Discrimination By Customers
Katharine T. Bartlett & Mitu Gulati

Abstract
Customers discriminate. They discriminate in whom they buy from, how much they pay, and how they evaluate those with whom they do business. With the growth of the sharing economy, customer opportunity to discriminate has increased substantially. Yet anti-discrimination applies only to firms, not customers. We examine why this might be so. We conclude that while there are reasons to be cautious about regulating customer discrimination, those reasons do not justify acceding to customer discrimination altogether. To open a discussion of the regulatory options that take account of the most significant concerns, we offer a modest proposal.
Discrimination By Customers

Katharine T. Bartlett & Mitu Gulati*

In a year-long experiment, iPods were sold through online advertisements. Each online advertisement featured a hand holding an iPod—some hands were white and some were black. The black hands received 13 percent fewer responses and led to 17 percent fewer offers than the ads with white hands.¹

The online rental marketplace Airbnb encourages owners seeking to rent their properties to provide personal profiles and even to post pictures of themselves to build trust with prospective customers. A study of the data combining pictures of all New York City landlords on Airbnb with their rental prices and information about quality of the rentals showed that non-black hosts are able to charge approximately 12 percent more than black hosts for comparable properties. Moreover, black hosts receive a larger price penalty than non-black hosts for having a poor location.²

The marketing company WordStream analyzed 300 responses from the company’s clients to a request to rate their level of satisfaction with their client service representatives. The analysis revealed that all of the men on staff had been given above average scores, while all women had below average scores. These results were contrary to the objective performance grades of the service representatives, which showed that female

* Duke Law School. For comments, thanks to Joseph Blocher, Jamie Boyle, Al Brophy, Curt Bradley, Bernie Burk, Devon Carbado, Mary Anne Case, Guy-Uriel Charles, Lee Fennell, Kim Krawiec, Maggie Lemos, David Lange, Ann Lipton, Richard McAdams, Darrell Miller, Louis Seidman, Patrick Shin, Neil Siegel, and Gregg Strauss, as well as to participants at workshops at Duke Law School, Indiana (Bloomington) Law School and the University of Chicago Law School. For research assistance, we thank Rose McKinley.

¹ See Jennifer L. Doleac & Luke C.D. Stein, The Visible Hand: Race and Online Market Outcomes, available at http://ssrn.com/abstract=1615149. The same study also found that online buyers trust black sellers less than white sellers. Buyers were 17 percent less likely to include their name in e-mails to black sellers, 44 percent less likely to accept delivery by mail, and 56 percent more likely to express concern about making a long-distance payment. Id. Other research demonstrated that a baseball card pictured in a black hand sold for, on average, 20 percent less than the same card in a white hand. See Ian Ayres et al., Race Effects on eBay, available at http://ssrn.com/abstract=1934432 (Sept. 27, 2011).

representatives performed better than male representatives. Overall, clients undervalued female marketers by 21 percent.³

- A study of over 1,000 taxicab trips in New Haven, Connecticut, found that customers tip African-American cab drivers approximately one-third less than white cab drivers, and that African-American drivers are 80 percent more likely than white drivers to be stiffed.⁴

- A study based on data collected outside five Virginia restaurants found that customers tip female servers less than men, unless their customers are regular patrons, or the service quality is exceptional.⁵

- A convenience survey of physicians attending a 2007 meeting of the American College of Emergency Physicians Scientific Assembly concluded that 24 percent of patients believe that they get better care from a person of the same gender and 32 percent of patients believe they get better care from a physician of the same race. Thirty-eight percent of providers say they would accommodate patient requests for physicians of the same gender, and 31 percent would accommodate requests for physicians of the same race.⁶

I. The Conundrum

Customers discriminate. They discriminate in whom they buy from, how much they pay, and how they evaluate those with whom they do business. This discrimination hurts some more than others. While there are individual and collective instances in which customers favor women and persons of color,⁷ customers more often discriminate against women and racial minorities.⁸ The question we explore here is whether the law should do anything about it.

⁵ See Matthew Parrett, Customer Discrimination in Restaurants: Dining Frequency Matters, 32 J. LABOR RES. 87 (2011).
⁷ See text accompanying notes __, supra.
⁸ The body of research on customer discrimination is large and, as one might expect, the strength of findings vary. Overall though, most of the evidence finding evidence of customer discrimination document discrimination against women and minorities, not in favor of them. Studies include, Clark Nardinelli & Curtis Simon, Customer Racial Discrimination in the Market...
Current law does not prohibit customer discrimination.\(^9\) Under federal and state anti-discrimination law, private firms of a certain size may not discriminate in their employment practices or in serving the public on the basis of race, gender, and other characteristics,\(^10\) yet customers are free to act in accordance with their racist and sexist preferences. Clients may refuse to hire a female lawyer to represent them simply because they believe men are more competent. Customers may avoid doing business with a gay photographer because they are disgusted by homosexuality. They may move to another line at a car-rental counter to steer clear of a service representative wearing a Sikh turban because they assume all foreign-looking people are terrorists. They may tip white male waiters more than black female ones because they believe men are, and should be, the real breadwinners. Current law does not even apply to firms when they act as customers; while in the customer role, they, too, may bring their race and gender biases to bear on with whom they select to do business.\(^11\)

We examine the carte blanche customers have to discriminate in light of the more customary approach to behaviors society deems harmful—i.e., the law regulates both sides of the transaction. For example, the law criminalizes both the sale of certain drugs and their possession (although selling is often considered worse than buying). Ditto prostitution (although selling is considered worse in some jurisdictions, and buying is deemed worse in others\(^12\)). Both the buying and selling of body organs and certain kinds of weapons are illegal, as are offering and accepting bribes.

One might try to rationalize the exclusive reliance on firms to achieve non-discrimination goals by the impracticability of regulating customer behavior. How would the law recognize, much less prove or effectively sanction, discrimination

---


\(^{10}\) The exception is Section 1981 of the Civil Rights Act of 1866, which prohibits race discrimination in private contracts. 42 U.S.C. 1981. Apart from the fact that the Act only applies to race discrimination, however, it appears never to have been applied against customers who discriminate on the basis of race. For a discussion of the possibilities of applying Section 1981, see Ian Ayres, Pervasive Prejudice: Unconventional Evidence of Race and Gender Discrimination 127-136 (2001).

\(^{11}\) Title VII of the Civil Rights Act of 1964 prohibits employment discrimination the basis of race, color, religion, sex or national origin. In addition, there are federal and state statutes addressing discrimination on the basis of other characteristics such as age, pregnancy and disability. Cite to public accommodations statutes.

\(^{12}\) In a sense, employers who hire employees are customers, in that they are purchasing labor from the employees. So, the distinction is perhaps between an ongoing employment relationship (which we regulate) versus a spot transaction (which we do not).

\(^{12}\) Traditionally, prostitution laws were aimed primarily against the prostitutes. See Sylvia Law, Commercial Sex: Beyond Decriminalization, 73 SO. CAL. L. REV. 523, __ (2000). Led by Sweden, Norway and Canada, there is some movement in the law today toward penalizing only the customer side of the transaction. For a discussion of the Swedish law, see Max Waltman, Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law, 33 Mich. J. INT’L L. 133 (2011)
by individual customers? As an initial response, we observe that if the low odds of apprehending discrimination were itself a reason not to regulate it, there would likely be no anti-discrimination laws at all. Discrimination by employers, landlords, shop owners and hotel and restaurant chains is notoriously hard to identify and prove.\textsuperscript{13} Nonetheless, the law makes it illegal for employers to discriminate. Race and sex discrimination in choosing a jury are also prohibited,\textsuperscript{14} despite the almost non-existent chance that such discrimination will be apprehended.\textsuperscript{15} From an enforcement standpoint, these prohibitions make little sense, but the law nonetheless marks the underlying discriminatory behavior as wrong.

Before we confront the enforcement difficulties, however, we need to address the preliminary, conceptual question of whether there \textit{should be} a public policy against customer discrimination. That is the primary subject of this paper. We explore two significant explanations for why, even for the most harmful forms of customer discrimination, society might choose not to regulate it. The first explanation is efficiency. Society may regulate firms (and especially big firms) and not customers because it believes that non-discrimination goals, like many other regulatory goals, are most efficiently met through the regulation of firms rather than individuals. The second explanation is a concern for personal autonomy and privacy. Society may regulate firms and not customers because it believes that limiting customer choice would infringe on the basic liberty interests of its citizens in ways not present in the regulation of firms. The concern with such potential infringement is not only that it is antithetical to strong constitutional values. There is worry also that legal coercion of customer behavior in the face of strong resistance to it may generate the kind of resentment and offense that is counterproductive of the deeper improvements in attitudes and commitments upon which nondiscrimination ultimately depends.

We conclude that these two rationales might sensibly inform appropriate legal approaches to customer discrimination, but that they do not justify writing off

\textsuperscript{13} Specifically, there is no one more likely to lose a civil case than a plaintiff in an employment discrimination case. Plaintiffs in employment discrimination cases do worse than defendants at every stage of litigation—settlements, pre-trial motions, trials, and appeals. See Keven M. Clermont & Stewart J. Schwab, \textit{How Employment Discrimination Plaintiffs Fare in Federal Court}, 1 J. EMPERICAL LEG. STUD. 429 (2004); Kevin M. Clermont, & Stewart J. Schwab, \textit{Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?}, 3 HARV. L. & POL’Y REV. 103 (2009).

\textsuperscript{14} J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (state may not exercise its peremptory challenges on the basis of sex); Batson v. Kentucky, 476 U.S. 79 (1986) (same, re. race); see also SmithKline Beecham Corp. v. Abbott Laboratories, (9th Cir. 2014) (holding it unconstitutional for a party to use peremptory strikes on the basis of sexual orientation).

\textsuperscript{15} The exceptions involve blatant circumstances involving the complete elimination of prospective jurors based on race. See Foster v. Chapman, cert. granted May 26, 2015 (in capital case, prosecutors highlighted each black prospective juror to indicate that juror was black, ranked each black prospective juror against each other, and struck each black candidate from the jury pool)
altogether legal measures to curtail customer discrimination. The efficiency rationale explains why regulating at the firm level is cheaper, but not why the law should not also regulate at the customer level. The privacy rationale offers a more powerful justification, but it applies better to some forms of discrimination than others and does not, we conclude, offer a blanket justification for ignoring all forms of customer discrimination.

We then offer a rough taxonomy of customer discriminations. Our taxonomy distinguishes between types of customer discrimination that are acceptable, perhaps even desirable; some that should be allowed, even if they are potentially harmful; and some that warrant society’s collective effort to thwart.

Having narrowed the forms of discrimination that are the principal target of this paper, in the final section we sketch out the policy approach that could make the most sense in this arena. Perhaps surprisingly given our skepticism of the rationales for giving wide berth to discrimination by customers, the policy does not involve a direct ban on customer discrimination. We conclude that a direct ban would be ineffective, and probably counterproductive. Instead, we advocate more indirect forms of intervention, such as public norm advocacy and mechanisms to allocate the costs of customer discrimination to the customers themselves. To advance these and other interventions, we offer a modest proposal to require those upon whom the law already imposes statutory nondiscrimination obligations—i.e. companies of a certain size—to refrain from facilitating discrimination by their customers. While current law exerts some pressure on business to guard against customer bias, a more explicit obligation would incentivize firms to be more vigilant about the impact of their practices on customer discrimination and also help to cultivate a stronger, more general community norm against discrimination.

II. The Rationales for Regulating Only Firms

In this section, we explore the two best reasons why society regulates discrimination by firms but not customers.

A. Efficiency
   1. The Rationale

One explanation for why we prohibit discrimination by firms and not by customers may be that firms are the easiest to regulate. They are readily
identifiable; they are already subject to many state obligations and regulations in exchange for the privilege of doing business in the state; and they have owners and managers who can be held accountable. Moreover, firms are the cheapest cost avoiders. They participate in the market as a single player with control over how their employees are hired, promoted, and fired, and how their goods and services and produced and sold. Policies and procedures of the firm operate on a scale that individual consumer decisions do not. Further, firms are driven largely by profits, and thus already have an incentive to eliminate market inefficiencies such as race- and gender-based discrimination.

It also may be the case that the burden of ending discrimination ordinarily is more easily absorbed by firms than by private individuals. To the extent there are costs in refraining from discrimination—including the potential loss of revenues from bigoted customers—nondiscrimination mandates spread that loss throughout an industry; without such spreading, firms choosing not to discriminate would be competitively disadvantaged by any associated costs.\(^\text{16}\)

2. The Response

The foregoing factors help to explain why supply-side regulation of firms of a certain size is easier than regulation of customer behavior but not why supply-side only regulation is the most efficient legal approach. Whether firm-only regulation is the most efficient legal approach depends upon how one defines and weighs the competing goals to be achieved. If society’s goals include reducing the full range of harmful discriminatory behaviors—by customers as well as by firms—it cannot be taken for granted without further analysis that a firm-only regulatory approach is the most efficient one.

Put another way, given the reality, and the harm, of discrimination by customers, the fact that regulating firms is easier than regulating individual customers does not explain why the law does not also prohibit customer discrimination—not even at a near-zero enforcement level. Customer discrimination acts both in conjunction with firm behavior, and apart from it.

\(^{16}\) That the law reflects some assessment of the capacity of businesses to bear the burden of nondiscrimination is apparent in the fact that small businesses do not have the same nondiscrimination obligations as larger ones. Only companies with 15 or more employees are subject to the nondiscrimination prohibitions of Title VII or the Americans with Disabilities Act (ADA).\(^{[cite]}\) The Family and Medical Leave Act (FMLA), which requires up to a three-month leave for the case of a new infant or ill family member, only applies to companies who employ more than 50 employees.\(^{[cite]}\) Likewise, businesses that are small enough sometimes are exempt from public accommodation laws.\(^{[cite]}\)
Indeed, there is reason to think that the “taste” for discrimination exists primarily at the individual rather than the firm level. The bottom line is this: To justify regulating only firms and not customers, it would need to be shown not only that the regulation of firms is cheaper or easier than regulating customer behavior, but also that regulation of firms is effective enough, in light of the competing goals and interests.

The presumed case for the effectiveness of a firm-only approach is that if firms cannot discriminate in their employment or sales practices, then customers will have no opportunities to indulge their biases. Customers who do not want to sit at a lunch counter with African-Americans will have no place to eat; airline passengers who prefer only female flight attendants will not have that choice if they want to fly; white clients who don’t want to work alongside black employees will narrow their choice of jobs. Further, when customers have no choice but to deal with businesses with more diverse workforces, it may be supposed that the resulting exposure to women and minorities will tend to reduce customer biases toward these groups, thus reducing the preferences that drive customer discrimination.17

In fact, over time current nondiscrimination law has exerted some pressure on firms to blunt the force of customer discrimination. Initially airlines were allowed to hire only female flight attendants because this is what their passengers preferred,18 but as the role of sex stereotypes became better understood, courts reversed course, holding that the public’s preference for female flight attendants did not justify discrimination against male applicants for the job.19 As a result, the traveling public soon got used to, and came to expect, male as well as female flight attendants, and even female flight attendants who do not conform to traditional criteria for female attractiveness. More recently, courts have held that black service employees cannot be matched with members of the public or potential customers of the same race. The Eleventh Circuit Court of Appeals held, for example, that a black woman who was let go by a telephone marketing company stated a prima facie case of race discrimination under section 1981 based on the company’s

practice of “race-matching” black callers and black scripts with phone numbers in black calling areas and white callers and scripts with white calling areas. In another case, the Seventh Circuit Court of Appeals reversed summary judgment against a black employee suing for race discrimination based, among other things, on the fact that employer assigned black salespersons to deal primarily with black accounts and white salespersons to serve white accounts. Outside the employment context, recent decisions have also held a hard line against discrimination that defendants attempted to justify based on the preferences of their customers. The Seventh Circuit Court of Appeals held, for example, that Craigslist may not post listings for housing sales or rentals by race, religion, sex, or family status, simply because its customers choose to discriminate on these bases.

Despite the profit-driven incentives that firms themselves have to avoid being discriminatory and the availability of current law to identify business practices that are based on discriminatory preferences by customers, race and gender discrimination by customers persists, as is apparent from the research described in the opening of this paper. Indeed, the opportunity for the exercise of discriminatory practices is likely to increase with the meteoric growth of customer transactions through on-line platforms—like Airbnb, Uber, Craigslist, Etsy, and so on—that, as facilitators of transactions among individual buyers and sellers rather than producers themselves, can disclaim responsibility under a firm-only regulatory approach for the discrimination of either their sellers or their buyers.

Critics of these platforms are urging that wage and hour laws and other regulations be extended to participants in this “sharing economy.” Notably, the very need for such an extension is itself a consequence of the law’s reliance on firms to achieve its regulatory goals; if the law from the beginning had decided to regulate transactions rather than firms, the discriminatory practices facilitated by these platforms would already be prohibited. As more and more transactions move off the traditional firm grid, nondiscrimination norms may, in turn, weaken. Indeed, because transactions in the sharing economy are more likely to involve intimate

20 Ferrill v. The Parker Group, 168 F.3d 468 (11th Cir. 1999).
21 See Johnson v. Zema Systems Corp., 170 F.3d 734 (7th Cir. 1999).
22 See Chicago Lawyers’ Committee for Civil Rights Under Law, Inc., 519 F.3d 666 (7th Cir. 2008).
23 This changes if the platform is deemed to be an employer as opposed to a transaction facilitator. More broadly though, scholars were observing a trend away from employee relationships and toward more market type contracting even without factoring in the phenomenal rise in platforms such as Uber and Airbnb. See Matthew T. Bodie, Employees and the Boundaries of the Corporation, Chapter 6, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW (Claire Hill & Brett H. McDonnell eds. 2012).
24 A class action case has been brought against Uber, for example, contending that its drivers should be treated as employees rather than independent contractors. See Steven Davidoff Solomon, Uber Case Highlights Outdated Worker Protection Laws, N.Y. TIMES, Sept. 15, 2015.
activities (e.g., dating sites) or intimate spaces (e.g., home services like TaskRabbit or Handyman), or create trust through the exchange of private information between buyer and seller (e.g., AirBnB), it is likely that sex-discrimination will become more explicit, frequent, and accepted as one of the sharing economy’s benefits.\(^{25}\)

Even without the explosion of the sharing economy, there is no reason to think that race and gender discrimination by customers will go away on its own. Most firms are profit-driven, and thus motivated to make rational, non-discriminatory decisions. Their primary motivation for finding ways to discriminate is to satisfy their customers.\(^{26}\) If customers do not wish to discriminate, firms in a competitive market likely will not.\(^ {27}\) In contrast, the discriminatory motives of customers tend to be personal—driven by animus, stereotypes, and preferences. Customers may be willing to pay for their preferences, and often these preferences can be exercised at no cost. As long as customers can find Uber drivers of the right gender, race and religion, male lawyers, straight photographers, white cashiers to serve them, etc.—and, in most markets, they should have no problem doing so—they have no reason not to exercise their preferences.\(^ {28}\) By relying entirely on supply-side regulation, the legal system misses the potential to change the calculation of customers when they choose to discriminate. Put another way, focusing only on firms concentrates on the slice of the market that already has strong reasons to refrain from discrimination, and ignores those who don’t have such reasons.

Reliance on firm-only nondiscrimination mandates also ignores the extent to which customer bias itself has a way of continuing to frustrate the success of the mandates directed against firms. Consider customer bias with respect to employees who provide direct service to customers. If customers steer away from store clerks, say, on the basis of their race and gender, these workers will tend to generate fewer revenues for their employers, and thus are likely not to do as well in

---

\(^{25}\) See Naomi Schoenbaum, *Gender and the Sharing Economy* (2015 draft) (arguing that sharing economy transactions tend to be built on greater intimacy between buyers and sellers, thereby reinvigorating gender stereotypes associated, for various reasons, with intimacy).

\(^{26}\) This was a key insight of Becker’s classic work on the economics of discrimination. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

\(^{27}\) There is also the matter of implicit bias, of which business managers are simply unaware. This is more difficult to weed out, even if employers have a strong economic motivation for doing so, but a profit-driven firm will find ways, especially if the law supports those ways with nondiscrimination obligations on the part of customers.

\(^{28}\) To be sure, this is oversimplified. It might be rational for a profit-driven business to discriminate to, say, enhance the camaraderie among its men, or save on search costs. On search costs, see Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 3490 (June 1983). Current law would prohibit such an exclusion, of course. Conversely, customers might also have competitive or profit-driven reasons not to discriminate. Our argument, here, is that the competitive, economic pressures of a profit-driven business provide incentives to refrain from discrimination that are often not present in individual customers.
their evaluations. Discriminatory customers will also give bad evaluations,29 which may affect pay and promotion decisions. In these circumstances, the rational store clerk may well gravitate away from direct customer-contact positions toward other types of work. Even if the firm, barred from discrimination, continues to interview and hire members of racial minorities, over time, these clerks will tend to move themselves gradually to the back offices, learn to moderate the fact of their racial identity,30 or find job elsewhere. Thus, even if the firm does not discriminate on grounds of race, customers have the power to lessen the market value of women and minority service workers and the choices they are able to pursue in the market. One can tell a similar story with respect to waitresses and other service workers, including teachers, lawyers, and bankers.

Not only does customer behavior alone have the potential to skew employee choices, but it underlies numerous market inequities that current law is, at present, helpless to prevent. Why, for example, do colleges and universities generally pay the (invariably male) coaches of their men’s basketball teams more than the (female, except for a few highly paid male) coaches of female basketball teams? The jobs are arguably similar in skill, effort and responsibility, and a school’s women’s team is sometimes more successful than the men’s team. The usual justification for gender-skewed pay differentials, which courts have accepted, is that men’s teams are revenue producing and thereby involve working conditions with more stress and responsibility than women’s teams, which are not revenue producing.31 But—and here’s the catch—the reason men’s teams produce more revenue is that the public disproportionately prefers to watch men’s games—i.e., customers discriminate. One can argue that men’s sports display more talent, strength, athleticism, or speed—i.e., that the discrimination is not based on gender—but these characteristics are, themselves, highly gendered. As Deborah Brake writes, “[t]he popularity and revenue-producing potential of a sport” is “a product of countless social and institutional factors, including longstanding and continuing investments in facilities, personnel, programs, recruiting, marketing, and coaching. … These investments contribute to a certain image and status of a

29 Importantly, evaluations are more ubiquitous than ever in the sharing economy, and as a result of the popularity of customer reviews, more common in traditional business as well.
30 See Mitu Gulati & Devin W. Carbado, WORKING IDENTITY (2000) (describing strategies pursued by women and minorities to avoid triggering gender and racial stereotyping by others).
31 See, e.g., Stanley v. Univ. of S. Cal., 13 F.3d 1313 (9th Cir. 1994), aff’d, 178 F.3d 1069 (9th Cir. 1999) (rejecting equal pay claim of to increase salary of women’s basketball coach from $60,000 to $150,000 to match salary of men’s basketball coach, even though she was much more successful in terms of team wins, but whose average attendance at women’s games was 762, as compared to 4,103 for men’s games). See also EEOCV v. Madison Community Unit School District No. 12, 818 F.2d 577 (8th Cir. 1987) (suggesting in dictum that revenue differentials might justify pay differences, while affirming that women should receive equal consideration for coaching positions for men’s teams).
sport that greatly affect its marketability.” To whatever extent any difference between male and female sports relates to factors other than gender, the fact remains that it is only because fans prefer men’s to women’s sports that men’s sports generate more responsibility, stress, and public relations work, and thus more pay for the coaches of men’s teams.

Another way in which customer bias frustrates employer-centric mandates is that customers have gender role expectations that employers are sometimes entitled to take into account in what they require of their employees. Sex-specific dress and appearance codes are one example. In Jespersen v. Harrah’s Casino, Harrah’s Casino was allowed to specify that the women employees in certain jobs should wear face powder, blush, mascara and lip color (“in complimentary colors”) and have their hair “teased, curled, or styled” hair (and “down at all times”), while men were not allowed to wear make-up or nail polish and their hair could not be below the top of their shirt collars (“[p]onytails are prohibited”). As with most other dress and appearance requirements challenged under Title VII, because these requirements corresponded to community expectations and did not impose manifestly unequal burdens, the Ninth Circuit Court of Appeals held that Harrah’s policy did discriminate based on sex, and thus was not required to be justified under the bona fide occupational qualification (BFOQ) exception. The upshot is that, while an employer is expected to refrain from acting on its own bias, it has considerable leeway to incorporate its customers’ attitudes in its dress and appearance policy. Through this logic, customer prejudices operate to justify employer policies that reflect these prejudices.

Customer preferences can also sometimes justify an employment practice even when that practice would otherwise be illegal discrimination. Under Title

32 See Deborah Brake, Revisiting Title IX’s Feminist Legacy: Moving Beyond the Three-Part Test, 12 AM. U.J. GENDER SOC. POL’Y & L., 453-481 (2004); Catharine A. MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 120 (1987) (arguing that “being female and being athletic have been socially contradictory and … being male and being athletic have been more or less socially synonymous”).

33 Coaches of men’s teams, in turn, are almost always likely male, at least in part because players expect it, although the same is not the case in women’s sports. E.g., Matthew J.X. Malady, Why Are There Still no Women Coaching Men’s Teams, SLATE (DOUBLEX), Sept 28, 2012, available at http://www.slate.com/articles/double_x/doublex/2012/09/female_coaches_why_are_there_more_women_in_charge_of_men_s_teams_.html


35 See, e.g., Belissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985) (employer who told female attorney to “tone down” her attire did not violate Title VII where it also required male attorneys to dress conservatively). But see Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028 (7th Cir. 1979) (dress code requiring men to wear “customary business attire” but women to wear uniforms demeaned professionalism of female employees and thus violated Title VII).
VII’s BFOQ exception, sex discrimination is justified if it is essential to the job. In some cases, discriminatory attitudes by customers are the crucial link between a discriminatory policy and the essence of the business. For example, several cases have found sex to be a BFOQ in therapeutic settings in which customers expressed strong gender preferences. In one case, after nine female residents in a female nursing home signed an affidavit objecting “most strenuously” to male nurses and male nurse’s aides (although apparently not to male doctors), the nursing home adopted a policy of hiring only female nurses, which was upheld by the court under the BFOQ exception. In these cases, the law treats customer biases as background facts, which—notwithstanding the nondiscrimination obligations of firms—firms may indulge when they can tie that bias to a business purpose.

Commercial advertising is another route by which customer behavior shapes business practices that, in turn, reinforce the customer prejudices on which they are based. In Wilson v. Southwest Airlines, Southwest Airlines engaged an advertising company, Bloom Agency, to develop a “winning marketing strategy.” Bloom developed a successful strategy designed to distinguish it from other airlines by “project[ing] to the traveling public an airline personification of feminine youth and vitality.” The ideal representative of this campaign was a “lady” who “is young and vital … she is charming and goes through life with great flair and exuberance…. You notice first her exciting smile, friendly air, her wit …” To carry out this gender-specific advertising policy, Southwest Airlines hired only female flight attendants.

---

36 The BFOQ exception applies only to sex discrimination, not race discrimination, although there may a kind of de facto BFOQ that operates in some settings, as with police departments who hire minority police personnel specifically to work in minority communities. Cf. Kate Manley, The BFOQ Defense, 16 DUKE J. GENDER L. & POL’Y 169 (2009).

37 See, e.g., Healey v. Southwood Psychiatric Hospital, 78 F.3d 128 (3d Cir. 1996) (upholding sex as a BFOQ in hiring counselors at psychiatric hospital); Jones v. Hinds General Hospital, 666 F. Supp. 933 (S.D. Miss. 1987) (upholding sex-based hiring of male and female nurse assistants and orderlies where job responsibilities included viewing or touching private parts of patients); Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376 (S.D.N.Y. 1992) (permitting sex as bfoq in positions at psychiatric hospital involving assistance to naked or partially dressed patients); Brooks v. ACF Industries, Inc., 537 F. Supp. 1122 (S.D. W. Va. 1981) (upholding sex as BFOQ for cleaning men’s bathhouses). But see EEOC v. Physicians Weight Loss Centers, 953 F.Supp. 301 (W.D. Mo. 1996) (rejecting sex as a BFOQ in weight-loss centers even though clientele was mostly female and did not want men taking their body measurements); Slivka v. Camden-Clark Memorial Hospital, 594 S.E.2d 616 (W. Va. 2004) (invalidating hospital policy of hiring only female obstetrics nurses, despite evidence that 80 percent of patients demanded female nurses and female nurses were needed as chaperones for male physicians).

38 In a different context, the Supreme Court in Dothard v. Rawlinson upheld the exclusion of women from jobs as correctional counselors in maximum-security prisons in Alabama because, as women, they were more likely to stir up prisoners, thus heightening the risk of sexual assaults or other violence. 433 U.S. 321 (1977). As is other BFOQ cases, in Dothard, attitudes and prejudices of people outside the challenged employment relationship are treated as givens, and used to justify sex-based practices within that relationship.


40 517 F. Supp. at __.

41 Id.
attendants. The policy was successfully challenged by a man seeking employment as a flight attendant. However, while the court found the female-only policy a violation of Title VII, the ad campaign itself was not challenged. Indeed, there was, and still is, no law under which the campaign could have been disapproved. Even in its new imaging (toned down undoubtedly because of gender norms by customers who have come to prefer, over the years, greater subtlety), Southwest Airlines continues to be the LUV airline, perhaps catering to the positive customer response to its sexy imaging.42

The many ways in which customer prejudice can effectuate an end-run around discrimination by firms reveals that even if the regulation of the firm is an easier way to attain our non-discrimination goals, it is not sufficient, and does not explain why we do not also regulate on the demand side, even a little bit. For a fuller understanding of the exemption for customer discrimination, we must look elsewhere.

B. Privacy and Individual Autonomy

1. The Rationale.

Another, potentially powerful way to explain why we don’t regulate customer discrimination is that we believe that individual customer’s biases and prejudices are ideas and beliefs which, undesirable though they might be, an individual in a free society has a right to have. Although the question for the law is how individuals act, not what they believe, one might well believe that what customers like, what they buy, with whom they dine, what entertainment they pursue, etc., are decisions so basic sense of their private identity—perhaps even to their religion and any number of other protected, personal commitments—that they should be able to act on them, free from public pressure about what choices they should make.

Public accommodation nondiscrimination statutes already recognize the privacy rationale. These statutes do not apply if a business, club, or other operation is sufficiently “private” or intimate to implicate the exercise of members’

rights of constitutionally-protected free expression or association.\textsuperscript{43} These rights are especially strong when the organization has a political or religious interest, and even more protected, when the expressive interest is exclusionary and unpopular. A white male supremacist group like the American Front is allowed to exclude women and minorities; the Rotary Club is not.

Associational rights include the freedom to engage in discriminatory behavior in private spaces—freedom that is not allowed in more public settings. Accordingly, although under federal law it is illegal to discriminate in the sale and rental of housing, there is typically an exemption from the nondiscrimination obligation for owners of, say, a small duplex rental in a small, owner-occupied building.\textsuperscript{44} The narrowness of this exemption is reflected in the fact that it is lost if the small landlord publicly advertises the availability of the unit on a discriminatory basis.\textsuperscript{45}

2. \textit{The Response}.

This broadly shared expectation of privacy or autonomy in the decisions we make in the marketplace is deep and strong, but it bears a closer look in the broader historical context of anti-discrimination laws. Race and gender theorists have long pointed out that society deems an action private or public not because of its inherent boundaries, but on the basis of society’s evolving values.\textsuperscript{46} At any particular regulatory moment, the zone of privacy or associational interests society wants to protect reflects a comparative weighing of the competing interests. In the 1950s, whether racial integration was worth intruding into the individual’s private sphere of association was an open question. At the time, as respected a scholar as Herbert Wechsler could write that “integration forces an association upon those for whom it is unpleasant or repugnant,” and that “[g]iven a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it,” allowing people to avoid repugnant associations could well be the value best supported by “neutral


\textsuperscript{44}See FHA 3603b. See also text accompanying notes _, infra.

\textsuperscript{45}See FHA 3604(c).

principles” in the Constitution.\(^47\) Robert Bork expressed a similar view when he identified as a principle of “unsurpassed ugliness” the view that

if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths.\(^48\)

Bork’s views had considerable support in 1963, but these views would garner little support today if raised as an argument against public accommodations law. Likewise, domestic abuse—once viewed as a private matter into which the state should not intrude\(^49\)—is considered today an appropriate sphere of state interference.\(^50\) Conversely, some matters once thought to be ones suitable for public regulation, such as campaign finance and gun control, are now deemed to infringe personal and private choices by individuals.\(^51\) For better or worse, the law has changed, and continues to evolve, in these matters.

Looking back over the zones of privacy and autonomy society used to take for granted, it should be clear that it is not enough to assert that individual privacy and autonomy are important interests. In the context of customer discrimination, it must be shown also that they are more important than interests with which they compete, including non-discrimination goals Transactions in some goods—like heroin and body organs—are harmful enough that we regulate their sale, both to buyers and sellers, despite the way they limit private behavior. Likewise, the law considers some activities—like prostitution and bribery—undesirable enough that

\(^47\) See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959) (suggesting that as between “denying the association to those individuals who wish it” and not “imposing it on those who would avoid it,” the latter would be given higher value). Twenty-five years later, Justice Powell expressed a similar view, when he argued that law firms should be allowed to associate themselves as they wished, even if this meant discrimination based on sex. See Hishon v. King & Spalding, 467 U.S. 69, __ (1984) (Powell, J. dissenting).


\(^49\) See, e.g., Frazier v. State, 86 S.W. 754 (Tex. Crim. App. 1905); see also American Law Institute, Model Penal Code, Commentary to §213.1(c) (1980) (explaining the need for spousal immunity in rape cases on the grounds that liability would “thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship”).

\(^50\) The debate is ongoing about the appropriate level of state interference, given competing goals individual protection and individual autonomy. Compare, e.g., Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991) (arguing that the failure of the state to intervene in domestic violence is itself a form of violence); Jeannie Suk, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009) (arguing that the breakdown of the boundary between public and private space that the domestic violence revolution helped to accomplish has reduced autonomy and privacy for both women and men); Elizabeth Ben-Ishai, The Autonomy–Fostering State: “Coordinated Fragmentation” and Domestic Violence Services, 17 J. POLITICAL PHIL. 307 (2009) (urging mandatory prosecution in domestic violence cases, but with a loosely coupled set of services to mediate the effects of state intrusion on women’s privacy and autonomy interests).

it prohibits them. That the law declines to prohibit race and gender discrimination by customers speaks not only to the strength of a societal commitment to privacy and personal autonomy, but to the comparative weakness of its commitment to eliminating private race and gender discrimination in the marketplace of goods and services.

In legal debates about discrimination, there has been no serious attempt to weigh the strength of society’s present interest in preventing customers from discrimination, in its various forms, against society’s present commitment to personal privacy and autonomy for its citizens, in its various forms. Some types of customer discriminations do not seem as dangerous or harmful as others, just as limits on customer discrimination may seem more intrusive with respect to some types of personal consumption choices than others. How to prioritize the competing interests will be considered in more detail in the next section. The point, here, is that prioritization is inevitable and is best done explicitly.

In short, while the privacy rationale offers some explanatory power for why the law does not regulate the exercise of customer bias, it begs the question it purports to answer: is the reduction of race and gender discrimination an important enough goal to consider some limits on customer choice to help achieve it? When society feels strongly enough that an activity engaged in by private individuals is harmful or offensive, it regulates it, taking into account competing interests. The failure to regulate any form of bias on the part of customers who have substantial power to frustrate nondiscrimination laws—the failure even to regulate firms when they act as customers—needs to be justified on its own terms.

III. Some Distinctions

So far our discussion might be understood to assume that all forms of customer discrimination are equally harmful and unacceptable. They are not. Some discrimination might be viewed appropriately as acceptable and even desirable. Some customer discrimination may be considered harmful but nonetheless tolerated because of the privacy and autonomy issues involved. Other discrimination is harmful and should be treated as unacceptable.

Sorting customer discrimination into these categories is a fraught task and necessarily tentative, entailing at the moment only our own values, without the benefit of a broad societal discussion of the topic—that we hope this paper will
further. Nonetheless, we will attempt to outline some likely terms of the conversation.


Some customer discrimination is not just tolerated, but might be considered to be a positive value in itself, even in terms of the values underlying our concern about customer discrimination. Customers sometimes discriminate by race or gender (or some other otherwise suspect basis), in concert, to promote non-discrimination goals. Examples abound. The bus boycott by blacks in Montgomery, Alabama in the mid-1950s was instrumental in creating awareness of racial segregation in the South. More recently, a “girlcott” started by teenagers in 2005 brought attention to Abercrombie & Fitch’s sales and marketing strategies that were thought to contribute to unhealthy body images for girls. Customers have boycotted Russian vodka to try to promote the change of Russia’s anti-gay laws. Today numerous consumer campaigns are directed at building black-owned businesses to build opportunities for blacks that have longed been disproportionately denied to them. BLACKOUT is an international movement designed to encourage customers to redirect their spending and investments to black-owned companies. Some brands, like FUBU (“For Us By Us”) are designed to draw customers seeking to keep their business within the black community.

A truly “color-” or “gender-blind” approach would not single out these instances from the rest. We would do so, however, on the theory that they diminish gender and racial inferiority and subordination rather than contribute to it.


54 See http://www.blackbusinessnetwork.com/Store/. Among other websites designed to facilitate customer discrimination in favor of black-owned businesses, see http://www.blackbusinessnetwork.com/Store/. See, e.g., Jennifer Malat & Mary Ann Hamilton, Preference for Same-Race Health Care Providers and Perceptions of Interpersonal Discrimination in Health Care, 47 J. HEALTH & SOC. BEHAVIOR 173 (2006) (racial minorities are more likely to seek a doctor of the same race, possibly because of general perceptions of discrimination in the provision of health care and the belief that physicians are less likely to discriminate against patients of their own race).
55 See http://www.fubu.com/.
56 See Michael Blake, The Discriminating Shopper, 43 SAN DIEGO L. REV. 1017, 1033 (2006) (proposing that customer discrimination should only be prohibited if it “exacerbate[s] or contribute[s] to a pattern of social marginalization leading to political exclusion and injustice”).
Other customer discrimination may be undesirable but outweighed by the customer’s interest in privacy and personal autonomy. It is not an easy matter to decide what belongs in this category, but in conversations with colleagues, the example that most often comes up is the on-line dating site. Most people consider dating so personal to people’s social and sexual identity that they do not want the state to exert any influence over dating choices. Race preferences might be a closer question but, even for these, most people believe that sexual attraction is a primal force, inherent to one’s identity and, within limits relating to abuse, ability to consent, etc., not something to be dictated by others. Indeed, the freedom to make one’s own choices with respect to one’s sexuality, family, and procreation is one of our most protected constitutional rights. This right remains important for market transactions. If it is appropriate to apply one’s own selective criteria to choosing with whom to dance in a bar, so it probably should also be acceptable for customers to apply those criteria in using a commercial dating site.

It is important to note that even though we would allow certain customer discrimination, this allowance is not without cost. Race selection in one’s personal relationships helps to maintain stereotypes and deprives people of opportunities based on their race and gender. If one can imagine a world without race preferences in dating, it would surely be a less discriminatory world. Still, most people consider any missed opportunities in this regard a necessary consequence of living in a free society. Few people, even if they applauded the goal of race-neutral dating, would be willing to sacrifice their ability to make unfettered decisions in specific dating decisions in order to advance society’s broader goal of nondiscrimination. Put differently, we suspect that no amount of debate would likely lead, today, to the regulation of on-line dating sites like Match.com, Peppr and Tinder in order to prevent customers from making choices based on race or gender preferences.

A similar example of customer discrimination that we would deem regretfully allowable is the choice of a roommate. In holding in 2012 that it is not a violation of the California Fair Employment and Housing Act for Roommate.com to allow

---

57 Except, perhaps, to prohibit sexual relationships that were not heterosexual—a ship that has already sailed. See Lawrence v. Texas.
59 See Elizabeth F. Emens, Intimate Discrimination: The State’s Role in the Accidents of Sex and Love, 133 Harv. L. Rev. 1307 (2009) (arguing that while the state has an important role in facilitating relationships and interactions across lines of race, gender, and disability, individuals should not be directly pressured into crossing these barriers).
its users to select roommates based on race, the Ninth Circuit Court of Appeals reasoned that

[t]he home is the center of our private lives. Roommates note our comings and goings, observe whom we bring back at night, hear what songs we sing in the shower, see us in various stages of undress and learn intimate details most of us prefer to keep private. Roommates also have access to our physical belongings and to our person.

Given the personal nature of sharing a living space, this reasoning is persuasive, even though a hands-off approach to roommate discrimination is likely to prejudice members of racial minorities. The same reasoning would not apply to housing markets not involving joint habitation in the same living unit.

Likewise, it is hard to imagine a ban on race matching in the sperm donor market. This choice, too, carries the potential of harmful discrimination, yet it goes to a deeply intimate decision about with whom one might procreate, and one’s sense of self-definition and personal autonomy.

There may be additional types of personal services that are so intimate that they also should be protected on privacy and autonomy grounds. Massage therapists and psychiatrists may fit this category, but perhaps not medical doctors or nurses. Others might classify these differently but, as a general matter, it is important to respect customer choices in highly personal spaces while putting continuing pressure on the stereotypes that may distort those choices. A massage therapist’s services, arguably, cannot be effectively performed where the client does not feel comfortable, relaxed, and safe from sexual threat. At the same time, there is no reason to indulge preferences resulting from stereotypes linking sex to competence, such as hospital patient preferences for female nurses.

3. Disapproved Customer Discriminations.

60 See Fair Housing Council of San Fernando Valley v. Roommate.com, 666 F.3d 1216 (9th Cir. 2012). For an earlier decision to the contrary in the context of two roommates who were looking for a third, see Dep’t Fair Employment and Housing v. Larrick, FEHC Dec. No. 98-12 (Cal. F.E.H.E.), 1998 WL 750901 (July 22, 1998).
61 Id at 12__.
62 See infra.
64 See Kimani Paul-Emily, Patients’ Racial Preferences and the Medical Culture of Accommodation, 60 UCLA L. REV. 463 (2012) (arguing that accommodate race and gender preference for doctors by patients serves therapeutic goals, and also lessens the problem of discrimination against minorities in the provision of health care).
The third category are those customer choices that cause harm to others and that—except potentially at the level of enforcement—are not outweighed by sufficiently strong privacy interests. In this category we would include customer discrimination in the form of avoiding store clerks on account of their race and gender, and race and gender bias in tipping, evaluating customer service representatives, and renting weekend accommodations. These cases infringe on customer choice but do not intrude on the kinds of intimate spaces and activities as the first two categories. In this regard, they are more like political campaign contributions, bribery, or buying guns and drugs, which the state regulates from the customer side, than like dating sites and massage therapists.

At present, the line between allowed customer discrimination and disapproved discrimination is policed, as regards to sex discrimination, through Title VII’s BFOQ exception, discussed earlier. It is a line that has evolved over time, as attitudes about discrimination have evolved. At one time, for example, case law held that sex was a BFOQ in a wide variety of prison and medical facility cases.\footnote{See notes __, supra.} Courts have drawn back on the exception,\footnote{See, e.g., Breiner v. Nevada Dep’t Of Corrections, 601 F.3d 1202 (9th Cir. 2010) (holding that sex is not a BFOQ for working in women’s prison); Slivka v. Camden-Clark Memorial Hospital, 594 S.E.2d 616 (W. Va. 2004) (holding that sex is not a BROQ for hiring only female obstetric nurses, despite evidence that 80 percent of patients demanded female nurses).} and today it is doubtful that any jurisdictions would permit it. So, too, the zone of privacy for customers choosing to exercise discriminatory preferences should shrink over time, with customer stereotypes diminishing and increasingly more forms of customer discrimination shifted to the disapproved category.

IV. An Approach to Customer Discrimination

It bears repeating that existing law already restricts customer preference to a certain extent. By making it illegal for employers, landlords and other providers of public accommodations to discriminate based on race and gender, the law limits customer choices about who they work with and buy from.\footnote{And there is Section 1981 that, at best we can tell, has not been widely used in the customer context (if ever). See supra note 9.} But discrimination persists. In this part we turn to the regulatory analysis. Are there regulatory tools that might curtail discrimination by customers effectively, and without unacceptable infringement on customer privacy and autonomy?
We conclude that even as to the forms of discrimination society should deem least acceptable, direct prohibitions of this discrimination are not the place to start. Instead, we make a modest proposal that clarifies and extends the obligations firms already have to take steps to ensure that they do not facilitate discrimination by their customers.

A. The Case Against An Outright Prohibition

The obvious strategy to ending customer discrimination would be an outright prohibition, analogous the prohibition of discrimination by firms in employment and public accommodations. A direct prohibition is attractive because it acknowledges the harm of customer discrimination and states a public norm against it. A direct prohibition follows from the logic of our analysis that, even if regulating firm rather than customer behavior is more efficient, it is not sufficient to reach, or condemn, discrimination by customers. A prohibition against customer discrimination is also consistent with our analysis that while customer privacy and autonomy interests are strong, they are not trump cards, and should be weighed against the strong interests society has in constraining at least some discriminatory behaviors by customers.

Nonetheless, we are unable to justify a direct constraint against customer discrimination. Our hesitancy is that, while the case for a hands-off approach to customer discrimination is not fully made by the efficiency and privacy rationales, these rationales do have force against a direct prohibition. As we suggested early in this essay, a direct prohibition on customer stereotyping would be a regulatory nightmare requiring, if pursued seriously, an unprecedented level of interference with customer decisions. The problem is not that we can’t track consumer behavior; most of our consumer searches and purchases are already well monitored in the private sector and the information so collected is freely traded in the market. Our “likes” and “dislikes” can be fairly easily determined under modern internet technologies. A more serious practical difficulty is determining what behavior constitutes actionable discrimination. An even more serious obstacle is the normative one that choices about what to buy, whom to buy it from, and how

---

68 Companies like Alibaba have so much information about their customers that they appear to be using that information to evaluate their customers (good, bad, etc.) so as to be able to determine how much credit to give them. See Neil Gough, Alibaba Data to Help Provide Credit Ratings, N.Y. TIMES (DealBook), Jan 28, 2015, http://dealbook.nytimes.com/2015/01/28/alibaba-creates-a-consumer-credit-rating-service/?_r=0
we engage with and evaluate those with whom we do business does seem, as a general matter, to define the freedom of American citizens.

Moreover—and this may be the most important consideration—since the values of privacy and autonomy are thought by people to be so fundamental to their being, regulation that infringes too deeply upon these values can be expected to be counterproductive. Behavioral research suggests that when people are made to do (or forebear from doing) something that transgresses their sense of themselves, they respond defensively, with resentment and defiance rather than acceptance.\footnote{See Michelle M. Duguid & Melissa C. Thomas-Hunt, Condoning Stereotyping?: How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes, J. APPLIED PSYCHOLOGY, Oct. 13, 2014 (describing experiments suggesting that knowledge about stereotypes actually increased stereotype-consistent behaviors); see also Katharine T. Bartlett, Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination, 95 VA. L. REV. 1893 (2009) (summarizing the research); Adam Grant & Sheryl Sandberg, When Talking About Bias Backfires, N.Y.TIMES, Dec. 7, 2014.} When the regulatory goal is to change attitudes, not just the beliefs that follow from those attitudes, the harm of such negative responses is particularly great. Resentment caused by bridge tolls or carbon emission standards is one thing; these are annoyances, sometimes expensive annoyances that (except in extreme cases) do not affect a person’s identity, self-definition, or sense of personal freedom. One’s choices about who cuts one’s hair, whose extra bedroom one rents, or what parameters one can set on an on-line dating service,\footnote{Cialdini, for example, has demonstrated that descriptive normative information about other people’s behaviors (i.e., other people steal petrified wood) may reinforce those undesirable behaviors, injunctive normative information (i.e., you should not steal petrified wood) was more likely to suppress them. See, e.g., Robert B. Cialdini et al., Managing Social Norms for Persuasive Impact, 1 SOCIAL INFLUENCE 3 (2006); Robert B. Cialdini, Crafting Normative Messages to Protect the Environment, 12 CURRENT DIRECTION IN PSYCHOLOGICAL SCI. 105 (2003).} in contrast, are deeply personal decisions. Thus, while the social science research also suggests that normative messages disapproving of discrimination and setting high expectations for overcoming it can have a desirable—indeed, essential—effect,\footnote{Some would put gun control in the same category, which may go toward explaining Supreme Court jurisprudence in this area.} direct coercion restraining deeply personal decisions may do more harm than good.

B. Some Strategies and a Modest Proposal

Given that customer discrimination is a serious enough issue to warrant some interventions by the state but not outright prohibition, what are the other options?

1. The Bully Pulpit

There already exists a general nondiscrimination norm in US society, and particularly so in the context of employment within firms and service by firms to their customers. The question is how to extend that norm to both sides of market
transactions. As Richard McAdams’ recent work has shown, getting the public to coordinate around a new norm is no easy matter. But the fact that a robust norm of nondiscrimination has been built up over a half century in the contexts of employment and public accommodations may make easier the task of extending it to individual customers.

Public service announcement campaigns aimed at individual behavior have been undertaken in a number of areas, some with success. “Keep America Beautiful” and similar campaigns helped to change social norms about litter and protection of the environment. “Just Say No” made visible a public war on drugs. Various anti-smoking initiatives out of the Surgeon General’s Office helped to move public behavior with respect to smoking. It is not far-fetched to think that raising public awareness about the harms and dynamics of customer discrimination, particularly with data that made people aware of its prevalence and potential harm, might strengthen the nondiscrimination norm and motivate people to be more thoughtful about their behavior as customers.

Firms, particularly the well-known ones, have platforms they can use to help definite and reinforce norms against customer discrimination. Firms communicate through direct and indirect advertising. These communications can appeal to, even create, customer biases; conversely, they can suppress or redirect them. Firms also have the power to structure the choices they give customers; as we discuss below, this power can be used to either exploit customer bias, or attempt to divert it.

b. Cost-Shifting Strategies

Beyond the bully pulpit, it may be worthwhile to think about how the costs of customer discrimination may be shifted from those it now harms to the customers who engage in it. Such strategies would be similar to other ways in which society discourages socially desirable behaviors by imposing costs on those who engage in those behaviors, sometimes in ways that also address the negative externalities those behaviors create. For example, the state imposes extra taxes on the purchases of cigarettes and alcohol both to discourage smoking and drinking, and to reflect the costs smoking and drinking impose on society more generally. It imposes premium taxes on gasoline to shift the costs of highway infrastructure on those who do the most driving.

Firms already employ similar techniques to influence other kinds of customer behavior and to allocate the costs of certain socially inefficient choices to those making those choices. In order to keep health costs and insurance rates from being more expensive for everyone, for example, managed health care plans typically charge more to see a doctor who is out of network than a doctor who has made certain concessions (including price concessions) in order to be part of the network. Society could decide to limit patient choices more directly, but out of respect for the highly personal nature of the decision about one’s doctor, managed care preserves the choice while requiring patients who make a choice that imposes extra costs on others (through the cost of insurance) to pay for it.

Similar models are used to exploit customer preferences for some goods and services to prop up the market for others which society considers more valuable than the market. Some drugs may be overpriced, for example, in order to subsidize the development of orphan drugs, or drugs needed by patients who could not otherwise afford them. In a wholly different context, many colleges, universities and sports franchises prop up the market for their less popular competitions by bundling with tickets to those events with tickets that are highly sought after. Season ticket packages bundle more competitive games or traditional rivalries with less desirable games so that all tickets will be purchased, usually at the same per-ticket price. Effectively, this increases the price of the most desirable tickets by forcing those who want those tickets to buy other, less desirable tickets as well. The practice has the not undesirable effect of inducing fans who might not otherwise attend the less competitive games to do so, possibly building support for these games.73

These models might work in some contexts to reallocate the costs of race and gender discrimination to those choosing to engage in it. For example, white patients might be allowed to avoid black doctors, but required to pay more to do so. Customers who systematically reject dark-skinned or female Uber drivers might have to pay a premium; those payments might then go into a fund that would enable Uber to reduce the effects of patterns of discrimination against those drivers. If such systems could be devised (to be sure, a challenge), it may turn out that many patients and passengers would be too embarrassed to exercise their right to make choices on the basis of race or gender. All the better; removing the choice to discriminate not only reduces the harm of discrimination but also promotes encounters that, in the long run at least, should reduce people’s preference to

---

73 If not prohibited, the fans may be able to resell the tickets. Even so, there will likely be transactions costs.
discriminate. This is the way social norms change. At the least, such a system may awaken patients to the significance of their choices and the costs of their discrimination on others.

One could imagine, similarly, the bundling by colleges and universities of tickets for men’s and women’s sports events, for the purpose of building more equal regard among customers for women’s sports. Such a system would not require fans to attend games they wish not to attend—anymore than any season-ticket holder is forced to attend such games. As a cost of attending men’s games, however, fans of men’s sports would help share the cost of equalizing men’s and women’s sports, and perhaps induce some fans to develop a taste for women’s sports.

That bundling is not a far-fetched strategy for reducing the opportunity to impose one’s discriminatory preferences on others is shown by student class assignments in many educational settings. Students are typically allowed to choose their courses by professor, and thus to engage in race and sex discrimination, which some surely do. In some circumstances, such as required courses, however, students have no choice. Looking no further than the 1L year of law school, students are typically assigned to their courses in “bundles” that are likely to include a demographic cross-section of available professors. No law school would allow a student to change Contracts classes because the student objected to being taught by a Black professor. Tellingly, few students today object to the mandatory assignment practice—it seems to make sense—even though it reduces the amount of choice that they have.

Tip-pooling in the restaurant and other businesses also involves bundling in order to level out the harmful effects of customer bias. The practice minimizes the effect of customer bias by spreading the costs of customer bias across a wider base of servers. When employers in various service industries create diverse teams of workers to serve their clients, they are also engaging in a bundling strategy that make it more difficult of biased customers to avoid persons against whom they are biased, reducing the costs of that bias against women and minorities, and creating opportunities for contact that may, in themselves, reduce bias.

74 One indicator here might be the race and gender differences that show up in teaching evaluations. See, e.g., Adam Driscoll et al., What’s in a Name: Exposing Gender Bias in Student Ratings of Teachers, J. INNOVATIVE HIGHER Ed. (Dec. 2014).
75 Although, by one report, students at UCLA Law School were allowed to transfer out of a 1L class taught by a white professor whose academic research makes the claim that Blacks who get into schools via affirmative action are hurt more than helped because they cannot compete successfully with white students. See Elie Mystal, Racists’ T-Shirts on Campus? Only If You Bother To Think About It, http://abovethelaw.com/2013/11/racists-t-shirts-on-campus-only-if-you-bother-to-think-about-it/.
c. A Proposal.

Having argued that there are strategies that might help inhibit customer discrimination, we offer a proposal, for discussion purposes, that is designed to encourage firms to adopt these and other strategies to block or reduce customer discrimination. The proposal is as follows:

**ANy INDIVIDUAL OR ENTITY WITH A LEGAL OBLIGATION NOT TO DISCRIMINATE ON THE BASIS OF RACE OR GENDER IN ITS EMPLOYMENT OR PUBLIC ACCOMMODATION PRACTICES ALSO HAS AN OBLIGATION NOT TO FACILITATE DISCRIMINATION BY ITS CUSTOMERS OF WHICH IT IS, OR SHOULD BE, AWARE, NOR TO DISCRIMINATE WHEN IT ACTS AS A CUSTOMER.**

The proposal extends current law by imposing some duty of care by those who already have a duty not to discriminate to ensure that they are neither engaging in discrimination as customers nor facilitating race and gender discrimination by their customers. The proposal has features that address each of the concerns spelled out in the prior sections of this paper. First, it imposes duties only upon those who already have a non-discrimination duty—that is, firms of a certain size. Our analysis of the reasons we do not directly regulate customer choice posited that while these reasons do not seem strong enough to abandon an appropriate societal concern with customer discrimination, they are a force to be reckoned with—i.e., it is generally easier and cheaper for the state to regulate firms than customers, and direct regulation against customers will both interfere with customer choice and be perceived as so offensive of privacy and autonomy values as to be counterproductive or true changes in people’s discriminatory preferences.

By avoiding a direct obligation on the customer, we blunt the force of these rationales. The proposal requires only those already having a non-discrimination obligation to avoid facilitating the kind of behavior by others that their non-discrimination obligations are intended to reduce. It recognizes that it is easier to regulate firms than individuals, without giving up on the goal of inhibiting customer discrimination. In concession to privacy concerns, the proposed rule does not impose any direct obligations against customers nor does it interfere directly with those choices. It retains the BFOQ exception when legitimate customer privacy, narrowly defined, is at risk, although its presumed effect would be to gradually reduce customer bias, and thus to decrease the need for the exception. By
not requiring the state itself to monitor customer behavior, the indirect approach avoids practical enforcement difficulties. It also minimizes concerns about backlash, relying instead on the incentives of firms to find means other than coercion and shame to effectuate positive change.

As noted above, non-discrimination law already, to a certain extent, prohibits businesses from discriminating against its employees in response to its customer biases.\(^\text{76}\) Despite some favorable authority along these lines, however, current law does not draw adequate attention to the harms caused by customer discrimination, nor does it hold firms accountable for those harms. The success of current law depends upon ascertainable victims of customer discrimination, which cannot always be identified.

The proposal is designed to help stiffen the spines of firms who might otherwise accede to demands by customers to discriminate based on race or gender, particularly when there is no specific present victim to hold the business to account. It enlists firms to attend directly not just to the fairness with which their employees or other customers are treated, but to the way customer preferences may assert themselves, indirectly as well as directly, and thus maintain an unlevel playing field for women and minorities.

Firms have available to them to full range of options discussed in earlier. They can proactively declare policies that they will not accede to discriminatory preferences by customers. They can back this up by declining to indulge customers who try to exert discriminatory preferences, in the process strengthening community non-discrimination norms. The Seventh Circuit Court of Appeals offered the strategy of announcing, and following through on, a non-discrimination policy in a case in which a nursing home’s policy of acceding to a patient’s racial preferences in nurses led to a racially hostile environment for a black nurse.\(^\text{77}\) Ideally this policy of self-identification with nondiscrimination goals could be as standard as announcing oneself to be an equal opportunity employer.

The proposed rule would encourage businesses to rethink branding and advertising decisions that reinforce discriminatory customer preferences. Under the proposal, a sports franchise should rethink a name, or mascot, that disrespects women or minorities; it should refuse, for example, to allow its fans to attend

\(^{76}\) See text accompanying notes __, supra.

\(^{77}\) See Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908 (7th Cir. 2010) (excluding black nurse from rooms of residents who objected to being treated by black nurses violated Title VII).
games in “redface”\textsuperscript{78} or other garb that shames or humiliates members of a historically disadvantaged minority.

In other contexts, it may be possible for businesses to shift cost of undesirable (but still allowed) discriminatory preferences to the customers who choose to exercise them. An example is the recent controversy about whether airlines should accommodate the seating preferences of ultra-Orthodox Jewish men whose religion prohibits them from sitting next to women.\textsuperscript{79} This discriminatory preference should be accommodated in the name of religious freedom, but there is no reason to require others to pay for it.\textsuperscript{80} Even though it may seem trivial to ask a woman to change her seat to accommodate the discriminatory preference of the ultra-Orthodox man, one might ask why the woman should be the one inconvenienced by that preference. Airlines could, instead, accommodate through having the man make prior arrangements, or even requiring him to buy an extra seat.

The proposal is also likely to increase the use by firms of strategies like tip pooling, which counteracts customer bias and keeps its costs from falling wholly on its victims and diverse work teams, which will frustrate the ability of clients to engage in such bias. A significant element of our proposal is that it reaches out to firms like Uber and Airbnb that are primarily intermediaries that enable market transactions. These firms have the temptation to help facilitate discrimination by customers to the extent customers have a taste for it. Our proposal puts them on notice that they have a legal obligation to refrain from giving in to this temptation—something that we think they will be inclined to do already, but where a nudge in the right direction might help.

V. The Proposal’s Limitations and Its Promise

We do not claim that the direct, measurable effects of the proposed rule will be large. We have not filled in all the details of what would need to be proved under the proposal, what would constitute a defense, or what the damages would be. The proposal limits liability to situations in which the firm has knowledge, or reason to


\textsuperscript{80} On the general matter of why religious accommodations should not always trump civil rights claims, or be cost-free, see Mary Anne Case, Why “Live-and-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights, 88 Sol Cal. L. Rev. __ (2015).
know, of customer discrimination that its own policies permit and that could be stopped through reasonable measures.

To an important extent, the proposal is concerned with the impact of a firm practice, including its unintended impact. To this extent, it is concerned more with disparate impact than disparate treatment. To date, disparate impact claims under existing nondiscrimination law have met with significant legal roadblocks. Among these roadblocks, plaintiffs are required to identify a particular practice that causes the disparate impact, which can be next to impossible to do from outside the business. 81 It will sometimes be the case that a firm is not engaged in a discernible practice that encourages or enables customer discrimination and thus will not violate the proposed rule, even though there might be a policy it could adopt that would discourage it. In addition, courts tend to defer to firms about what constitutes a legitimate business need, sometimes misallocating the burden on that issue to a challenger who has shown the disparate impact of a policy rather than on the firm to show business legitimacy. 82 Courts also have been, by and large, unwilling to consider non-statistical showings of impact or to credit broader societal data about the effects of a business practice. 83 It is difficult to prove statistically, for example, that firm advertising that associates its products with thin, sexy woman serves to promote an ideal that undermines confidence by customers in women as competent professionals.

The difficulties of proving a disparate impact under the proposed rule do not mean, however, that the rule would be without effect. Laws have expressive and educational effects as well as direct, behavioral effects. Insofar as the goal here is to change the customer attitudes that lead to discriminatory preferences, those expressive effects may be the most important thing.

Can a law have expressive effects if it has no teeth? It seems plausible that it can. 84 Consider bans against smoking in cars with children present. There is little chance of effectively enforcing such laws. Nonetheless, such bans should be

81 See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989); Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997).
83 See Ilhart, 118 F.3d at 1157; more generally and for other cites, see Grossman, supra note __, at 618.
84 See McAdams, supra note __ (describing the conditions under which such effects might occur).
expected to educate the public about the health risks of smoking and help change social norms about the acceptability of smoking around children. \[85\]

One would expect the expressive power of rules that are difficult to enforce is strengthened by laws expressing the same norms that can be enforced. Smoking bans in restaurants, bars and public buildings helps build the necessary constituency to take seriously less enforceable measures against smoking in cars. Likewise, Title VII and other civil rights statutes are well established rules that, despite evidence that cases brought under these statutes are hard to win, \[86\] have had significant influence on nondiscrimination norms. These norms have created a foundation on which further efforts to limit discrimination can build—even discrimination that the law cannot easily reach.

There is at present no law that tells customers, or the businesses they patronize, that customer discrimination is wrong. Research suggests that the normative information conveyed by the law can be important in enabling individuals in society to coordinate their actions around socially beneficial actions or to solve collective action problems. \[87\] The proposal has the potential to help on these fronts. At the least, the proposal may bring visibility to the issue—visibility that might be all the more positive for not being a heavyweight form of new government regulation. There is also the possibility of enacting the proposed rule on a local level, \[88\] which may even more clearly signal a changing community norm. \[89\]

VI. Conclusion

The proposed rule takes account of the importance of reducing customer discrimination, while accounting for the concerns that make regulation in this area such a sensitive matter. There may well be a better idea out there. If so, we’d love to hear it. But we have tried to show that it no longer seems possible to think of customer discrimination as entirely out of bounds. Customer discrimination harms


\[86\] See supra

\[87\] See generally McAdams, supra note __. Among the research studies showing injunctive normative information can suppress negative social norms. See, e.g., Robert B. Cialdini et al., Managing Social Norms for Persuasive Impact, 1 SOCIAL INFLUENCE 3 (2006); Robert B. Cialdini, Crafting Normative Messages to Protect the Environment, 12 CURRENT DIRECTION IN PSYCHOLOGICAL SCI. 105 (2003). In the work discrimination context, see Adam Grant & Sheryl Sandberg, When Talking About Bias Backfires, N.Y.TIMES, Dec. 7, 2014.


\[89\] See McAdams, supra note __.
some people in the same way as discrimination by firms, if fewer at a time. It is time for society to acknowledge this harm and take appropriate steps to reduce it. Every extension of non-discrimination law has taken some getting used to; with some imaginative thinking, firms should be able to frame solutions to the problem of customer discrimination that, someday, will also seem second nature.