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Discrimination by Algorithm: Employer Accountability for Biased Customer Reviews

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ABSTRACT

From Uber to Home Depot to Starbucks, companies are increasingly asking customers to rate workers. Gathering data from these ratings, many firms utilize algorithms to make employment decisions. The proliferation of customer ratings raises the possibility that some customers may review workers negatively for racist, sexist, or other illegal reasons. Absent a legal framework to address these changes, the expanding influence of consumer-sourced feedback threatens to undermine fundamental antidiscrimination protections for workers. This Article critically evaluates the legal regulation of customer-based, algorithmic discrimination in the workplace. The traditional view of customers as clients assumes that customers have no direct power to discipline or discharge workers. Yet today, online review systems allow customers to rate workers and decide their fates. Responding to these developments, this Article provides a method for understanding the rise of “managerial customers” and the legal responsibility that companies should assume for discriminatory customer reviews.

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INTRODUCTION

Please rate your experience from one to five stars. Businesses today increasingly call upon customers to review workers. From Uber to Instacart to DoorDash, platforms invariably ask customers to evaluate drivers and delivery people.¹ Beyond the “gig” economy,² firms in traditional work settings also solicit customer ratings. For example, companies in a wide assortment of service and retail sectors, such as Applebee’s, T.J. Maxx, and Dick’s Sporting Goods, request customer feedback on workers.³ Although these rating systems enable employers to evaluate employees⁴ with increased efficiency, the growing solicitation of customer input also raises the possibility that some workers will lose their jobs

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1. See ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* 155 (2018) (explaining how Uber uses customer-sourced ratings to evaluate worker performance); Kathleen Griesbach, Adam Reich, Luke Elliot-Negri & Ruth Milkman, *Algorithmic Control in Platform Food Delivery Work*, 5 *SOCIUS: SOCIO. RSCH. DYNAMIC WORLD* 1, 6–7 (2019) (discussing how platforms use algorithms to make workplace decisions based on an individual’s average star rating).
 2. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 *COLUM. L. REV.* 1623, 1625 (2017) (explaining how companies in the “gig” or “platform” economy facilitate transactions between parties).
 3. See Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 *BERKELEY TECH. L.J.* 1183, 1186–87 (2017) (discussing the ubiquity of online reputational systems); Caroline O’Donovan, *An Invisible Rating System at Your Favorite Chain Restaurant Is Costing Your Server*, *BUZZFEED NEWS* (June 21, 2018, 1:23 PM), <https://www.buzzfeednews.com/article/carolineodonovan/ziosk-presto-tabletop-tablet-restaurant-rating-servers> [<https://perma.cc/7SW6-S588>] (discussing customer ratings at chain restaurants); *Applebee’s Guest Experience Survey*, *CUSTOMERSURVEY.COM* (Feb. 1, 2021), <https://www.customer-survey.com/www-talktoapplebees-com> [<https://perma.cc/33RG-L7Y6>]; *DICK’S Sporting Goods Customer Satisfaction Survey*, *CUSTOMERSURVEY.COM*, <https://www.customer-survey.com/www-dickssportinggoods-com-feedback> [<https://perma.cc/W8ZV-EJ8M>]; *T.J. Maxx Customer Satisfaction Survey*, *CUSTOMERSURVEY.COM*, <https://www.customer-survey.com/www-tjmaxxfeedback-com> [<https://perma.cc/RPT4-J9TX>].
 4. The antidiscrimination protections discussed here apply to employees and not to independent contractors. Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 *B.U. L. REV.* 1673, 1676–77 (2016) (discussing the relevance of employee status to antidiscrimination coverage). Whereas many of the workers discussed in this Article are employees of the traditional retail and service firms that hire them (e.g., Olive Garden servers, Walmart associates, etc.), courts continue to debate whether platform workers are employees. See Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 *N. ILL. U. L. REV.* 379, 393–98 (2019) [hereinafter Cunningham-Parmeter, *Gig-Dependence*] (explaining how courts have reached different conclusions on the question of whether platform workers are employees). The employment status of platform workers is beyond the scope of this Article.

because of discriminatory customer feedback. For example, while some dissatisfied customers may provide one-star ratings to workers for legitimate reasons (e.g., poor service), other customers may negatively rate workers for racist, sexist, or other illegal reasons.⁵ Unfortunately, the algorithms that gather reviews and administer consequences do not distinguish between legitimate customer motives and discriminatory feedback.⁶ Uber, for example, “deactivates” drivers when their average rating falls below a predetermined level, approximately 4.6 out of five stars.⁷ For drivers hovering above that line, a one-star review can cause drivers to lose their jobs, even if discrimination influenced the low rating.⁸ Similarly, businesses in retail and service settings fail to screen customer ratings for bias, even though low customer scores can lead directly or indirectly to discharge.⁹

In the years to come, customer-based inputs will increasingly influence working conditions.¹⁰ This rapid expansion of algorithmic management threatens to amplify the well-known effects of customer biases.¹¹ Numerous studies demonstrate that, after controlling for objective criteria, customers assign lower satisfaction ratings to female and nonwhite service employees in offline markets.¹² For example, female customer service representatives tend to receive worse reviews than men.¹³ Customers exhibit similar patterns of bias in online transactions as well. For instance, the discriminatory practices of certain Airbnb

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5. See Minna J. Kotkin, *Uberizing Discrimination: Equal Employment and Gig Workers*, 87 TENN. L. REV. 73, 80 (2019) (examining how online review systems facilitate bias).
 6. See Elizabeth Tippet, *Employee Classification in the United States*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 291, 291 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., 2018) (equating online reviews of workers with traditional performance reviews of employees).
 7. See Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 1027 (2017); Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMPAR. LAB. L. & POL’Y J. 577, 597–98 (2016) (discussing the phenomenon of “firing by algorithm”).
 8. See Bodie et al., *supra* note 7, at 1027–28 (outlining the challenge of inferring bias from online reviews).
 9. See discussion *infra* Part I.A.2 (discussing customer feedback systems in traditional work settings).
 10. See Levy & Barocas, *supra* note 3, at 1186 (discussing the ubiquity of rating systems).
 11. See Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671, 673–74 (2016) (explaining how algorithmic decisionmaking can reproduce discrimination).
 12. See Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2186–87 (2018) (summarizing data on bias in customer satisfaction ratings).
 13. See Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 224–25 (2016) (surveying data on reviews in different service sectors).

and eBay users are well-documented.¹⁴ Likewise, a study of the platforms Fiverr and TaskRabbit found that negative customer ratings correlated with workers' race and gender.¹⁵ Without a legal framework to address these changes, the expanding influence of consumer-sourced feedback threatens to undermine the fundamental antidiscrimination protections that lie at the core of American employment law.¹⁶

Whereas antidiscrimination law has traditionally characterized *customers as clients*, this Article develops a legal framework for assessing *customers as algorithmic managers*. The traditional view of customers as clients assumes that customers have no direct power to discipline or discharge workers. Yet today, technology has rapidly foisted customers into novel managerial roles. Responding to these developments, this Article provides a method for understanding the managerial positions that consumers now occupy and the legal obligations that firms should assume for discriminatory customer reviews.

The Supreme Court has frequently held companies strictly responsible for their agents' violations of Title VII of the Civil Rights Act of 1964¹⁷—the nation's primary workplace antidiscrimination law. For example, in the sexual harassment context, the Court has required employers to automatically compensate victims when supervisors harass and discharge subordinates.¹⁸ In the non-harassment context, courts have held employers strictly liable for the biased acts of decisionmakers as company agents.¹⁹ In these situations, Title VII liability arises not because firms themselves have engaged in discrimination, but because firms have entrusted agents with delegated powers that agents abuse. Crucially, this type of vicarious liability is automatic or "strict," in that employers must pay for their

14. See Bodie et al., *supra* note 7, at 1027–28 (explaining how algorithms can aggravate the injuries caused by discriminatory judgments).

15. Anikó Hannák, Claudia Wagner, David Garcia, Alan Mislove, Markus Strohmaier & Christo Wilson, *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr*, Proc. of the 20th ACM Conf. on Computer-Supported Coop. Work and Soc. Computing 1914, 1914 (2017); see also Scott Middleton, Discrimination, Regulation, and Design in Ridehailing 22–23 (June 2018) (unpublished master's thesis, Massachusetts Institute of Technology) (on file with author) (reviewing studies of customer ratings and bias).

16. See generally Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 4 (2020) (explaining how the spread of monitoring technology and artificial intelligence threatens to undermine labor protections).

17. 42 U.S.C. §§ 2000e–2000e-17.

18. See *Vance v. Ball State Univ.*, 570 U.S. 421, 431–32 (2013).

19. See Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1320 (2014) (explaining how courts apply a rule of strict vicarious liability to employment discrimination actions).

agents' Title VII violations, even when firms have not engaged in blameworthy conduct.²⁰

In addition to exposing companies to a no-fault system of vicarious liability when company agents engage in discrimination, Title VII also holds employers *directly* accountable for their own illegal behavior.²¹ For example, courts assign direct responsibility to businesses for making hiring or promotion decisions that are motivated by race or other prohibited characteristics. Unlike vicarious liability, which obligates firms to automatically pay for their agents' Title VII violations, direct liability focuses on firms themselves and their own culpability in facilitating discrimination.²²

Applying the foregoing principles to customer-based, algorithmic management, this Article asserts that employer liability for biased customer ratings should depend on the level of delegated authority that customers receive when firms ask them to rate workers.²³ The Article offers the following schematic to identify two distinct positions that algorithms now allow customers to occupy: (1) action manager and (2) advisory client. In some circumstances, algorithms provide customers with the functional authority to fire workers, thereby deputizing customers as *action managers*. In other circumstances, though, algorithms merely allow customers to act as *advisory clients* who provide input on a worker's performance.²⁴ Mapping Title VII's distinction between vicarious liability and direct liability onto these roles, this Article argues that firms should automatically pay for the discriminatory conduct of action managers because firms have entrusted these customers with delegated powers as company agents. In contrast, when rating systems do not give customers the functional power to fire workers, then customers are advisory clients. In these circumstances, Title VII liability should apply to firms that directly engage in culpable conduct, such as

20. See RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. L. INST. 2006); Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 144 (2001) (examining Title VII's different liability rules for harassment).

21. 42 U.S.C. § 2000e-2(m).

22. See J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 280–82 (1995) (summarizing liability standards for claims of workplace discrimination).

23. See Sandra F. Sperino, *Caught by the Cat's Paw*, 2019 BYU L. REV. 1219, 1262–63 (2019) (outlining various definitions of the term “supervisor”).

24. See Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 95–96 (2018) (discussing Title VII caselaw on discriminatory customer preferences); Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 253–54 (2016) (explaining how customer bias affects the working conditions of service employees).

allowing the biased feedback of advisory clients to motivate employment decisions.²⁵

To illustrate this distinction between action managers and advisory clients, consider a platform that hires drivers to deliver on-demand meals. The company uses an app to gather orders and asks customers to rate drivers. Now assume that one sexist customer consistently assigns one-star ratings to female drivers. Perhaps the customer includes sexist language in his reviews as well. Through dozens of transactions, the data available to the platform would show that the sexist customer repeatedly rates male drivers higher than female drivers for no objective reason. If the meal-delivery platform has programmed its algorithm to automatically terminate employees once they fall below a certain average rating threshold (e.g., 4.5 stars), then the firm has delegated its firing authority to the customer as an action manager and should face automatic liability for any discharge that results from the customer's discriminatory feedback. Conversely, if the company's performance-rating algorithm does not provide customers with the functional ability to fire drivers, then the customer who provides sexist ratings is akin to a third party who recommends discharge but cannot act on that impulse.²⁶ In that scenario, the customer is an advisory client, and Title VII liability should depend on whether the customer's low rating motivated the company to act.²⁷ Thus, in contrast to the automatic liability generated by action managers, a firm's responsibility for the negative reviews of advisory clients should depend on whether biased ratings actually influenced the firm's own decisions.

Although legal scholars have begun to consider the workplace implications of algorithmic discrimination,²⁸ this research has generally assumed that existing

25. Whereas this Article outlines legal theories based on automatic, vicarious liability and direct liability, other scholars have proposed models that focus exclusively on employer culpability. See, e.g., Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV. 1055, 1059 (2017) (asserting that “recklessness [is] the bridge between the theory of negligence and the requirement of intent as defined by Title VII jurisprudence”); Flake, *supra* note 12, at 2172 (arguing against strict employer liability in favor of a negligence-based standard that focuses on an employer’s “knowledge of and response to the biased feedback”).

26. See Flake, *supra* note 12, at 2200 (discussing the “cat’s paw” theory of liability and explaining how Title VII holds employers liable when they act upon discriminatory input from others).

27. 42 U.S.C. § 2000e-2(m) (listing Title VII’s “motivating factor” definition of discrimination).

28. See generally Bodie et al., *supra* note 7, at 963 (discussing the need for greater scholarly attention to the interaction between people analytics and the law of the workplace); Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 523–24 (2018) (observing that a small, robust branch of legal scholarship has begun to focus on algorithmic discrimination); Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531, 533 (2020) (arguing that legal scholarship has not fully grappled with the employment law ramifications of changes to workplace technologies); E. Gary Spitko,

Title VII theories cannot adequately address this nascent problem.²⁹ Acknowledging Title VII's doctrinal limitations, this Article applies standing theories of vicarious and direct liability to online review systems. Holding companies liable for discriminatory customer feedback is an entirely consistent—though admittedly modern—application of traditional agency principles. Firms write the algorithms, dictate the methods used to provide input, and control the rules that lead to deactivation. Under these circumstances, Title VII ought to hold companies responsible for adverse employment outcomes that result from discriminatory reviews.

This Article proceeds as follows: Part I discusses the proliferation of rating systems and the potential for biased customer reviews to infect these systems. Whereas firms often publicly describe themselves as “anti-racist” companies,³⁰ Part I explains how businesses rarely bolster their rhetorical commitment to antidiscrimination values with enforcement mechanisms that actually combat racism or other forms of discrimination in online reviews. Moving beyond the tendency of many firms to offer only performative expressions of antidiscrimination values, Part II outlines a legal model for holding employers legally accountable, both directly and vicariously, for biased customer ratings. The

Reputation Systems Bias in the Platform Workplace, 2019 BYU L. REV. 1271, 1273–74 (2019) (examining the effect that biased ratings have on workers).

29. See, e.g., Ifeoma Ajunwa, *The Paradox of Automation As Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1680 (2020) (discussing bias in hiring algorithms and calling for “updated legal frameworks”); Bodie et al., *supra* note 7, at 1027–28 (asserting that “traditional discrimination doctrine has a hard time providing a remedy” for discriminatory reviews); Flake, *supra* note 12, at 2173 (“[N]either the disparate treatment nor the disparate impact analytical framework is fully equipped to handle customer feedback discrimination claims”); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 865–66 (2017) (asserting that the problem posed by workforce analytics “calls for fundamentally rethinking antidiscrimination doctrine”); Joshua A. Kroll, Joanna Huey, Solon Barocas, Edward W. Felten, Joel R. Reidenberg, David G. Robinson & Harlan Yu, *Accountable Algorithms*, 165 U. PA. L. REV. 633, 636 (2017) (arguing that “legal standards that govern decision processes have not kept pace with technology”); Spitko, *supra* note 28, at 1274 (proposing new regulations for minimizing the harm caused by reputational systems); Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 428 (2018) (asserting that the Supreme Court’s bifurcated Title VII jurisprudence should be revised to address algorithmic discrimination). *But see* Bornstein, *supra* note 28, at 524–25 (highlighting Title VII’s adaptability and calling for the application of existing anti-stereotyping theories to algorithmic discrimination).
30. See, e.g., *Reaffirming Our Commitment to Being an Anti-Racist Company*, UBER: NEWSROOM (May 15, 2021), <https://www.uber.com/newsroom/reaffirming-our-commitment> [<https://perma.cc/HT2W-V5JM>]; Leslie Stretch, *A Message from Medallia’s CEO: Confronting Inequality Takes More Than Words*, MEDALLIA (June 9, 2020), <https://www.medallia.com/blog/confronting-inequality-takes-more-than-words> [<https://perma.cc/6LVK-AV5Z>] (describing the firm’s commitment to “anti-racism”).

Article explains how this model of legal responsibility can prompt firms to genuinely police customer discrimination, as compared to current systems, which merely incentivize cosmetic compliance with antidiscrimination norms.

Part III outlines several steps that companies could take to limit the influence of biased reviews and, therefore, reduce the legal exposure that firms should face for those reviews. For example, businesses can program their algorithms to audit customer reviews for discriminatory language or to detect discriminatory patterns among certain customers (e.g., consistently giving nonwhite workers lower ratings for no objective reason).³¹ A firm that identified provable patterns among certain users would not face liability if the firm denied those users the power to act as action managers or to affect working conditions as advisory clients. In other words, an algorithm's opaque code should not prevent companies from analyzing widely available data and preventing predictable harms.³²

Part IV anticipates objections to the proposal. For example, critics might assert that holding employers liable for online reviews would impede customer candor,³³ while failing to expose the unstated biases of most reviewers. But such a critique underestimates the ability of firms to identify discriminatory patterns among users, while overstating the inhibiting effect that the current proposal would have on the average customer. First, given that plaintiffs cannot sue customers individually for Title VII violations,³⁴ the fear of personal liability should not deter forthright comments. Second, under the proposal outlined here, customers could still rate workers negatively for poor performance, as long as they did not repeatedly reserve adverse feedback disproportionately for members of protected groups without objective reasons. Part IV explains how courts can distinguish honest ratings from those that contain substantial evidence of discriminatory intent.

31. See Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. Pa. L. REV. ONLINE 189, 190–91 (2017) (explaining how social scientists have long utilized auditing as a tool to identify discrimination in employment).

32. See JON KLEINBERG, JENS LUDWIG, SENDHIL MULLAINATHAN & CASS R. SUNSTEIN, *DISCRIMINATION IN THE AGE OF ALGORITHMS* 30 (2019) (Nat'l Bureau Econ. Rsch., Working Paper No. 25548) (arguing that observers can scrutinize algorithmic decisionmaking much more effectively than human decisionmaking).

33. See Spitko, *supra* note 28, at 1273 (explaining how reputational systems can promote trust and efficiently match users).

34. *Fantini v. Salem State Coll.*, 557 F.3d 22, 31 (1st Cir. 2009) (“[W]e find that there is no individual employee liability under Title VII.”); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1606–07 (2018) (discussing personal liability and the judicial consensus that individuals cannot be held individually responsible for Title VII harassment claims).

Admittedly, it might seem rather easy for customers to conceal their discriminatory impulses inside the “black box” of the algorithm.³⁵ But this critique underestimates the potential for data analytics to expose purposeful customer discrimination in meaningful ways.³⁶ In traditional Title VII settings, judges often infer discriminatory intent by identifying procedural irregularities and unequal patterns of treatment among comparable workers.³⁷ Although far from perfect, these same proxies for discrimination can help firms detect bias among reviewing customers. Companies already collect large datasets to develop highly detailed profiles of behavioral patterns among users.³⁸ Just as algorithms can gather and interpret customer data for predictive and promotional purposes, algorithms can also cull this data to look for significant patterns of bias among reviewers.

The rapid emergence of online feedback systems has given rise to an entirely new class of managerial customers. No longer merely clients, customers now monitor and rate workers in a variety of industries. Unfortunately, this increased solicitation of customer feedback creates a substantial risk that customer bias will creep into online reviews. Safely ensconced in algorithmic anonymity, customers can currently assign biased, poor reviews to workers without having to justify the negative rating. Absent safeguards to diminish the amplifying power that algorithms give to discriminatory decisionmaking, this new management model can inflict substantial harm on protected groups.³⁹ To avoid this outcome, antidiscrimination law should provide firms with greater incentives to scrutinize online reviews for bias and hold firms accountable for the discriminatory acts of this new managerial class.

I. THE EMERGING CLASS OF MANAGERIAL CUSTOMERS

Your next manager may be an algorithm. Fast-moving technological innovations have exposed a growing number of workers to algorithmic

35. See Bales & Stone, *supra* note 16, at 26 (discussing biased decisionmaking and algorithmic employment outcomes).

36. See Bodie et al., *supra* note 7, at 962–63 (surveying workplace changes caused by data analytics).

37. See Barocas & Selbst, *supra* note 11, at 696 (considering how courts evaluate a decisionmaker’s motives).

38. See Kim, *supra* note 29, at 861–82 (analyzing the growth of third-party data aggregators and the effect of this shift on employee privacy).

39. See Bornstein, *supra* note 28, at 522–23 (discussing the influence of data inputs on algorithmic outcomes).

management systems.⁴⁰ The term “algorithmic management” describes the use of data and software to manage large numbers of workers at scale.⁴¹ Firms utilize automated systems to accomplish a wide range of management tasks, including recruitment, hiring, efficiency monitoring, and retention.⁴² For example, software can quickly scan resumes to identify the best candidates for open positions.⁴³ Likewise, employers increasingly use data-gathering devices, such as scanners, trackers, and phones, to constantly monitor workers on the job.⁴⁴

Despite the substantial risk that these systems pose to worker autonomy, algorithmic management has the potential to reduce the influence of biased decisionmaking on workplace outcomes.⁴⁵ For example, by removing human managers from hiring processes, hiring algorithms can theoretically pick the best candidates for jobs.⁴⁶ Similarly, software programs that track worker productivity can help reduce the influence of biases that human managers often bring to promotion and retention decisions.⁴⁷

Unfortunately, although software can replace human subjectivity with seemingly objective code, algorithms can also amplify biases by repackaging discriminatory inputs.⁴⁸ For example, even if programmers write code in a way

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40. See Min Kyung Lee, Daniel Kusbit, Evan Metsky & Laura Dabbish, *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*, Proc. Of the 33rd Annual ACM Conf. on Human Factors in Comput. Sys. 1603 (2015) (considering different forms of algorithmic management).
 41. *Id.*; Rogers, *supra* note 28, at 562–63 (discussing how firms feed data into algorithms to manage workers).
 42. See generally Carlotta Bunzel, *Algorithmic Management in Organizations: Benefits, Challenges, and Best Practices*, ACADEMY TO INNOVATE HR, <https://www.aihr.com/blog/algorithmic-management/#What> [<https://perma.cc/LLF2-7MLA>] (describing various modes of algorithmic management).
 43. See *id.* (outlining certain efficiency gains that come with algorithmic management).
 44. See Rogers, *supra* note 28, at 532 (discussing the explosive growth of employee-tracked data).
 45. See Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 ABA J. LAB. & EMP. L. 289, 289–94 (2021) (addressing concerns that algorithmic management exposes workers to invasive and unfair treatment).
 46. See Sullivan, *supra* note 29, at 399–401 (explaining how firms can incorporate artificial intelligence into the hiring process).
 47. See ALEXANDRA MATEESCU & AIHA NGUYEN, ALGORITHMIC MANAGEMENT IN THE WORKPLACE 9 (2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf [<https://perma.cc/XZU2-SUJV>] (discussing how vendors of management software claim that algorithms can correct the biases of human decisionmakers).
 48. See Greg Satell & Josh Sutton, *We Need AI That Is Explainable, Auditable, and Transparent*, HARV. BUS. REV. (Oct. 28, 2019), <https://hbr.org/2019/10/we-need-ai-that-is-explainable-auditable-and-transparent> [<https://perma.cc/3KRZ-944A>] (examining how biased inputs can impact the decisions of artificial intelligence systems).

that specifically eliminates any reference to a job applicant's race, the algorithm may still search for factors among job applicants that correlate with race, such as their residence zip code, thereby yielding racially skewed results.⁴⁹ Likewise, if the facial-recognition software used at some workplaces correctly identifies white faces at higher rates than the faces of nonwhite workers—as many such services do⁵⁰—the costs of these errors will fall disproportionately on protected groups.⁵¹ Uniquely adding to the bias-enhancing risks associated with algorithmic decisionmaking, online rating systems stand apart in their use of unchecked customer feedback.

A. Customer Reviews and Algorithmic Cliffs

Our “scored society” rates everything.⁵² Websites such as Amazon, TripAdvisor, Yelp, and many others, constantly call upon consumers to rate, review, and comment on their marketplace transactions.⁵³ Applied to the workplace, customers increasingly share their impression of workers through online systems as well.⁵⁴ For example, platforms such as Uber, Lyft, TaskRabbit, DoorDash, Instacart, and Upwork ask customers to quickly rate workers on a five-star scale.⁵⁵ But beyond these well-known platforms, companies in more

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49. See Charles A. Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 372 n.69 (2020) (describing how algorithms can discriminate, even when using neutral criteria to search for workers in the labor market).
 50. See Elizabeth A. Brown, *A Healthy Mistrust: Curbing Biometric Data Misuse in the Workplace*, 23 STAN. TECH. L. REV. 252, 282 (2020) (discussing racial disparities in the identification rates of facial recognition technology).
 51. See Elizabeth A. Rowe, *Regulating Facial Recognition Technology in the Private Sector*, 24 STAN. TECH. L. REV. 1, 28–30 (2020) (examining the growing use of facial recognition software by companies).
 52. See Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 2–3 (2014) (discussing the proliferation of rankings in various aspects of social life).
 53. Alex Rosenblat, Karen Levy, Solon Barocas & Tim Hwang, *Discriminating Tastes: Customer Ratings as Vehicles for Bias*, INTEL. & AUTONOMY, at 5 (Oct. 2016) (comparing the process of rating Uber drivers to the process of reviewing companies and products on Yelp and Amazon).
 54. See Spitko, *supra* note 28, at 1276–78 (discussing the increasing solicitation of customer feedback by firms).
 55. *Dasher Ratings Explained*, DOORDASH, https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en_US [<https://perma.cc/HXE7-J5VH>]; *Driver and Passenger Ratings*, LYFT, <https://help.lyft.com/hc/en-us/articles/115013079948> [<https://perma.cc/RF55-R3D7>]; *How Do I Leave a Review?*, TASKRABBIT, <https://support.taskrabbit.com/hc/en-us/articles/213301766-How-Do-I-Leave-a-Review-> [<https://perma.cc/P8D7-Z7WQ>]; *Job Success Score*, UPWORK, <https://support.upwork.com/hc/en-us/articles/211068358> [<https://perma.cc/4YD6-T4V6>]; *Understanding Ratings*, UBER,

traditional service sectors also provide customers with online opportunities to review workers. For example, Starbucks invites customers to provide “connection scores” to rate the level of service that they received at cafes.⁵⁶ T.J. Maxx asks customers to indicate whether they are “highly satisfied” or “highly dissatisfied” with the friendliness of their sales associate.⁵⁷ Likewise, Home Depot invites customers to rate the friendliness of their cashiers on a five-point scale.⁵⁸ Taco Bell links its “Tell the Bell” survey to individual transactions at specific stores.⁵⁹ Apple invites customers to rate from “Poor” to “Excellent” the tech support that they received from individual employees at Apple Stores.⁶⁰ In addition, Office Depot, Ulta Beauty, and Walmart all invite customers to comment on their retail experiences with workers.⁶¹

Several factors have led to the explosive growth of customer-centric reviews across industries. For example, firms in the highly competitive service sector must keep customers happy or risk losing business to competitors.⁶² Allowing companies to constantly monitor the quality of customer interactions, rapid technologies can instantaneously query customers about their experiences after every transaction.⁶³ Although companies have long solicited feedback through analogue means such as comment cards, toll-free numbers, and focus groups,

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- <https://help.uber.com/driving-and-delivering/article/understanding-ratings?nodeId=fa1eb77f-ad79-4607-9651-72b932be30b7> [<https://perma.cc/SG2F-6QXM>].
56. See Louise Matsakis & Eli M. Rosenberg, *How Starbucks Uses Dubious ‘Connection Scores’ to Evaluate Its Workforce*, NBC NEWS (May 28, 2022), <https://www.nbcnews.com/business/starbucks-connection-scores-customer-whims-rcna29315> [<https://perma.cc/68BX-U2AP>] (discussing the coffee chain’s system for rating workers and summarizing allegations that low scores cause certain employees to lose work hours).
 57. *T.J. Maxx Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-tjmaxxfeedback-com> [<https://perma.cc/RPT4-J9TX>].
 58. *Home Depot Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-homedepot-com-survey> [<https://perma.cc/CCS4-SWR2>].
 59. *Taco Bell Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-tellthebell-com> [<https://perma.cc/392R-AGY3>].
 60. E-mail from Apple Inc. to Keith Cunningham-Parmeter, Professor of L., Willamette U. (Apr. 14, 2022, 09:36 PST) (on file with author) (“How did Martina do?”).
 61. *Office Depot Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey-officedepot-com> [<https://perma.cc/VRD6-HUP8>]; *Ulta Guest Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey-ulta-com> [<https://perma.cc/X6JJ-KTMN>]; *Walmart In-Store Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey-walmart-com> [<https://perma.cc/5WVS-KEEQ>].
 62. See Flake, *supra* note 12, at 2173–75 (discussing the ubiquity of customer feedback systems).
 63. See Flake, *supra* note 12, at 2175–76 (considering reasons for the recent proliferation of online ratings).

such methods were often slow and unreliable.⁶⁴ In contrast to these twentieth-century approaches to obtaining customer input, firms today can ask customers for immediate feedback through apps, texts, or other electronic means.⁶⁵ Therefore, what was once a time-consuming process with low response rates has evolved into digital review systems that can assess workers in real time at scale.⁶⁶

Despite the ubiquity of online rating systems, however, firms today vary considerably in how they handle negative customer feedback. For example, many businesses in the platform economy program software to automatically deactivate workers when their average star rating falls below a certain threshold.⁶⁷ In these circumstances, negative customer reviews can push workers over algorithmic cliffs that result in discharge. In contrast, companies in offline markets tend to fold adverse customer feedback into larger evaluative processes.⁶⁸ Distinguishing between these various methods of handling customer input, the following Subparts consider the consequences that one-star reviews pose to workers in both the platform economy and in more traditional employment sectors.

1. On-Demand Work and the Consequence of One-Star Reviews

Many companies in the platform economy “deactivate” workers if their average customer rating falls below a predetermined number.⁶⁹ Consider the food delivery platform DoorDash, which tells its “Dashers” that “[r]atings determine if you’re eligible to dash.”⁷⁰ Emphasizing the importance of receiving satisfactory

64. See Wang, *supra* note 24, at 279 n.189 (discussing various methods for gathering customer feedback).

65. Flake, *supra* note 12, at 2175–76 (distinguishing older feedback technologies from current digital systems).

66. See Tom Zoellner, *Customer Surveys Have Taken over the World. Not Everyone Rates Them a 10*, L.A. TIMES (Feb. 23, 2020, 6:00 AM), <https://www.latimes.com/business/story/2020-02-23/customer-surveys> [<https://perma.cc/G5HC-7F9E>] (examining the proliferation of online rating systems).

67. See Josh Dzieza, *The Rating Game: How Uber and Its Peers Turned Us into Horrible Bosses*, THE VERGE, (Oct. 28, 2015, 11:00 AM), <https://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden> [<https://perma.cc/WP9N-92SW>] (explaining how negative ratings cause job losses in the platform economy).

68. See Zoellner, *supra* note 66 (discussing the job-related impacts of negative customer reviews).

69. See generally Levy & Barocas, *supra* note 3, at 1219–20 (explaining how platforms use customer ratings to set thresholds for deactivation).

70. *Dasher Ratings Explained*, DOORDASH, https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en_US [<https://perma.cc/HXE7-J5VH>].

customer reviews, the platform issues the following warning: “Dashers may be deactivated from the DoorDash platform if they have a customer rating below 4.2.”⁷¹ In a similar vein, the ride-hailing firm Lyft cautions drivers that it will “deactivate your User account immediately” if a driver’s average rating falls below a certain level.⁷²

In addition to exposing workers to algorithmic cliffs, Uber sends drivers progress reports that compare their average star rating to “top drivers” in the area.⁷³ The platform also relays customer-supplied critiques such as “You received a ‘Talks Too Much’ complaint.”⁷⁴ Unlike DoorDash, which specifies the precise star rating that workers must maintain, Uber only vaguely describes the exact point at which its software will push workers over algorithmic cliffs, saying that drivers who “don’t meet the minimum average rating for their city may lose” the ability to drive for Uber.⁷⁵ Instacart also does not identify its minimum rating threshold, instead nebulously warning workers that “failure to maintain . . . minimum standards of service may result in deactivation . . .”⁷⁶

In addition to triggering automatic deactivations, low customer ratings can also affect future job assignments. For example, customer ratings determine whether Instacart shoppers receive valuable “batches” (available orders). When new orders arrive, the platform first sends high-value batches to shoppers with higher ratings.⁷⁷ Thus, even one negative review can cause Instacart shoppers to

71. *Id.*

72. *Lyft Terms of Service*, LYFT (Dec. 12, 2022), <https://www.lyft.com/terms> [<https://perma.cc/MS2Y-GH8X>].

73. Rosenblat et al., *supra* note 53, at 5 (explaining how Uber allows drivers to compare themselves to “top partners”).

74. Rosenblat et al., *supra* note 53, at 5 (describing how “[d]rivers who receive this notice are directed to a website that gives them detailed advice on rider interactions, such as ‘If they don’t seem to be engaging in conversation, then silence could be key here’”).

75. *Uber Community Guidelines*, UBER (Oct. 20, 2021), <https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=united-states&lang=en> [<https://perma.cc/FJ3N-REHZ>].

76. *Full Service Shopper Account Access Guidelines, United States of America*, INSTACART, <https://shoppers.instacart.com/guidelines> [<https://perma.cc/BDK2-4FHY>]; see also Ehud Sopher, *Instacart’s Harsh Ratings System Hurts Grocery Delivery People Like Me*, VOX (Mar. 19, 2021, 8:30 AM), <https://www.vox.com/first-person/22338325/Instacart-grocery-delivery-ratings-system> [<https://perma.cc/NSD8-EN8B>] (discussing the consequences of low customer ratings).

77. See Sopher, *supra* note 76 (describing an Instacart shopper’s experience with negative customer feedback); see also *Providing a Fair & Reliable Experience for Shoppers*, INSTACART BLOG (Mar. 1, 2021), <https://www.instacart.com/company/shopper-community/providing-a-fair-reliable-experience-for-shoppers> [<https://perma.cc/7RLF-T5AY>] (discussing Instacart’s “batch” system).

lose income by causing the monetary worth of their batches to fall.⁷⁸ Similarly, the chore platform TaskRabbit reserves high-paid tasks for Taskers with higher ratings.⁷⁹ TaskRabbit does not automatically deactivate poorly rated Taskers, but instead places them at the bottom of search results.⁸⁰

While some platforms tie customer ratings to a worker's job assignment, other companies use ratings to explicitly determine a worker's hourly wage. For example, the house-cleaning platform Handy relies on customer ratings to assign workers to various "payment tiers."⁸¹ Similarly, Uber sometimes offers guaranteed minimum hourly pay rates to select drivers who maintain a higher average driver rating.⁸²

But not all companies that solicit customer feedback utilize a five-star rating system to automatically make their compensation and deactivation decisions. Although companies in traditional service settings increasingly ask customers to rate workers, seldom do they enumerate the consequences of negative reviews.

2. Traditional Service Work and Online Customer Feedback

Firms that operate outside the platform economy also frequently solicit feedback from customers about their experiences with workers. Sent via text, email, or via point-of-sale receipts, these surveys often ask customers to rate service workers.⁸³ For example, surveys from Applebee's and IHOP ask

78. See Faith Abubey & Erica Y. King, *Instacart Shoppers Challenge Ratings System*, ABC NEWS (June 21, 2021, 12:59 PM), <https://abcnews.go.com/US/Instacart-shoppers-challenge-ratings-system-call-prison/story?id=78184476> [<https://perma.cc/U8HL-6XFH>] (explaining how four-star reviews can cause Instacart shoppers to lose income because they receive fewer orders); see also Sopher, *supra* note 76 (asserting that although Instacart excludes a shopper's lowest rating from the shopper's average, a second low rating can cause the shopper to receive lower-paid batches).

79. See Jeremias Prassl & Martin Risak, *Uber, TaskRabbit & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMPAR. LAB. L. & POL'Y J. 619, 643 (2016) (explaining how TaskRabbit prioritizes different Taskers on its platform).

80. See *id.*; see also Johana Bhuiyan, *Unfair Ratings Cost Some Instacart Shoppers Hundreds a Week. Here's What's Happening*, L.A. TIMES (Dec. 21, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story/2020-12-21/Instacart-shoppers-ratings-returns-missing-orders> [<https://perma.cc/T63G-XK9D>] (outlining the consequences of negative ratings in the platform economy); Dzieza, *supra* note 67 (examining how low ratings negatively impact platform workers).

81. See MATEESCU & NGUYEN, *supra* note 47, at 8 (explaining how Handy relies on customer ratings to help determine workers' pay).

82. See Rosenblat et al., *supra* note 53, at 6 (explaining how Uber invites "select" drivers to participate in the pay guarantee program).

83. See Flake, *supra* note 12, at 2175–76 (examining various mechanisms for gauging customer satisfaction); Harsh Vardan, *Customer Feedback: How to Collect and What to*

customers to identify their server and rate their level of attentiveness.⁸⁴ Likewise, McDonald's, Olive Garden, Pizza Hut, and Taco Bell supply customers with online tools for remarking on workers.⁸⁵ Aside from the restaurant industry, numerous firms in other service sectors give customers opportunities to rate or review workers, including Xfinity/Comcast, Supercuts, and Jiffy Lube.⁸⁶

Workers at call centers know that potentially irate customers will have the opportunity to rate them immediately after calls.⁸⁷ Car dealerships ask customers to review the performance of salespeople soon after interacting with them.⁸⁸ Exposing doctors and nurses to a rating system resembling that of a ride-hailing platform, the healthcare provider Kaiser Permanente asks patients to rate clinicians on a five-point scale, with one point equating to "very poor" patient care and five points equating to "very good" patient care.⁸⁹

In contrast to platforms such as DoorDash or Lyft, firms in traditional service sectors rarely disclose the specific job consequences associated with negative

Do With It, HIVER (Mar. 28, 2023), <https://hiverrhq.com/blog/collect-customer-feedback#the-best-ways-to-collect-customer-feedback> [<https://perma.cc/G5GU-HQ9R>] (discussing several methods for collecting customer input); YOUNG ENTREPRENEUR COUNCIL, *Nine Effective Ways To Collect and Use Customer Feedback*, FORBES (June 30, 2020, 7:15 AM), <https://www.forbes.com/sites/theyec/2020/06/30/nine-effective-ways-to-collect-and-use-customer-feedback/?sh=680eb58f1a3b> [<https://perma.cc/52R8-9Q4P>] (describing how firms solicit and gather customer feedback).

84. *Applebee's Guest Experience Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-talktoapplebees-com> [<https://perma.cc/33RG-L7Y6>]; *IHOP Guest Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/wwwtalktoihop-com> [<https://perma.cc/KN4Z-BJ8A>].
85. *Guest Satisfaction Survey*, OLIVE GARDEN, <https://www.olivegardensurvey.com/?AspxAutoDetectCookieSupport=1> [<https://perma.cc/94HB-3Z25>]; *McDonald's Food for Thoughts Survey*, CUSTOMERSURVEY.COM (May 20, 2022), <https://www.customer-survey.com/www-mcdfoodforthoughts-com> [<https://perma.cc/74FL-BQZ3>]; *Pizza Hut Survey - 2022*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-tellpizzahut-com> [<https://perma.cc/9EAD-TZJE>]; *Taco Bell Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-tellthebell-com> [<https://perma.cc/392R-AGY3>].
86. *Give Feedback About an Experience*, SUPERCUTS, <https://www.supercuts.com/about-supercuts/contact-us.html> [<https://perma.cc/DU27-WXET>]; *Jiffy Lube Customer Feedback*, JIFFY LUBE, <https://www.jiffylube.com/contact/customer-feedback> [<https://perma.cc/V5MN-69TT>]; *Send Tom Feedback*, XFINITY, <https://support.xfinity.com/svp-contact-form> [<https://perma.cc/PRB5-652P>].
87. See Zoellner, *supra* note 66 (questioning the ability of customer ratings to provide reliable information about employee performance).
88. See Zoellner, *supra* note 66 (examining various methods for soliciting customer feedback).
89. *About Our Review System*, KAISER PERMANENTE, <https://healthy.kaiserpermanente.org/oregon-washington/clinicians/about-ratings> [<https://perma.cc/CPW9-4N8E>].

ratings. For example, Medallia, one of the largest players in the multibillion-dollar, customer-experience industry, operates real-time customer feedback systems for companies such as Mercedes-Benz and 7-Eleven.⁹⁰ In a typical retail transaction, Medallia asks customers to describe their experience and assign a star rating to that experience.⁹¹ For example, Medallia asks Apple Store customers to rate individual workers on a five-point scale by posing questions such as: “How did Martina do?”⁹² After gathering this data, Medallia then sends this feedback to the firm that hired them. As the company explains, “The Medallia Customer Experience Management . . . platform . . . captures data from every customer and employee interaction across every touchpoint, analyzes that data to create actionable insights, and then delivers it to every level of the organization so that people can take action.”⁹³

Similar to Medallia’s rating system, the customer-experience firm SMG also collects customer feedback for restaurants, retail firms, and other businesses.⁹⁴ For example, SMG’s surveys for Dick’s Sporting Goods and Marshalls ask customers to rate the friendliness of associates from “highly satisfied” to “highly dissatisfied.”⁹⁵ Without specifying the consequences of negative reviews, SMG vaguely states that “[i]mprovement efforts and results are kicked into high gear as the focus is on specific, metrics-informed issues, and your team members—and

90. See Steve Johnson, *Q&A: Medallia CEO Borge Hald, on Gauging Customer Sentiment*, MERCURY NEWS (May 23, 2014, 6:09 AM), <https://www.mercurynews.com/2014/05/23/qa-medallia-ceo-borge-hald-on-gauging-customer-sentiment> [<https://perma.cc/CFX7-VBRY>]; see also Zoellner, *supra* note 66 (describing the large amounts of data that customer-experience firms analyze).

91. See Johnson, *supra* note 90 (explaining how Medallia relays customer-experience information to clients).

92. E-mail from Apple Inc. to Keith Cunningham-Parmeter, Professor of L., Willamette U. (Apr. 14, 2022, 9:36 AM) (on file with author).

93. *Where Can I Find Information About Medallia*, MEDALLIA, https://surveysupport.medallia.com/s/article/Where-can-I-find-information-about-Medallia-ka?language=en_US [<https://perma.cc/Z7XL-AY5L>] (explaining how Medallia serves clients in numerous industries).

94. See *Customer XM Solutions for Your Industry*, <https://smg.com/industries> [<https://perma.cc/FB4X-EXSP>] (describing different business sectors that SMG serves).

95. *Dick’s Sporting Goods Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-dickssportinggoods-com-feedback> [<https://perma.cc/W8ZVEJ8M>]; *Marshalls Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-marshallsfeedback-com> [<https://perma.cc/V7K4-V574>].

stakeholders—across the organization will begin to see improvement in metrics from their actions.”⁹⁶

Although employers in traditional retail and service sectors do not typically disclose the consequences associated with negative reviews, the performance data gathered by firms undoubtedly impacts personnel determinations.⁹⁷ For example, chain restaurants allow customers to review servers through scaled rating systems.⁹⁸ A recent investigation of these systems contained allegations that low ratings caused servers to lose tables or jobs at Chili’s, Olive Garden, and Smokey Bones barbeque restaurant.⁹⁹ Beyond restaurants, employers in other service sectors have reportedly used customer feedback to assign preferential shifts to well-reviewed workers and to terminate low-rated workers.¹⁰⁰

Of course, there is nothing wrong with a system that measures customer satisfaction to reward quality work or to punish employees for poor performance. But the use of subjective customer impressions can also allow discriminatory inputs to creep into those decisions. As the following Subpart explains, numerous studies indicate that customers act on their own biases when rating workers in both online and offline marketplaces.

B. Evidence of Bias Among Reviewing Customers

Customers discriminate in a wide variety of transactions. When customers decide what to pay, whom to tip, or where to rent, the race or sex of the transacting parties often affects the decisionmaking process.¹⁰¹ With regard to customer feedback, numerous studies across multiple disciplines have consistently demonstrated that customers frequently act upon conscious and unconscious

96. *Improving Outcomes with Your Experience Management Software and Program*, SMG, <https://www.smg.com/blog/blog-detail/smg-blog/2022/01/05/improving-outcomes-with-your-experience-management-software-and-program> [<https://perma.cc/NCV7-C7L3>].

97. See Zoellner, *supra* note 66 (considering the consequences of negative online reviews).

98. See O’Donovan, *supra* note 3 (explaining how customer rating systems proliferate at restaurants).

99. See O’Donovan, *supra* note 3 (stating that the companies described in the report either denied or failed to reply to allegations that they used customer reviews to determine employment outcomes).

100. See Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1191 (2017) (considering consequences that employees face for receiving negative customer reviews); Wang, *supra* note 24, at 279–80 (discussing the use of customer feedback in offline markets).

101. See Bartlett & Gulati, *supra* note 13, at 224–25 (summarizing studies on customer discrimination in market transactions).

biases when reviewing the performance of workers.¹⁰² Although most of these studies have focused on traditional, offline transactions, newer research suggests that similar patterns exist in online reviews as well.¹⁰³

Some of the most reliable field experiments in the area analyze customer ratings of certain employees who differ by race or gender, but who otherwise perform comparably.¹⁰⁴ Take, for example, a study that attempted to test for customer bias by asking students to review the performance of workers at a university bookstore. The researchers asked the student-subjects to watch a video that purported to show a bookstore employee's interaction with a customer. The student-subjects did not know that the bookstore employee who appeared in the video was actually an actor. The researchers recorded several videos that depicted actors of different races and genders who played the part of the bookstore employee and who followed identical scripts.¹⁰⁵ Thinking that they were evaluating the performance of a real bookstore employee (as opposed to an actor-employee), the student-subjects then rated the employee's performance on a scale of one to seven. Controlling for several variables, the researchers observed that the student-subjects assigned significantly lower satisfaction ratings to female employees, as compared to their white male counterparts, even though all of the employees read identical scripts.¹⁰⁶ Overall, the study observed that "[c]ustomers tended to be less satisfied with the services provided by women and nonwhite employees rather than by men and white employees, even when objective indicators of performance were controlled."¹⁰⁷

Researchers have identified similar patterns of bias in student evaluations at higher education institutions. Studies in this area have generally shown that

102. Flake, *supra* note 100, at 1190–91 (discussing various studies that measure bias in customer reviews); see also David R. Hekman, Karl Aquino, Bradley P. Owens, Terence R. Mitchell, Pauline Schilpzand & Keith Leavitt, *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 239 (2010) (testing for evidence of gender and racial bias among customers); Lillian MacNell, Adam Driscoll & Andrea N. Hunt, *What's in a Name: Exposing Gender Bias in Student Ratings of Teaching*, 40 INNOVATIVE HIGHER EDUC. 291, 292 (2015) (testing for student bias in higher education).

103. See generally Hekman et al., *supra* note 102; MacNell et al., *supra* note 102, at 292 (studying student evaluations of online instructors); Rosenblat et al., *supra* note 53, at 6 n.6 (explaining how Uber's pay structure can expose drivers to discrimination based on protected characteristics).

104. Hekman et al., *supra* note 102, at 249 (asserting that certain test designs can reduce variability in employee behavior).

105. Hekman et al., *supra* note 102, at 249.

106. Hekman et al., *supra* note 102, at 251 (stating that "the objective performance of each employee was made comparable by using an equivalent behavioral script").

107. Hekman et al., *supra* note 102, at 256.

students perceive female instructors to be less capable than male instructors, regardless of the instructor's actual performance or ability.¹⁰⁸ To help prove this point, one controlled experiment asked students to evaluate the performance of a faceless instructor in an online college class. Students could contact the instructor only via email or online comments, so they never heard their instructor's voice or saw their instructor's face.¹⁰⁹ Researchers led half the students to believe that their instructor was male, while the other half believed that their instructor was female.¹¹⁰ This allowed researchers to test for bias in the students' evaluations, while holding the instructor's actual gender constant.¹¹¹ Even though students rated the exact same instructor, when they believed that their instructor was male they gave the instructor significantly higher scores on promptness, professionalism, fairness, respectfulness, and enthusiasm.¹¹² The study's authors offered the following observation: "Regardless of actual gender or performance, students rated the perceived female instructor significantly more harshly than the perceived male instructor, which suggests that a female instructor would have to work harder than a male to receive comparable ratings."¹¹³

In addition to experiments involving retail workers and college instructors, numerous other studies have tended to show bias in customer evaluations of physicians, servers, and telephone representatives.¹¹⁴ Just as customers exhibit discriminatory patterns in their reviews of workers, employers exhibit patterns of bias in their hiring decisions. For example, in one study, researchers investigated racial disparities in hiring by sending job applications to 1600 entry-level openings. The resumes used in the study were identical, except that the researchers added racial clues to some resumes, while "whitening" others.¹¹⁵ The results

108. See Colleen Flaherty, *Bias Against Female Instructors*, INSIDE HIGHER ED. (Jan. 11, 2016), <https://www.insidehighered.com/news/2016/01/11/new-analysis-offers-more-evidence-against-student-evaluations-teaching> [https://perma.cc/7QN5-MK5Z] (summarizing studies on bias against women in student evaluations); MacNell et al., *supra* note 102, at 293–94 (discussing earlier research on student perceptions of women in academia).

109. MacNell et al., *supra* note 102, at 296.

110. MacNell et al., *supra* note 102, at 296.

111. MacNell et al., *supra* note 102, at 296.

112. MacNell et al., *supra* note 102, at 298 (outlining how "[s]tudents in the two groups that perceived their assistant instructor to be male rated their instructor significantly higher than did the students in the two groups that perceived their assistant instructor to be female, regardless of the actual gender of the assistant instructor").

113. MacNell et al., *supra* note 102, at 301.

114. See Wang, *supra* note 24, at 283–84 (discussing studies of bias among customers).

115. See Dina Gerdeman, *Minorities Who 'Whiten' Job Resumes Get More Interviews*, HARV. BUS. SCH. WORKING KNOWLEDGE (May 17, 2017), <https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews> [https://perma.cc/G2F3-DVWP].

produced stark racial disparities: Twenty-five percent of Black candidates received callbacks when they “whitened” their resumes, whereas only ten percent received calls when their resumes contained racial clues.¹¹⁶ Summarizing the results of numerous field studies in this area, one reviewer observed: “Each study comes to the same basic conclusion—that race matters in hiring decisions. Estimates of the magnitude of discrimination do, however, vary across studies, with [white applicants] anywhere from 1.5 to five times more likely to receive a callback or job offer,” as compared to Black applicants.¹¹⁷

In contrast to the extensive attention that scholars have paid to offline transactions, fewer field experiments have focused specifically on the presence of bias in online review systems. Yet initial studies suggest that customers exhibit similar patterns of bias in digital settings as well.¹¹⁸ For example, one recent study tried to determine whether ride-hailing customers discriminated against female drivers.¹¹⁹ Researchers asked subjects to play the role of ride-hailing passengers who would rate hypothetical drivers based on vignettes provided to the passenger-subjects. The passenger-subjects received the name and gender of their “driver” and were told that the driver had provided the passenger-subjects with a “low-quality” experience, such as having a dirty car or driving erratically. The passenger-subjects then rated their hypothetical driver based on the experience described in the vignette. On average, when passenger-subjects believed that a female driver had provided low-quality service, they assigned her significantly lower ratings, as compared to men who provided the same low-quality service.¹²⁰ The authors concluded that “this creates the issue that female drivers may be dismissed from the platform for performing equal quality work as men.”¹²¹

116. *See id.*

117. Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 112–13 (2007); *see also* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1470–71 (2012) (surveying evidence of biased hiring practices from numerous field studies).

118. *See* Nancy Leong, *The Race-Neutral Workplace of the Future*, 51 U.C. DAVIS L. REV. 719, 722–23 (2017); Rosenblat et al., *supra* note 53, at 7–8 (stating that “[c]onsumer-sourced ratings... are highly likely to be influenced by bias on the basis of factors like race or ethnicity”).

119. Brad Greenwood, Idris Adjerid, Corey M. Angst & Nathan L. Meikle, *How Unbecoming of You: Online Experiments Uncovering Gender Biases in Perceptions of Ridesharing Performance*, 175 J. BUS. ETHICS 499 (2020).

120. *Id.* at 513 (highlighting the need to identify under “what circumstances women and other social groups are more or less likely to be penalized” by customers).

121. *Id.* (explaining how rating systems can create additional barriers to success for female workers).

Mirroring experiments that demonstrate a reluctance among some employers to interview candidates with distinctively Black names, researchers have highlighted a similar dynamic in online transactions. One of the more extensive field experiments on racial bias in the platform economy involved researchers who posed as potential Airbnb guests.¹²² Airbnb allows hosts to see the names of guests before deciding whether to accept or reject their stay requests. The study found that guests with distinctively Black names received sixteen percent fewer accepted stay requests, as compared to guests with distinctively white names, but whose guest profiles were otherwise identical.¹²³

Just as customers seem to discriminate against female ride-hailing drivers and Black Airbnb guests, an audit study of ratings on TaskRabbit found that Black workers received significantly lower ratings, as compared to other workers with similar skills and experience.¹²⁴ In addition, the researchers observed that a Tasker's perceived race and gender negatively correlated with the Tasker's search rank (i.e., the Tasker's position in search results), even controlling for objective variables such as the Tasker's length of service or number of previous reviews.¹²⁵ Another audit study involving the freelance marketplace Fiverr yielded similar results, with Black men receiving significantly lower customer ratings, as well as significantly fewer reviews, as compared to other men.¹²⁶ When researchers shifted their focus from numerical ratings to verbal reviews of Fiverr workers, they found that reviewers used notably fewer positive adjectives and more negative adjectives to describe the performance of Black workers.¹²⁷

Rating systems often foster bias by asking customers to assess highly subjective worker characteristics. For example, questions related to "attitude" or "overall satisfaction," provide no clear evaluative standards, even though the numerical outputs generated by these ratings give the appearance of objectivity.¹²⁸ Compounding this problem, when customers provide feedback anonymously—a common feature of five-star rating systems—they are more likely to base their

122. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 1–2 (2017).

123. *Id.* at 2 ("We find widespread discrimination against guests with distinctively African American names.").

124. Hannák et al., *supra* note 15, at 1927.

125. Hannák et al., *supra* note 15, at 1915 (studying 13,500 worker profiles on TaskRabbit and Fiverr for evidence of bias among reviewers).

126. Hannák et al., *supra* note 15, at 1923.

127. Hannák et al., *supra* note 15, at 1927 ("The models reveal that social feedback on these sites often has a significant statistical relationship with perceived gender and race.").

128. See Wang, *supra* note 24, at 280 (explaining how stereotypes and biases can distort feedback in subjective review systems).

reviews on biases and stereotypes.¹²⁹ Although some customers certainly act on unexamined biases, the anonymity and subjectivity provided by online reviews also allow other customers to mask intentional discriminatory impulses.¹³⁰

In light of the real-world consequences associated with negative feedback (e.g., lower pay, job loss, etc.), firms should do more to prevent discriminatory reviews from impacting workplace decisions. But as the following Subpart outlines, companies often express a rhetorical commitment to antidiscrimination values without taking tangible steps to weed out biased ratings from their online systems.

C. Employers and Cosmetic Compliance with Antidiscrimination Norms

Companies that rely on customer reviews often express a rhetorical commitment to antidiscrimination values. But beyond making public pronouncements, firms rarely explain what tangible steps they take, if any, to actually prevent biased ratings from harming workers.¹³¹ Take Uber. The platform’s “Zero Tolerance” policy pledges to “fight racism and be a champion for equity—both inside and outside our company.”¹³² In this declaration, Uber commits “to ridding our platform of racism.”¹³³ Despite this statement, though, Uber’s “Zero Tolerance” policy says nothing about how or if Uber monitors customer reviews for evidence of discrimination. Indeed, even though Uber holds itself out as an anti-racist company, Uber does not track individual worker demographics to determine whether customer reviews yield racist outcomes.¹³⁴

129. See Wang, *supra* note 24, at 282 (examining conditions that increase the likelihood that bias will impact customer feedback).

130. See Rossana Ducato, Miriam Kullmann & Marco Rocca, *European Legal Perspectives on Customer Ratings and Discrimination*, in *PERFORMANCE APPRAISAL IN MODERN EMPLOYMENT RELATIONS* 225, 226–37 (Tindara Addabbo, Edoardo Ales, Ylenia Curzi, Tommaso Fabbri, Olga Rymkevich & Iacopo Senatori eds., 2020) (explaining how rating systems can exacerbate known societal prejudices and provide a “false sense of objectivity”); see also discussion *infra* Part IV.B (discussing unconscious bias and the use of data analytics to identify patterns of purposeful discrimination in online reviews).

131. See Sam Harnett, *Black and Brown Gig Workers Report Lower Ratings—But Companies Make Bias Hard to Track*, KQED (Jul. 22, 2021), <https://www.kqed.org/news/11878952/black-and-brown-gig-workers-report-lower-ratings-but-companies-make-bias-hard-to-track> [<https://perma.cc/SE33-YAG3>] (examining whether platforms take tangible steps to combat biased customer ratings).

132. *Zero Tolerance for Racism*, UBER, <https://www.uber.com/us/en/u/right-to-move> [<https://perma.cc/2U3V-8TKK>].

133. *Id.*

134. M. Keith Chen, Judith A. Chevalier, Peter E. Rossi & Lindsey Currier, *Suppliers and Demanders of Flexibility: The Demographics of Gig Work*, (Industrial Organization Seminar, University of

Uber is not alone in publicly opposing workplace discrimination without articulating rules that verifiably counteract customer bias in online ratings. For instance, Uber's ride-hailing competitor, Lyft, flatly states that "[d]iscrimination against riders or drivers isn't tolerated on the Lyft platform."¹³⁵ Despite this commitment, however, Lyft does not identify any specific mechanisms it utilizes to flag biased customer feedback. Platforms outside the ride-hailing sector exhibit a similar pattern of publicly opposing discrimination without addressing the known problems of discriminatory customer reviews. For example, DoorDash states that it is "committed to providing opportunities free from discrimination," but does not explain how workers can complain to DoorDash if customers discriminate against them through online feedback.¹³⁶

To the extent that platforms describe any procedure for preventing biased ratings from negatively affecting workers, such policies typically require workers themselves to initiate complaints. For example, Lyft tells drivers that if a "passenger rated you poorly due to something out of your control, you can request a review through the app."¹³⁷ Similarly, Uber advises drivers that "if you witness discrimination taking place, you can report the situation to Uber and we will address any report in accordance with our policies."

But putting the onus on workers to identify and report discriminatory acts cannot possibly expose biased ratings because workers typically lack the ability to identify the customers who gave them one-star reviews. Unlike platforms such as Amazon or Yelp, which break down specific reviews by the username of each reviewer, many work-based platforms disclose only average star ratings to workers, without disclosing the individual rating of any single user. Uber, for

Pennsylvania Economics, April 13, 2022), <https://economics.sas.upenn.edu/system/files/2022-04/UberGenderDemogPaper%20%2811%29JC.pdf> [<https://perma.cc/QDH4-SAD9>] ("Uber does not collect data on driver race or ethnicity."); Dzieza, *supra* note 67 (stating that Uber does not collect racial demographic information about drivers); Harnett, *supra* note 131 (reporting that many platforms do not track workers' demographic information, thereby leaving companies "in the dark" about whether bias infects their review systems); *Reaffirming Our Commitment to Being an Anti-Racist Company*, UBER (May 15, 2021), <https://www.uber.com/newsroom/reaffirming-our-commitment> [<https://perma.cc/8HPM-VHKX>].

135. *Anti-Discrimination Policies*, LYFT, <https://help.lyft.com/hc/e/articles/115012923767-Anti-Discrimination-Policies> [<https://perma.cc/DS3P-ATMT>].

136. *DashForce Deactivation Policy*, DOORDASH, https://help.doordash.com/dashers/s/article/DashForce-Deactivation-Policy?language=en_US [<https://perma.cc/5KDW-CSD6>].

137. *Driver and Passenger Ratings*, LYFT, <https://help.lyft.com/hc/en-us/articles/115013079948> [<https://perma.cc/RF55-R3D7>].

example, states that “[r]atings are always reported as averages, and neither riders nor drivers will see the individual rating left for a particular trip.”¹³⁸ DoorDash, Instacart, and Lyft also disseminate only average, anonymized ratings to workers.¹³⁹ Although the practice of aggregating ratings promotes safety and customer candor, it also prevents workers from knowing who gave them low scores and why. As such, any antidiscrimination policy that requires workers to initiate complaints cannot possibly combat biased inputs from individual reviewers who remain safely cloaked in algorithmic anonymity.

Even if workers could identify patterns of bias among certain reviewers, platforms explicitly disclaim responsibility for this type of discriminatory customer feedback. For example, TaskRabbit’s Terms of Service state: “You agree that TaskRabbit is not responsible or liable for any Feedback or other User Generated Content.”¹⁴⁰ Similarly, Uber tells users that the platform “shall not be obligated to, review, monitor, and remove User Content.”¹⁴¹ Lyft and Grubhub issue similar disclaimers.¹⁴²

Outside the platform economy, employers in traditional service sectors largely fail to disclose the steps that they take, if any, to prevent biased customer ratings from negatively impacting workers. For example, the customer-experience firm SMG has publicly asserted that its clients support “the value of a diverse, fair, and welcoming workforce.”¹⁴³ Despite this broad commitment to

138. *I Would Like to Know My Rating*, UBER, <https://help.uber.com/riders/article/i-would-like-to-know-my-rating-/?nodeId=0539e772-747c-49a7-8c26-f28c65e6f14d> [<https://perma.cc/5K8M-NQY2>].

139. Abubey & King, *supra* note 78 (explaining how Instacart shoppers do “not know[] which customer left them a bad rating”); *Dasher Ratings Explained*, DOORDASH, https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en_US [<https://perma.cc/HXE7-J5VH>]; *How to Rate Your Driver*, LYFT, <https://help.lyft.com/hc/e/articles/115013081788-How-to-rate-your-driver> [<https://perma.cc/4L5G-L685>] (“All feedback is anonymous, and it’s reviewed before it’s shared with drivers.”).

140. *TaskRabbit Global Terms of Service*, TASKRABBIT, <https://www.taskrabbit.com/terms> [<https://perma.cc/ZXQ2-RD7K>] (Feb. 19, 2021).

141. *U.S. Terms of Use*, UBER, <https://www.uber.com/legal/tr/document/?country=united-states&lang=en&name=new-general-terms-of-use> [<https://perma.cc/JSU5-46CW>].

142. *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> [<https://perma.cc/MS2Y-GH8X>] (stating that Lyft is under “no obligation, to monitor the materials posted on the Lyft Platform”); *Terms of Use*, GRUBHUB (Dec. 14, 2021), <https://www.grubhub.com/legal/terms-of-use> [<https://perma.cc/QA4L-EYHY>] (stating that Grubhub may “monitor any and all use of the Platform . . . [but is] under no obligation to do so”).

143. *Diversity, Equity, + Inclusion in the Workplace*, SMG, <https://smg.com/resources/diversity-equity-inclusion-in-the-workplace-how-to-align-dei-efforts-with-expectations-and-drive-employee-engagement> [<https://perma.cc/MLQ4-PDAM>]; *HomeGoods Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www->

diversity, however, SMG never explains how it prevents customer bias from negatively impacting the surveys that it administers on behalf of leading organizations. For instance, even though SMG's HomeGoods survey asks customers to rate "the friendliness of the cashier" and the "friendliness of the associate at the front of the store," SMG does not explain if or how it scrutinizes these inputs for evidence of bias.¹⁴⁴ Similarly, Medallia, a company that measures customer experiences for Old Navy, Staples, and Sephora, has publicly committed to "anti-racism and combating unconscious biases."¹⁴⁵ Yet despite Medallia's expertise in analyzing customer-experience data, the firm says nothing about if or how it identifies customers who give one-star reviews for discriminatory reasons.¹⁴⁶

In sum, firms exhibit a mix of four common behaviors related to discriminatory customer feedback: (1) issue broad statements that express the firm's commitment to antidiscrimination values; (2) articulate few tangible strategies to counteract biased customer reviews; (3) rely on workers to complain about perceived discrimination; and (4) disclaim any responsibility for combatting bias in online reviews. Unsurprisingly, these strategies do little to prevent biased customers from pushing workers over algorithmic cliffs or otherwise influencing employment outcomes. In light of firms' current unwillingness to monitor online ratings for evidence of bias, a new approach to antidiscrimination liability should provide businesses with greater incentives to detect and prevent biased feedback from corrupting workplace decisions.

homegoodsfeedback-com [https://perma.cc/69M7-LNAY]; *Valvoline Instant Oil Change Customer Satisfaction Survey*, CUSTOMERSURVEY.COM (June 23, 2022), https://www.customer-survey.com/www-tellvalvoline-com [https://perma.cc/87XG-9F8Z].

144. *Diversity, Equity, + Inclusion in the Workplace*, *supra* note 143; *HomeGoods Customer Satisfaction Survey*, *supra* note 143.

145. Leslie Stretch, *A Message from Medallia's CEO: Confronting Inequality Takes More Than Words*, MEDALLIA (June 9, 2020), https://www.medallia.com/blog/confronting-inequality-takes-more-than-words [https://perma.cc/QJ8X-FV53]; *Old Navy Customer Experience Survey*, CUSTOMERSURVEY.COM, https://www.customer-survey.com/survey-medallia-com-oldnavy-feedback [https://perma.cc/2LGU-9LHB]; *Sephora USA Survey*, CUSTOMERSURVEY.COM, https://www.customer-survey.com/survey-medallia-com-sephora-usa [https://perma.cc/4PSD-8XA2]; *Staples Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, https://www.customer-survey.com/survey3-medallia-com-staplescares [https://perma.cc/4BGM-EDSQ].

146. See generally *Cognitive Biases and the Customer Experience*, MEDALLIA (Mar. 15, 2016), https://web.archive.org/web/20220817024012/https://medblog.medallia.com/blog/take-the-test-are-personal-biases-coloring-your-view-of-the-customer-experience/ [https://perma.cc/BS8G-8NAD] (referencing Medallia's use of "next-generation text analytics," but failing to state whether Medallia uses the same tools to identify patterns of biased feedback among customers).

II. EMPLOYER LIABILITY FOR DISCRIMINATORY CUSTOMER RATINGS

Companies should automatically pay for discrimination when they allow biased customers to push workers over algorithmic cliffs. Some firms, especially those in the platform economy, have developed algorithms that empower customers to demote and discharge workers. In these circumstances, antidiscrimination law ought to hold firms strictly accountable for the discriminatory decisions of their action managers.

Yet not all rating systems give customers so much power. In contrast to action managers, when customers do not possess the functional authority to fire workers, Title VII liability should depend on whether companies play culpable roles in facilitating discrimination. For instance, if a firm allows customers to provide nonbinding input on workers, then firms should pay for discrimination when they uncritically embrace the biased feedback of advisory clients. Of course, in order for workers to successfully bring Title VII claims, they first must prove that discrimination occurred. Therefore, this discussion begins by exploring the definition of “discrimination” under Title VII, as it relates to customer feedback.

A. Disparate Treatment Through Online Reviews

The theories known as “disparate treatment” and “disparate impact” represent Title VII’s two primary methods for holding employers accountable for discrimination.¹⁴⁷ Whereas disparate treatment requires evidence of a decisionmaker’s purposeful act, courts categorize disparate impact as a form of unintentional mistreatment.¹⁴⁸

At first glance, the theory of disparate impact might seem like a promising way to hold companies accountable for discriminatory customer ratings. After all, standard disparate impact inquiries ask whether employers utilize neutral tools (e.g., star-rating systems) that expose protected groups to adverse outcomes (e.g., disproportionate discharges).¹⁴⁹ But despite the facial appeal of this approach, the

147. See Waldman, *supra* note 24, at 108–09 (outlining the contours of disparate treatment and disparate impact liability); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1360–61 (2009) (discussing the judicial focus on disparate treatment and disparate impact theories under Title VII).

148. See Zatz, *supra* note 147, at 1374–75 (noting that courts frequently refer to an employer’s “intent” or “motivation” when describing disparate treatment).

149. See Sullivan, *supra* note 29, at 418–19 (outlining various levels of proof in disparate impact claims).

“business necessity” defense to disparate impact liability might impede many such claims.¹⁵⁰ An employer can defeat a disparate impact claim by proving that a disputed practice advanced important business needs—assuming that no other equally effective, less-discriminatory tool was available.¹⁵¹ In the context of customer ratings, firms could plausibly argue that they have a business need to measure customer satisfaction. After all, online rating systems provide companies with an efficient method for assessing customer sentiment in real time.¹⁵² Given the importance of gauging customer contentment, the business necessity defense—as currently articulated by courts—would represent a substantial obstacle to disparate impact claims that attempt to challenge discriminatory customer reviews.¹⁵³

In light of disparate impact’s doctrinal limitations, the theory of disparate treatment represents the most plausible route for plaintiffs to legally contest customer bias in online review systems. But what kind of conduct gives rise to disparate treatment under Title VII? Despite decades of debate on this question, judges have enumerated somewhat different elements for proving disparate treatment, at times using terms like “intent” and “motive” interchangeably to describe the prohibited state of mind that decisionmakers must possess.¹⁵⁴ But even though judges vary in their description of Title VII’s threshold requirements, courts uniformly agree that an employee’s protected trait must play some part in the decisionmaking process to constitute disparate treatment.¹⁵⁵

Scholars have criticized courts for “fetishizing” the concept of intent in the antidiscrimination context, especially in light of online marketplaces that can easily conceal an actor’s purpose.¹⁵⁶ Despite these legitimate critiques, however,

150. See Flake, *supra* note 12, at 2210–11 (considering the application of disparate impact challenges to biased customer reviews).

151. See Waldman, *supra* note 24, at 108–09 (discussing the application of Title VII’s “business necessity” defense to disparate impact claims).

152. See Spitko, *supra* note 28, at 1302–03 (questioning whether employers can face disparate impact liability for subjecting employees to biased customer rating systems).

153. See Kim, *supra* note 29, at 865–66 (discussing problems with applying disparate impact theory to algorithmic decisionmaking). But see Allan G. King & Marko J. Mrkonich, “*Big Data*” and the Risk of Employment Discrimination, 68 OKLA. L. REV. 555, 556–57 (2016) (asserting that some courts may decline to allow firms to raise business necessity defenses if they embrace software tools that have discriminatory effects while eschewing less-discriminatory alternatives).

154. See Sullivan, *supra* note 117, at 1450–51 (describing different judicial formulations of the term “intent to discriminate”).

155. See Zatz, *supra* note 147, at 1376–77 (explaining how courts require proof that a plaintiff’s protected trait entered the causal chain of an employer’s decision).

156. Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside Employment Law*, ONLABOR (Jan. 19, 2016), <https://onlabor.org/beyond-misclassification-gig-economy->

Title VII's disparate treatment inquiry mandates a slightly lower proof threshold, as compared to other federal antidiscrimination statutes. For example, unlike the Age Discrimination in Employment Act,¹⁵⁷ which requires proof that a defendant's discriminatory intent constituted the but-for cause of an adverse employment action, Title VII plaintiffs must establish that an employee's protected characteristic played a "motivating factor" in an employment outcome.¹⁵⁸ Applying this slightly lower standard to online reviews, plaintiffs that challenge discriminatory customer feedback systems must establish that customer bias played a motivating (though not exclusive) role in the disputed employment action.

But even assuming that customers acted with discriminatory purpose,¹⁵⁹ the question remains whether Title VII should hold employers responsible for that biased conduct. Applying the theories of vicarious and direct liability to customer ratings, the following Subpart explains why an employer's obligation to pay for customer discrimination ought to depend on the level of delegated authority that customers possess.

B. Action Managers: Strict Liability When Biased Feedback Causes Automatic Job Losses

The legal doctrine of vicarious liability requires principals to pay for the wrongful acts of others.¹⁶⁰ Applying this doctrine to the antidiscrimination context, Title VII holds employers vicariously (or "derivatively") responsible for the unlawful acts of their "agents."¹⁶¹ In a diverse set of cases that involve a

discrimination-outside-employment-law [<https://perma.cc/3Q2U-XYLK>] (discussing the "simmering concern about how customer feedback ratings may hard-wire discrimination into the supervisory techniques of gig economy platforms"); *see also* KLEINBERG ET AL., *supra* note 32, at 121 (examining the challenges of proving disparate treatment); Kim, *supra* note 29, at 910–11 (summarizing scholarly debate over the "doctrinal superstructure" of Title VII); Sullivan, *supra* note 49, at 370–72 (discussing the difficulty of evaluating a decisionmaker's mental processes).

157. 29 U.S.C. § 623.

158. 42 U.S.C. § 2000e-2(m); *see also* Sullivan, *supra* note 49, at 359–60 (evaluating Title VII's lower intent requirement).

159. *See* discussion *infra* Part IV.B (explaining how auditing software can help determine whether certain customers exhibit discriminatory review patterns).

160. *See* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 159 n.11 (2021); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988) (outlining the contours of vicarious employer liability).

161. 42 U.S.C. § 2000e(b) (stating that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a

variety of adverse employment actions—hiring, discharge, and harassment—the U.S. Supreme Court has consistently held that a firm’s vicarious Title VII liability depends on the level of power that putative agents holds. Applied to online rating systems, this schematic provides a useful model for distinguishing between action managers and advisory clients.

1. Supervisors and Decisionmakers as Agents Under Title VII

The Supreme Court’s sexual harassment jurisprudence has frequently differentiated between agents and non-agents. The Court first characterized sexual harassment as a form of sex discrimination in *Meritor Savings Bank v. Vinson*.¹⁶² In that decision, the Supreme Court referred to the universally understood agency rule that held “employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor’s actions.”¹⁶³ Twelve years after *Meritor*, the Court again addressed supervisory harassment and vicarious liability in *Burlington Industries, Inc. v. Ellerth*¹⁶⁴ and *Faragher v. City of Boca Raton*.¹⁶⁵ In these companion cases, the Court explained why supervisors were “agents” for Title VII harassment purposes, while other employees were not. Justifying the distinction between supervisors and non-supervisors, the Court explained that a supervisor’s decision to impose “a significant change in employment status” on a subordinate was “an official act of the enterprise, a company act.”¹⁶⁶ Thus, when supervisors harassed subordinates and then fired them, the *Faragher* and *Ellerth* Courts explained that employers faced automatic, vicarious Title VII liability for delegating workplace powers to agents who engaged in illegal conduct.¹⁶⁷ In short, *Faragher* and *Ellerth* situated supervisors as company agents because they wielded the powers of the firm.

person”); see Sykes, *supra* note 160, at 563 (defining vicarious liability as a rule that imposes legal responsibility on one party for the wrongful acts of another). Title VII liability for an employer’s unlawful refusal to hire is “automatic” or “strict” in that an employer cannot escape legal responsibility even if it exercises due care in trying to prevent the unlawful act. Sykes, *supra* note 160, at 577 (examining notions of “strict” and “vicarious” liability in the sexual harassment context); see also Cunningham-Parmeter, *supra* note 160, at 159 n.11 (discussing vicarious liability rules under Title VII).

162. 477 U.S. 57, 72 (1986).

163. *Id.* at 70–71 (citation omitted).

164. 524 U.S. 742 (1998).

165. 524 U.S. 775 (1998).

166. *Ellerth*, 524 U.S. at 761–62.

167. *Id.* at 762 (discussing how “[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates”); *Faragher*, 524

Fifteen years after *Faragher* and *Ellerth*, the Court again highlighted harassment law's fundamental distinction between supervisory agents and others.¹⁶⁸ In *Vance v. Ball State University*,¹⁶⁹ the Court concluded that an actor's "decisionmaking power" separated supervisors from other non-agent actors: "We hold that an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim . . ."¹⁷⁰ In sum, from *Meritor*, to *Ellerth*, to *Faragher*, to *Vance*, the Supreme Court has repeatedly held that companies face automatic Title VII liability when supervisors exercise their delegated powers by harassing and discharging subordinates.

Beyond the harassment context, the Supreme Court has held firms strictly accountable for the discriminatory acts of decisionmakers who hire and fire workers, because decisionmakers are company agents.¹⁷¹ For example, if the president or human resources officer of a company refuses to hire an applicant because of the applicant's race, the employer must automatically answer for the decisionmaker's discrimination, regardless of company fault.¹⁷² Like the antidiscrimination mandate that requires firms to always compensate victims for supervisory harassment that culminates in discharge, Title VII also holds firms strictly accountable when company decisionmakers exercise their power in biased ways.¹⁷³ By wielding firm-delegated authority to discipline and fire workers, the decisionmaker is the firm for purposes of Title VII liability.¹⁷⁴

Just as decisionmakers retain the authority to fire subordinates, algorithms today enable action managers to deactivate workers. Analogizing

U.S. at 808 (describing supervisors who retain the authority to take "tangible employment action[s], such as discharge, demotion, or undesirable reassignment").

168. See *Vance v. Ball State University*, 570 U.S. 421, 424 (2013).

169. 570 U.S. 421 (2013).

170. *Id.* at 431.

171. See Verkerke, *supra* note 22, at 280–82 (comparing liability rules for discriminatory decisionmaking with liability rules for harassment).

172. See Chamallas *supra* note 19, at 1319–20 (discussing how, outside the harassment context, courts impute discriminatory discharges to employers because such decisions are "action[s] of the employer").

173. See Cunningham-Parmeter, *supra* note 160, at 159 (examining the application of Title VII's strict liability standard to discriminatory decisions that company agents make outside of the harassment context).

174. See Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII*, Section 1983, Title IX, 7:3 WM. & MARY BILL RTS. J. 755, 761–62 (1999) (distinguishing between rules of direct and vicarious liability in employment law).

action managers to decisionmakers and supervisors, the following Subpart explains why courts should hold firms automatically liable when biased action managers push workers over algorithmic cliffs.

2. Customers as Agents with Actual, Apparent, or Ratified Workplace Authority

At first glance, it might seem like a doctrinal leap to compare ordinary customers to supervisors, decisionmakers, and other company agents. After all, courts do not typically view customers as agents of the firms with whom they do business.¹⁷⁵ But this traditional take on agency law assumes that customers lack any real authority over workers. Disrupting the conventional understanding of customers as clients, online ratings and algorithmic cliffs have fundamentally changed the relationship between workers, firms, and customers. No longer mere clients, customers increasingly make rating decisions that determine employment outcomes.

Critics might nonetheless point to doctrinal differences that distinguish customers from the recognized agents of Title VII jurisprudence: Whereas supervisors and decisionmakers are employees of the firms that retain their services, customers are not. But despite this distinction, customers can still create agency relationships with firms, even if they do not share employment relationships with them. As this Subpart explains, action managers are company agents not because firms employ them but because action managers possess the actual, apparent, or ratified authority to deactivate workers.¹⁷⁶

The doctrine of *respondeat superior* represents the most common form of vicarious workplace liability.¹⁷⁷ Latin for “let the master answer,” *respondeat superior* holds firms liable for torts that employees commit within the scope of their employment.¹⁷⁸ Applying this doctrine to Title VII cases, the Supreme Court has held that firms must pay when employees, including supervisors and decisionmakers, engage in discriminatory acts while carrying out their

175. See Zatz, *supra* note 147, at 1381 (discussing the role that customers play in third-party harassment cases).

176. See *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449 (9th Cir. 2018) (examining vicarious liability theories other than *respondeat superior*).

177. See Chamallas *supra* note 19, at 1333 (outlining the core elements of *respondeat superior* liability).

178. Cunningham-Parmeter, *Gig-Dependence*, *supra* note 4, at 399–406 (examining the historical development of *respondeat superior* liability).

employment-related duties.¹⁷⁹ In short, the Court's Title VII jurisprudence has focused on one type of vicarious liability (i.e., *respondeat superior*) that deals with certain authoritative employees (i.e., supervisors and decisionmakers).

Before the advent of customers as action managers, the Supreme Court's exclusive focus on employee-generated vicarious liability reflected a now-outdated assumption that only employees could commit Title VII violations on behalf of employers.¹⁸⁰ As the *Ellerth* Court stated, "Tangible employment actions fall within the *special province* of the supervisor. The supervisor has been empowered by the company as a *distinct class* of agent to make economic decisions affecting other employees under his or her control."¹⁸¹ Observing that ordinary coworkers "cannot dock another's pay, nor can one co-worker demote another," the *Ellerth* Court characterized coworkers as non-agents.¹⁸²

Today, the assumption that only supervisors can hire and fire subordinates no longer holds true. In addition to supervisors and decisionmakers, certain customers (i.e., action managers) now possess decisive managerial powers. In light of this shift, courts should consult a range of agency theories to determine when companies must pay for the biased ratings of non-employee, action managers.¹⁸³ Title VII's statutory text states that "any agent" can expose firms to vicarious liability.¹⁸⁴ This more expansive reference to "any agent" (rather than "any employee") invites a broad evaluation of the potential relationships that action managers and firms share. Specifically, the common law theories of actual authority, apparent authority, and ratification can help courts analyze the delegated powers that action managers now possess.¹⁸⁵

179. See Cunningham-Parmeter, *supra* note 160, at 158–60 (discussing Title VII violations and vicarious liability); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1244–46 (1991) (examining the application of agency principles to different categories of workers); see also RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006) (discussing the key components of employer-employee relationships under which an employer may be held vicariously liable for an employee's torts).

180. See Flake, *supra* note 100, at 1182–83 (summarizing the traditional view of customers as clients who cannot cause employees to suffer adverse employment actions).

181. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (emphasis added).

182. *Id.*

183. See Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After Meritor: Much Ado About Nothing*, 42 ARK. L. REV. 795, 798 (1989) (distinguishing *respondeat superior* from other agency theories).

184. 42 U.S.C. § 2000e(b).

185. See Jones v. Royal Admin. Servs., Inc., 887 F.3d 443, 449 (9th Cir. 2018) (discussing *respondeat superior* and other theories of vicarious liability).

The Restatement of Agency explains that an agency relationship “arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control”¹⁸⁶ According to this definition, an agent acts with “actual authority” when the agent reasonably believes that the principal has authorized the agent to act.¹⁸⁷ These concepts arguably apply to customers as action managers. Action managers “act on the principal’s behalf” when they rate workers with authority delegated to them by firms.¹⁸⁸ In response to this assertion, though, firms might argue that they neither “control” customers nor “authorize” them to discriminate, as prescribed by the Restatement of Agency. After all, companies do not tell action managers how to rate workers. But even though firms do not control the numerical ratings that customers assign, firms control the online review systems that carry out the wishes of action managers. Whereas action managers have discretion over their own feedback, companies very much control the gathering, interpretation, and execution of that feedback.

In addition to denying that they “control” action managers, companies might also assert that they never “authorize” customers to discriminate.¹⁸⁹ Indeed, firmwide nondiscrimination policies typically forbid this sort of conduct. Yet, as explained above, many companies merely engage in cosmetic acts of antidiscrimination compliance by failing to actually monitor online ratings for evidence of bias.¹⁹⁰ The Restatement of Agency explains that actual authority extends beyond specifically allowed acts to those that are “consistent with’ a principal’s ‘general statement of what the agent is supposed to do.’”¹⁹¹ Currently, firms grant customers unfettered discretion to review workers. In these circumstances, a company’s nonbinding antidiscrimination statement should not necessarily immunize firms from Title VII claims, given that action managers do what they are “supposed to do” when they rate workers.¹⁹²

186. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006); *see also* *Brown v. DirecTV, LLC*, 562 F. Supp. 3d 590, 607 (C.D. Cal. 2021) (defining “actual authority” and distinguishing it from other agency theories).

187. RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. L. INST. 2006).

188. *Id.* at § 1.01.

189. *Id.* at § 2.01.

190. *See* discussion *infra* Part I.C (explaining how many firms engage in cosmetic acts of antidiscrimination compliance without taking genuine steps to combat bias in online review systems).

191. *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 449 (9th Cir. 2018) (internal citations omitted) (discussing agency law’s various definitions of “actual authority”).

192. RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. L. INST. 2006).

Looking beyond the concept of actual authority, companies arguably ratify their customers' decisions when they act upon biased customer feedback by discharging workers.¹⁹³ Ratification requires principals to agree to be bound by the prior action of another entity or person.¹⁹⁴ Unlike actual authority, principals do not need to retain the right to control agents before ratifying their misconduct.¹⁹⁵ According to the Restatement of Agency, "A person may ratify an act . . . by receiving or retaining benefits it generates if the person has knowledge of material facts."¹⁹⁶ Applying this standard to customer ratings, companies agree to be bound by the decisions of their customers when they carry out biased customer directives. Although firms may not consciously be aware of their action managers' discriminatory decisions, ratification also includes a principal's "willful ignorance" of underlying facts.¹⁹⁷ To that end, firms exhibit willful ignorance when they grant action managers the functional authority to deactivate workers but fail to look for detectable patterns of bias in customer behavior.¹⁹⁸

In addition to actual authority and ratification, the theory of apparent authority (or "apparent agency")¹⁹⁹ can accurately describe the relationships that certain companies and action managers share. Firms vest actors with apparent authority when they give others the impression that those actors possess firm-delegated powers.²⁰⁰ In addition, some courts require proof that third parties

193. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1073–75 (9th Cir. 2019) (defining different ways that principals can ratify their agents' acts).

194. See RESTATEMENT (THIRD) OF AGENCY § 4.01 (AM. L. INST. 2006); see also *Henderson*, 918 F.3d at 1073 (examining agency law's definition of "ratification").

195. RESTATEMENT (THIRD) OF AGENCY § 4.01 cmt. b. (AM. L. INST. 2006) (citing the majority rule that ratification theory can expose principals to liability for the acts "done by an actor . . . who is not an agent but pretends to be").

196. *Id.* at § 4.01 cmt. g.

197. *Henderson*, 918 F.3d at 1073 (explaining that "[u]nder the 'willful ignorance' theory, the principal may not know the material facts, but has 'ratified with awareness that such knowledge was lacking'" (citing RESTATEMENT (THIRD) OF AGENCY § 4.01 (AM. L. INST. 2006))).

198. See discussion *infra* Part IV.B considering how data analytics can assist firms with identifying patterns of bias among certain reviewers); see also discussion *infra* Part I.C (explaining how many firms cannot determine if online review systems expose workers to biased decisionmaking because firms fail to track worker demographics).

199. See David L. Reed, *Vicarious Liability Under Doctrine of Ostensible or Apparent Agency*, 6 AM. JUR. PROOF OF FACTS 3d 457 (2022) (discussing the tendency of some courts to interchangeably use the terms "apparent authority" and "apparent agency").

200. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBICK, *THE LAW OF TORTS* § 433 (2022) (explaining how judges utilize the doctrine of apparent agency to hold firms accountable for the public perceptions that they create).

detrimentally change their positions in reaction to an actor's apparent authority,²⁰¹ while other courts simply require proof that third parties reasonably believe in the actor's authority.²⁰² Like ratification, the theory of apparent authority does not depend on the level of control that principals retain over agents.²⁰³ Applied to online ratings, businesses increasingly create the public perception that reviewing customers decide when to discipline and discharge workers. By automatically keying deactivation decisions to customer ratings, companies outwardly present action managers as actors who possess decisionmaking power. Workers, in turn, rely on these representations by engaging in transactions with customers who appear to possess managerial authority over them. Under these circumstances, businesses expose themselves to vicarious liability by granting customers the apparent authority to push workers over algorithmic cliffs.

The Supreme Court has said that agency principles serve as a "starting point" to vicarious liability analyses under Title VII and that courts should "adapt agency concepts to the practical objectives of Title VII."²⁰⁴ As such, courts should be less concerned with the formalism of any single agency rule and more concerned with the practical question of whether firms delegated the power to dictate discriminatory outcomes to customers. From a practical perspective, it should not matter whether employers formally delegate decisionmaking powers to supervisors and decisionmakers, or functionally outsource the same authority to customers who discriminate.²⁰⁵ In either case, the firm has granted agents the power to make workplace decisions. Accordingly, courts should embrace the flexible agency analysis that the Supreme Court has already announced and hold firms strictly accountable for the biased decisions of action managers.²⁰⁶

201. See, e.g., *Thomas v. Taco Bell Corp.*, 582 F. App'x 678, 679 (9th Cir. 2014) (stating that a plaintiff who asserts a claim for apparent authority must establish that the plaintiff detrimentally relied on the appearance of an agency relationship).

202. See DOBBSET AL., *supra* note 200, at § 433 ("The main issue that has both bedeviled and divided courts in this area is whether a plaintiff must prove reliance on the appearance of agency the defendant has created, and if so, what exactly that means.").

203. See *Covington v. Int'l Ass'n of Approved Basketball Offs.*, 710 F.3d 114, 120 (3d Cir. 2013); *Brown v. DirecTV, LLC*, 562 F. Supp. 590, 608 (C.D. Cal. 2021) (noting that apparent authority "applies to actors who appear to be agents but are not").

204. *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998); see also Brian C. Baldrate, Note, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*, 31 CONN. L. REV. 1149, 1164–77 (1999) (examining the Supreme Court's application of agency principles to harassment claims).

205. See Zatz, *supra* note 156 (asserting that online review systems help facilitate certain types of discriminatory outcomes that Title VII would clearly prohibit in traditional work settings).

206. See Flake, *supra* note 12, at 2202 (observing that when employers incorporate customer feedback into the decisionmaking process, customers become "pseudoagent[s]").

C. Advisory Clients: Liability Limited to Ratings That Motivate Adverse Decisions

Many online systems do not vest customers with the functional authority to discharge workers. For example, a customer at a chain restaurant might leave a one-star rating, but that negative review does not directly trigger adverse job consequences. Because the customer does not possess the actual or functional power to fire the low-rated server, the customer is not an action manager, but rather an advisory client. This distinct division of power calls for distinct rules of liability. Fortunately, federal antidiscrimination law has developed a separate set of standards for determining when to hold firms responsible for relying on the biased advice of third parties. In addition to exposing employers to automatic, vicarious liability, Title VII also holds employers directly responsible for their own role in facilitating discrimination. Specifically, firms must pay for Title VII violations when they allow biased recommendations to motivate adverse employment outcomes.²⁰⁷

At first glance, it might appear that discrimination cannot motivate an employer's decision if advisory clients cloak their biases in seemingly neutral one-star reviews. After all, a company that uses customer ratings to manage a widely dispersed workforce would not necessarily know about an advisory client's discriminatory purpose.²⁰⁸ But several branches of Title VII jurisprudence hold employers directly responsible for allowing themselves to become conduits of bias. In a diverse set of cases—customer harassment, customer preferences, and subordinate bias—courts have extended Title VII liability to employers that facilitate discrimination.²⁰⁹ Although each scenario differs doctrinally and factually, decisions in this area have all focused on an employer's direct role in perpetuating antidiscrimination violations. Taken together, these cases can help courts determine when to hold employers directly responsible for acting on the biased feedback of advisory clients.

207. See Sullivan, *supra* note 29, at 404–05 (discussing Title VII's intent requirement).

208. See Spitko, *supra* note 28, at 1300–01 (expressing skepticism that platform workers can successfully challenge biased customer reviews by bringing disparate treatment claims).

209. See generally Cunningham-Parmeter, *supra* note 160, at 158–59 (discussing vicarious Title VII liability in the context of sexual harassment and other antidiscrimination violations); Sykes, *supra* note 160, at 577 (distinguishing liability rules related to coworker harassment from “strict” liability).

1. Unchecked Customer Harassment

Cases involving customer harassment provide useful vehicles for determining when firms should pay for acting upon the discriminatory inputs of advisory clients. In addition to preventing harassment by supervisors, Title VII also requires employers to prevent customer harassment at work.²¹⁰ Indeed, a unanimous body of appellate law holds employers responsible for harassment when they unreasonably fail to prevent members of the public from harassing employees.²¹¹ Whereas supervisory harassment exposes firms to vicarious liability for the bad acts of supervisory agents, a firm must answer for customer harassment only when the company itself has engaged in blameworthy conduct.²¹² By focusing on an employer's own behavior, the test for customer harassment represents a form of direct liability, not vicarious liability.²¹³

Consider a few recent examples. In *Christian v. Umpqua Bank*,²¹⁴ a bank employee sued her employer for failing to stop a customer from harassing her. According to the plaintiff, the customer repeatedly went to the bank, sent the plaintiff flowers, said that they were "soulmates," and pledged that they were "meant to be together."²¹⁵ Despite the plaintiff's request for help, the plaintiff's employer directed her to "hide in the break room" whenever the harassing customer returned to the bank.²¹⁶ Reviewing these facts, the Ninth Circuit observed that "an employer may be held liable for sexual harassment on the part of a private individual, such as [a customer], where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."²¹⁷ Noting that Title VII

210. See Flake, *supra* note 100, at 1192–93 (noting that Title VII exposes firms to identical liability standards when either coworkers or customers harass employees).

211. See Zatz, *supra* note 147, at 1360–67 (arguing that courts have difficulty tracing third-party harassment directly to an employer's own misconduct).

212. See Chamallas, *supra* note 19, at 1329 (distinguishing negligence liability from vicarious liability in the harassment context).

213. See Sykes, *supra* note 160, at 578 (noting that a liability standard based on an employer's negligence "is not really vicarious at all"); see also Cunningham-Parmeter, *supra* note 160, at 208–09 (discussing how the Supreme Court uses a negligence standard to evaluate claims of non-supervisory harassment).

214. 984 F.3d 801, 808 (9th Cir. 2020).

215. *Id.* at 806–07.

216. *Id.* at 808–12 (stating that "[i]naction is not a remedy 'reasonably calculated to end the harassment,' and '[w]e refuse to make liability for ratification of past harassment turn on the fortuity of whether the harasser . . . voluntarily elects to cease his activities'" (citing Fuller v. City of Oakland, 47 F.3d 1522, 1529 (9th Cir. 1995))).

217. *Id.* at 811.

requires employers to “act promptly” in response to customer harassment, the Ninth Circuit denied the defendant’s motion for summary judgment.²¹⁸

Similarly, in *EEOC v. Costco Wholesale*,²¹⁹ the Seventh Circuit reviewed a retail employee’s allegations that a customer harassed her at a Costco warehouse. According to the plaintiff, the harassing customer told her that she was “exotic,” asked her out six times, said he “couldn’t tell if [she] was 17 or 27,” videotaped her on the warehouse floor, and touched her twice.²²⁰ Distinguishing supervisory harassment from customer harassment, the Seventh Circuit noted that “an employer is not vicariously liable for the sexual harassment of its employee by a customer.”²²¹ Instead, “an employer is responsible for its own negligence” when it tolerates harassment on its premises.²²² In light of Costco’s “unreasonably weak” response to the harassment,²²³ the Seventh Circuit affirmed the jury’s verdict for the plaintiff.²²⁴

In these and other cases, courts have explained how customer harassment exposes firms to direct liability for playing a role in employee mistreatment.²²⁵ Incorporating tort-based concepts of fault into Title VII law, this negligence-sounding standard of liability considers an employer’s responsibility for fostering an environment that gives rise to customer harassment.²²⁶ For example, in *Vance v. Ball State University*,²²⁷ the Supreme Court described certain conditions that could expose employers to liability for non-supervisory harassment: “Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.”²²⁸

Judges have offered different rationales for holding employers liable for customer harassment, even when employers themselves do not engage in intentional misconduct. Some courts have characterized an employer’s

218. *Id.* at 814.

219. 903 F.3d 618, 621 (7th Cir. 2018).

220. *Id.* at 623–24.

221. *Id.* at 627.

222. *Id.*

223. *Id.* at 628.

224. *Id.* at 629.

225. See Zatz, *supra* note 147, at 1372 (examining the liability standard for third-party harassment).

226. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 948–53 (1993) (discussing the judicial development of liability rules for customer and coworker harassment).

227. 570 U.S. 421, 448–49 (2013).

228. *Id.*

acquiescence to non-employee harassment as a form of ratification, while others have highlighted a firm's own complicity in failing to combat knowable misbehavior.²²⁹ Unlike customer harassment claims, though, courts have declined to apply negligence standards to traditional disparate treatment claims (e.g., discriminatory hirings, firings, demotions, etc.) because of the longstanding requirement that such claims require proof of purposeful discrimination.²³⁰

Highlighting the distinction between customer harassment and other forms of Title VII liability, critics could argue that any negligence-based approach to employer accountability for discriminatory customer reviews would not comport with the intent-based requirements of disparate treatment law. But this argument ignores the fact that biased customer reviews originate from a customer's own intentional choice to assign discriminatory ratings to certain workers. Like customer harassment, discrimination by advisory clients involves third-party actors who use their business relationships with employers to discriminate against workers. Rather than attach automatic liability to firms, both scenarios require evidence that employers engaged in blameworthy conduct by allowing Title VII violations to occur.²³¹ According to this view, both the reviewing customer and the firm engage in intentional acts: The customer intentionally discriminates, and the firm intentionally operationalizes feedback systems that are known to harvest customer biases. Under these circumstances, firms should face direct Title VII liability for structuring review systems in a way that facilitates intentional discrimination.²³²

2. Effectuating Discriminatory Customer Preferences

Companies violate Title VII when they knowingly honor the discriminatory wishes of their customers.²³³ At times, customers directly ask firms to follow their

229. See Flake, *supra* note 100, at 1196 (considering various justifications for holding employers liable for customer harassment).

230. See Bornstein, *supra* note 25, at 1067 (discussing the judicial reluctance to import negligence concepts into disparate treatment analyses).

231. See Wang, *supra* note 24, at 289–90 (comparing the use of discriminatory customer feedback to an employer's toleration of customer harassment).

232. See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 897–98 (2007) (outlining a standard for “structural discrimination,” which focuses on “the employer’s structuring of a work environment that facilitates bias in the individual decisionmaker’s action”).

233. See Craig Westergard, Comment, *Unfit to Be Seen: Customer Preferences and the Americans with Disabilities Act*, BYU J. PUB. L. 179, 192–94 (2019) (discussing the judicial skepticism of defenses to discrimination claims based on customer preferences).

bigoted directions.²³⁴ At other times, businesses assume that their customers prefer to work with certain types of employees.²³⁵ But regardless of whether customers explicitly or implicitly articulate their biased preferences, the same liability rule applies: Employers engage in intentional discrimination if they comply with these requests.²³⁶

Much of the law on discriminatory customer preferences originated from cases in which airlines engaged in sex discrimination.²³⁷ In the touchstone decision of *Diaz v. Pan American World Airways*,²³⁸ the Fifth Circuit rejected an air carrier's attempt to hire only female flight attendants. Despite the air carrier's assertion that customers preferred to work only with women, the Fifth Circuit held that "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid."²³⁹ Similarly, the much-cited decision of *Wilson v. Southwest Airlines*²⁴⁰ explained how Southwest Airlines wanted to "project[] an image of feminine spirit, fun, and sex appeal" by hiring only female flight attendants.²⁴¹ Ruling against the airline, the *Wilson* court held that Title VII prevented "employers from refusing to hire an individual based on stereotyped characterization of the sexes"²⁴²

Beyond sex discrimination claims, the prohibition against honoring biased customer wishes applies to Title VII's other protected categories as well. For example, in *Chaney v. Plainfield Healthcare Center*,²⁴³ a nursing home resident refused to receive services from "Black CNAs." Ruling against the employer that had acceded to the customer's bigoted preference, the Seventh Circuit cited well-settled authority that "a company's desire to cater to the perceived racial

234. See Flake, *supra* note 100, at 1201 (analyzing different forms of discriminatory customer requests).

235. See generally Wang, *supra* note 24, at 252–53 (discussing the conflict between an employer's desire to please customers and antidiscrimination law's formal prohibition against honoring a customer's biased request).

236. See Flake, *supra* note 100, at 1201–02 (explaining why employers cannot raise "customer satisfaction" as a defense to discriminatory claims).

237. See Westergard, *supra* note 233, at 193–94 (summarizing the early development of caselaw on discriminatory customer preferences).

238. 442 F.2d 385, 386 (5th Cir. 1971).

239. *Id.* at 388–89; see also Wang, *supra* note 24, at 257–58 (analyzing the case).

240. 517 F. Supp. 292, 293 (N.D. Tex. 1981).

241. *Id.* at 294.

242. *Id.* at 304 (international citations omitted); see also Waldman, *supra* note 24, at 99–100 (examining judicial decisions that barred employers from acting on sexist customer preferences).

243. 612 F.3d 908, 910 (7th Cir. 2010).

preferences of its customers is not a defense under Title VII for treating employees differently based on race.”²⁴⁴ Likewise, in the context of national origin discrimination, the Equal Employment Opportunity Commission (EEOC) has stated that an “employment decision based on the discriminatory preferences of others is itself discriminatory.”²⁴⁵

The cases in this area do not map perfectly onto the modern problem of biased online ratings. Whereas the older customer preference cases typically involved employers that deliberately embraced biased customer demands, firms that rely on customer feedback do not necessarily know about their customers’ discriminatory impulses. Therefore, employers would argue that courts should not conflate a company’s accidental adoption of biased customer reviews with a firm’s conscious decision to carry out the discriminatory wishes of customers. But this argument ignores a firm’s role in designing and implementing online review systems that allow unfettered customer biases to flourish.

Holding firms accountable for their uncritical adoption of biased customer ratings would reduce the incentives that firms currently have to remain consciously ignorant of such bias. As explained below, basic data analytics can help companies identify patterns of discrimination among reviewing customers.²⁴⁶ Rather than study this data and prevent advisory clients from discriminating, however, firms today publicly promote their antidiscrimination values but concurrently disclaim any obligation to investigate bias in their online review systems.²⁴⁷ Given the availability of analyzable data from which firms can identify discriminatory patterns among individual customers, employers that heedlessly carry out the recommendations of advisory clients play a direct role in facilitating discriminatory outcomes. Just as courts in the early customer preference cases prevented airlines from intentionally acting upon discriminatory customer preferences, a modern application of Title VII liability principles should

244. *Id.* at 913; *see also* *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 477 (11th Cir. 1999) (barring employer from assigning “get-out-the-vote” phone calls based on race); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981) (prohibiting an employer from honoring the racially discriminatory policies of other nations).

245. U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2016-2. EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION (2016), https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_Toc451518809 [[https:// perma.cc/W7E7-EB2U](https://perma.cc/W7E7-EB2U)].

246. *See* discussion *infra* Part III.C (describing the role that data analytics can play in identifying biased patterns of customer behavior).

247. *See* discussion *supra* Part I.C (discussing the tendency of many firms to engage in performative acts of antidiscrimination compliance).

hold employers accountable for operationalizing feedback systems that harness customer bias.

Courts can infer intent when individuals act with “conscious indifference” to the adverse consequences of their actions.²⁴⁸ Likewise, when there is a high probability that certain facts exist, individuals act with intent if they purposefully choose to avoid learning those facts.²⁴⁹ Whereas customers in the older preference cases made their discriminatory wishes clear, an employer that carries out the discriminatory demands of advisory clients achieves the same result by uncritically adopting the advice of biased customers.²⁵⁰ To realize Title VII’s broader antidiscrimination goals, it should make no difference whether bias originates from explicit customer requests or from data analytics that firms choose to ignore.²⁵¹ In both cases, the company acts as the conduit of discriminatory customer preferences. As such, Title VII liability should apply to firms that blindly act upon the biased feedback of advisory clients.

3. Subordinate Bias Liability for Incorporating Discriminatory Reviews

Courts may also attempt to apply the so-called “cat’s paw” (or “subordinate bias”) theory of liability to analyze discriminatory customer reviews.²⁵² Most famously invoked by Judge Richard Posner, the name “cat’s paw” draws from a fable in which a monkey tricks a cat to put its paw into a fire so that the monkey can eat roasting chestnuts without burning its hands.²⁵³ In other words, the monkey dupes the cat into unwittingly doing the monkey’s devious bidding.

The same rough schematic could theoretically apply to an employer’s unknowing use of biased customer feedback. Analogizing this scenario to cat’s paw liability, customers trick employers into discriminating, just as the monkey

248. See Bornstein, *supra* note 25, at 1093 (evaluating tort-based concepts of intent in the Title VII context).

249. See Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 933 n.191 (2018) (discussing firmwide culpability for adopting the biased decisions of algorithms).

250. See Leong, *supra* note 118, at 728 (examining whether the use of biased rating systems exhibits discriminatory intent on the part of entities that use those systems).

251. See Ajunwa, *supra* note 29, at 1729 (advocating for a standard of liability based on “discrimination per se” when firms adopt biased algorithmic decisions); Bornstein, *supra* note 25, at 1110 (asserting that Title VII should recognize claims based on “reckless discrimination”).

252. *Lobato v. New Mexico Env’t Dep’t*, 733 F.3d 1283, 1294 (10th Cir. 2013) (explaining how courts use the phrases “subordinate bias” and “cat’s paw” to describe the same theory of liability).

253. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

tricked the cat into burning its paw. Despite the facial appeal of this analogy, even Judge Posner has warned against “doctrine stated as metaphor” and has characterized cat’s paw liability as “a judicial attractive nuisance”²⁵⁴ Similarly, scholars have criticized courts for using cat’s paw liability to distort Title VII precedent.²⁵⁵

Lured by the doctrine’s “attractive nuisance,” the Supreme Court analyzed cat’s paw liability in *Staub v. Proctor Hospital*.²⁵⁶ In that case, the Court assessed the claims of an army reservist whose employer allegedly fired him because of his military service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).²⁵⁷ Like Title VII, USERRA prohibits employers from allowing an employee’s protected class (in this case military membership) to serve as a “motivating factor” in an adverse employment action.²⁵⁸ The plaintiff in *Staub* alleged that his immediate supervisor resented the plaintiff’s off-duty military obligations and fabricated stories that caused the company’s human resources department to fire the plaintiff without knowing about the supervisor’s discriminatory intent.²⁵⁹ Ultimately, the *Staub* Court held that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”²⁶⁰

On its face, the *Staub* decision addressed a very limited question: when to hold employers legally responsible for the discriminatory acts of “supervisors.”²⁶¹

254. *Cook v. IPC Int’l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012) (referring to the judicial development of cat’s paw liability as a “dreadful muddle” because it “confuses judges, jurors, and lawyers alike”).

255. See William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO STATE L.J. 1027, 1067 (2014) (criticizing *Staub*’s incorporation of tort concepts into Title VII); Sperino, *supra* note 23, at 1220–21 (discussing inconsistencies between cat’s paw liability and existing antidiscrimination precedent); Sandra F. Sperino, *Into the Weeds: Modern Discrimination Law*, 95 NOTRE DAME L. REV. 1077, 1109–10 (2020) [hereinafter Sperino, *Into the Weeds*] (describing the difficulty that lower courts have with applying cat’s paw doctrine to real-world problems); Sandra F. Sperino, *Killing the Cat’s Paw*, 50 SETON HALL L. REV. 1303, 1305 (2020) (arguing that the cat’s paw theory of liability confuses both readers and judges).

256. 562 U.S. 411 (2011).

257. *Id.* at 415.

258. *Id.* at 416–17 (noting that the use of the term “motivating factor” appears in both USERRA, 38 U.S.C. § 4311(a), and Title VII, 42 U.S.C. § 2000e-2(a), (m)).

259. *Id.* at 414.

260. *Id.* at 422.

261. See Spitko, *supra* note 28, at 1302 (observing that *Staub* specifically declined to address whether coworkers can expose employers to cat’s paw liability).

Formally anchoring its decision in agency law, the *Staub* Court relied on *respondeat superior* to hold employers vicariously liable when a “supervisor acts within the scope of his employment”²⁶² Given that courts do not typically view customers as supervisors,²⁶³ judges may simply conclude that *Staub* does not apply to discriminatory customer reviews.²⁶⁴ But despite the apparent dissimilarity between traditional supervisors and customers, *Staub* embraced a very broad definition of “supervisor” that arguably applies to customers who review workers through online systems.

In *Staub*, the Supreme Court affixed the “supervisor” label to a biased manager who explicitly lacked the ability to take tangible employment actions against her subordinates.²⁶⁵ This unique definition of “supervisor” differs markedly from the Court’s Title VII harassment jurisprudence, which states that “the authority to take tangible employment actions is the *defining* characteristic of a supervisor.”²⁶⁶ Given the stark contrast between the Court’s definition of “supervisor” in Title VII cases and in *Staub*, it appears that the *Staub* Court intended to place a much broader class of actors under the umbrella of cat’s paw liability. For example, the *Staub* Court characterized the biased supervisor as a company agent because she was an “actor in the events” who reviewed the plaintiff’s performance as part of her job.²⁶⁷ Although *Staub* involved an application of *respondeat superior* liability, as noted above, other agency theories such as ratification and apparent authority could also categorize customers as “actors in the events” of workplace evaluation.²⁶⁸

Another reading of *Staub* suggests the Supreme Court was less concerned with vicarious liability (and, therefore, agency questions), and more concerned with the defendant’s own responsibility for acting upon discriminatory inputs. Referencing the employer’s “fault” multiple times, the *Staub* Court criticized companies that fail to independently “determin[e] that the adverse action was, apart from the supervisor’s recommendation, entirely justified.”²⁶⁹ In focusing on

262. *Staub*, 562 U.S. at 422 n.4.

263. See Zatz, *supra* note 147, at 1381 (considering the application of agency theories to claims involving customer harassment).

264. See Spitko, *supra* note 28, at 1304 (questioning whether cat’s paw liability applies to biased customer reviews).

265. See Sperino, *Into the Weeds*, *supra* note 255, at 1109 (highlighting the Supreme Court’s inconsistent use of the term “supervisor” in its antidiscrimination jurisprudence).

266. *Vance v. Ball State Univ.*, 570 U.S. 421, 440 (2013) (emphasis added).

267. *Staub*, 562 U.S. at 421–22.

268. See discussion *supra* Part II.B.1 (evaluating the relationship between firms and reviewing customers in light of several common law theories of agency).

269. *Staub*, 562 U.S. at 421.

the employer's own level of care, the *Staub* Court seemed to stray from a pure, no-fault agency inquiry, and instead evaluated an employer's direct culpability in failing to verify the accuracy of biased inputs.²⁷⁰

Since *Staub*, several federal courts have invoked cat's paw liability to build upon this hybrid approach to direct and vicarious Title VII liability. For example, the Second Circuit used cat's paw liability to hold "an employer liable under Title VII when, through its *own* negligence, the employer gives effect to the intent of one of its—even low-level—employees."²⁷¹ Similarly, the First Circuit has held that cat's paw liability applies to non-supervisory inputs when an "employer *acts negligently* by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation."²⁷² This same fault-based approach to cat's paw liability can assist courts in evaluating the effect that discriminatory customer reviews have on an employer's decisions. According to this hybrid approach to vicarious and direct liability, an employer violates Title VII partially because the employer delegated review powers to customers (vicarious liability) and partially because the employer engaged in blameworthy conduct by failing to meaningfully validate customer reviews itself (direct liability).²⁷³

Viewed from a policy perspective, the *Staub* Court made clear that employers cannot immunize themselves from antidiscrimination liability by vesting all final employment powers in a single, remote decisionmaker.²⁷⁴ After all, a different rule would create tremendous incentives for companies to uncritically adopt the recommendations of biased, lower-level managers. To avoid this result, the *Staub* Court stated that cursory, "independent" investigations of biased inputs will not prevent employers from facing cat's paw liability.²⁷⁵ Just as the *Staub* Court required employers to scrutinize recommendations for evidence of discrimination, courts should not reward firms that purposefully avoid looking for evidence of bias in their advisory clients' reviews.

270. *Id.* ("Nor do we think the independent investigation somehow relieves the employer of 'fault.'").

271. *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 273–74 (2d Cir. 2016) (emphasis added).

272. *Velazquez-Perez v. Devs. Diversified Realty Corp.*, 753 F.3d 265, 273–74 (1st Cir. 2014) (emphasis added).

273. See *Flake*, *supra* note 100, at 1211–12 (asserting that in third-party discrimination cases, Title VII liability should hinge on whether employers responded reasonably to instances of customer discrimination).

274. See *Sullivan*, *supra* note 117, at 1444–46 (arguing that *Staub* attempted to discourage employers from aggregating decisionmaking powers).

275. *Staub v. Proctor Hosp.*, 562 U.S. 411, 420–21 (2011).

Title VII liability does not depend on whether a customer, coworker, or supervisor sets in motion a chain of events that leads to discharge.²⁷⁶ Rather, antidiscrimination law asks simply whether biased inputs helped motivate an adverse employment outcome. Indeed, in many of its canonical Title VII cases prior to *Staub*, the Supreme Court did not discuss the authoritative roles of actors who provided biased feedback.²⁷⁷ Instead, the Court simply searched for evidence of bias and proof that the bias played a motivating role in an ultimate job action. By definition, an employer's uncritical reliance on biased recommendations means that the tainted feedback helped motivate the employment outcome.²⁷⁸ As such, Title VII liability should apply to firms that heedlessly embrace the biased feedback of advisory clients.

III. PREVENTING BIASED RATINGS FROM IMPACTING WORKPLACE DECISIONS

Faced with a genuine risk of liability for acting upon biased customer reviews, employers could reduce their legal exposure to Title VII claims by combatting discrimination in online feedback systems. Under the proposal outlined here, an employer's incentive to counteract bias would depend on the level of delegated authority that customers possess. For example, although employers would face automatic, vicarious liability when action managers push workers over algorithmic cliffs, firms could still reduce their exposure to Title VII claims by stripping action managers of decisionmaking authority once certain reviewers exhibited a pattern of bias. For advisory clients, firms that regularly scrutinized online ratings for evidence of bias would reduce the chances of making employment decisions that were motivated by discriminatory intent.

In short, both theories of direct and vicarious Title VII liability would encourage employers to take meaningful steps to reduce bias in online reviews because doing so would reduce their exposure to Title VII claims. To that end,

276. Sperino, *Into the Weeds*, *supra* note 255, at 1109 (explaining how courts have reached different conclusions about whether an employee's status as "coworker" or "supervisor" matters for cat's paw liability).

277. See Sperino, *supra* note 23, at 1239–47 (distinguishing *Staub* from other Supreme Court precedent that focused on an employer's direct liability for acting upon biased feedback).

278. See *Lobato v. New Mexico Env't Dep't*, 733 F.3d 1283, 1294 (10th Cir. 2013) (internal citation and quotations omitted) (considering the extent to which an employer's "uncritical reliance" on biased feedback should give rise to Title VII liability).

numerous tools can help firms identify and combat the presence of bias in customer rating systems.²⁷⁹ This Part evaluates several such steps.

A. Anonymize Interactions Between Customers and Workers

In situations where customers must first hire workers and later review them, companies could strip these transactions of verbal or visual cues to deny biased customers the information that they need to engage in discrimination.²⁸⁰ Firms can scaffold the dissemination of a user's identifying information at different points in transactions: from the moment of hire, to on-the-job interactions, to declining to disclose distinguishing information altogether.²⁸¹ This strategy of anonymizing interactions has a long history of successfully reducing bias in offline markets.²⁸²

Reflecting the importance of preserving anonymity among users, some platforms already refuse to disclose identifying information until later points in transactions. For example, faced with allegations of discrimination, Airbnb announced in 2018 that it would no longer allow hosts to see guests' profile photos until after bookings were completed.²⁸³ Similarly, the service platform Fancy Hands anonymously connects personal assistants to customers.²⁸⁴

Although companies might contend that they need to share identifying information with customers to promote safety and personalize interactions, other methods can achieve these goals, while still withholding descriptive information

279. See Levy & Barocas, *supra* note 3, at 1184–85 (discussing various design features in algorithmic management systems that can amplify customer bias).

280. See Levy & Barocas, *supra* note 3, at 1185 (offering suggestions for reducing bias in online hiring).

281. See Levy & Barocas, *supra* note 3, at 1206 (explaining how the search results of online marketplaces can encourage discrimination by users).

282. See generally Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 738 (2000) (reporting that women's chances of advancement at an orchestra increased by fifty percent when a screen was placed between judges and those who auditioned for the orchestra); Leong, *supra* note 118, at 722 (discussing the benefits of removing identifying information from transactions).

283. *Airbnb Answers: Guest Profile Photos*, AIRBNB (Mar. 5, 2020), <https://www.airbnb.com/resources/hosting-homes/a/airbnb-answers-guest-profile-photos-77> [<https://perma.cc/RB2S-WGZR>] (explaining that hosts cannot see guests' profile photos until after booking); see also Carly Olson, *Airbnb Blocks Oregon Hosts from Seeing Guests' Names in Push Against Racial Bias*, GUARDIAN (Jan. 4, 2022, 1:00 AM), [<https://perma.cc/Z23B-G5KA>] (reporting that to settle allegations of race discrimination in Oregon, Airbnb agreed to withhold the photo and name of guests before confirming bookings in the state).

284. See Hannák et al., *supra* note 15, at 1914 (explaining how platforms can structure interactions to reduce the effect of human biases on those interactions).

from users. For example, rather than seeing the names and pictures of workers at the time of hire, customers could receive a secure code to facilitate anonymous hiring.²⁸⁵ To promote a more personalized experience, workers could post distinctive usernames or personal stories to their online profiles, while still withholding information that would identify their protected characteristics.²⁸⁶

Whereas anonymity can combat biased hiring in the platform economy, it would still fail to eliminate biased reviews in most circumstances. For example, workers in traditional service settings (e.g., restaurant workers, retail cashiers, etc.) cannot ordinarily mask their identifying information from customers. Likewise, although many platforms can anonymize interactions at the hiring stage of transactions, customers could still rely on biases to negatively rate workers at the end of their face-to-face interactions.

Despite the difficulty of masking workers from customers in most scenarios, however, firms could completely anonymize certain transactions. For example, when a shopper makes a delivery for Instacart or when a programmer writes code through Amazon Mechanical Turk, there is no need for customers to see the names and faces of workers at any point in the transaction.²⁸⁷ In these settings, firms could substantially reduce the likelihood that bias would infect rating decisions. But given that most workers cannot shield their identifying information throughout every transaction, firms should embrace additional strategies to counteract the presence of bias in online reviews.

B. Cross-Validate Low Ratings

In addition to anonymizing transactions, firms could attempt to validate customer ratings by requesting additional information from users or by comparing negative ratings to objective performance criteria. For example, a retail establishment that solicits customer feedback could also measure the number of sales that associates complete. Similarly, in the platform economy, delivery services could measure workers' timeliness, efficiency, or other tangible metrics.²⁸⁸ Having gathered this information, firms that still wanted to rely on customer

285. See Kotkin, *supra* note 5, at 82 (asserting that an exchange of passwords or codes could address the security concerns that customers might have with anonymous hiring).

286. See Middleton, *supra* note 15, at 94–95 (listing steps that ride-hailing platforms can take to reduce discriminatory outcomes in online review systems).

287. See Rosenblat et al., *supra* note 53, at 14 (considering whether anonymous hiring reduces levels of reputational trust among users); see also Griesbach et al., *supra* note 1, at 1 (examining different varieties of platform work).

288. See Liz Taylor, Note, *When the Customer Is Wrong: Systemic Discrimination in the App-Based Service Industry*, 81 U. PITT. L. REV. 241, 258–59 (2019) (describing evaluative methods that can replace online ratings).

ratings could cross-reference the numerical scores that customers provide with observable performance data to confirm the reliability of reviews. If the objective performance data correlated with a pattern of poor customer ratings, for instance, firms would have more confidence in the validity of the negative customer feedback. If, however, objective metrics did not correlate with negative customer ratings, companies might question the accuracy of the poor customer reviews. In such circumstances, firms could still collect customer feedback and share it with workers to inform them about their performance, but the ratings themselves would not necessarily lead to discipline or discharge.²⁸⁹

Beyond comparing customer feedback to observable metrics, companies could also attempt to validate online reviews by asking customers to provide descriptive feedback to accompany their numerical ratings. For instance, firms might allow customers to give a four- or five-star rating without explanation but require customers to briefly state why they gave lower scores. Indeed, some companies currently ask customers to provide reasons for their low ratings. For example, Instacart requires customers to explain any rating below five stars, and the platform promises its shoppers that certain low scores will not count against them.²⁹⁰ According to the platform's rating policy, if an Instacart customer gives a one-star review because a grocery item was out of stock, for instance, the platform will not incorporate the negative feedback into the evaluative process.²⁹¹ Similarly, Uber extends "Ratings Protection" to drivers when customers give low ratings for reasons beyond the drivers' control, such as bad traffic.²⁹²

Firms could use similar strategies to enforce antidiscrimination norms by asking customers to justify their numerical ratings. Of course, customers could still hide their biases behind other justifications (e.g., "too talkative," "drove dangerously," etc.).²⁹³ But courts that evaluate Title VII cases frequently treat a

289. See Rosenblat et al., *supra* note 53, at 15 (suggesting that companies can utilize customer feedback for purposes other than formal evaluation).

290. *Providing a Fair & Reliable Experience for Shoppers*, INSTACART BLOG (Mar. 1, 2021), <https://www.Instacart.com/company/shopper-community/providing-a-fair-reliable-experience-for-shoppers> [<https://perma.cc/7RLF-T5AY>] (explaining how Instacart calculates a shopper's rating); see also Sopher, *supra* note 76 (discussing the ratings protections that Instacart offers to shoppers).

291. See Sopher, *supra* note 76 (outlining the details of Instacart's customer feedback system).

292. *180 Days of Change: A Better Ratings Experience*, UBER BLOG (Nov. 16, 2017), <https://www.uber.com/blog/180-days-change-ratings-experience/#content> [<https://perma.cc/N2A8-U8FK>] (declaring that "riders will be required to provide feedback on all trips rated 4 stars or below").

293. See Leong, *supra* note 118, at 725 (examining steps firms can take to reduce bias in rating systems).

decisionmaker's written explanation as a potential heuristic for discriminatory intent.²⁹⁴ Applied to online reviews, a customer's pattern of explanations might align with a pattern of discriminatory low ratings. For instance, a customer may consistently give one-star reviews to women or Black workers with pretextual explanations like "unfriendly," while reserving five-star ratings and verbal praise for white workers. In these circumstances, courts could assess numerical scores in conjunction with descriptive feedback to help determine whether intentional bias potentially crept into certain reviews.

C. Audit Ratings for Patterns of Discrimination

In addition to measuring objective performance criteria and requesting additional information from customers, companies should also scrutinize the content and pattern of customer reviews to ensure that they do not contain evidence of bias. As a preliminary auditing step, firms could scan textual reviews for bigoted language. Natural-language processing can quickly examine large data sets to identify specific keywords.²⁹⁵ As in other online contexts, software programs might initially flag problematic reviews, while humans could audit flagged content to determine if a review's text actually contained discriminatory language.²⁹⁶ Although few customers include explicitly racist or sexist comments in their evaluations of workers, companies should at the very least ensure that textual reviews lack any obvious expressions of bias before acting on them.²⁹⁷

Of course, a firm's obligation to weed out discriminatory reviews should extend well beyond searching for smoking guns. In addition to ensuring that customer reviews do not contain explicitly bigoted language, companies should also audit customers' numerical ratings to identify potential patterns of bias.²⁹⁸ Because firms increasingly associate feedback systems with individual customer accounts, loyalty programs, or logins, algorithms could easily flag customer accounts that consistently reserve low reviews for protected groups.²⁹⁹ To achieve

294. See Bathaee, *supra* note 249, at 892–93 (discussing various mechanisms for proving bias).

295. See Rogers, *supra* note 28, at 562 (describing the use of natural-language processing to monitor emails and scan resumes).

296. See Satell & Sutton, *supra* note 48 (discussing the benefits of combining machine learning with additional levels of human review).

297. See Wang, *supra* note 24, at 286–87 (describing circumstances in which firms should face liability for adopting biased customer reviews).

298. See Kim, *supra* note 31, at 190 (explaining how auditing can help firms reduce bias in algorithmic decisionmaking).

299. See Bartlett & Gulati, *supra* note 13, at 253–54 (examining different methods for reducing the presence of bias in customer reviews); Zatz, *supra* note 156 (explaining how firms'

this end, firms would have to gather demographic information from workers—an admitted cost to worker privacy that is necessary to carry out Title VII’s prophylactic objective and to prevent customers from engaging in proxy discrimination.³⁰⁰

After gathering information about individual workers, firms could collect ratings data and measure different outcomes.³⁰¹ With this data in hand, businesses could then utilize auditing tools to test for expressions of bias within those datasets.³⁰² Companies that solicit customer feedback already gather large amounts of data about users’ preferences and behaviors. Firms then rely on this monitored information to nudge participants in numerous ways.³⁰³ Given the demonstrated capacity of businesses to collect and analyze enormous datasets, firms could build on these existing systems to audit customer ratings.³⁰⁴

Following its analysis of feedback patterns, a firm could document its efforts to prevent questionable ratings from harming workers.³⁰⁵ Although auditing software would never definitively determine when customers engaged in discrimination, firms could take additional steps when faced with a customer’s unexplainable pattern of negative reviews to further inquire into the situation, including: comparing negative ratings to objective performance criteria, requesting additional information from the customer, issuing a warning, deactivating the customer, or simply ignoring the customer’s feedback altogether.³⁰⁶ By embracing these and other mitigating measures, companies could reduce the prevalence of bias in their online systems, and thereby reduce their legal exposure to Title VII claims.

“voracious appetite for data gathering and analysis” provides “ample opportunities to . . . identify and discount customers whose patterns of ratings suggest bias”).

300. See Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1266–67 (2020) (discussing the value of gathering and disclosing membership data to prevent discrimination).

301. See Rosenblat et al., *supra* note 53, at 12 (suggesting tangible steps that companies can take to counteract biased decisionmaking).

302. See Patrick Huston & Lourdes Fuentes-Slater, *The Legal Risks of Bias in Artificial Intelligence*, LAW360, (May 27, 2020, 5:30 PM), <https://www.law360.com/articles/1274143/the-legal-risks-of-bias-in-artificial-intelligence> [<https://perma.cc/3GPK-26FK>] (outlining strategies for challenging algorithmic bias).

303. See Calo & Rosenblat, *supra* note 2, at 1628–30 (explaining how firms monitor behavioral data in the platform economy).

304. See Middleton, *supra* note 15, at 76 (examining ways that on-demand platforms can measure discriminatory outcomes).

305. See Yifat Nahmias & Maayan Perel, *The Oversight of Content Moderation by AI: Impact Assessments and Their Limitations*, 58 HARV. J. LEGIS. 145, 149 (2021) (arguing for greater public involvement in auditing biased algorithmic decisionmaking).

306. See discussion *infra* Part IV.B (explaining how companies can ignore discriminatory reviews, while still encouraging customers to provide candid feedback).

IV. OBJECTIONS TO HOLDING EMPLOYERS ACCOUNTABLE FOR BIASED CUSTOMER REVIEWS

Critics could raise several objections to this proposal. For example, holding companies liable for biased reviews could deter customer candor, thereby undermining the reliability of review systems. In addition, the liability rules described here might do very little to prevent determined bigots from pushing workers over algorithmic cliffs. After all, it would seem exceedingly difficult for firms to distinguish between legitimate one-star reviews and those that are motivated by customer bias. And even if data analytics could reliably flag certain accounts for exhibiting problematic patterns, it might seem unfair to hold firms accountable for the discriminatory reviews of third-party customers. This Part considers each of these objections in turn and explains why, despite these legitimate critiques, holding employers liable for biased customer reviews is vastly superior to current systems that allow unbridled customer feedback to decide workers' fates.

A. Diminishing Customer Candor and the Value of Rating Systems

Rating systems offer a number of benefits to firms and users alike. Relying on real-time feedback from customers, firms can minimize supervisory costs and gain management efficiencies.³⁰⁷ Produced at scale and generated instantaneously, customer-sourced data allow firms to monitor compliance with employment rules and maintain performance expectations.³⁰⁸ This arrangement also works quite well for customers. When workers know that customers can give them one-star reviews at a moment's notice, customers are more likely to receive good service, even if some workers might mask their fear of discharge with a smile.³⁰⁹

The proposal described here could theoretically undermine these enumerated benefits. After all, if firms faced increased liability for discriminatory reviews, then they might threaten customers with consequences for engaging in suspected acts of bias. These threats, in turn, might diminish customer candor in feedback systems. For example, rational customers might refuse to give low

307. See Spitko, *supra* note 28, at 1273–74 (listing several advantages of online rating systems).

308. See Spitko, *supra* note 28, at 1277 (explaining how companies use rating systems to enforce workplace requirements).

309. See Ngai Keung Chan, *The Rating Game: The Discipline of Uber's User-Generated Ratings*, 17 SURVEILLANCE & SOC'Y 183, 184 (2019) (discussing how platform workers react to the threat of deactivation); Dzieza, *supra* note 67 (considering the efficiencies generated by online ratings).

ratings for fear of being accused of discrimination. Other customers might decline to rate workers altogether.³¹⁰

But the foregoing concerns significantly overstate the number of customers who might be flagged by auditing software for exhibiting suspicious review patterns. Under the proposal outlined here, Title VII liability would apply to firms that fail to correct identifiable patterns of bias by individuals who exhibit a clear pattern of this behavior over the course of many interactions. Such a rule would not impede customer candor in most circumstances because the number of flagged users would be limited to those that evince likely acts of purposeful discrimination. In addition, asking customers to provide a reason for their numerical score should not deter most users from explaining why they gave negative feedback to certain workers. After all, in a world in which customers regularly provide reviews and rely on them to make decisions, customers should have no problem describing the poor service that caused them to leave negative feedback.³¹¹

As a tactic for preserving customer candor, firms could simply not inform reviewers that their accounts have been flagged for suspicious activity. Instead, businesses could silently ignore the feedback of customers who exhibit questionable review patterns.³¹² This strategy of tuning out certain reviewers would allow firms to avoid biased outcomes, while also averting the damage to customer candor that explicit warnings might otherwise cause. Thus, once auditing software identified accounts that exhibited patterns of bias, companies would simply disregard all future reviews coming from the identified accounts. Platforms already disregard the ratings of certain reviewers who consistently give low ratings to users.³¹³ Using similar auditing strategies, it would not require much additional effort to identify and disregard ratings from users who

310. See Spitko, *supra* note 28, at 1321–22 (discussing the limited incentives that individual actors have to provide online feedback).

311. See Middleton, *supra* note 15, at 97 (evaluating the advantages of placing additional reporting requirements on reviewers who provide negative feedback).

312. See Levy & Barocas, *supra* note 3, at 1224–25 (suggesting methods for reducing the impact of biased ratings on workers).

313. See, e.g., *180 Days of Change: A Better Ratings Experience*, UBER BLOG (Nov. 16, 2017), <https://www.uber.com/blog/180-days-change-ratings-experience/#content> [<https://perma.cc/N2G4-T76E>] (stating that the platform ignores “low ratings from riders who consistently give low ratings”); see also *Providing a Fair & Reliable Experience for Shoppers*, INSTACART BLOG (Mar. 1, 2021), <https://www.Instacart.com/company/shopper-community/providing-a-fair-reliable-experience-for-shoppers> [<https://perma.cc/LT5D-3GY4>] (describing situations in which Instacart will ignore certain ratings).

disproportionately reserve their negative feedback for members of protected groups. Although this approach would still allow flagged (but unwarned) customers to engage in future transactions, it would prevent bias from infecting workplace determinations, while still promoting customer candor throughout the review process.

B. Proving Intent: Repeat Customers and Comparator Data

Skeptics of the proposal might contend that the legal regulation of customer-based, algorithmic discrimination cannot meaningfully expose unexpressed customer biases. For example, a customer's quantitative rating does not contain any evidence of discrimination on its face.³¹⁴ Given that plaintiffs who assert disparate treatment claims under Title VII must prove that they experienced an adverse employment action "because of" a protected characteristic, as opposed to "because of" poor service, it might seem impossible to prove that online ratings contain evidence of bias.³¹⁵ And even if plaintiffs could point to a pattern of discrimination by certain customers, employers might argue that the identified customers acted on "unconscious" or "implicit" impulses.³¹⁶

As noted above,³¹⁷ courts require plaintiffs in disparate treatment cases to show that purposeful discrimination occurred, even though Title VII's text does not contain a specific intent mandate.³¹⁸ Although scholars still contest the meaning of intentional discrimination,³¹⁹ assuming that plaintiffs must prove that

314. See Flake, *supra* note 12, at 2195 (observing that "bias cannot be easily ascertained" from numerical customer ratings).

315. See Sullivan, *supra* note 29, at 405 (describing the challenge of inferring discriminatory intent from online feedback).

316. See Sullivan, *supra* note 117, at 1467–69 (discussing the relationship between cognitive bias and antidiscrimination law); Taylor, *supra* note 288, at 245–56 (examining the problem of implicit bias in customer reviews).

317. See discussion *supra* Part II.A (discussing Title VII's proof requirements).

318. See Matthew U. Scherer, Allan G. King & Marko N. Mrkonich, *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms*, 71 S.C. L. REV. 449, 497–98 (2019) (asserting that Title VII's statutory text lacks any reference to a specific intent requirement); see also Oppenheimer, *supra* note 226, at 916–17 (assessing the normative differences between assessing liability based on conscious and subconscious discrimination).

319. See Barocas & Selbst, *supra* note 11, at 698 (evaluating the requirement that plaintiffs provide evidence of "conscious intent" to successfully assert disparate treatment claims); Kim, *supra* note 31, at 190 (discussing the scholarly disagreement over the definition of "discrimination"); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 1000 (2005) (examining the limits of disparate treatment law).

customers “knowingly” or “consciously” assigned them discriminatory ratings, algorithms can help identify patterns of purposeful decisionmaking in online reviews.

Subjective review processes can give rise to both conscious and unconscious forms of discrimination.³²⁰ Take, for example, the numerous field studies that show statistically significant patterns of discrimination against individuals with racially distinctive Black names.³²¹ Although some employers that refuse to hire these applicants act on unacknowledged biases, other employers decline to interview candidates precisely because of their racially distinctive names.³²² The same dynamic holds true in studies showing that female service workers receive lower performance scores than men.³²³ Some of these customers harbor unexamined sexist instincts, while others intentionally act on discriminatory impulses. For example, if a female Uber driver has to choose between tolerating a sexually harassing customer or receiving a one-star rating if she complains, the choice she faces has nothing to do with “implicit bias,” but instead with the customer’s provable discriminatory intent.³²⁴

Like ratings and algorithms, humans do not outwardly reveal the reasons behind their decisions. Indeed, long before the days of online feedback, courts in Title VII cases developed tools for identifying the real reasons behind a defendant’s decision.³²⁵ In traditional, offline settings, humans lie about their intent when faced with accusations of discrimination.³²⁶ Given this known propensity of defendants to dissemble, courts have frequently inferred discriminatory intent from an employer’s differential treatment of comparable workers.³²⁷ In standard

320. See Sullivan, *supra* note 117, at 1474–75 (considering the antidiscrimination implications of “subconscious bias”).

321. See discussion *supra* Part I.B. (discussing field experiments that test for bias in customer behavior).

322. See Sullivan, *supra* note 117, at 1468 (considering examples in which decisionmakers knowingly act upon their discriminatory preferences).

323. See discussion *supra* Part I.B. (examining instances of customer discrimination against female service workers).

324. See Taylor, *supra* note 288, at 252 (discussing sex discrimination allegations that female drivers in the United Kingdom asserted against Uber).

325. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169 (1995) (examining the role that unconscious bias plays in antidiscrimination regulation); see also Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 797–98 (2011) (discussing the challenge of highlighting implicit biases); Zatz, *supra* note 156 (distinguishing between provable instances of discriminatory intent and the problem of implicit bias).

326. See KLEINBERG ET AL., *supra* note 32, at 113 (considering the challenge of identifying a decisionmaker’s motives in discrimination cases).

327. See Sullivan, *supra* note 29, at 405 (outlining different modes of proof under Title VII).

disparate treatment cases, for instance, courts frequently ask whether the employer would have treated the plaintiff differently if she were a different sex or race.³²⁸ To help prove this point, plaintiffs often rely on comparator evidence.³²⁹ For example, a female plaintiff who alleges sex discrimination might offer evidence that her employer gave raises only to less-qualified male coworkers, but not to her.

In contrast to online reviews, though, which involve frequent transactions and numerous opportunities for customers to provide feedback, offline workplaces do not always produce a sufficient number of interactions to reliably compare a firm's differential treatment of similar coworkers.³³⁰ Consider, for example, a nonwhite employee who works at an office and asserts that his boss failed to promote him because of his race. Such a plaintiff might try to offer evidence that the boss had a history of promoting only white candidates.³³¹ But what if the boss had no promotion history or the boss previously promoted only one other worker? In such a case, the limited number of interactions between the boss and his subordinates would significantly lower the probative value of comparator data.³³²

In contrast to offline settings, in which supervisors may issue only a few promotions or performance reviews per year, online systems now enable customers to constantly rate workers. For example, a single customer of Uber or DoorDash may rate dozens of drivers annually.³³³ Given the frequency with which customers provide feedback, companies could program their algorithms to flag certain accounts that consistently reserve low ratings for workers of protected groups. And this ability to meaningfully scrutinize a customer's review behavior is not limited to the platform economy. Multiple retail and service firms use the same experience-management companies to gather and disseminate customer ratings. For example, the experience-management firm Medallia gathers ratings

328. See Oppenheimer, *supra* note 226, at 945 (discussing the common use of comparator evidence in disparate treatment litigation).

329. See Sandra F. Sperino, *Co-Worker Evidence in Court*, 65 ST. LOUIS U. L.J. 1, 8 (2020) (discussing the prevalence of comparator evidence in Title VII litigation).

330. See Goldberg, *supra* note 325, at 751–53 (critiquing some courts for requiring plaintiffs to produce comparator evidence).

331. See, e.g., *Burks v. Wisconsin Dep't of Transp.*, 464 F.3d 744, 751 (7th Cir. 2006) (noting that factors relevant to a comparator analysis include “whether the employees reported to the same supervisor, whether they were subject to the same standards and whether they had comparable education, experience and qualifications”).

332. See generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193 (2009) (examining the increasing importance of comparator evidence in antidiscrimination cases).

333. See generally Flake, *supra* note 12, at 2176 (describing how some firms bombard customers with review requests).

for Apple, Old Navy, Staples, and Sephora.³³⁴ Similarly, Medallia’s competitor, SMG, collects customer feedback for companies such as Marshalls, Dick’s Sporting Goods, and HomeGoods.³³⁵ These ratings are frequently provided through point-of-sale receipts or other customer-identifying methods, thereby giving firms the theoretical ability to analyze a customer’s rating pattern across brands.³³⁶ As the trail of data from each transaction grows, so too do the chances that firms can analyze that data for evidence of discrimination.³³⁷

As with any Title VII case, plaintiffs must prove that the likelihood of an innocent explanation decreases as certain reviewers disproportionately assign negative feedback to members of protected groups. In the typical Title VII case, plaintiffs offer no direct proof of discrimination, but rather present various pieces of evidence that stand as proxies for discrimination.³³⁸ In other words, courts look for an “impression of discrimination,” based on the differential treatment of workers and the lack of a rational explanation for that differential.³³⁹ Like any Title VII case that relies on inferential evidence, determinations about whether customers acted with discriminatory intent will never be definitive. Yet this search for bias within online ratings—despite its crudeness—fits squarely within Title VII’s existing modes of proof.

334. *Old Navy Customer Experience Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey-medallia-com-oldnavy-feedback> [<https://perma.cc/2LGU-9LHB>]; *Sephora USA Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey-medallia-com-sephora-usa> [<https://perma.cc/4PSD-8XA2>]; *Staples Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/survey3-medallia-com-staplescares> [<https://perma.cc/4BGM-EDSQ>]; E-mail from Apple Inc. to Keith Cunningham-Parmeter, Professor of L., Willamette U. (Apr. 14, 2022, 09:36 PST) (on file with author) (containing Medallia survey that solicited customer feedback on the performance of an Apple Store employee).

335. *Dick’s Sporting Goods Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-dickssportinggoods-com-feedback> [<https://perma.cc/W8ZV-EJ8M>]; *HomeGoods Customer Satisfaction Survey*, CUSTOMERSURVEY.COM, <https://www.customer-survey.com/www-homegoodsfeedback-com> [<https://perma.cc/69M7-LNAY>].

336. See Bartlett & Gulati, *supra* note 13, at 253–54 (examining methods for reducing bias in customer reviews); YOUNG ENTREPRENEUR COUNCIL, *supra* note 83 (outlining various digital methods for collecting customer feedback).

337. See Leong, *supra* note 118, at 723 (explaining how researchers can infer bias from online customer feedback).

338. Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1395–96 (2014) (asserting that most Title VII plaintiffs offer indirect evidence to prove that defendants acted with discriminatory intent).

339. See *id.* at 1382–83 (discussing the difficulty with determining a decisionmaker’s motives in Title VII cases).

When gathered in sufficient quantities, certain patterns of behavior can illuminate a decisionmaker's motives—a practice of inferring intent that is common when allegations of discrimination occur in offline settings.³⁴⁰ The sheer volume of information generated by online feedback, though, increases the reliability of this inferential process.³⁴¹ At the end of the day, proving discriminatory intent requires both identifying a gap in outcomes and then attributing that gap to a particular cause.³⁴² But unlike traditional offline settings that may involve only a handful of decisions, the process of repeatedly rating workers can allow factfinders to identify quantifiable gaps in reviewing behaviors more easily. In fact, the large datasets generated by online ratings can often produce more reliable evidence of biased behavior, as compared to traditional Title VII cases.³⁴³

C. Fairness to Firms and Advancing Antidiscrimination Norms

At first glance, a rule that holds firms strictly responsible for the biased decisions of action managers might seem unfair to companies that have no direct control over the individual ratings that customers assign.³⁴⁴ Likewise, attaching Title VII liability to firms that act on the advice of advisory clients might seem inequitable, given that negative reviews appear neutral on their face. But these objections minimize the role that companies play in designing and acting upon review systems that facilitate customer bias.

Society expects firms that enjoy economic benefits from their public activities to assume responsibility for the predictable costs of those activities, even when companies do not directly engage in discriminatory conduct.³⁴⁵ Applied to online ratings, as the entity that benefits from the efficiencies of algorithmic management, a business ought to pay for discriminatory outcomes produced

340. See Sullivan, *supra* note 117, at 1451 (examining methods for proving discriminatory intent).

341. See Zatz, *supra* note 156 (acknowledging “ample opportunities to analyze, and adjust for, various forms of bias in drivers’ ratings, as well as to identify and discount customers whose pattern of ratings suggest[s] bias”).

342. See KLEINBERG ET AL., *supra* note 32, at 118 (discussing the challenges of proving discriminatory intent).

343. See KLEINBERG ET AL., *supra* note 32, at 115 (arguing that properly structured algorithms can provide a counterweight to human discrimination).

344. See Noa Ben-Asher, *How Is Sex Harassment Discriminatory?*, 94 NOTRE DAME L. REV. ONLINE 25, 27 (2018) (explaining how a rule of automatic liability for harassment claims can apply to “perfectly vigilant” employers).

345. See Krieger, *supra* note 325, at 196–97 (evaluating the rationales for vicarious employer liability).

by systems that it created and implemented.³⁴⁶ When firms generate discrimination-related costs by offloading management responsibilities to customers, firms should bear the costs of this purposeful choice.

By requiring firms to pay for adverse job actions that arise from discriminatory customer reviews, the liability rules outlined here would advance Title VII's twin goals of compensation and deterrence.³⁴⁷ Consistent with Title VII's compensation objective, requiring employers to pay for the discriminatory conduct of action managers would increase the likelihood that victims would receive payment for antidiscrimination violations. Likewise, holding employers legally accountable when they uncritically act upon the biased wishes of advisory clients would advance Title VII's make-whole objective.³⁴⁸

In addition to compensating victims of discrimination, a liability scheme that encourages employers to monitor customer reviews for bias would advance Title VII's deterrence goal.³⁴⁹ Sending clear signals to companies that they must pay for predefined harms provides those firms with incentives to prevent the enumerated harms.³⁵⁰ As noted above, businesses can take several tangible steps to reduce the chances that biased reviews will lead to adverse job actions—such as anonymizing user interactions, auditing ratings, cross-validating poor reviews, and ignoring feedback from potentially biased customers. In light of these widely available tools, if courts compelled firms to pay for the damages caused by discriminatory feedback, rational firms would attempt to reduce their legal exposure to these

346. See Chamallas, *supra* note 19, at 186 (discussing vicarious liability and risk creation); Cunningham-Parmeter, *supra* note 160, at 210–11 (arguing that employers should pay for the costs of coworker harassment).

347. See Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 85–86 (1992) (examining the relationship between Title VII's objectives and the concept of vicarious liability); Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 735–36 (2000) (discussing Title VII's compensatory and deterrent purposes).

348. See Cunningham-Parmeter, *supra* note 160, at 163–64 (explaining why expanding the scope of harassment liability would advance Title VII's goals); Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for Faragher and Ellerth*, 36 SAN DIEGO L. REV. 41, 58–59 (1999) (examining Title VII's primary objectives).

349. See Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 200 (2004) (discussing Title VII's deterrence objectives in the context of sexual harassment).

350. See Verkerke, *supra* note 22, at 308 (examining how different liability regimes can advance deterrence goals).

claims by embracing effective strategies for combatting discrimination in their review systems.³⁵¹

Although the liability rules outlined here might seem like novel legal interventions, courts have long sought to fulfill Title VII's deterrence and make-whole objectives by holding firms accountable for biased decisionmaking.³⁵² Consistent with these goals, firms should not enjoy Title VII immunity simply by digitally removing themselves from acts of discrimination that they help facilitate.³⁵³

CONCLUSION

Firms today make rhetorical commitments to antidiscrimination values yet do very little to genuinely combat discrimination in their online review systems. Expressing support for anti-racist values, many companies fail to take meaningful steps to prevent racist feedback from harming workers. In contrast to the status quo, a liability regime that incentivizes bona fide monitoring of online reviews would encourage firms to do more than cosmetically comply with antidiscrimination norms.

If customers retain the power to push workers over algorithmic cliffs, then firms have delegated their firing authority to customers as action managers. Likewise, employers that uncritically embrace the biased feedback of advisory clients play a culpable role in discriminatory outcomes. No longer merely the clients of companies, customers now actively supervise workers and decide their fates. In light of this shift, antidiscrimination law should recognize the ascendance of managerial customers and hold firms accountable for discriminatory customer reviews.

351. See Cunningham-Parmeter, *supra* note 160, at 212–13 (explaining how expanding the scope of harassment liability would encourage employers to do more to prevent harassment); Sykes, *supra* note 160, at 569 (analyzing employers' incentives for discovering harassment).

352. See Fisk & Chemerinsky, *supra* note 174, at 786–89 (acknowledging and critiquing the Supreme Court's attempts to advance Title VII's compensation and deterrence objectives).

353. See Taylor, *supra* 288, at 253 (explaining how bias in online review systems undermines society's interest in combatting antidiscrimination violations).