jobs. When the *same jobs* appeared in an integrated alphabetical listing with no reference to sex 81% of the women preferred the Male-Interest jobs to the Female-Interest jobs.

*Id.* at 860-61. Dr. Bem's study is available. *Id.* at 860; *see also* Hailes v. United Air Lines, 464 F.2d 1006, 1007, 1009 (5th Cir. 1972) (male plaintiff "reasonably believed that any job application" to defendant airline in response to its ad for "stewardesses" in "Help Wanted—Female" column of newspaper "would be futile").

115. The litigation instead focused on whether the discrimination language was nonetheless justified as a bona fide occupational qualification or whether the statutory prohibition, as applied, violated the newspaper's free speech rights. The latter question was ultimately resolved when the Supreme Court upheld the constitutionality of the order barring "all reference to sex in employment advertising column headings." *Pittsburgh Press Co. v.*



affirming the Commission's *Pittsburgh Press* decision, the Commonwealth Court of Pennsylvania concluded:

When the Pittsburgh Press arbitrarily arranges and publishes such column headings it is aiding in sex discrimination. The ruling that employment want ad column headings be written asexually is appropriate because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is proper because it represents the highest degree of societal commitment to the ideal of legal sexual equality.<sup>116</sup>

This *Pittsburgh Press* decision parallels the 1975 ruling of the Connecticut Supreme Court finding that "sex-classification in help-wanted advertising constitutes a per se violation" of Connecticut law.<sup>117</sup> In that case, the Evening Sentinel appealed an order from the Connecticut Commission on Human Rights and Opportunity to plaintiffs to "cease and desist the use of segregated columns for classified employment based on sex."<sup>118</sup> The same commission that dismissed our claims concerning "boy's toy's and girl's toy" had, over thirty years earlier, found that segregating help-wanted advertisements categories (Help Wanted Male, Help Wanted Female, and Help Wanted Male/Female) was discriminatory even though job-seekers remained free to apply to jobs listed in any category.<sup>119</sup> In upholding the Commission's order, the Connecticut Supreme Court reasoned:

It is part of a policy to eliminate sex-discrimination in its *subtle as well as overt forms*. The very act of classifying individuals by means of criteria irrelevant to the ultimate end sought to be accomplished operates in a discriminatory manner. . . .

Symbolic discrimination as in the instant case is every bit as restrictive as naked exclusions. The distinction between "help

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Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 380–81 (1973). A footnote of the opinion also disposed of a constitutional claim related to the newspaper's disclaimer:

Pittsburgh Press also argues that the Ordinance violates due process in that there is no rational connection between sex-designated column headings and sex discrimination in employment. It draws attention to a disclaimer which it runs at the beginning of each of the "Jobs—Male Interest" and "Jobs—Female Interest" columns . . . .

It suffices to dispose of this contention by noting that the Commission's commonsense recognition that the two are connected is supported by evidence in the present record. The Guidelines on Discrimination Because of Sex of the Federal Equal Employment Opportunity Commission reflect a similar conclusion.

*Id.* at n. 7.

116. *Pittsburgh Press*, 287 A.2d at 169.

117. *The Evening Sentinel v. Nat'l Org. for Women*, 357 A.2d 498, 503 (Conn. 1975).

118. *Id.* at 500.

119. *Pittsburgh Press Co.*, 287 A.2d at 168, 171.

wanted men" and "help wanted men only, no women" is nugatory. . . . The [Connecticut Fair Employment Practices Act] operates to eliminate not only the unjustified exclusion of people from occupations, but also the practices leading to and facilitating such discrimination.<sup>120</sup>

Thus, notwithstanding the independent duty of employers to consider all jobseekers on a non-discriminatory basis, the mere framing of some jobs as "male" or "female" was held to be a restriction that offended the notion of fair employment.<sup>121</sup>

Courts' finding of a *per se* violation is remarkable in part because mere sex-segregated framing does not qualify as disparate treatment.<sup>122</sup> An employer who asks (via the advertisement) all applicants whether they prefer a "man's job" or a "woman's job" and who proceeds to then evaluate applicants for either job without regard to the applicants' sex is not treating applicants differently because of their sex.<sup>123</sup> Nonetheless, the courts universally struck down the mere gendered advertisement as a civil rights violation, often explicitly invoking revulsion to a linguistic version of the *Plessy* principle: "The 'separate but equal' principle is no longer a legitimate argument in civil rights cases."<sup>124</sup> The demise of sex-segregated advertisement is also remarkable because in the space of a few short years, a long-standing practice of dozens of newspapers across the country was amended without substantial court involvement.<sup>125</sup> As Elizabeth Boyer summarized in 1971:

While it seems improbable that Congress intended enforcement of a federal statute to depend on state and municipal human relations and civil rights commissions, these groups at the present

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120. *The Evening Sentinel*, 357 A.2d at 504 (emphasis added). In his dissent, Justice MacDonald (no relation to McDonald's) disagreed in terms reminiscent of the decision letter dismissing our 2009 complaint:

At the calculated risk of being accused of male chauvinism, I must observe that I consider this particular controversy nothing more than a tempest in a teapot that raises such ridiculous overtones as to call for some equally ridiculous observations. I do not consider it discrimination, for example, but merely a convenience to job hunters, to place under a "Help Wanted Male" heading the advertisement of a carnival for a strong man, of the Pittsburgh Steelers for a linebacker, or of a dramatic producer for a Winston Churchill. I consider equally nonobjectionable to a potential National Organization for Men the placing under a "Help Wanted Female" caption the carnival's ad for a bearded lady, a nightclub's ad for a topless dancer or the ad of a dramatic producer for a Lady Godiva or Cleopatra.

*Id.* at 506 (MacDonald, J. dissenting).

121. *Id.* at 504 (majority opinion).

122. *Regulating Opt-Out*, *supra* note 19, at 2113.

123. *Pittsburgh Press*, 287 A.2d at 165.

124. *Id.* at 168.

125. Boyer, *supra* note 106, at 226.

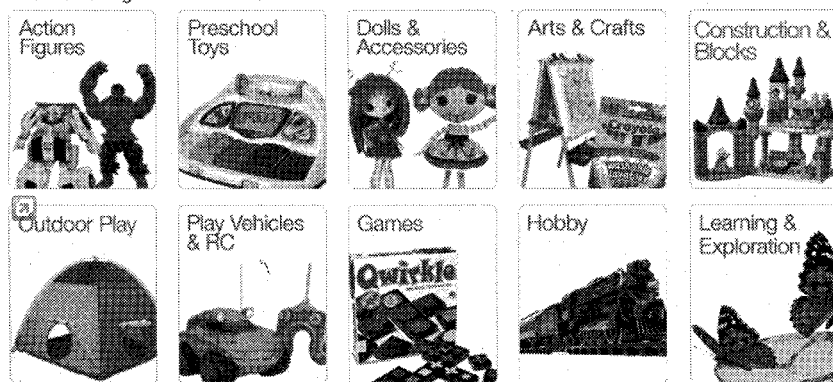
time seem to be accomplishing more, as a practical matter, than are the more traditional forms of adversary proceedings under the federal statute.<sup>126</sup>

This brief history is relevant to our “boy’s toy or girl’s toy” claim because it shows both that merely gendered framing of contractual solicitations can constitute discrimination and that state human rights commissions can take a leading role in altering what was theretofore commonplace industry behavior.<sup>127</sup>

## V. THE LIMITS OF SEX-SEGREGATED MARKETING

McDonald’s 2008 Position Statement defended a practice—namely, asking whether consumers prefer a “boy’s toy” or “girl’s toy”—that we found, as an empirical matter, to be nonexistent in our 2013 sample.<sup>128</sup> Nonetheless, the practice of what might be called “sex-segregated marketing” is alive and well in a variety of online and physical markets.<sup>129</sup> Amazon.com eschews gendered classification of its toy offerings, choosing instead to provide the following top level categories<sup>130</sup>:

Featured Categories



126. *Id.*

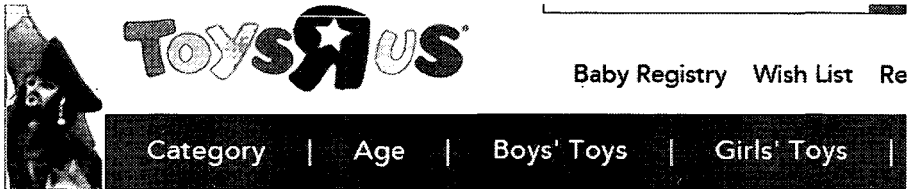
127. *Id.*; see also *Pittsburgh Press*, 287 A.2d at 169.

128. See Position Statement, *supra* note 55, at 7.

129. See Elizabeth Sweet, *Guys and Dolls No More?*, N.Y. TIMES (Dec. 21, 2012), [http://www.nytimes.com/2012/12/23/opinion/sunday/gender-based-toy-marketing-returns.html?\\_r=0](http://www.nytimes.com/2012/12/23/opinion/sunday/gender-based-toy-marketing-returns.html?_r=0), archived at <http://perma.cc/R444-G66V> (noting that “gender segregation” in toy ads has “grown to unprecedented levels”).

130. AMAZON (Sep. 16, 2013), <http://web.archive.org/web/20130916040807/http://www.amazon.com/toys/b?ie=UTF8&node=165793011>, archived at <http://perma.cc/ZW53-XS3N> (accessing authors image by searching for Amazon Toys & Games in the Internet Archive index).

Note how the picture accompanying the "Construction & Blocks" category features a pink castle, an image stereotypically associated with girls, for what otherwise might be considered stereotypically a "boy's" category.<sup>131</sup> But ToysRUs.com guides potential customers with sex-segregated menu titles<sup>132</sup>:



And as the Position Statement explicitly argued, department stores, cosmetic companies and clothing retailers frequently segregate their offerings into "men's" and "women's" categories.<sup>133</sup> We take it as beyond argument that many of these practices fall outside the prohibition of public accommodation law.<sup>134</sup> It turns out that Anna's initial intuition that marketing jobs as for men or women is likely actionable, but marketing perfume or shoes as for men or for women is likely not.<sup>135</sup>

Given the different positive laws concerning sex-segregated marketing, it is natural to ask whether there are principled distinctions between contexts where sex-segregated marketing is illegal (e.g., employment advertisements) and contexts where sex-segregated marketing is legal (e.g., adult clothing advertisements).<sup>136</sup> Beyond technical legal distinctions,<sup>137</sup> we focus on three context-distinguishing

131. *Id.*; see also Sweet, *supra* note 129.

132. TOYS "R" US (June 26, 2013), <http://web.archive.org/web/20130626061014/http://www.toysrus.com/shop/index.jsp?categoryId=2255956>, archived at <http://perma.cc/L3W9-UFEY> (accessing authors image by searching for ToysRUs in the Internet Archive index).

133. See Position Statement, *supra* note 55, at 6 ("Under [Ian Ayres's and Anna Ayres-Brown's] proposed reading, department stores would run afoul of the law by keeping dresses and skirts only in women's sections or carrying blouses only in women's sizes. Cosmetic companies could be sued if their employees failed to offer a splash of perfume (marketed specifically to women) to men passing by in the mall. Clothing retailers could no longer organize their websites to differentiate between men's and women's apparel.").

134. See CONN. GEN. STAT. § 46a-64 (2012).

135. See *Pittsburgh Press*, 287 A.2d at 169.

136. See Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1257, 1260 n.25 (2003) (discussing Title VII and the ambiguous scope of its singular exception, which allows gender-discrimination only if an employer shows that such selectivity is a bona fide occupational qualification [BFQP] necessary in the ordinary operation of the specific operation in question).

137. McDonald's might have made four possible arguments. First, the public accommodation statute in Connecticut prohibits denial because of your sex. See CONN. GEN. STAT. § 46a-64(a)(1). In this regard, McDonald's would not have technically discriminated against the drive-through customer, but the customer's child instead. But query whether courts

characteristics concerning: First, the strength and legitimacy of customer preferences for sex-segregated categories; Second, the existence of less restrictive alternatives; and, Third, the likelihood of cognizable harms to suggest that, as a positive matter, most tribunals might have difficulty enjoining sex-segregated marketing of Happy Meal toys.

The preference of the customers themselves for the sex-segregated labeling would likely push courts toward countenancing the practice. While courts often deny the importance of consumer preferences to establish bona fide occupational qualifications (BFOQs),<sup>138</sup> deeply rooted preferences implicitly undergird privacy BFOQs<sup>139</sup> and might analogously support sex-segregated framings.<sup>140</sup> Finding gender-specific labels convenient is different than having a gendered preference for particular items, but the two are related.<sup>141</sup> Since most men and women prefer different kinds of shoes,<sup>142</sup> it makes it more convenient for them to search for stores or departments that highlight

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would countenance such a practice and outcome. A court would likely hold, for example, that choosing one applicant over another due to the sex of the applicant's child constitutes discrimination under Title VII. *Id.* Second, McDonald's could have argued that there was no denial of goods to begin with under the Connecticut public accommodation statute. *Id.* While the "boy's toy or girl's toy" question is not in itself a denial, it might still nevertheless constitute a prohibited restriction. See Boyer, *supra* note 106, at 224 (analyzing EEOC guidelines which indicate that a limitation based on sex could still violate Title VII). Third, as the Position Statement itself suggested, a franchisor could not be responsible for the discriminatory actions of its employees. See Position Statement, *supra* note 55, at 3 (noting that the store manager trains employees to ask customers who order a Happy Meal whether they want a "boy's toy" or a "girl's toy"). However, it is well established in civil rights jurisprudence that the doctrine of *respondeat superior* applies, thus rendering a franchisor liable for the discriminatory actions of its employees. See Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (holding that an employer may be vicariously liable for a supervisor's discriminatory actions, subject to an affirmative defense based on the reasonableness of the employer's and plaintiff victim's conduct). Lastly, McDonald's might have argued that disparate impact claims are not cognizable under the public accommodation statute. The Supreme Court has recently granted certiorari to decide whether plaintiffs may bring disparate impact claims under the Fair Housing Act (FHA), so the last argument may be persuasive. Mount Holly v. Mt. Holly Gardens Citizens in Action, 658 F.3d 375 (3d Cir. 2011), *cert. granted*.

138. See Kapczynski, *supra* note 136, at 1260 n.25 (noting that the Second Circuit, in *Forts v. Ward*, denied a sex-based BFOQ for prison guards working nights shifts in a women's prison dorm).

139. See *id.* at 1277 ("[S]ame-sex privacy may be a customer preference, but Title VII should defer to it because it is a *really strong* customer preference. As Lex Larson's treatise puts it, '[G]iving respect to deep-seated feelings of personal privacy involving one's own genital areas is quite a different matter from catering to the desire of some male airline passengers to have a little diluted sexual titillation from the hovering presence of an attractive female flight attendant.'").

140. *Id.*

141. See Jess, *Let Clothes be Clothes?*, LET TOYS BE TOYS (June 4, 2014), <http://www.lettoysbetoys.org.uk/let-clothes-be-clothes/>, archived at <http://perma.cc/36UW-XKW8>.

142. But see *Kinky Boots*, BROADWAY.COM <http://www.broadway.com/shows/kinky-boots/story/>, archived at <http://perma.cc/6NL4-4JRX> (last visited Jan. 28, 2015).

whether the collection is comprised of "men's" or "women's" footwear. As applied to Happy Meals, a customer preference for sex-segregated labeling might come from either children or their parents. A (male or female) child who has never heard of the "Justice" brand might make a superior decision by choosing between a "boy's" or "girl's" toy option. Or more prosaically harried parents in the drive-through line may prefer the "boy's or girl's" toy framing because it flattens discretion and avoids a child's dawdling consideration of choosing between a Digi Sport game or Hello Kitty watch toys.

The strength and legitimacy of customer preferences will in part be a function of the next best non-gendered label that the store might have deployed. The reasonableness of men's or women's fragrances is undermined if it might be linguistically feasible to alternatively label the counters as "perfume" and "cologne." Amazon's ability to successfully market non-gendered categories (Action Figures, Dolls, Arts & Crafts, Construction & Blocks, etc.) weakens the linguistic convenience argument that ToysRUs or McDonald's might make.<sup>143</sup> McDonald's might have instead used the categories "mostly preferred by boys" and "mostly preferred by girls." While still gendered, the "mostly preferred" label is less segregating because it at least acknowledges preference variation within each gender.<sup>144</sup> Just as BFOQs have been denied in employment when a less discriminatory alternative exists,<sup>145</sup> courts might have more difficulty accepting the utility of sex-segregated labels when effective non-gendered or less gendered categories exist.

Finally, courts are more likely to find a violation when the perceived harms of sex-segregation are more pronounced.<sup>146</sup> The practice of asking whether the customer prefers a "boy's toy" or "girl's toy" introduces two distinct types of harms: one that imposes a gendered structure that artificially defines what it means to be a male or female and another that potentially forces children to deny their personal identity.<sup>147</sup> With respect to the harm of gendered socialization, the *Pittsburgh Press* decision, which struck down sex-segregated newspaper want-ad headings, emphasized that the advertisements were a gateway to employment and the "economic security and stability [that] are essential to the pursuit of life, liberty and happiness."<sup>148</sup>

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143. See *AMAZON*, *supra* note 130.

144. See *Regulating Opt-Out*, *supra* note 19, at 2037 (talking about variations in specificity of altering rules).

145. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-72 (11th Cir. 1982).

146. See *Kapczynski*, *supra* note 136, at 1282, 1292.

147. See *Sweet*, *supra* note 129.

148. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 287 A.2d 161, 168 (Pa. Commw 1972).

In contrast, the denial of one's preferred Happy Meal toy when considered as a physical object ranks as one of the most trivial of material deprivations.<sup>149</sup> But in considering the harms of sex-segregated marketing (and the more express forms of disparate treatment uncovered in our counter tests), it is standard for courts to consider not just the material harms, but the symbolic harms of defendant's discrimination.<sup>150</sup> The labeling of toys as for boys or girls calls forth stereotypes of what it means to be male or female.<sup>151</sup> The sex-segregated framing does not just reflect current preferences, but it also reinforces a symbolic order of gender that has discriminatory effects upon children.<sup>152</sup> When the McDonald's employee at the drive-through presumed that girls would prefer a Justice toy because it was pink and that boys would prefer a Power Ranger toy because it was "mechanical,"<sup>153</sup> she implicitly cast girls and boys in gender-defined roles.<sup>154</sup> McDonald's marketing practices "insinuate that children's genders define their interests."<sup>155</sup> The discriminatory result here was in characterizing girls as constitutively interested in fashion (as the employee phrased it, "girl's stuff" such as bracelets) and boys as constitutively interested in construction and building.<sup>156</sup> By deciding that "boys should like fighting and girls should like fashion, the restaurant singles out children who don't satisfy McDonalds' standards for what is 'normal.'"<sup>157</sup>

The provision of toys is certainly less connected than employment to economic security, but if "[p]lay is the [c]hild's [w]ork," then toys are important tools through which they come to learn about the world.<sup>158</sup> To understand the potential harm of sex-segregated marketing, we

149. McDonald's Position Statement makes clear early on that they viewed our stance as "frivolous." See Position Statement, *supra* note 55, at 1.

150. *Evening Sentinel v. Nat'l Org. for Women*, 357 A.2d 498, 504 (Conn. 1975) ("Symbolic discrimination as in the instant case is every bit as restrictive as naked exclusions."). The court also observed that the Connecticut Fair Employment Practices Act seeks to eliminate subtle as well as overt forms of discrimination. See *id.*

151. See Sweet, *supra* note 129.

152. See Kapczynski, *supra* note 136, at 1261–62 ("Same-sex privacy cases . . . reinforce a symbolic order of gender that has a discriminatory effect upon women . . .").

153. See *supra* Part III.

154. Antonia Rose Ayres-Brown, *Purchase and Prejudice* at 41 (unpublished manuscript, 2013) (on file with authors); see also Sweet, *supra* note 129.

155. Ayres-Brown, *supra* note 154, at 41.

156. See *id.* at 1; see also Kapczynski, *supra* note 136, at 1261–62 (explaining that a discriminatory effect may, for example, involve casting women to fit within gender norms).

157. Ayres-Brown, *supra* note 154, at 2.

158. As Jean Piaget suggested, children's play is an expression of "pure assimilation—the process by which the child transforms the world to meet his or her personal needs." David Elkind, *Thinking about Children's Play*, CHILD CARE INFO. EXCHANGE, May 2001, at 27–28.

must measure not only the impact of the labels on gendered norms, but also “the kinds of legal subjects that these norms call forth.”<sup>159</sup> Beyond the reinforcing or reifying of gendered identities, McDonald’s practices of forcing children or parents often in the presence of their children to choose between a “boy’s toy” or “girl’s toy” occasions a more personal, localized harm on the children.<sup>160</sup> To respond to a “boy’s toy or girl’s toy” question literally calls upon customers to actively give voice to this gendered labeling.<sup>161</sup> In contrast to the perfume counter or the shoe store, where customer may see the sign “women’s” or “men’s” but need not mirror those gendered terms in order to receive the desired product, customers at the drive-through—often without notice of the underlying toy themes—have to say that they want a “boy’s toy” or “girl’s toy.” McDonald’s practice, thereby, singles out children who do not satisfy their standards for each gender’s interests. The second kind of harm that can flow from McDonald’s practices thus lies in compelling a child to pigeonhole himself or herself into a sexual category based on a toy choice or having a child hear the parent make this rigid categorization.<sup>162</sup> McDonald’s question harms children who may have heterodox preferences, those not necessarily aligned with McDonald’s gendered framing of its toys.<sup>163</sup> McDonald’s own reply points to the disjunction that some children might feel between what gender they internally identify as and a social label imposed by the external world, when it acknowledged that asking for an opposite-sexed toy might produce “social awkwardness.”<sup>164</sup>

Kenji Yoshino has powerfully identified the costs associated with the “outing” or “covering” of identity.<sup>165</sup> The “boy’s toy” or “girl’s toy” question creates these costs for children with heterodox preferences or their parents because they must either bear the costs of covering their true preferences and presenting an assimilated preference by asking for the same-sex toy.<sup>166</sup> The covering child downplays the child’s heterodox preference by implicitly accepting McDonald’s gendered norms (Justice bracelets are *for* girls, while Power Ranger action figures are *for* boys) while also ordering the child’s true preference for

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159. See Kapczynski, *supra* note 136, at 1283–84.

160. See Ayres-Brown, *supra* note 154, at 1.

161. *Id.*

162. See Jess, *supra* note 141.

163. *Id.*

164. Reply, Ayres, CHRO No. 0930361 at 3 (Conn. Comm’n on Human Rights and Opportunities 2009).

165. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 775–76 (2002) [hereinafter Yoshino, *Covering*].

166. *Id.* at 772.



a gender-opposite toy.<sup>167</sup> Encouraging this kind of gendered assimilation, the “boy’s toy” or “girl’s toy” question fails to accommodate and recognize the complexity of a child’s personal identity.<sup>168</sup> Alternatively, the child with heterodox preferences can bear the costs of publicly “outing” themselves by declaring that they prefer toys that were designed for a different sex.<sup>169</sup> In either circumstance, McDonald’s “boy’s” or “toy’s” couching of preferences gives artificially gendered meaning to toys that can run counter to the ultimate identity of a child and needlessly reminds children and their parents that their toy preferences run counter to gendered social expectations.<sup>170</sup>

At the end of the day, one can still easily imagine reasonable readers thinking that legally prohibiting the “boy’s toy or girl’s toy” question is a bridge too far. Our evidence of default counter discrimination and refusals to deal are troubling, but it is just “a tempest in a teapot” to complain about “sex-segregated” marketing.<sup>171</sup> Any inconveniences from having to respond to a gendered toy question are “so trivial that . . . the time-honored maxim ‘*de minimis non curat lex*’ applies.”<sup>172</sup> Some readers may even worry that a small-scale social science study about toy choice might serve to trivialize the commands of our civil rights laws. At least in one instance, however, a small-scale social science study about toy choice was seen to illuminate the harms of discrimination.<sup>173</sup> In *Brown vs. Board of Education*, the Supreme Court cited to a doll study conducted by Kenneth and Mamie Clark which found that many black children preferred playing with white dolls to black dolls.<sup>174</sup> While the focus of our study is markedly different, the Clark study reminds us that children’s choices of play things can reflect the residue of discrimination in society more generally.<sup>175</sup>

167. See *id.*

168. As Yoshino observes, certain outsider groups such as religious minorities and people with disabilities have a “formal legal right to accommodation.” KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 167 (Random House, 1st ed. 2006) [hereinafter YOSHINO, *COVERING: THE HIDDEN ASSAULT*]. Theoretically, accommodation would be the solution to “coerced covering.” *Id.* at 168.

169. See Yoshino, *Covering*, *supra* note 165, at 775.

170. YOSHINO, *COVERING: THE HIDDEN ASSAULT*, *supra* note 168, at xi–xii.

171. *Evening Sentinel v. Nat’l Org. for Women*, 357 A.2d 498, 506 (Conn. 1975) (MacDonald, J., dissenting).

172. See, e.g., *McEachin v. McGuinnis*, 357 F.3d 197, 203 n.6 (2d Cir. 2004) (“There may be inconveniences so trivial that they are most properly ignored. In this respect, this area of the law is no different from any others in which the time-honored maxim ‘*de minimis non curat lex*’ applies”).

173. See *Kenneth B. Clark*, NNDB: TRACKING THE ENTIRE WORLD, <http://www.nndb.com/people/883/000115538/>, archived at <http://perma.cc/3QXM-9EGZ> (last visited Jan 28, 2015).

174. *Brown v. Bd. of Educ. Of Topeka*, 347 U.S. 483, 494, 494 n.11 (1954).

175. See *Clark*, *supra* note 173.

CONCLUSION: AN OPEN LETTER TO DONALD THOMPSON,  
THE CEO OF MCDONALD'S

On October 8, 2013, one of us mailed the following letter with a draft of this Essay to Donald Thompson, the Chief Executive Officer of McDonald's:

Dear Mr. Thompson,

Five years ago, I wrote to your predecessor, Jim Skinner, and asked him to address McDonald's gender-classified Happy Meal toys. I explained the harmfulness of the toys' sexist connotations and hurtful implications.

A customer satisfaction representative responded and explained that:

When we offer a happy meal with two different themes, our employees have been specifically trained to ask customers which of the two toys offered that week they would like, and not whether they would like a "girl" toy or a "boy" toy.

As described in the enclosed essay, my father and I found both in 2008 and again in 2013 that McDonald's employees rarely comply with this training. Our recent testing uncovered troubling evidence of sex discrimination:

Do you care that 93.30% of drive-through employees, instead of asking drive-through customers ordering a Happy Meal about their toy preference, asked the customer for the sex of the customer's child ("Is it for a boy or a girl?" or simply "boy or girl")?

Do you care that one of your franchises openly flouts your professed corporate policy and claims in its Position Statement to a Human Rights Commission that it trains its employees "to ask customers who order a Happy Meal whether they would prefer a 'girl' toy or a 'boy' toy"?

Do you care that 92.9% of counter employees without asking a child about her or his toy preference just gave the toy that the store had designated for that child's gender?

Do you care that 42.8% of stores refused to offer opposite-sex toys even after the child re-approached the counter and affirmatively asked for an alternative?

Do you care that a McDonald's employee refused to offer an in-stock Power Ranger toy to one girl even after she had twice asked for a "boy's toy?" Do you care the employee likely lied to her about not having any boy's toys because of her sex? Do you care that your workers are willing to compromise their integrity in order to conform to a child's interests to that child's sex's stereotypes?

And if you do care, what will you do about it?<sup>176</sup> Will you be willing to take affirmative steps to help ensure that your professed corporate policy is in fact followed by your franchisees?

My father and I applaud the healthy food changes you've made to the Happy Meal since we conducted our original study. But we are disturbed by your company's continued sex-segregated marketing practice. It is more than a little ironic that boys in our 2013 visits encountered such difficulty obtaining both literal and figurative Justice. We do not intend to file suit over our recent new filings. However, we stand ready to help you in any way that we can—including giving you a platform to state your views—to grapple with the issue of "sex-segregated" labeling.

Sincerely,

Anna Ayres-Brown<sup>177</sup>

On December 17, 2013, we were heartened to receive this reply:

Dear Ms. Ayres-Brown,

Your letter to Don Thompson dated October 8, 2013 has been directed to me for response. I want to thank you for your letter and for raising your concern about the manner in which our Happy Meal toys were distributed to customers in certain of our McDonald's restaurants.

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176. If you're skeptical about whether employees actually did these things at your restaurants, we'd be happy to provide recordings of our interactions.

177. Letter from Anna Ayres-Brown to Don Thompson, Chief Executive Officer, McDonald's, (Oct. 8, 2013) (on file with authors).

We take your concern seriously. It is McDonald's intention and goal that each customer who desires a Happy Meal toy be provided the toy of his or her choice, without any classification of the toy as a "boy" or "girl" toy and without any reference to the customer's gender. We have recently reexamined our internal guidelines, communications and practices and are making improvements to better ensure that our toys are distributed consistent with our policy.

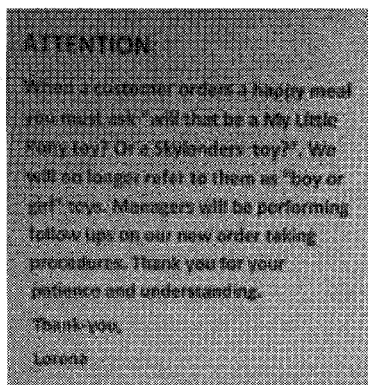
I hope you can appreciate the even with additional communication and training and improvements to our processes, it may take some time to fully see the results of our efforts in more than 14,000 restaurants in the U.S. It is our intention to continue to monitor to ensure that our policy is being implemented and followed throughout our system.

We again appreciate the time you took to bring this matter to our attention.

Yours very truly,

Patricia Harris  
Chief Diversity Officer<sup>178</sup>

McDonald's corporate response is all that we might have wished. What's more, as this article was being edited for publication, DoSomething.org posted this photo that a McDonald's manager posted at McDonald's store to inform employees of the new no "boy or girl" toy policy<sup>179</sup>:



178. Letter from Patricia Harris, Chief Diversity Officer, McDonald's, to Anna Ayres-Brown (Dec. 17, 2013), available at [http://islandia.law.yale.edu/ayres/McDonalds\\_Letter.pdf](http://islandia.law.yale.edu/ayres/McDonalds_Letter.pdf), archived at <http://perma.cc/QK5Q-M2LS>.

179. *Print, Persuade and Post*, *supra* note 10; see also Ayres-Brown, *Went to the CEO*, *supra* note 77.

This photo shows that McDonalds is trying. We acknowledge that there are surely limits to a franchisor's ability to control the "more than 14,000 restaurants in the U.S."<sup>180</sup> As we move forward, crowdsourcing may be the easiest way to assess whether the franchisor's best intentions are being put into franchisee practice.<sup>181</sup> Any reader can simply order a Happy Meal to find out. We have included a hyperlink below where you can report your experience, and if you would like to help us crowd-source enforcement, we have provided another link so that you can print a copy of McDonald's official policy.<sup>182</sup> We have found that giving a copy to a store's manager is a powerful way to change behavior at the local level.

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180. Letter from Patricia Harris, *supra* note 178. In response to a Freakonomics post about this article, an anonymous commenter wrote:

As someone that works internally with McDonalds in the Happy Meal business, I believe this change to gender-neutral customer prompting at the point of sale is being rolled out nationally in the coming months. Some markets are currently employing this policy, while others will be starting by July at the latest. . . .

. . . .

I would caution Freakonomics readers to be patient with compliance on this change, at least until July.

*Print, Persuade, and Post*, *supra* note 10.

181. *Print, Persuade, and Post*, *supra* note 10.

182. You can report your experience for the next 5 years at [http://survey.az1.qualtrics.com/SE/?SID=SV\\_3vMabqZFfwQOrZ3](http://survey.az1.qualtrics.com/SE/?SID=SV_3vMabqZFfwQOrZ3), *archived at*, <http://perma.cc/Q5RN-PKW6> (last visited Jan. 28, 2015), and you can print a copy of the Diversity Officer's letter at [http://islandia.law.yale.edu/ayres/McDonalds\\_Letter.pdf](http://islandia.law.yale.edu/ayres/McDonalds_Letter.pdf), *archived at* <http://perma.cc/QK5Q-M2LS> (last visited Jan. 28, 2015).

