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## Article

# New Economy, Old Biases

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### INTRODUCTION

Alan David Freeman's seminal article, "*Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*,"<sup>1</sup> provided a pathbreaking account of Supreme Court jurisprudence. The article laid bare a striking contradiction. The law promised racial equality, and indeed communicated that we had achieved such equality. Yet the actual circumstances in which non-white people lived, worked, and attended school were in no way equal to the circumstances enjoyed by white people. In short, the law guaranteed equality while simultaneously rationalizing the ongoing existence of grievous inequality.

According to Professor Freeman's penetrating analysis, the law accomplished this rationalization in two ways. First, it promised formal equality. Second, it ignored structural inequality and disparities not obviously traceable to individual bad actors. As a result, the law provided a weak remedy for discrimination. Sometimes it provided no remedy at all.

This Symposium Article will point out a related feature of antidiscrimination law that restricts equality despite the Court's superficial dedication to equality. In keeping with Professor Freeman's work, my task is mostly descriptive, with a gesture at how we might improve upon the status quo. I first

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1. Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

recount antidiscrimination law's inattention to the private—and, at times, its explicit prioritization of a private “right” to discriminate over antidiscrimination values such as equality and dignity.

The consequences of private discrimination are perhaps felt with most strength in the marketplace. Here, Congress has, in fact, provided a number of statutory mechanisms that could be used to combat private discrimination.<sup>2</sup> Yet the Court has largely refused to acknowledge and remedy private discrimination that suppresses racial minorities' participation in the marketplace. This inattention has extended conditions of economic inequality and the problems that attend them.

On that note, I turn to a pressing issue of private discrimination today. Many have heralded the so-called “sharing economy,” which includes online or app-driven businesses such as Uber, Lyft, Airbnb, TaskRabbit, and Postmates, as a means to reduce discrimination.<sup>3</sup> After all, some argue, it is difficult for a business to discriminate against someone on the basis of race when the parties are in different locations rather than face to face. But as I will show, certain features specific to the sharing economy actually *increase* the potential racial discrimination, both in a one-off encounter and over time. After enumerating the social science research supporting the existence and persistence of discrimination in the sharing economy, I briefly consider how various legal mechanisms might be reinterpreted to provide constructive solutions.

## I. THE FAILINGS OF ANTIDISCRIMINATION LAW

“[A]s surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political

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2. See *infra* Part II (examining federal statutes such as 42 U.S.C. § 1981 (contracts); 42 U.S.C. § 1982 (housing); and several Titles of the Civil Rights Act of 1964, including Title II (public accommodations), Title VI (funding), and Title VII (employment)).

3. This list is fluid and evolving. Businesses come and go quickly in the sharing economy. One such business, Homejoy, received a great deal of media attention before abruptly going out of business. See Ellen Huet, *What Really Killed Homejoy? It Couldn't Hold on to Its Customers*, FORBES (July 23, 2015), <http://www.forbes.com/sites/ellenhuet/2015/07/23/what-really-killed-homejoy-it-couldnt-hold-onto-its-customers>.

power, without any violation of antidiscrimination law.”<sup>4</sup> So wrote Alan David Freeman in 1978.

Since the publication of his seminal article, “*Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*,” unfortunately too little has changed. When Professor Freeman wrote that “black children today have neither an affirmative right to receive an integrated education nor a right to equality of resources for their schools,”<sup>5</sup> he could have been talking about the Supreme Court’s decision in *Seattle School District No. 1*.<sup>6</sup> When he explained that people can “evade responsibility for ostensibly discriminatory conduct by showing that the action was taken for a good reason, or for no reason at all,”<sup>7</sup> he could have been speaking about the discourse of police blamelessness for the deaths of black men and women that the Black Lives Matter movement<sup>8</sup> today struggles to address. And when he lamented the “political powerlessness”<sup>9</sup> of black people, he could have been talking about a Fourth Amendment so emaciated that it now allows police officers to pull over suspects based on race without committing an “unreasonable” search or seizure.<sup>10</sup>

In short, Professor Freeman provided a pathbreaking account of Supreme Court doctrine that—sadly—remains apt in many ways today. The article showed that, by ignoring structural inequality and disparities not obviously traceable to individual bad actors, the law provides a weak remedy for discrimination. And the Court is not alone in its refusal to acknowledge the lived realities of racial inequality. As many scholars have noted, the cheerful narrative of success in achiev-

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4. Freeman, *supra* note 1, at 1050.

5. *Id.* at 1068.

6. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (invalidating two public school student apportionment plans that utilized race as a factor).

7. Freeman, *supra* note 1, at 1055 (footnote omitted).

8. See BLACK LIVES MATTER, <http://www.blacklivesmatter.com> (last visited Jan. 18, 2016) (providing news related to Black Lives Matter, a chapter-based national organization dedicated to combatting anti-black racism).

9. Freeman, *supra* note 1, at 1080.

10. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (acknowledging that “the Constitution prohibits selective enforcement of the law based on considerations such as race,” but nevertheless stating that “[s]ubjective intentions [of police officers] play no role in ordinary, probable-cause Fourth Amendment analysis”).

ing formal equality presents a stark contrast to the entrenched racial inequality that remains to this day.<sup>11</sup>

## II. PRIVATE FICTIONS

Professor Freeman's critique of the structural dimension of racial subordination extends readily to private discrimination. He says that formal equality will not produce equality on the ground. I agree, and say that, moreover, governmental efforts to produce equality on the ground will fall short unless they strive to reach the private sector and do so effectively. Creating lived equality requires the participation not only of the government, but also of the individuals it governs.

Other critical legal theorists have observed that the distinction between public and private is in many ways illusory, or at least much less distinct than some would have us believe.<sup>12</sup> But even if the distinction between public and private were not intractably blurry, the effect of private discrimination shows that we cannot have a society that is equal along racial lines if the law is inattentive to private actors.

The Supreme Court's record is decidedly mixed when it comes to regulating private behavior as a precursor to creating conditions of equality. In *The Civil Rights Cases*,<sup>13</sup> the Court held that in the Civil Rights Act of 1875 Congress exceeded its power under the Fourteenth Amendment when it stated that "[a]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the [public] accommodations . . . subject only to the conditions . . . applicable alike to citizens of every race and color, regardless of any previous condition of servitude."<sup>14</sup> But it later held, in *Heart of Atlanta Motel v. United States*<sup>15</sup> and *Katzenbaugh v. McClung*,<sup>16</sup>

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11. See, e.g., Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?*, 100 MINN. L. REV. 1, 45 (2015) (noting that, while "formal equality" is achieved through race antidiscrimination laws, "discrimination and inequality persist").

12. See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351-53 (1982); Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6, 7 (1988).

13. 109 U.S. 3 (1883).

14. *Id.* at 9 (quoting the Civil Rights Act of 1875, 18 Stat. 335 (1875), *invalidated by* *The Civil Rights Cases*, 109 U.S. at 3). For a discussion of the Court's decision, see RICHARD C. CORTNER, *CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 2-4* (2001).

15. 379 U.S. 241 (1964).

16. 379 U.S. 294 (1964).

that the Commerce Clause permitted Congress to regulate race discrimination by private actors,<sup>17</sup> and three concurrences in the cases explored the possibility that the Fourteenth Amendment did as well.<sup>18</sup> In short, the Court has at times understood the importance of reaching private behavior as a precondition to equality and has at other times has looked the other way.

Congressional history tells a similar story. As early as the Civil Rights Act of 1875, Congress attempted to reach private conduct, although as noted above for many decades that effort was limited by the Supreme Court. With the Reconstruction-era civil rights statutes, Congress provided a remedy for discrimination in contracts on the basis of race as well as for race-based discrimination in housing.<sup>19</sup> Several portions of the Civil Rights Act of 1964 also reach and prohibit discrimination on the basis of race by private actors. Title II forbids discrimination in places of “public accommodation.”<sup>20</sup> Title VI prohibits discrimination by entities that accept federal funds.<sup>21</sup> And Title VII outlaws discrimination in the workplace.<sup>22</sup>

One noteworthy feature of such laws is that they do not all incorporate the intent requirement that the Supreme Court read into the Equal Protection Clause in *Washington v. Davis*.<sup>23</sup> For some laws, courts have read in a similar requirement—for example, “the vast majority of courts” has held that 42 U.S.C. § 1981 requires a showing of intentional discrimination.<sup>24</sup> But for those statutes that do not, such as Title VII,<sup>25</sup> the party as-

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17. See *Heart of Atlanta Motel*, 379 U.S. at 262; *McClung*, 379 U.S. at 304–05.

18. See *Heart of Atlanta Motel*, 379 U.S. at 278–79 (Black, J., concurring); *id.* at 279–83 (Douglas, J., concurring); *id.* at 292–93 (Goldberg, J., concurring); see also CORTNER, *supra* note 14, at 179.

19. See 42 U.S.C. § 1981 (2012) (contracts); 42 U.S.C. § 1982 (2012) (housing). In my view both statutes are highly underutilized by plaintiff’s attorneys, who could press upon the boundaries of conduct prohibited by the statutes.

20. 42 U.S.C. § 2000a (2012).

21. See 42 U.S.C. § 2000d–2000d-7.

22. See 42 U.S.C. § 2000e.

23. 426 U.S. 229, 239–40 (1976). *Washington v. Davis* involved the equal protection “component” of the Fifth Amendment. Its holding was reaffirmed in the context of a Fourteenth Amendment equal protection claim in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–66 (1977).

24. Glenn B. Manishin, Note, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*, 80 COLUM. L. REV. 137, 138 (1980). For a discussion of the path that courts have taken, see *id.* at 137, 138–40, 138 n.11, 139 nn.12–14.

25. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (holding

serting racial discrimination need not show the existence of a bad actor—a perspective that Professor Freeman lamented in his work<sup>26</sup>—and instead must only show that the discrimination in fact occurred.<sup>27</sup> On a superficial level, this is certainly an improvement upon the statutes for which courts have required a showing of discriminatory intent, although so many other factors lead to tepid enforcement that the consequences on the ground for the private sector have not been as robust as one might otherwise hope.

Despite these efforts at implementing substantive equality within the private sector as well as the public, and the hopes that many advocates and scholars placed upon the statutes designed to reach the private sector,<sup>28</sup> and even the views expressed by some that the laws have in fact instantiated actual on-the-ground equality,<sup>29</sup> the law has fallen short in many ways. Samuel Bagenstos notes that a zealous concern for individual liberty has limited the effect of public accommodations statutes such as Title II.<sup>30</sup> Anne-Marie Harris describes how despite 42 U.S.C. § 1981's explicit protection of minority shoppers' "right to contract on the same terms as white shoppers,"<sup>31</sup>

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that Title VII did not require a showing of intentional discrimination). *Washington v. Davis* left the *Griggs* rule undisturbed. See *Washington*, 426 U.S. at 239.

26. See Freeman, *supra* note 1, at 1052–57.

27. There are, of course, differences among individual statutes. Moreover, we should remain mindful that each state also has various civil rights statutes in addition to the federal regime; these, too, sometimes hinge on particular mental states.

28. See, e.g., Theodore Eisenberg & Stewart Schwab, Comment, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 603–04 (1988).

29. See Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996) (asserting that there is a "settled social consensus" that public accommodations cannot exclude patrons on the basis of race); see also Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 156, 159 (Bernard Grofman ed., 2000) ("Although Title II was probably the most talked about section of the Civil Rights Act, the section about which emotions ran highest, the section over which the most blood had been spilled, it quickly faded in significance.").

30. See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1207 (2014) ("Since the Reconstruction era, continuing through the civil rights era to today, public accommodations laws have triggered legal controversy over the extent to which antidiscrimination principles should penetrate into spaces that had at one time been understood as 'private' or 'social.'").

31. Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L. J. 1, 47 (2003).

courts have failed to interpret the statute to prohibit even clear cut cases of consumer racial profiling,<sup>32</sup> while Jeremy Bayless and Sophie Wang consider how the same issue inhibits enforcement of Title II's prohibition on discrimination in public accommodations.<sup>33</sup> Scholars have provided many other such examples.<sup>34</sup> So even though we have statutes on the books that reach private racial discrimination, courts interpret those statutes parsimoniously and private actors accordingly face no consequences for behavior that in fact results in discrimination and, unsurprisingly, fail to alter their behavior.

The dissonance Professor Freeman points out between the law's claim of equality and the actual felt effects of discrimination exists with equal force in the private sector. Section 1982 forbids housing discrimination, yet the foreclosure crisis of 2010 disproportionately decimated poor black communities,<sup>35</sup> and 70% of black people in the city of Chicago still live in nearly all-black neighborhoods—a number that dropped only nine percentage points between 1990 and 2010.<sup>36</sup> Title II forbids discrimination by places of “public accommodation,” defined broadly as “any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility . . . any gasoline station . . . any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment” and other establishments that affect interstate

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32. See *id.* at 55–56 (“Section 1981 currently protects consumers when merchants deny them access to their premises. Plaintiffs whose allegations fall short of complete denial of access, however, are usually unable to obtain compensation under the statute.”).

33. See Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 288 (2011) (explaining the statutory protections offered to protect minorities in retail stores and noting that Title II of the Civil Rights Act of 1964 provides no protection to shoppers in retail establishments).

34. See, e.g., Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1214–16 (1997) (discussing the persistence of discrimination in public accommodations); Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 199 (2005) (exploring judicial interpretation of 42 U.S.C. § 1981 in cases involving discrimination in the context of consumer retail contracts).

35. See Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 630 (2010).

36. Dan Keating, *Why Whites Don't Understand Black Segregation*, WASH. POST (Nov. 21, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/11/21/why-whites-dont-understand-black-segregation>.

commerce.<sup>37</sup> Yet despite the sweeping language of Title II, many people of color still struggle to hail taxis and face hostility in restaurants.<sup>38</sup> Title VII prohibits discrimination on the basis of race, yet workplace inequality remains: courts remain resistant to claims of discrimination on the basis of functional proxies for racial identity such as attire, accent, and hairstyle.<sup>39</sup> The list could go on.

In light of this duality—facial equality and functional inequality—it is tempting to hope that non-legal mechanisms will provide a solution. Some people have hung their hopes on the sharing economy.

### III. THE NEW PRIVATE DISCRIMINATION

Much has been written over the past few years about the “sharing economy.” While there is no single authoritative definition of that economy, a definition cited with some frequency is that the sharing economy is a “socio-economic ecosystem” built around the shared creation, production, distribution, trade, and consumption of goods and services, that offers new ways of filling human needs as basic as housing and transportation.<sup>40</sup> The success of businesses such as Uber and Lyft, which provide car services, or Airbnb, which offers housing rentals, shows how the sharing economy can make our lives easier and more efficient. One estimate predicts that the sharing economy will grow from \$15 billion annual global revenue in 2013 to \$335 billion in 2025.<sup>41</sup>

Some people have hailed the sharing economy as a cure for race discrimination in the marketplace<sup>42</sup>—and in some instanc-

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37. 42 U.S.C. § 2000a(a)–(c) (2012).

38. See Dan Harris & Gitika Ahuja, *Race for a Cab: When Hailing a Ride Isn't So Black and White*, ABC NEWS (Apr. 1, 2009), <http://www.abcnews.go.com/GMA/race-cab-hailing-ride-black-white/story?id=7223511>.

39. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1297–98 (2000); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1145–46 (2004).

40. Benita Matofska, *What Is the Sharing Economy?*, PEOPLE WHO SHARE, <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/> (last visited Mar. 21, 2016).

41. See John Hawksorth & Robert Vaughan, *The Sharing Economy—Sizing the Revenue Opportunity*, PWC, <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html> (last visited Feb. 11, 2016).

42. See Latoya Peterson, *Cab Drivers, Uber, and the Costs of Racism*, RACIALICIOUS (Nov. 28, 2012), <http://www.racialicious.com/2012/11/28/cab>

es it is. Latoya Peterson, noting longstanding discrimination against black people in transportation, describes an experience with Uber:

The price made me gag, but the rest of the experience was flawless: I knew exactly when my car would arrive, I received a text when they reached my location, I gave them a location without quibbling, and rode there in peace.<sup>43</sup>

The idea is that the Internet—by filtering out racial signifiers—will eliminate the possibility of discrimination arising from overt or unconscious racism.<sup>44</sup> An Uber driver who accepts a request to pick up a black person is bound to do so, while a taxi driver can simply drive past that person on the street. An Airbnb landlord who rents out her property to a black person over the Internet has obligated herself to complete the transaction, while a landlord who first meets a prospective tenant in person may yet engage in discrimination.

In many situations, sharing economy mechanisms may well improve upon their traditional analogues. But the mere existence of the sharing economy is not a panacea for race discrimination. Rather, as we applaud the sharing economy's marketplace innovations, we should also work to ensure that different yet equally problematic structures do not replicate and perpetuate age-old discrimination that continues to plague existing economic relationships.

Existing research raises real concerns as to whether sharing economy businesses ameliorate discrimination, or whether they actually worsen it.<sup>45</sup> For example, some research has found that Airbnb—a company that allows property owners to make housing available for vacation or other short-term rentals—has been associated with facilitating both implicit and intentional unregulated discrimination.<sup>46</sup> One study, for example, found

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-drivers-uber-and-the-costs-of-racism (stating that Uber “removes the racism factor when you need a ride”).

43. *Id.*

44. *See id.*

45. Nancy Leong & Aaron Belzer, *The New Public Accommodations*, 105 GEO. L.J. (forthcoming 2017) (on file with author).

46. *See* Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 3 (Harvard Bus. Sch., Working Paper No. 14-054, 2014), [http://www.hbs.edu/faculty/Publication%20Files/Airbnb\\_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf](http://www.hbs.edu/faculty/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf). Scholars have also noted the problem. *See, e.g.*, Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 121–22 (2015), [http://www.stanfordlawreview.org/sites/default/files/online/articles/67-Stan\\_L\\_Rev\\_Online\\_121\\_Todisco.pdf](http://www.stanfordlawreview.org/sites/default/files/online/articles/67-Stan_L_Rev_Online_121_Todisco.pdf) (noting that Airbnb provides hosts with information about prospective guests that “serves as a heuristic for race,”

that “non-black hosts are able to charge approximately 12% more than black hosts, holding location, rental characteristics, and quality constant.”<sup>47</sup> Uber and Lyft have also both faced accusations of discrimination on the basis of race,<sup>48</sup> as well as on the basis of a proxy for race, by refusing to visit neighborhoods populated predominantly by people of color.<sup>49</sup> How can this happen? Many sharing economy platforms offer opportunities for participants to create profiles that may reveal their race through a profile picture or a racially-coded name.<sup>50</sup> As Michael Todisco explains, “[b]efore accepting or denying any request, Airbnb hosts are furnished with the guest’s first name, often a picture, and other personal information.”<sup>51</sup> Thus, sharing economy businesses may not, in fact, filter out the effect of race.

In addition to these instances of one-off discrimination, sharing economy businesses also employ rating systems that risk expression of implicit bias and even magnify its effects. Rating systems therefore instantiate the same inequality long present in the old economy.<sup>52</sup>

An example will help to demonstrate the troubling effect of ratings on the normal course of business in much of the sharing economy. Consider Uber. Through a free, user-friendly smart phone app, Uber “not only stores data about its passengers, but also allows its drivers to rate passengers and makes the ratings

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which gives hosts “a nearly unfettered ability to decline potential guests” on the basis of race).

47. Edelman & Luca, *supra* note 46.

48. Xajaxsingerx, *Ridesharing and Redlining: Uber, Lyft, Race and Class*, DAILY KOS (May 27, 2014), <http://www.dailykos.com/story/2014/5/27/1302417/-Ridesharing-and-Redlining-Uber-Lyft-Race-and-Class>.

49. While not the focus of this brief Article, discrimination on the basis of categories other than race is also possible; both Uber and Lyft have faced lawsuits for failure to provide services to the blind, disabled, and elderly. See Jen Wiecezner, *Why the Disabled Are Suing Uber and Lyft*, FORTUNE (May 22, 2015), <http://fortune.com/2015/05/22/uber-lyft-disabled>; Lucy Zemljic, *Ride-Sharing Firms Uber & Lyft Sued by 14 Connecticut Cab Companies*, (May 24, 2014), <http://www.lowestrates.com/news/ride-sharing-firms-uber-lyft-sued-14-connecticut-cab-companies>.

50. For a discussion of racially-coded names, see Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283.

51. Todisco, *supra* note 45, at 122.

52. Leong and Belzer, *supra* note 45; see also Noah Zatz, *Is Uber Wagging the Dog With Its Moonlighting Drivers?*, ONLABOR (Feb. 1, 2016), <http://onlabor.org/2016/02/01/is-uber-wagging-the-dog-with-its-moonlighting-drivers/>; Noah Zatz, *Uber: A Platform for Discrimination*, ONLABOR (Oct. 22, 2015), <http://onlabor.org/2015/10/22/uber-a-platform-for-discrimination/>.

available to other drivers.”<sup>53</sup> Yet this seemingly innocuous business model potentially facilitates discrimination in several ways.

Most obviously, drivers’ and passengers’ ratings of one another may be influenced by express or implicit racial bias. Such bias may affect their interactions during individual encounters.

But the insidious potential of the app is that it aggregates these ratings over many interactions. One possible result is that when a driver considers whether to pick up a passenger he may decide not to if she has a bad rating. Another possibility is that a passenger may notice a driver’s poor rating, cancel a request for service, and try again in a few moments in the hopes of getting picked up by someone else. If the driver and the passenger do end up in the same car, a marginal rating may prime one or both individuals to perceive one another in negative ways. For example, if a driver knows that a passenger has a relatively low rating, he may be more inclined to interpret innocuous behavior (declining to remove headphones, disinclination to engage in small talk) as unfriendly and to punish the passenger with a poor rating.

Throughout the interaction, the format of the app itself prompts and amplifies discrimination. Passengers upload photos when they sign up for the service<sup>54</sup>—although it is unclear exactly how the photos are used, Uber’s website makes clear that they might be provided to the driver. Moreover, the app provides the driver and passenger with one another’s names, which are often correlated with race.<sup>55</sup> Even absent the prime of a low rating, the prime of racially identifying information associated with the driver or passenger through the app may color the subsequent interaction.

The fact that drivers for Uber or Lyft may be using this rating information to decide whether or not to pick someone up is concerning at best.<sup>56</sup> And the lack of transparency creates a greater concern: although it is possible to call and learn your customer rating, the cause of the rating remains unclear.

True, some checks on such discrimination may “reduce racial profiling and destination bias”: Uber claims to require its

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53. Nancy Leong, *Uber, Privacy, and Discrimination*, RIGHTS BLOG (Apr. 20, 2014), <http://www.nancyleong.com/race-2/uber-privacy-discrimination>.

54. See *Update My Profile Photo*, UBER, <http://help.uber.com/h/15726fa5-152f-468c-a42c-ad63315b58ef> (last visited Feb. 11, 2016).

55. Barnes and Onwuachi-Willig, *supra*, note 50.

56. See *id.*

drivers to accept 90% of all requests, and Lyft drivers are unable to see the destination request until they have picked up the passenger.<sup>57</sup> But these tools are at best very crudely calibrated to the entrenched problem of race discrimination.

Nevertheless, one concern is that the way that sharing economy businesses use customer data can facilitate discrimination.<sup>58</sup> For example, how is someone supposed to know whether her Uber profile will be used by a driver to either intentionally or unconsciously discriminate against her, either in deciding whether to pick her up or deciding what rating to award her?<sup>59</sup> Because such information is hidden from the public, the common assertion that sharing economy businesses are less discriminatory is not actually subject to any sort of external verification.

Without more information and analysis on the ways these ratings are being used in everyday business, it is difficult to prove the exact effect of the rating systems. For that reason, “[t]hese kinds of private scoring systems are prone to abuse if companies don’t publicize them or make the ratings sufficiently transparent,” especially when one does not have easy access to one’s score or the ability to improve one’s score by learning from experience.<sup>60</sup> As Professor Tim Iglesias has explained: “If the primary intention of Airbnb, Uber, Lyft and other new companies is really to help people,” they should “incorporate as nonprofits and state their public purposes clearly so that they can be held accountable to them.”<sup>61</sup> While ratings often make potential customers’ decisions easier and establish a business’s reputation, as the rating system stands now, the systems of companies like Uber are susceptible to abuse.<sup>62</sup>

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57. Johana Bhuiyan, *Uber and Lyft Position Themselves as Relief from Discrimination*, BUZZFEED NEWS (Oct. 7, 2014), <http://www.buzzfeed.com/johanabhuiyan/app-based-car-services-may-reduce-discrimination-issues>.

58. See Leong, *supra* note 53.

59. See *id.*

60. G.S. Hans, *Are You a Two-Star Passenger? The Problem with Uber’s Hidden Customer Rating System*, CTR. FOR DEMOCRACY & TECH. (July 29, 2014), <https://cdt.org/blog/are-you-a-two-star-passenger-the-problem-with-ubers-hidden-customer-rating-system>.

61. Greg Harman, *The Sharing Economy Is Not As Open As You Might Think*, GUARDIAN (Nov. 12, 2014), <http://www.theguardian.com/sustainable-business/2014/nov/12/algorithms-race-discrimination-uber-lyft-airbnb-peer>.

62. See David Mandell, *Can the Sharing Economy End Discrimination?*, FAST COMPANY (Aug. 8, 2014), <http://www.fastcompany.com/3034112/the-future-of-work/can-the-sharing-economy-end-discrimination>.

If users demonstrated that such abuse took place, however, several existing civil rights statutes should apply to Uber's discrimination. Under 42 U.S.C. § 1981, the company should be found to have engaged in discrimination in making contracts. Uber is almost certainly a public accommodation,<sup>63</sup> and should thus be subject to the reach of Title II. And if passengers also discriminate against drivers with poorer ratings, Uber might well be liable under Title VII for constructing a rating system that facilitates such discrimination.

Whether these statutes will be applied in this manner to the sharing economy, however, is also up for debate. The problem is less with the existing laws and more with the way that courts apply them and the evidentiary hurdles that race discrimination plaintiffs must overcome before they are believed. I think that Professor Freeman would have predicted as much.

### CONCLUSION

What is to be done about discrimination in the age of the sharing economy? First and most importantly, we must heed Professor Freeman's words, which remain timely across the decades. We must beware of rationalization—of explaining away disparate effects on members of different racial groups—and of the false promise of facially neutral systems.

Professor Freeman is very hard on the existing law. So am I. But there are solutions if we are willing to embrace them. Perhaps most obviously, courts can interpret existing federal civil rights statutes more boldly, bringing regulation of the private sector better in line with true equality rather than its weaker formal cousin. There may also be a role for more robust enforcement of state civil rights statutes regulating the private sector. Many such statutes are written more expansively than their federal analogs, and state courts may be more willing to enforce those statutes aggressively. And with the new intricacy

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63. While the issue is not settled in the courts, several commentators have agreed that taxis are public accommodations, and Uber is closely analogous to a taxi service. *See, e.g.,* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 605–06, 606 n.12 (1999) (“Since . . . Congress passed the Civil Rights Act of 1964, it has been illegal for common carriers, including taxis to discriminate on the basis of race.”); Peter Siegelman, *Racial Discrimination in “Everyday” Commercial Transactions: What Do We Know, What Do We Need To Know, and How Can We Find Out?*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 70 (Michael Fix & Margery Austin Turner eds., 1998) (referring to “hailing a taxicab” as a “public accommodation”).

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cies of the sharing economy, legislatures at both the state and federal level should move proactively to address some of the potential problems I have described here. For example, as I describe in more detail elsewhere,<sup>64</sup> statutes could require collection and public disclosure of racial usage data by sharing economy businesses—not unlike the way the Equal Employment Opportunity Commission requires collection of such data by employers to ensure compliance with Title VII. Such mandatory disclosure would serve multiple functions: it would make clear when racial disparities exist; it would provide important evidence in the event of litigation under existing statutes; and, perhaps most importantly, it would provide sharing economy businesses with an incentive to correct racial disparities rather than face negative publicity in the wake of disclosures revealing such disparities.

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64. See Leong and Belzer, *supra* note 45.