DISCRIMINATION BY CUSTOMERS

Katharine T. Bartlett & Mitu Gulati

Abstract

Customers discriminate by race and gender, with considerable negative consequences for female and minority workers and business owners. Yet anti-discrimination laws apply only to discrimination by firms, not by customers. We examine efficacy and privacy reasons for why this may be so, as well as changing features of the market that, by blurring the line between firms and customers, make current law increasingly irrelevant. We conclude that, while there are reasons to be cautious about regulating customer behavior, 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. This proposal does not create a legal obligation on the part of customers themselves, but rather requires firms that already have nondiscrimination obligations to do more to reduce the occurrence, and consequences, of discrimination by customers.
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I. THE CONUNDRUM

Customers discriminate, by race and gender, in every step of a market transaction. For starters, they discriminate in whom they choose to do business with. In one year-long experimental study, online advertisements for iPods showing the device in a black hand received 13 percent fewer responses and led to 17 percent fewer offers than the advertisements showing the device in a white hand.1 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.2

Customers also discriminate in how much they are willing to pay. An experimental study with baseball cards showed that a card in a black hand sold, on average, for 20 percent less than the same card in a white hand.3 Another study, based on the pictures and rental information of all New York City property owners seeking to rent their property on Airbnb, revealed that guests pay non-black hosts approximately 12 percent more than black hosts for comparable properties, and that black hosts receive a larger price penalty than non-black hosts for having a poor location.4 Discrimination in how much customers are willing to pay is especially notable when it comes to tipping. A study of over 1,000 taxicab trips in New

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2 Id.
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 to be stiffed. Customers who discriminate on the basis of race discrimination, however, it appears never to have been applied against individual customers who discriminate on the basis of race, and the few cases brought against corporate customers have been easily defended. Current law does little. Federal and state anti-discrimination laws prohibit firms of a certain size from discriminating against employees and customers on the basis of race, gender, and other characteristics. There is no question that customers discriminate and that this discrimination disproportionately hurts women and persons of color. The question we explore is what, if anything, the law should do anything about it.

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another because of its white clientele, with whom they feel more comfortable associating. Clients may refuse to hire a female lawyer to represent them 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 family breadwinners. Current law barely even applies 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

When society deems market behaviors harmful enough to regulate, it customarily regulates both the supply and the demand side of the transaction. For example, both the sale of certain drugs and their possession are criminal.12 Prostitution laws make both selling and buying sex illegal.13 It is illegal to both buy and sell body organs,14 as well as to offer and accept bribes.15

Why, then, are there anti-discrimination prohibitions against firms, and none against customers? There would be practical problems with a law aimed directly at customers, of course—problems in monitoring customer behavior, determining what behaviors are discriminatory, and proving a case of discrimination. As we later discuss in detail,16 these problems are reason enough to steer away from a direct prohibition of discrimination by customers. Yet if discrimination by customers is a problem society wants to address, there may be other approaches to consider. The preliminary question, then, is whether there should be a public policy against customer discrimination. If so, the next question is what legal approach makes the most sense. This article is the first academic work to address seriously either of these two questions.

136 (2001). What the ineffectiveness of Section 1981 might tell us about the efficacy of a prohibition against discrimination directly against customers is explored further at Part IV(A), infra.

11 Although, theoretically at least, firms may open themselves up to a section 1981 challenge if they refuse to buy from a business on account of race. See note 10.

12 Although selling, quite often determined by the amount in possession, is typically considered more serious than buying. For a chart of federal drug possession and trafficking penalties, see http://www.dea.gov/druginfo/ftp3.shtml.


15 See, e.g., 18 U.S.C. 201(b) & (c).

16 See Part IV infra.
In Part II, we explore two significant explanations for why society might choose to ignore discrimination by customers. The first explanation is efficacy. Society may regulate firms (especially big firms) and not customers because it believes that non-discrimination goals are most effectively met through the regulation of firms. 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, but 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 necessary to reduce prejudice.

We conclude that these two rationales might sensibly inform what legal approach to discrimination by customers is best, but that they do not justify ignoring this discrimination altogether. The efficacy rationale explains why regulating at the firm level is cheaper, but not whether the current regulatory scheme is adequate to address discrimination by customers. The privacy rationale offers a more powerful justification for focusing on firms rather than customers, but again does not justify the absence of any policy strategies whatsoever for reducing discrimination by customers. What, then, might those strategies be?

A policy against discrimination by customers does not mean necessarily treating all forms of discrimination the same. There are differences in the kinds of harms discrimination by customers imposes, as well as in the relative benefits and burdens of strategies to reduce those harms. How society should approach discrimination by customers depends upon these differences. Although lines are hard to draw, in Part III we make an effort to distinguish between types of discrimination that are acceptable, perhaps even desirable; types that should be allowed, even if they have some potential for harm; and types that are harmful enough, without compensating benefits, to warrant the greatest degree of societal intervention.

Taking into account these differences, in Part IV, we sketch out a policy approach for consideration. We conclude that a direct ban on discrimination by customers would be ineffective, and probably counterproductive. Instead, we advocate a more indirect form of intervention, directed at those upon whom the law already imposes statutory nondiscrimination obligations—i.e. companies of a certain size. The proposal imposes a duty on these actors to refrain from facilitating discrimination by their customers. This Part explains the difference this proposal might make, and explores the different strategies it might encourage firms to adopt.
We note that the matter of discrimination by customers is of growing importance as traditional notions of the firm are breaking down. Current law assumes a bi-furcated market composed of corporate entities who sell and individuals who buy; it regulates the former and not the latter. But some of the most successful firms today—the Lending Clubs, Ubers, Airbnbs and Amazons of the world—operate not as sellers in the usual sense, but as coordinators of, or matchmakers between, buyers and sellers. The sellers on these platforms are often themselves individuals who seek to profit from their excess capacity, not corporate entities who produce goods and services to sell. Although in this economy, too, expectations to complete a transaction are sometimes higher on sellers than on buyers, the actual buy-sell transaction online is between parties who are both customers of the platform, and thus beyond the scope of current anti-discrimination rules. This challenge to the traditional boundaries makes reconsideration of the law’s approach to customers even more urgent.

II. **The Rationales for Regulating Only Firms**

In this section, we explore the two most powerful reasons why society regulates discrimination by firms but not customers: efficacy and privacy.

A. Efficacy

1. **The Efficacy Rationale.**

One explanation for why we prohibit discrimination by firms and not by customers is 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.

Firms are also often 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 are produced and sold. Policies and procedures of the firm operate on a scale that individual consumer decisions do not. For this reason, the burden of ending discrimination may be 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—anti-discrimination mandates tend to spread that loss throughout an industry; without such spreading, firms choosing not to

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discriminate might be competitively disadvantaged by any associated costs.\textsuperscript{18}

Further, firms are driven largely by profits, and thus already have an incentive to identify and eliminate potential inefficiencies, including discrimination, within their organizations. For this purpose (and others), firms tend to have mechanisms in place to collect information about transactions and interactions—information that they need for their own decisions that can, in turn, be used for public purposes, including the reduction of discrimination.\textsuperscript{19}

An added advantage in terms of efficiency is that the regulation of firms might be expected to lead to a reduction of discrimination by customers. If firms cannot discriminate in their employment or sales practices, then individual customers, presumably, will have fewer opportunities to indulge their biases. Customers who do not want to sit at a lunch counter with African-Americans will have fewer places to eat out; airline passengers who prefer only female flight attendants will not have that choice if they want to fly; white customers who don’t want to shop alongside black customers will find their shopping choices narrowed. Further, when customers have no choice but to deal with businesses with more diverse workforces, the resulting exposure to women and minorities may tend to reduce customer biases toward these groups, thus altering the preferences that drive customer discrimination.\textsuperscript{20}

\textsuperscript{18} 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). See 42 U.S.C. 2000e(b). 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. See 29 U.S. C. 2611(4)(A)(i). Likewise, businesses that are small enough sometimes are exempt from public accommodation laws. See text accompanying notes 63-64, \textit{infra}.

\textsuperscript{19} On the ability of “large, sophisticated firms” to “detect and root out internal legal violations—and otherwise alter employees’ and contractors’ behavior—more easily than public authorities or outside private attorneys,” see Brishen Rogers, \textit{The Social Costs of Uber}, 82 U. CHI. L. REV. DIALOGUE 85, 90 (2015), available at https://lawreview.uchicago.edu/page/social-costs-uber.

\textsuperscript{20} For example, after courts disallowed airlines hiring only female flight attendants and imposing unreasonable appearance and weight restrictions on them, see \textit{Diaz}, 442 F.2d 385; \textit{Wilson v. Southwest Airlines}, 517 F. Supp. 292 (N.D. Tex. 1981), the traveling public soon got used to, and came to expect, male as well as female flight attendants, and even female flight attendants who did not conform to traditional criteria for female attractiveness. Cynthia Estlund makes a similar point about the beneficial effects of contact in the workplace. See Cynthia Estlund, \textit{Working Together: How Workplace Bonds Strengthen a Diverse Democracy} (2003). The literature on the benefits of contact in reducing prejudice is legion. Much of it builds on the “contact hypothesis” developed by Gordon Allport, \textit{The Nature of Prejudice} 281 (1954). For studies linking exposure and contact to the reduction of discriminatory biases, see Katharine T. Bartlett, \textit{Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination}, 95 VA. L. REV. 1893, 1946-1956 (2009).
2. **Efficacy Limitations on Regulating Only Discrimination By Firms.**

If we had to choose who to regulate—firms or customers—these factors make a pretty good case for regulating firms. These factors do not explain, however, why the existing regulatory scheme focuses entirely on discrimination by firms, rather than both on firms and customers, nor why that regulatory scheme does not require firms to pay more attention to discrimination by its customers. Discrimination customer by customer may be less significant, by volume, than discrimination by firms, but it is harmful both in individual instances and in its cumulative effects, including its influence on firm behavior itself, discussed below.\(^{21}\)

One could make a case that discrimination by customers is even more in need of a legal boost than discrimination by firms. As noted above, firms are profit-driven and thus already motivated to make rational, non-discriminatory decisions.\(^{22}\) Customers are more likely to be motivated by personal emotions, stereotypes, and preferences.\(^{23}\) Customers can often exercise their discriminatory preferences at no cost; in most markets, customers can find male lawyers or straight photographers or white cashiers to serve them. Even when there are costs,\(^{24}\) without having to account for profits in the same way firms do, customers may be more willing to pay for their discriminatory preferences than firms are.\(^{25}\) If this is the case, by focusing on discrimination by firms rather than by customers, current law concentrates on the slice of the market that already has strong reasons to refrain from discrimination, and ignores those without this built-in restraint.

The larger problem with a legal approach to discrimination targeted only against discrimination by firms is that it addresses discrimination by customers, if at all, as an individual phenomenon that can be managed through an opposing, institutional response. In so doing, current law ignores the complex interaction between individual preferences and institutional practices—an interaction that creates a cycle of discrimination in which

\(^{21}\) See text accompanying notes 28-39, *supra.*

\(^{22}\) This was a key insight of Becker’s classic work on the economics of discrimination. *See* GARY BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

\(^{23}\) This includes implicit bias, which underlies some discriminatory behavior by both customers and business managers. This is more difficult to weed out, even if employers have a strong economic motivation, but a profit-driven firm is more likely to figure out a way to do so than a customer is to challenge her own bias.

\(^{24}\) In the Airbnb study, for example, hosts who reject African-American guests are able to find a replacement guest only 35 percent of the time. *See* Edelman et al., Racial Discrimination in the Sharing Economy, *supra* note 4.

\(^{25}\) To be sure, we have oversimplified this analysis to make the point. It might be rational for a profit-driven business to discriminate in order, say, to 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 A.M. ECON. REV. 3490 (June 1983). Current law would prohibit such an exclusion, of course. Conversely, customers might 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.
many participate but for which no one is held responsible. This interaction creates real harm, although that harm is often difficult to trace, diagnose or measure.

Consider customer bias with respect to employees who provide direct service to customers. If customers steer away from store clerks wearing, say, Muslim garb, these workers will tend to generate fewer revenues for their employers, and thus may affect employer pay and promotion decisions. Prejudiced customers who have no choice but to deal with the Muslim workers will give bad evaluations, which reinforces these decisions. Within these feedback loops, even if the firm (barred from discrimination) continues to interview and hire members of racial minorities, over time, rational clerks will tend to move themselves to the back office, learn to moderate the fact of their racial identity, or find a job (less well-paying) elsewhere. In this way, customer bias serves to lessen the market value of women and minority service workers and diminish the choices they are able to pursue in the market.

Market inequities caused by customer bias that current law does not even attempt to address take many other, disparate forms. For example, colleges and universities generally pay the coaches of their men’s basketball teams (who are mostly male, in part because of the preferences of the players—another layer of “customer”)—more than the coach of female basketball teams (who are mostly female because, among other things, these jobs generally pay less). The jobs are arguably similar in skill, effort and responsibility—the factors that matter under the Equal Pay Act—and a school’s women’s team is sometimes more successful than the men’s team. The usual justification for the pay differentials in coaching, 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. But the reason men’s teams produce more revenue is that the public disproportionately prefers to watch men’s games—i.e., customers discriminate.

26 Importantly, the sharing economy has made peer-to-peer evaluations ubiquitous.
27 See Devon Carbado & Mitu Gulati, WORKING IDENTITY (2000) (describing strategies pursued by women and minorities to avoid triggering gender and racial stereotyping by others).
30 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).
31 Id.
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 sport that greatly affect its marketability."

To whatever extent the 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. The higher market rewards that flow, consequently, to male athletes simply reinforces these preferences.

Current law not only fails to take on customer bias; it provides a number of loopholes that allow businesses to act on, and thus perpetuate, the stereotyped-based prejudices of their customers. The law allows businesses to impose dress and appearance standards on their employees, for example, because as long as these standards track community expectations for dress and appearance, these standards are not considered sex discrimination. In Jespersen v. Harrah’s Casino, the Ninth Circuit Court of Appeals held that Harrah’s Casino could specify that the women employees in certain job categories 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 long as both men and women are subject to standards that do not impose manifestly unequal burdens, employers are allowed to incorporate the sex-based expectations of their customers. Here, again, an employer is expected to

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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”).


35 444 F.3d 1104.
refrain from acting on its own bias, but it has considerable leeway to conform its practices to the biases of its customers.

Even when a firm practice supported by biased customer preferences is understood to discriminate based on sex, firms are sometimes able to justify that practice—at least in the case of gender—based on a logic derived from those preferences. Under Title VII’s BFOQ exception,36 sex discrimination is justified if it is essential to the job and, in some cases, discriminatory attitudes by customers provide 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.37 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.38 In such a way, the law treats customer biases as a given that firms may indulge when they can tie those biases to a business purpose.39

Just as customer biases influence business practices, business practices also influence customer preferences. Customers do not come to the market with fully formed preferences;40 these preferences emerge, based in part on the choices made available to them by firms. Thus, while firms theoretically have no business reason to discriminate except for the

36 The BFOQ exception applies only to sex discrimination, not race discrimination, although there may be 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 psychatric hospital involving assistance to naked or partially dressed patients); Brooks v. ACF Industries, Inc., 537 F. Supp. 1122 (S.D. W. Va. 1982) (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); Silvka 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).


39 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, 335-37 (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.

preferences of their customers, these preferences are often ones that the firms, themselves, may help to create and nurture. The result is a complicated collusion in which discriminatory preferences perpetuate themselves without any clearly identifiable starting point.

This collusion is especially apparent in advertising. Advertising both reflects customer preferences and creates or reinforces those preferences. The most successful advertising is that which captures and builds on the emotional needs and desires of the customer and then associates specific products with the fulfillment of those needs. This process is fundamentally a social one. Customers, who may not even be aware of their preferences, are attracted to images of people with whom they seek to identify. They often want to wear and drive the products that others, with whom they identify, also wear and drive. Customers derive associational value from who else buys the products they buy, or who else goes to the same bars, takes the same cruises, or uses the same cab service. Firms understand these associational preferences, and seek to exploit them. The Marlboro Man ads—sometimes described as the “most powerful brand image of the century”—succeed because potential customers want to be identified with the rugged, masculine values the cowboy image represents; for those to whom it appeals, smoking is not only acceptable, but also sexy and macho. Likewise, the clothing ads of many firms both exploit and construct female body images. An infamous example were Abercrombie & Fitch ads depicting young, skinny girls in seductive poses, as well as tight t-shirts emblazoned with such slogans as “Who needs a brain when you have these?” and “Female students wanted for sexual research.” Ads that build on racist identity also tap into and reinforce racial stereotypes and prejudice. Consider an ad for “Wong Brothers Laundry Service: Two Wongs Can Make It White;” an Intel ad with six muscular black runners bowing in front a white man dressed in business attire under the headline “maximize the power of your employees;” and a series of liquor ads depicting white people acting out African-American hip-hop stereotypes.

41 See Jennifer L. Aaker et al., Non-Target Markets and Viewer Distinctiveness: The Impact of Target Marketing on Advertising Attitudes, 9 J. CONSUMER PSYCHOLOGY 124 (July 2013) (demonstrating that target marketing induces identification by target audiences, especially among groups with distinctive, non-majority groups).
46 Id.
While such ads may be the subject of public criticism or boycotts,\textsuperscript{47} they are not illegal, of which firms are well aware.\textsuperscript{48} \textit{Wilson v. Southwest Airlines}\textsuperscript{49} held that Southwest Airlines could not deny employment to male flight attendants, but the case did not disapprove of the company’s advertising strategy, designed to distinguish it from other airlines by “project[ing] to the traveling public an airline personification of feminine youth and vitality.”\textsuperscript{50} Indeed, there was, and still is, no law under which the campaign could have been disapproved and First Amendment considerations probably prevent the state from enacting one. Even in its new 2015 imaging (toned down for the times), Southwest Airlines continues to be the LUV airline, catering to the positive customer response to its sexy imaging.\textsuperscript{51}

The interactive nature of customer bias and business practice is even more apparent in the online economy. Online peer-to-peer platforms blur the line between firms or sellers, who are regulated, and customers, who are not. As noted above,\textsuperscript{52} online platforms such as Airbnb, Craigslist, Eatwith, Etsy, Rover and many other platforms do not initiate transactions as either sellers or buyers; rather, they facilitate the transactions of site users—sellers and buyers—by bringing them together. As facilitators, they can disclaim responsibility for the discrimination of any of these users applies in their searches. Current law allows this.\textsuperscript{53}

While online sharing platforms do not participate directly as sellers or buyers in a transaction, they amass data about their users, both sellers and buyers. This data is used to target site users with products and services in which their search and buying histories suggest potential interest. In directing their users to these products and services, these platforms in effect reinforce existing preferences and do not expose customers to options that might weaken those preferences.

\textsuperscript{47} See, e.g., text accompanying notes 71-74.
\textsuperscript{48} Trade magazines make this clear to their readers. See, e.g., Van Thompson, \textit{Racial Discrimination in Advertisements}, available at \url{http://yourbusiness.azcentral.com/racial-discrimination-advertisements-20941.html} (“Racism in advertising is not in itself illegal, but that doesn’t mean it’s wise.”).
\textsuperscript{50} 517 F. Supp. at 294 (describing ideal representative of the campaign as 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 …”).
\textsuperscript{52} See Part I, supra.
\textsuperscript{53} 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, \textit{Employees and the Boundaries of the Corporation}, Chapter 6, in \textit{Research Handbook on the Economics of Corporate Law} (Claire Hill & Brett H. McDonnell eds. 2012).
These platforms not only track the customer’s own preferences in order to guide the customer’s future purchases, but they also aggregate the preferences of other customers. These aggregations can be influential; in some cases, they may be viewed as the best available data on a matter of interest to site users. Crowd-sourcing apps, for example, collect information about the safety of neighborhoods based on the reported experience of users, information that is then consulted by other users when they are determining where to shop, or dine, or go to the movies. The Sketch Factor App does just this. To the extent that users consider a neighborhood “sketchy” because of the visibility of a significant number of black people in the neighborhood, however, the app simply builds on stereotypes, in a way likely to be harmful to businesses in that neighborhood. And once a neighborhood is deemed unsafe—however unfairly that conclusion is reached—subsequent activity by consumers is likely to reinforce this conclusion. Fewer whites will be present in the neighborhood, triggering further user responses indicating that the neighborhood is unsafe and magnifying the effects of the stereotyping and bias. This phenomenon is called algorithmic discrimination. The more ubiquitous and trusted these peer-to-peer apps become, the greater their potential for influencing the reality that customers, through their decisions, reproduce.

This kind of circularity of business practices and customer preferences often make it impossible to know, in any one instance, which drives which. One controlled study reported that fake web users pretending to be male job seekers were more likely to be shown Google ads for high-paying executive jobs than equivalent female job seekers. What explains this phenomenon? Do searches by female job seekers create a pattern leading the algorithm to predict lack of interest in certain job categories by women, as compared to their male counterparts? Or do hiring decisions create the pattern that leads the algorithm to predict more frequent matches between high-paying jobs and men, and thus to facilitate these matches? Or is some other combination of factors responsible? It is hard to know when

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56 See Claire Cain Miller, When Algorithms Discriminate, N.Y. TIMES, July 9, 2015. See also Salon Barocas & Andrew D. Selbst, Big Data’s Disparate Impact, 104 CAL. L. REV. ___ (forthcoming 2016) (describing how supposedly neutral data aggregation has the potential to exacerbate discrimination).
layers of aggregated data launder the reality that the data help to create and sustain.

Naomi Schoenbaum identifies another concern with these unregulated, on-line platforms, which is that they are more likely to involve intimate activities (e.g., dating sites) and intimate spaces (e.g., home services like TaskRabbit or Handyman), and to entail the exchange of private information between buyer and seller (e.g., AirBnB). The greater the intimacy of the transactions conducted in the sharing economy, Schoenbaum argues, the more likely and the more explicitly sex bias influences the transaction, and thus the more acceptable sex discrimination becomes. The lack of structural features in the sharing economy that have constrained discrimination in the traditional economy, like EEO procedures and face-to-face contact between employees and managers, just makes this worse.

In sum, it is wrong to assume, in either the traditional economy or the sharing economy, that discrimination by customers and firm practices operate independently from one another. Firm and consumer preferences are interactive, cumulative, and often mutually self-justifying. The question remains what the law should do about it.

B. Privacy and Individual Autonomy

1. The Privacy and Individual Autonomy Rationale.

Another, potentially powerful explanation for why the law focuses on firm behavior and not customers is the societal commitment to privacy and individual autonomy. This commitment is to the view that, however undesirable an individual customer’s prejudices may be, they are prejudices that an individual in a free society has a right to have. Although the question for the law of discrimination is how individuals act, not what they believe, decisions about what a customer buys, with whom she dines, and what entertainment she pursues would still seem to be choices so basic to that customer’s sense of private identity—including the highly protected domains of her religion and her politics—that she should be able to make them, free from public pressure.

Public accommodation nondiscrimination statutes already recognize the privacy rationale. As a matter of constitutional law, these statutes do not

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58 Naomi Schoenbaum, Gender and the Sharing Economy __ Ford. Urb. L. J. (forthcoming, 2016) (arguing that sharing economy transactions tend to safety by aggregating customer prejudices about unsafe neighborhoods. supposedly neutral data aggregation has the potential to exacerbate discrimination).

59 Id.

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.61 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.62 Accordingly, although under federal law it is illegal to discriminate in the sale and rental of housing, there is typically an exemption from anti-discrimination rules for owners of, say, a small duplex rental in a small, owner-occupied building.63 The narrowness of this exemption, as well as the recognized normative power of its visible exercise, is reflected in the fact that the exemption is lost if the small landlord publicly advertises the availability of the unit on a discriminatory basis.64

2. Limitations on the Privacy Rationale for Regulating Only Discrimination By Firms.

The broadly shared expectation of privacy or autonomy in the decisions individuals 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.65 At any particular regulatory moment, the zone of privacy or associational interests society decides 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 principles” in the

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63 Adrienne Davis calls this “spatial privacy.” See Davis, supra note 60, at 1235-1237.
64 See FHA 3603(b).
Constitution.\textsuperscript{66} Robert Bork was less guarded 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.\textsuperscript{67}

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\textsuperscript{68}—is considered today an appropriate sphere of state interference.\textsuperscript{69} Conversely, court recently have given more protection to liberty and autonomy interests in some matters once thought suitable for public regulation, including campaign finance and gun control.\textsuperscript{70} 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 the interests with which they compete, including non-discrimination goals. When society prohibits markets in heroin and body parts, it infringes on people’s right to choose to participate in these markets in order to advance a more important interest in protecting its citizens. The question is

\textsuperscript{66} See Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{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 \textit{Hishon v. King & Spalding}, 467 U.S. 69, 79-80 (1984) (Powell, J. concurring).


\textsuperscript{68} See, e.g., \textit{Frazier v. State}, 86 S.W. 754 (Tex. Crim. App. 1905); see also \textit{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’)}.

\textsuperscript{69} 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, \textit{The Violence of Privacy}, 23 \textit{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, \textit{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, \textit{The Autonomy-Fostering State: “Coordinated Fragmentation” and Domestic Violence Services}, 17 \textit{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).

what value society now places on its commitment to nondiscrimination in relation to other, competing values.

In legal debates about discrimination, there has been no serious attempt to weigh the strength of society’s present interest in preventing customers from discriminating, in its various forms, against society’s present commitment to personal privacy and autonomy for its citizens. This analysis requires attention to context. Some types of customer discriminations are not as harmful as others, and some limits on customer discrimination are more intrusive than the alternatives. In conducting this analysis, it also bears keeping in mind that today’s on-line platform economy already represents a massive voluntary and unregulated “sharing” of personal information, including physical locations, pictures, tastes, travel patterns, work hours, passport and driver’s license data, and financial details. Given the many uses to which this information is put, it seems odd to conclude, today, that this information should not be used, even a little bit, to curtail race and gender discrimination.

How to prioritize the competing interests will be considered in more detail in the next sections. The point, here, is that prioritization of these interests is inevitable; the only question is how explicit society should be about it. 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?

III. SOME DISTINCTIONS

So far our discussion might be understood to assume that all forms of customer discrimination are equally harmful and unacceptable. This is not the case. 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 implications. Other discrimination is harmful and should be treated as unacceptable.

Sorting customer discrimination into these categories is a fraught task and necessarily tentative. Our suggestions below reflect our own values, without the benefit of a broad societal discussion of the topic that we hope this article will further.

A. Acceptable (Even Desirable) Customer Discrimination.

Some customer discrimination might be considered not just tolerable, but a positive value in terms of the overall goal of reducing
customer discrimination. For example, customers sometimes discriminate by race or gender, in concert, to promote non-discrimination goals. The bus boycott by blacks in Montgomery, Alabama in the mid-1950s was instrumental in creating awareness of racial segregation in the South and, ultimately, in stimulating the civil rights movement. A “girlcott” started by teenagers in 2005 brought attention to Abercrombie & Fitch’s sales and marketing strategies that contributed 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 long been disproportionately denied to them. BLACKOUT is an international movement designed to encourage customer 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 distinguish these instances from the rest. We would do so, however, because they diminish gender and racial inferiority and subordination rather than contribute to it.

B. Regretfully Allowed Customer Discrimination.

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 on-line dating sites may be the best example. Who someone dates is a very personal matter, integral to an individual’s social and sexual identity and not the kind of thing with which the state ordinarily should interfere. This is not simply a private choice, but it concerns activities that often take place in private spaces to which courts have afforded special protection. Whether or not sexual desire is as inherent to one identity as is commonly assumed, the fact remains that the freedom to make one’s own choices with respect to one’s sexuality, family, and procreation is one of this nation’s most

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73 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/.
74 See http://www.fubu.com/.
75 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”).
77 See id.
protected constitutional rights.\textsuperscript{78} It seems appropriate to grant this same freedom in market transactions. If individuals can apply their own selective criteria in choosing with whom to dance in a bar, it seems reasonable that they also be able to do so when they access a commercial dating site.\textsuperscript{79}

It is important to note that this concession to personal privacy and choice in the online dating world is not without cost. Race selection in dating helps maintain the racial distinctions upon which racial hierarchy is based. It also perpetuates the current biases in dating markets, especially the bias against black women.\textsuperscript{80} The exercise of these biases, though, seems best understood as a regretful but 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 own ability to make unfettered decisions involving their sexuality in order to advance society’s broader goal of nondiscrimination. In any event, it seems doubtful that any amount of debate would likely lead, today, to the regulation of online dating and sex sites like Match.com, Peppr and Tinder in order to prevent customers from making choices based on race or gender preferences. This is not, in any event, a good place to start.

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 its users to select roommates based on race,\textsuperscript{81} the Ninth Circuit Court of Appeals reasoned that

\begin{quote}
[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.\textsuperscript{82}
\end{quote}

As with dating sites, a hands-off approach to roommate discrimination is likely to disproportionately prejudice members of racial minorities. Nonetheless, the privacy considerations attending’s one’s private living space are compelling enough to make this an area in which forced

\textsuperscript{79} 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).
\textsuperscript{80} See Ralph Richard Banks, Is Marriage For White People?: How the African American Marriage Decline Affects Everyone 33 (2011) (citing statistics showing that black women have the lowest marriage rates of any group, due in part to a high black incarceration rate and the fact that black men are three times more likely to marry outside of their race than black women).
\textsuperscript{81} 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).
\textsuperscript{82} 666 F.3d at 1221.
nondiscrimination is unlikely to work. The same reasoning would not apply outside of joint living situations, nor to educational settings in which part of the point or roommates is to enlarge students’ horizons.

Likewise, it is hard to imagine a ban on race matching in the sperm donor market.\(^{83}\) This choice, too, carries the potential of harmful discrimination, yet it goes to a deeply intimate decision about with whom one might procreate, as well as one’s sense of self-definition and personal autonomy.

There may also be personal services that are so intimate in nature and space 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 cases differently,\(^ {84}\) but, as a general matter, it is important to respect customer choices in highly personal spaces while putting continued 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. There is not the same reason to indulge preferences resulting from stereotypes linking sex to competence, such as a hospital patient preferences for female nurses or male doctors.\(^ {85}\)

C. Disapproved Customer Discriminations.

The third category are those customer choices that cause harm to others and do not implicate the kinds of privacy interests discussed above. In this category we would include race and gender bias by customers when they avoid store clerks on account of their race and gender or evaluate them in a discriminatory way. We would also include race and gender bias in tipping, buying an iPod, or renting weekend accommodations. Limitations in these instances infringe on customer choice but do not intrude on particularly intimate spaces and activities. In this regard, they are more like political campaign contributions, bribery, or buying 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 above.\(^ {86}\) It is a line that has evolved over time, as attitudes about discrimination have evolved. At one

\(^{83}\) The matter is hardly free from complication though. See Guido Pennings, The Right to Choose Your Donor: A Step Toward Commercialization or a Step Toward Empowering the Patient, 15 HUM. REPROD. 508 (2000); Dov Fox, Racial Classification in Assisted Reproduction, 118 YALE L. J. 1144 (2009).

\(^{84}\) See, e.g., Schoenbaum, supra note 58 (resisting any BFOQ exception for personal services).

\(^{85}\) See text accompanying notes 89-92, 120, infra.

\(^{86}\) See text accompanying notes 36-39, supra.
Discrimination by Customers

Time case law held that sex was a BFOQ in a wide variety of prison and medical facility cases. Courts have pulled back on the exception, and today these cases are comparatively rare. So, too, as customer stereotypes diminish over time, the kinds of discriminatory preferences are deemed necessary to protect customer privacy interests should shrink.

Some of the toughest cases will likely remain in the medical area, where patients have highly personal reasons for wanting to choose their own doctors—reasons that may blend objective justifications with subjective race and gender stereotypes. Many women, for example, prefer female gynecologists, and increasingly, black patients prefer black doctors. Comfort level with one’s doctor may well affect medical outcomes. And because of potential doctor bias, sex-matching or race-matching may actually produce higher objective levels of medical care. Yet it remains a difficult question whether women should be allowed to exercise their preference for female gynecologists, or whether blacks should be able to choose only black doctors. Society has largely avoided these questions, as it has avoided all questions about discrimination by customers. In the next section we provide a possible framework for examining them.

IV. An Approach to Customer Discrimination

87 See notes __, supra.
88 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 BFOQ for hiring only female obstetric nurses, despite evidence that 80 percent of patients demanded female nurses).
89 See Elizabeth Howell et al., Do Women Prefer Female Obstetricians, 99 Obstetrics & Gynecology 1031 (2002) (based on convenience sample, 34 percent of women preferred a female gynecologist); J. Schmittiediel et al., Women’s Provider Preferences for Basic Gynecology Care in a Large Health Maintenance Organization, 1999 (6) J. Women’s Health Gen., Based Med. 825 (1999) (using survey data, study showed that 52.2 percent of women in large health maintenance organization preferred female gynecologist).
90 See Aasim Padela et al., Patient Choice of Provider Type in the Emergency Department: Perceptions and Factors Relation to Accommodation of Requests for Care Providers, 27 J. Emerg. Med. J. 465, 466 (2010) (citing convenience study of physicians concluding that 24 percent of patients believe that they get better care from a physician of the same gender, and 32 percent of patients believe they get better care from a physician of the same race); 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).
91 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).
92 See, e.g., Marianne Schmid et al., Racial Differences in the Surgical Care of Medicare Beneficiaries With Localized Prostate Cancer, JAMA Oncol., Jan. 2016, available at http://oncology.jamanetwork.com/article.aspx?articleid=2463623 (study showing that in treatment of localized prostate cancer, black patients had a 7-day treatment delay and were less likely to undergo lymph node dissection).
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 indirectly limits customer choices about who they work with and buy from. But discrimination persists. In this part we turn to the regulatory analysis. Are there regulatory tools that might curtail this discrimination without unacceptable infringement on customer privacy and autonomy?

We conclude that, even as to the forms of discrimination society should deem least acceptable, a direct prohibitions of discrimination by customers is not the place to start. Instead, we make a modest proposal to slightly enlarge the obligations firms already have.

A. The Case Against An Outright Prohibition

The most obvious strategy for reducing customer discrimination would be an outright prohibition, analogous to 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 efficacious, 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 reluctant to advocate for a direct constraint against customer discrimination. Our reasons bring us back to the justifications we first examined for refraining from regulation against customers: efficacy and privacy.

In Part IIA, we noted some of the mistaken assumptions relating to efficacy that underlie the firm-only regulatory approach to discrimination. Yet it is not clear that any rights of action directly against individual customers would add much efficacy. One piece of evidence is Section 1981 of the Civil Rights Act of 1866. Section 1981 prohibits discrimination on the basis of race in private contracts, yet there are virtually no reported cases of Section 1981 being applied against individual (i.e., non-corporate) customers nor is there any serious discussion in the literature, either academic or practitioner, about the potential uses of Section 1981 as a tool against discrimination by customers. This tells us, among other things, that most customer interactions are probably too fleeting and lacking in

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93 See Part II(A), supra.
94 Supra, note 11.
meaningful documentation for any disgruntled seller to chase after a potentially discriminatory customer with a legal action.

While the case for a hands-off approach to customer discrimination is not fully made by the efficacy rationale, a direct prohibition on customer stereotyping would likely be a regulatory nightmare. 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 traded in the market. Individual “likes” and “dislikes” can be easily determined under modern internet technologies. The problem is, rather, determining what constitutes discrimination—would it be one act, or many (how many?)? Would discriminatory intent need to be shown (if so, how?), or would a pattern of discriminatory decisions be sufficient? How convincing would that pattern have to be? Would a pattern of discrimination be shown by successive acts against different sellers or would there need to be a sufficient number of discriminatory decisions harming the same seller? What kind of harm, if any, would have to be shown?

There is also the matter of customer privacy, examined in Part IIB. Even if a generalized interest in privacy does not justify the absence of all legal strategies to reduce discrimination by customers, it suggests the desirability of a protective zone within which customers can make buying decisions, at least certain kinds, without the threat of legal action.

It is also the case that direct regulation that infringes too deeply upon the perceived core rights of American citizens is highly risky in terms of achieving its own goals. Behavioral research suggests that when legal coercion deeply transgresses people’s sense of themselves, they respond defensively, with resentment and defiance rather than acceptance. When the regulatory goal depends upon changing attitudes, this kind of response is especially damaging. Having to pay bridge tolls or meet carbon emission standards is one thing; these are annoyances (even sometimes expensive annoyances) that generally do not challenge a person’s sense of identity, self-definition, or feeling of personal freedom. Constraints on to whom to rent an extra bedroom, how much to tip a restaurant server, or what parameters one can set on an on-line dating service are vastly more

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95 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.

96 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 Bartlett, supra note 20, at 1936-1941 (summarizing the research); Adam Grant & Sheryl Sandberg, When Talking About Bias Backfires, N.Y. TIMES, Dec. 7, 2014.

97 Some would add gun control to this category, which may help explain Supreme Court jurisprudence in this area. See, e.g., District of Columbia v. Heller, 554 U.S. 570 (2008).
personal. Thus, while strong, normative messages disapproving of discrimination are essential to reshaping norms, indirect strategies may be more effective than coercive rules in transmitting those norms.

B. A Modest Proposal

This analysis brings us back to the firm, the party upon whom society, for some very good reasons, already relies to reduce discrimination. Firms, particularly the well-resourced ones, collect enormous amounts of information about their customers. They know their customers’ preferences and buying habits. They have the ability to structure the choices they give customers, influence their preferences and habits, and distribute the costs of discrimination that they are unable, or not required, to eliminate.

With these advantages in mind, we propose that entities that already have a legal obligation not to discriminate themselves—this means, primarily, employers of a certain size and entities subject to public accommodations laws—also have an obligation not to facilitate discrimination by their customers, or to discriminate when they, themselves, act in the role of a customer.

The proposal has features that address each of the concerns spelled out in the prior sections of this article. 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 society does not directly regulate customer choice concluded that, while these reasons do not seem strong enough to abandon an appropriate societal concern with customer discrimination, they are practical realities; 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 of true changes in people’s preferences.

By avoiding a direct obligation on the customer, we blunt the force of these concerns and realities. The proposal requires only those already having a nondiscrimination obligation to avoid facilitating the kind of behavior by others that they are not allowed to engage in themselves. 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. The rule can be drafted to accommodate an exception along the lines of the BFOQ exception to Title VII, in situations in which the most compelling instances

98 See Bartlett, supra note 20, at 1934-1935.
99 See text accompanying notes 19, 54-56, supra.
100 See Rogers, supra note 19, at 90.
implicating customer privacy are at risk, although its presumed effect would be to gradually reduce customer bias, and thus to decrease the need for the exception. By not involving the state directly in monitoring customer behavior, the indirect approach avoids the practical enforcement difficulties associated with that monitoring. It also minimizes concerns about backlash, relying instead on firms, who make all other business decisions, to find the means to inhibit discrimination by their customers.

As noted above, anti-discrimination law already, to a certain extent, prohibits businesses from discriminating against its employees in response to its customer biases.101 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. Laws prohibiting disparate impact discrimination102 might have been useful to this end, but courts have thrown up roadblocks to disparate impact claims. For example, courts have held that plaintiffs must identify a particular practice that causes the disparate impact,103 which can be next to impossible to do, especially when the impact is the result of an amalgam of interactive factors, not all of them under the control of the same party.104 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.105 The proposed rule would provide some counterweight to these limitations and perhaps help begin a new chapter in disparate impact law.

The proposed rule would encourage firms to use their influence to extend the nondiscrimination 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.106 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. The state can help here with its own public service campaigns by attacking discrimination with the same vigor it has used to attack smoking, littering, and drugs.

A significant advantage of our proposal is that it reaches firms like Amazon, Uber and Airbnb that are primarily intermediaries of the transactions of others. These firms would now be responsible for not only the treatment of their employees and the public they serve, but also for the ways in which their platforms facilitate discrimination by their customers.

101 See text accompanying notes 101, supra.
103 See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989); Illhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997).
104 See Part I(A)(2), supra.
105 See Illhardt, 118 F.3d at 1157; more generally, and for other cites, see Joanna L. Grossman, Pregnancy, Work, and the Promise of Full Citizenship, 98 GEO. L.J. 567, 615-618 (2010).
Today, they have no such responsibility.\textsuperscript{107} Ironically, because of their enormous data-gathering capacities these firms may be even better equipped to affect their customers’ behavior than traditional firms.\textsuperscript{108}

There are a number of ways firms can respond to the obligation imposed by the proposed rule. One is to proactively declare that they will not accede to the discriminatory preferences of their customers. Corporate self-identification with nondiscrimination goals could become as standard as the current practice of announcing oneself to be an equal opportunity employer. Some online companies like Google, already have policies limiting the kinds of information their users can demand from each other.\textsuperscript{109} Other companies, on their own volition, also appear to be considering steps to constrain customer discrimination.\textsuperscript{110} These policies can structure customer choice by removing their ability to discriminate along race or gender lines. Early movers, while perhaps at a competitive disadvantage in the near term, might be expected to gain reputationally in the long run. Indeed, businesses are likely to conclude that enacting such policies voluntarily benefit them more than waiting for litigation,\textsuperscript{111} or public outcry.\textsuperscript{112} Responding to consumer bias, in some contexts, gives businesses a chance to iterate and reinforce their corporate values, as Fox News did in standing up to Donald Trump’s demands that Megyn Kelly be dropped as a moderator for one of the Republican presidential candidate debates. Trump’s demands were in retaliation for Kelly challenging Trump on his sexist views at a prior debate.\textsuperscript{113} Failure to stand up to Trump by Fox News

\textsuperscript{107} See, e.g., Chi. Lawyers’ Comm. For Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) (holding that in allowing its online customers to post housing ads that state racial preferences, Craigslist does not violate fair housing discrimination statutes).

\textsuperscript{108} See Rogers, supra note 19, at 90.

\textsuperscript{109} Constraining the use of stereotyping of discriminatory information will be more difficult, however, and not always in the interests of the firm. See Kevin Montgomery, Google’s Ad System Has Become Too Big to Control, Wired, Aug 8, 2015, http://www.wired.com/2015/07/googles-ad-system-become-big-control/

\textsuperscript{110} The peer-to-peer lending facilitator, Lending Club, is one such company – although it is by no means clear that it simply making customers/investors promise not to discriminate, as Lending Club seems to do, is sufficient to stop that behavior. See Kadhim Shubber, Lenders Can’t Discriminate, But What About Investors, FTALPHAVILLE, Jan 13, 2016, http://ftalphaville.ft.com/2016/01/13/2150093/lenders-cant-discriminate-but-what-about-investors/

\textsuperscript{111} See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908 (7th Cir. 2010) (finding a nursing home had created a hostile environment for a black nurse when it excluded that nurse from the rooms of residents who objected to being treated by black nurses).


might otherwise have damaged Kelly’s future career opportunities, as well as chilled the behavior of other (female) journalists. While this is a rather extreme (and controversial) example, it illustrates the normative power of firms to stand up to consumers who seek to use their power in discriminatory ways.

The proposed rule would also pressure businesses to rethink branding and advertising decisions that reinforce discriminatory customer preferences. This includes advertisements that encourage customers to think of women as sex objects, or as less competent than men. 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 games in “redface”\(^{114}\) or other garb that shames or humiliates members of a historically disadvantaged minority.

The proposal should cause firms to reduce or eliminate practices through which biased customers affect the employment prospects of women and minorities. Customer evaluations are notoriously biased along race and gender lines.\(^{115}\) Teacher evaluations by students, likewise, have been shown to reflect significant biases against women and minorities.\(^{116}\) Firms and educational institutions should not rely on these evaluations unless they can find a way to negate that bias.\(^{117}\)

The proposed rule would make it clearer that firms can’t have hiring policies that assume that members of the public prefer to deal with people of their own race. Because of the direct impact of these policies on employees, some courts have interpreted existing employment discrimination law to outlaw them. 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.\(^{118}\) 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.\(^{119}\)

As for discrimination by customers that should be discouraged but not necessarily banned, there may be ways, in some settings, that firms can place the cost of that discrimination on those customers. The model would


\(^{115}\) See supra notes 7-8, 26-27.

\(^{116}\) See supra note 8.


\(^{118}\) Ferrill v. The Parker Group, 168 F.3d 468 (11th Cir. 1999).

\(^{119}\) See Johnson v. Zema Systems Corp., 170 F.3d 734 (7th Cir. 1999).
be alcohol and tobacco taxes, by which society discourages socially desirable behaviors by shifting the negative externalities of those behaviors to those engaged in them, or managed care health plans, in which participants may have to pay more to see, say, an out-of-network doctor than one covered by the plan. While the matter is more complicated as a practical matter, if race and gender preferences in doctor selection is deemed to be “regretfully allowable,”120 health care systems might be able to figure out how to impose a higher cost on patients who insist on a doctor of their preferred race and/or gender. This strategy could preserve the choice while encouraging patients with race and gender preferences to think twice about it.

Similarly, Uber might be able to assess a fee on customers who systematically reject dark-skinned drivers with foreign-sounding names; the proceeds could conceivably be redirected toward the population of drivers negatively affected by such systematic rejections. Another example concerns requests to airlines by ultra-Orthodox Jewish men to reseat female passengers so that these men do not sit next to them, in violation of their religious proscriptions.121 The airlines may well want to accommodate this religious preference, but there is no reason to require women passengers to do the accommodating; instead, the airlines could require the passenger to make prior arrangements, or even to buy an extra (empty) seat.

In other settings, goods and services can be bundled, to reduce the harmful effect of discriminatory customer preferences. One example is tip-pooling in the restaurant business. Tip-pooling helps to level out the harmful effects of race and gender bias in tipping by spreading those effects across all servers. As a result, no one set of servers, defined by race or gender, is disproportionately affected by customer bias.

There are other contexts, as well, in which bundling can structure markets in which discrimination might otherwise occur and to reduce the negative impact of customer bias. Once a market is structured, customers tend to adapt to it. For example, law schools typically assign 1L students to their courses in “bundles” that 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, and few students object to the practice, even though it reduces their choices. The practice also exposes students to professors they may have otherwise avoided, hopefully in a way that reduces bias. Professional service firms do something similar when they assemble diverse work teams

120 See supra notes 76-85.
to provide services; in addition to its other advantages, this practice both makes it more difficult for clients to discriminate, and creates the working relationships in which prejudice may be reduced.

Pushing this strategy even further, one could imagine colleges and universities bundling tickets for men’s and women’s sports teams, both to even out the opportunities for women and men in sports and to build more equal regard among customers for women’s sports. Many colleges and universities already prop up the market for their less popular sporting events (say, non-conference games) by bundling tickets to those events with tickets that are more highly sought after (conference games). Bundling tickets for men’s and women’s teams would not require fans to attend games they do not wish to attend—any more than any season-ticket holder is forced to attend non-conference games. It would, however, spread the cost of equalizing men’s and women’s sports and perhaps even induce some fans to develop a taste for women’s sports.

There are undoubtedly other strategies that firms and entities of public accommodation might use to discourage discrimination by their customers, situate the cost of that discrimination on those engaged in it, or spread that cost more evenly across society. The proposed rule incentivizes the development of such strategies.

V. CONCLUSION

The direct, measurable effects of the proposed rule are not likely to be large. While some changes in a firm’s practices will be compelled by the proposed rule, it will be difficult, and inappropriate, to pin responsibility on firms for the choices of their customers, many of which are the product of complicated interactions, not all of them within the control, or controllable by, firms.

Despite these limitations, it might be hoped that the rule would have at least an indirect impact on societal norms about discrimination by customers. 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. When multiple measures support the same norms, the expressive effect can be expected to be

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123 For a description of these advantages, particularly with respect to discriminatory attitudes by employees, see Bartlett, supra note 20, at 1960-1971.
124 See Estlund, supra note 20.
125 If not prohibited, the fans may be able to resell the tickets. Even so, there will likely be transactions costs.
126 See generally Richard H. McAdams, THE EXPRESSIVE POWERS OF LAW (2015) (describing the conditions that strengthen the expressive powers of law). 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.
There can be little doubt that anti-discrimination laws have had a significant impact on workplace fairness and in access to public accommodations, despite the fact that plaintiffs in discrimination cases are more likely to lose their lawsuits than plaintiffs in any other category of civil litigation. The law prohibiting race and sex discrimination in choosing a jury is almost impossible to enforce, and yet the law marks the underlying discriminatory behavior as wrong, in part to signal society’s disapproval of discrimination and to build social norms accordingly. The proposed rule has the potential to make this kind of contribution to nondiscrimination norms.

There is at present no law that tells customers, or the businesses they patronize, that customer discrimination is wrong. The proposal changes this. It recognizes 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, assuming a continued societal commitment to reducing race and gender discrimination, it no longer seems possible to think of customer discrimination as entirely beyond the law’s concern. Customer discrimination harms some people in the same way as discrimination by firms, if fewer at a time. It may be time for society to acknowledge this harm and take appropriate steps to reduce it. Every extension of nondiscrimination 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, in the course of time, also will seem second nature.

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127 Cf.

128 Among all categories of civil litigation, discrimination cases are the hardest to win. Plaintiffs in discrimination cases do worse than defendants at every stage of litigation—settlements, pre-trial motions, trials, and appeals. See Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPIRICAL LEG. STUD. 429 (2004); Kevin M. Clermont, & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 HARV. L. & POL’Y REV. 103 (2009).

129 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, 740 F.3d 471 (9th Cir. 2014) (holding it unconstitutional for a party to use peremptory strikes on the basis of sexual orientation).

130 The exceptions involve blatant circumstances involving the complete elimination of prospective jurors based on race. See Foster v. State, 374 S.E.2d 188 (Ga. 1988), cert. granted sub nom Foster v. Humphrey, 135 S. Ct. 2349 (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).

131 As another example, some countries are considering bans on smoking in cars with children present. There is little chance of effectively enforcing such laws, but their advocates believe they would educate the public about the health risks of smoking and help change social norms about the acceptability of smoking around children. See Neil Thorpe, Smoking Ban in Cars With Children Difficult To Enforce, in THE CONVERSATION, Feb. 10, 2014, available at http://theconversation.com/smoking-ban-in-cars-with-children-difficult-to-enforce-22960.