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## Dignity Transacted: Emotional Labor and the Racialized Workplace

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## DIGNITY TRANSACTED: EMOTIONAL LABOR AND THE RACIALIZED WORKPLACE

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Lu-in Wang\*  
Zachary W. Brewster\*\*

### ABSTRACT

*In interactive customer service encounters, the dignity of the parties becomes the currency of a commercial transaction. Service firms that profit from customer satisfaction place great emphasis on emotional labor, the work that service providers do to make customers feel cared for and esteemed. But performing emotional labor can deny dignity to workers by highlighting their subservience and requiring them to suppress their own emotions in an effort to elevate the status and experiences of their customers. Paradoxically, the burden of performing emotional labor may also impose transactional costs on some customers by facilitating discrimination in service delivery. Drawing on the extant scholarship on emotional labor and ongoing research on full-service restaurants, we argue that the strain and indignities of performing emotional labor, often for precarious compensation, lead servers to adopt various coping strategies, including some that open the door to their delivery of inferior and inhospitable service. When these strains and indignities are coupled with culturally entrenched racial stereotypes and racialized discourse in the workplace, the result is that people of color—a legally protected category of customers—are systematically denied dignity and equality by being excluded from the benefits of welcoming and caring customer service. Discriminatory customer service often is so subtle and ambiguous that it escapes legal accountability. It nevertheless warrants our attention, because it contributes to the social and economic marginalization of people of color. Far from being a mundane or trivial concern, the dynamics described in this Article underscore the various ways in which particular groups come to be designated as suitable targets for a wide range of disregard and mistreatment. These dynamics also illuminate how structural conditions facilitate and promote economic discrimination, as well as the connections between workers' rights and civil rights.*

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## INTRODUCTION

The infamous 2018 “Starbucks incident,”<sup>1</sup> along with a spate of other highly publicized events in which people of color were questioned, harassed, and even arrested while engaging in mundane activities,<sup>2</sup> seemed to catch many Americans by surprise. These oc-

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1. On April 12, 2018, two Black men were arrested as they waited for a business associate at a Philadelphia Starbucks. A White employee called the police because the men had not ordered anything and had asked to use the restroom. See, e.g., Jelani Cobb, *Starbucks and the Issue of White Space*, THE NEW YORKER (June 4 & 11, 2018), <https://www.newyorker.com/magazine/2018/06/04/starbucks-and-the-issue-of-white-space>; Patricia Madej, *Philadelphia Starbucks Case: What We’ve Learned Since the Arrests*, THE INQUIRER (April 19 2018), <https://www.philly.com/philly/news/starbucks-philadelphia-arrests-black-controversy-boycott-timeline-20180419.html>).

2. See, e.g., Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police.*, N.Y. TIMES (April 25, 2018), <https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html>; Andrea Diaz & Amanda Watts, *Staff at a Bank in Ohio Called Police on a Black Man Trying to Cash His Paycheck*, CNN (Dec. 20, 2018), <https://www.cnn.com/2018/12/19/us/cleveland-man-alleges-racial-profiling-at-huntington-bank-trnd/index.html>; Dialynn Dwyer, *Read the Statement from Smith College on an Employee Calling the Police on a Black Student Eating Lunch in a Campus Building*, BOSTON (Aug. 2, 2018), <https://www.boston.com/news/local-news/2018/08/02/police-called-on-black-student-eating-lunch-at-smith-college>; Daniel Politi, *Portland Hotel Calls Cops on Black Guest Making a Phone Call in the Lobby*, SLATE (Dec. 26, 2018), <https://slate.com/news-and-politics/2018/12/portland-hotel-calls-cops-on-black-guest-making-a-phone-call-in-the-lobby.html>; Ashley Southall, *“Appalling” Video Shows the Police Yanking 1-Year-Old from His Mother’s Arms*, N.Y. TIMES (Dec. 9, 2018), <https://www.nytimes.com/2018/12/09/nyregion/nypd-jazmine->

currences should not have come as a surprise, however. As much as Americans might wish to believe that we have moved past the era of routine racism depicted in the recent, Oscar-winning movie *Green Book*,<sup>3</sup> episodes like the Starbucks incident are not isolated events involving a few bigoted bad apples. Rather, incidents such as these are the stuff of everyday life for many people of color, who regard as inevitable the occurrence of racially based acts of disrespect, both “small and large,” when they navigate “white spaces.”<sup>4</sup> Such spaces include places of public accommodation that are ostensibly open to and welcoming of all. These incidents also are symptomatic of broader service environments in which racialized discourse shapes the workplace culture and normalizes the delivery of racially discriminatory service. Ironically, the leeway to engage in racist behavior in customer service is facilitated by the discretion afforded service workers in fashioning their service delivery—discretion that is itself an outgrowth of a seemingly essential feature of customer service that is thought to enhance its value. That feature, “emotional labor,”<sup>5</sup> is the work that service providers do to make customers feel cared for and esteemed.<sup>6</sup>

Service firms focus on and prioritize customer satisfaction with interactive service. This emphasis is generally regarded as positive, and certainly as beneficial for customers. In many ways it is, but performing the work of customer service, including emotional la-

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headley-baby-video.html (reporting on arrest of Black woman who sat on the floor of a Brooklyn food stamp office because no chairs were available).

3. GREEN BOOK (Universal Pictures 2018). The movie depicts the “true friendship” between “Tony Lip ([played by Viggo] Mortensen), a bouncer from an Italian-American neighborhood in the Bronx,” and “Dr. Don Shirley ([played by Mahershala] Ali), a world-class Black pianist,” whom Lip is hired to drive on a concert tour from Manhattan to the Deep South. During their travels, “they must rely on ‘The Green Book’ to guide them to the few establishments that were then safe for African-Americans. Confronted with racism, danger, as well as unexpected humanity and humor—they are forced to set aside differences to survive and thrive on the journey of a lifetime.” See GREEN BOOK SYNOPSIS, (2019) <https://www.greenbookfilm.com/synopsis/>. *Green Book* received the 2019 Academy Award (“Oscar”) for Best Picture. See THE OFFICIAL ACADEMY AWARDS DATABASE (2020), <http://awardsdatabase.oscars.org/>.

The Green Book to which the movie title refers is THE NEGRO MOTORIST GREEN BOOK, an annual guide book first published in 1936 by Victor Hugo Green to help Black travelers find services and accommodations that would be open to them in the segregated United States. See Jacinda Townsend, *How the Green Book Helped African-American Tourists Navigate a Segregated Nation*, SMITHSONIAN MAGAZINE (April 2016), <https://www.smithsonianmag.com/smithsonian-institution/history-green-book-african-american-travelers-180958506/>. In 2014, Jan Miles began logging racial incidents and published the log as Jan Miles, THE POST-RACIAL NEGRO GREEN BOOK (2017). See Jan Miles, *Racism Isn’t Dead. Black Americans Still Need a “Green Book.”*, WASH. POST (Feb. 23, 2019), <https://www.washingtonpost.com/opinions/2019/02/23/racism-isnt-dead-black-americans-still-need-green-book/>.

4. Elijah Anderson, “*The White Space*,” 1 SOC. RACE & ETHNICITY 10, 15 (2015).

5. See ARLIE RUSSELL HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 6–7 (2012 ed.) (originating the term “emotional labor”).

6. See discussion *infra*, Part III.A.

bor, imposes costs on workers and, paradoxically, on some customers as well. For workers, firms' relentless focus on customer satisfaction has negative consequences for their work conditions by, among other things,<sup>7</sup> facilitating and even promoting workplace discrimination from both employers and customers.<sup>8</sup>

This Article discusses the somewhat surprising flipside: the negative implications of firms' emphasis on customer satisfaction for *customers*—again with respect to discrimination in the service environment. The Article will explain how emotional labor, which is meant to make customers feel welcomed and catered to, can create openings for and set up dynamics by which disfavored categories of customers—in particular, people of color—are not only excluded from the benefits of welcoming and caring customer service but also are designated as the expected and accepted targets for inferior customer service. Using the example of full-service restaurants, the Article will show how the strain of performing emotional labor, coupled with the prevalence of explicit racial stereotyping of customers, sets up a process through which discrimination in service delivery comes to feel justified, normal, and acceptable in the workplace. It will also discuss how the inherent ambiguity of emotional labor contributes to the incidence of subtle but common forms of discrimination in service delivery while simultaneously undermining any likelihood of legal accountability. These subtle yet pervasive incidents may go largely undetected, but they deserve attention because they undermine the dignity and sense of worth accorded people of color when they navigate (White) spaces of public accommodation. Furthermore, these encounters produce and reproduce the workplace conditions that lead to the more egregious episodes of disparate treatment that do capture attention and sometimes result in legal liability.

This Article focuses on racialized customer service in full-service restaurants for a number of reasons. First, when he was asked, “[w]hat’s the most important food-industry issue nobody is talking about?,” the late, celebrated chef Anthony Bourdain answered, “[r]acism.”<sup>9</sup> A growing body of social science literature underscores the pervasiveness of racial prejudice and discrimination in

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7. For example, the “culture of customer sovereignty” promotes customer bullying and abuse of service workers. See, e.g., Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 250, 268–70 (2016), and discussion *infra*, Part III.A.

8. See generally, e.g., Wang, *supra* note 7.

9. Eugene Scott, *Anthony Bourdain Used His Platform to Draw Attention to the Marginalized*, WASH. POST (June 8, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/08/anthony-bourdain-used-his-platform-to-draw-attention-to-the-marginalized/>.

the full-service restaurant industry<sup>10</sup> and lends credibility to Bourdain's assessment. Second, patronizing restaurants is a common experience and a regular part of life for most people.<sup>11</sup> Like shopping, it is a quintessentially American activity.<sup>12</sup> Because restaurants are too often a site for race-based service, the popularity of restaurant-going "increases customers' vulnerability to race-based mistreatment in this setting."<sup>13</sup> Third, full-service restaurants epitomize the importance of emotional labor in customer service—customers value it, restaurants profit from it, and servers provide it in anticipation of compensation.<sup>14</sup> In fact, much of the social science research on customer service and emotional labor has focused on restaurant servers. Last, an emerging body of research examines the dynamics by which the structure of restaurant work facilitates racialized customer service. This Article draws on these separate strands of empirical research to offer a new perspective on a longstanding and complex social problem. It also finds hope for change in insights from that research into how business and employment practices, along with the law, could more effectively address and reduce this form of economic discrimination.<sup>15</sup>

Part I reviews social science literature that documents and problematizes the racialized environments of restaurant workplaces and the insidious threat they pose to the dignity of consumers of color. Part II argues that the modern, subtle form of discrimination that these environments foster remains lawful in spite of the legal protections that Congress has enacted to vindicate the dignity interests of all persons by ensuring the right to full and equal enjoyment of the services of places of public accommodation. Part III describes the processes by which the demands of performing emotional labor impose costs on and undermine the dignity of interactive service workers themselves. It also highlights the ways in which the structural conditions and incentives of restaurant work—in particular, servers' reliance on customers' tips for compensation—exacerbate those burdens. Among servers' strategies for coping with these strains and indignities is to commiserate with one an-

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10. See *infra* Parts I and IV.

11. Zachary W. Brewster, Michael Lynn, & Shelytia Cocroft, *Consumer Racial Profiling in U.S. Restaurants: Exploring Subtle Forms of Service Discrimination Against Black Diners*, 29 SOC. F. 476, 478 n.6 (2014) (noting that "[d]uring an average month, over 90% of the adult population dines out at least once, and 43% report that restaurants are an essential part of their lifestyle") (citations omitted).

12. *Id.* at 477.

13. *Id.* at 478 n.6.

14. See discussion *infra* Parts III and IV. Hochschild includes restaurant servers ("waiters"), as well as bartenders, in her list of jobs that "involve a substantial amount of emotional labor." HOCHSCHILD, *supra* note 5, App. C, Table 4, at 245 and 250.

15. See discussion *infra* Part V.

other in the backstage about their workplace tribulations—especially their customers. Part IV examines the ways in which racist discourse in the restaurant workplace disseminates and magnifies racist stereotypes to define people of color as customers who can acceptably be mistreated through the withholding of authentic emotional labor. It argues that these cultural norms interact with servers' backstage coping strategies to systematically deprive customers of color of the warm and caring service that is a hallmark of the full and equal enjoyment of a place of public accommodation. Part V offers proposals for how advocates can use these lessons to educate judges and juries on the ways in which subtle discrimination deprives customers of color of their legally protected rights. That Part maintains, however, that the more effective avenue for meaningful change will come at the organizational level, through reforms in policies and practices that recognize and uphold the dignity of both customers and workers.

## I. DIGNITY DEPRECIATED

Allegations of racism continue to plague the United States restaurant industry. Stories detailing incidents of perceived anti-Black bias within full-service restaurants surface in the popular press with almost predictable regularity.<sup>16</sup> These anecdotes are buttressed by a small but growing empirical literature documenting prejudicial attitudes toward and discriminatory actions against Black Americans in their roles as both restaurant consumers<sup>17</sup> and employees.<sup>18</sup> This evidence suggests that the expression of anti-Black biases may be a pervasive feature of the full-service restaurant industry, reflecting a

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16. See, e.g., Doug Criss, *A Waitress Asked Some Black Teens to Prepay for Their Meal. A Fellow Diner Wasn't Having That* (Mar. 16, 2018), <https://www.cnn.com/2018/03/15/us/mainehop-race-trnd/index.html>; Willa Frej, *Waffle House Under Fire After Video Shows Black Customers Handcuffed in Bill Dispute*, HUFFINGTON POST (June 15, 2018), [https://www.huffingtonpost.com/entry/boycott-waffle-house-video-handcuff\\_us\\_5b238407e4b0d4fc01fd52a2](https://www.huffingtonpost.com/entry/boycott-waffle-house-video-handcuff_us_5b238407e4b0d4fc01fd52a2); Melissa Howell, *Customers Claim Racial Discrimination After Being Asked to Pay First Before Dining at DC Restaurant* (April 19, 2018), <http://www.fox5dc.com/news/local-news/customers-claim-racial-discrimination-after-being-asked-to-pay-first-before-dining-at-dc-restaurant>; Tanisia Kenney, *Missouri Restaurant Issues Apology, Returns Facility Fee to Black Patrons Who Were Escorted Out by Cops After Their Waitress Felt "Overwhelmed,"* ATLANTA BLACK STAR (Feb. 14, 2019), <https://atlantablackstar.com/2019/02/14/missouri-restaurant-issues-apology-returns-facility-fee-to-black-patrons-who-were-escorted-out-by-cops-after-their-waitress-felt-overwhelmed/>.

17. See, e.g., Zachary W. Brewster, Jonathan R. Brauer, & Michael Lynn, *Economic Motivations and Moral Controls Regulating Discrimination Against Black and Hispanic Diners*, 65 SOC. Q. 506 (2015).

18. See, e.g., Marc Bendick, Jr. et al., *Employment Discrimination in Upscale Restaurants Evidence from Matched Pair Testing*, 47 SOC. SCI. J. 802 (2010); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009).

“culture of white servers” shaped by racist “backstage” interactions among “front of the house” workers—servers and hostesses, who tend to be White.<sup>19</sup>

In a 2004 survey of 195 primarily White restaurant servers working across eighteen different full-service restaurants in Raleigh, North Carolina, a sizable number of respondents reported that it was not uncommon to observe their coworkers and managers using racialized language in their workplaces.<sup>20</sup> Specifically, almost two-thirds (63.4%) of the servers in this study reported at least sometimes observing their coworkers making racist comments, 25% reported observing their managers making such comments, and 70% reported observing the use of racially coded argot in their workplaces.<sup>21</sup> Further, over 75% of respondents admitted that they at least sometimes discussed the race of their customers with coworkers.<sup>22</sup> Given these findings, it is perhaps not surprising that servers in this study also reported observing their coworkers racially discriminating in their service delivery. In fact, two-thirds of the participants reported that customers in their restaurant sometimes received poor service because of their race, and over 50% confessed that they sometimes observed coworkers treating Black clientele poorly.<sup>23</sup>

Despite people’s tendency to go to great lengths to disavow even a suggestion that they treat people differently based on their race,<sup>24</sup> 40% of the servers in this study admitted that their own service sometimes varied according to their customer’s race. The researchers conservatively estimated that “roughly 2 meals out of every 50 meals served in the average sampled restaurant results in an incident of discriminatory service”—adding up to about “7,018 an-

19. Several qualitative studies have documented evidence of a “culture of white servers,” characterized, in part, by the normativity of anti-Black discourse and observed mistreatment of Black restaurant clientele in restaurant establishments. See, e.g., Danielle Dirks & Stephen K. Rice, *Dining While Black: Racial Rituals and the Black American Restaurant Experience*, in RACE AND ETHNICITY: ACROSS TIME, SPACE, AND DISCIPLINE 255 (Rodney D. Coates ed., 2004); Brianna Billingsley, *Racialized and Class Contexts: Shifting Audiences and Changes in Emotional Labor Among Restaurant Servers*, 86 SOC. INQUIRY 641 (2016); Christine Mallinson & Zachary W. Brewster, *Blacks and Bubbas: Stereotypes, Ideology, and Categorization Processes in Restaurant Servers’ Discourse*, 16 DISCOURSE & SOC. 787, 799 (2005). The racialized culture and backstage behavior of restaurant servers are discussed more fully *infra* Part IV.

20. See Zachary W. Brewster & Sarah N. Rusche, *Quantitative Evidence of the Continuing Significance of Race: Tableside Racism in Full-Service Restaurants*, 43 J. BLACK STUDIES 359 (2012).

21. *Id.* at 374. To avoid explicit reference to customers’ race, servers have been observed using a variety of code words to refer to Black clientele in the dining room (e.g., Canadians, cousins, moolies, blacktops, White people, Mondays, etc.). See, e.g., Dirks & Rice, *supra* note 19.

22. Brewster & Rusche, *supra* note 20, at 374.

23. *Id.*

24. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (4th ed. 2014).



nual incidents of discriminatory service delivery per sampled restaurant.”<sup>25</sup> A more recent study replicated servers’ admissions of racially profiling their customers. In that study, a survey of nearly 1000 servers from across the United States, almost 60% of respondents admitted that they do not always give their Black or Hispanic customers their best effort.<sup>26</sup> These results suggest that the explicit expression of racism and discriminatory delivery of customer service in the restaurant industry may be a national rather than a local phenomenon.

As recently reported events attest, race-based service delivery often takes blatant and undeniable forms. In most cases, however, discriminatory service is subtle and difficult to detect because of a divergence between servers’ “backstage” maneuvering and their “front stage” presentation, which will be explored below.<sup>27</sup> Sometimes servers simply try to avoid waiting on Black customers, an assignment that they may regard as “punishment” and exert great effort to escape, through demanding or pleading with hostesses not to give them those assignments or making deals to swap tables with other servers.<sup>28</sup> While some servers who end up being assigned to

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25. Brewster & Rusche, *supra* note 20, at 374.

26. Brewster, Brauer, & Lynn, *supra* note 17, at 524.

27. See discussion *infra* Part IV. Another factor that appears to undermine Black consumers’ ability to detect subtle and ambiguous forms of service discrimination is the racially homogeneous composition of dining parties. The authors of a recent study of Black and White customers’ satisfaction and their perceptions of the quality of restaurant service have explained, “Black consumers may be discriminated against in a host of subtle ways and yet, as a function of dining primarily or exclusively with same race friends and family, still perceive that the service they typically receive in restaurants is normal, acceptable, or even exceptional . . . . If Blacks are unable to directly juxtapose their dining experiences with the experiences of Whites, then they may not be cognizant of the relatively inferior service that they seem to receive (based on servers’ self-reported admissions) while dining away from home in full-service restaurants.” Zachary W. Brewster & Jonathan R. Brauer, *Different Service, Same Experience: Documenting the Subtlety of Modern Racial Discrimination in U.S. Restaurants*, 58 CORNELL HOSPITALITY Q. 190, 198 (2017); cf. Lawrence Houston III et al., *Who Cares if “Service with a Smile” Is Authentic? An Expectancy-Based Model of Customer Race and Differential Service Reactions*, 144 J. ORG. BEHAVIOR & HUMAN DECISION PROCESSES 85 (2018) (reporting results of studies finding differences in White and Black participants’ customer service experiences that, *inter alia*, “result in Blacks holding lower expectations for positive displays from service providers than Whites”). This interpretation was bolstered by the results of a post-hoc analysis that assessed the multiplicative effects of respondents’ race and having experience as a restaurant server on respondents’ reports of their recent and more typical dining experiences. While both Black and White respondents with serving experience were found to be more likely than those without such experiences to report being the recipient of inattentive, poor, and rude service, this difference was particularly pronounced among Black consumers. This finding thus suggests that Black consumers with serving experience may be knowledgeable of not only of the racial stereotypes that permeate many restaurant workplaces but also of the various subtle ways that servers can discriminate in their delivery of service. As a result of such knowledge, Blacks with serving experience are thought to be more proficient than their non-serving counterparts at identifying “subtle service slights as exemplars of race-based service.” Brewster & Brauer, *supra*, at 199.

28. See Dirks & Rice, *supra* note 19, at 269–71.

tables with Black customers might neglect them or otherwise deliver objectively poor service, even servers who dislike waiting on Black customers are not likely to provide openly discriminatory service. Rather, racially discriminatory service is more likely to take the form of what has been called “service with a smirk”: exerting minimal effort, doing only what they have to do, and not “go[ing] out of their way to be friendly.”<sup>29</sup> In other words, servers decline to extend to Black customers the emotional labor that is a key component of their work and that makes customers feel welcome and esteemed. Such lackluster service degrades the dining experiences of customers of color and indicates that White servers see them as “undeserving of enjoyable dining experiences.”<sup>30</sup>

In fact, when servers withhold those subtle markers of warmth, they deprive customers of an important source of the value to be expected in a full-service restaurant experience. A recent study of Black and White diners found no evidence that Black customers perceived differences in the *objective* aspects of service delivery, whether those behaviors are “conventionally required” (such as servers’ smiling throughout the encounter, giving their names, or maintaining eye contact) or “discretionary personal behaviors” (such as recommending a food dish or complimenting the customer’s choice of a particular dish).<sup>31</sup> It did find, however, that Black customers’ *subjective* appraisals of servers’ interpersonal behaviors were significantly lower than those of White customers.<sup>32</sup> Black customers viewed their servers as behaving “in comparatively less enthusiastic, welcoming, and sincere ways”<sup>33</sup>—that is, being inauthentic or engaging in false displays of warmth, known as “surface acting,” when serving them.<sup>34</sup>

This—subtle and ambiguous service with a smirk—is what modern racism looks like.<sup>35</sup> It hardly bears repeating a point that by now has become well-established: rather than the more overt discrimination that was common and even routine in the past—though it has not, as noted, been eliminated in the present—

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29. *Id.* at 271.

30. Sarah E. Rusche & Zachary W. Brewster, “*Because They Tip for Shit!*”: *The Social Psychology of Everyday Racism in Restaurants*, 2 SOC. COMPASS 2008, 2026 (2008); *see also* Brewster & Rusche, *supra* note 20, at 367.

31. Brewster, Lynn, & Cocroft, *supra* note 11, at 485–88.

32. *Id.*

33. *Id.* at 488.

34. *See infra* Parts III.A. and IV. Customers can detect and respond less favorably to surface acting than to the authentic expression of caring known as “deep acting.”

35. *Cf.* Anderson, *supra* note 4, at 15 (“The black person’s realization of her predicament may be gradual, as awareness often occurs in subtle and ambiguous ways over time, through what may seem to be the deceptively ordinary interactions and negotiations of everyday life.”).

racism today *on the whole* tends to be covert, subtle, insidious, and sometimes unconscious.<sup>36</sup> Indeed, the very “squishiness” of emotional labor itself is problematic because it simultaneously promotes and obscures discrimination, thereby both increasing the opportunity while undermining legal accountability for discrimination in customer service.<sup>37</sup>

Furthermore, the soft, subjective elements of customer service are the key components—the very “heart”<sup>38</sup>—of interactive or “value added” customer service.<sup>39</sup> As Part III.A. will show, firms profit from marketing warm, caring, and attentive service to customers as being of value, and customers do indeed value it. With respect to a feature of customer service that gives it a large share of its worth, customers of color therefore receive comparatively less than White customers.<sup>40</sup> Such subtle forms of discrimination in service delivery also reduce the economic opportunities and benefits afforded to people of color. To the extent that members of disfavored customer groups do not receive special “treats” from servers in the form of complimentary goods and services, for example, they again receive comparatively less through their inequitable distribution. Even job opportunities might be limited by how a group is stereotyped or perceived as customers. In upscale retail settings, for example, the image of the ideal worker mirrors that of the desired (typically White) customer—and, indeed, some upscale fashion retailers recruit their sales staff directly from regular shoppers at their stores.<sup>41</sup>

Discrimination in customer service also imposes direct costs on members of disfavored groups to the extent that they overcompensate in an attempt to overcome their own disfavored status. Law professor Regina Austin, for example, has written that she sometimes over-tips as a way of challenging negative stereotypes about

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36. See generally BONILLA-SILVA, *supra* note 24 (discussing the persistence of racism through subtle and apparently nonracial social practices and mechanisms).

37. See *infra* Part II.

38. See generally HOCHSCHILD, *supra* note 5 (developing the concept of emotional labor in service work in a book entitled “The Managed Heart: Commercialization of Human Feeling”).

39. In other words, interactive customer service “has the feel of simple civility or caring . . . [and] is more easily understood in experience than in definition; you know it when you see it.” KARL ALBRECHT & RON ZEMKE, *SERVICE AMERICA: DOING BUSINESS IN THE NEW ECONOMY* 20 (1985).

40. See Brewster, Lynn, & Cocroft, *supra* note 11, at 481; see also *id.* at 492 (pointing out that the cumulative effect of servers’ withholding those niceties on racial grounds is “the inequitable distribution of nuanced server behaviors that collectively contribute to either cultivating or alternatively undermining a hospitable and satisfying dining experience”).

41. See, e.g., Bendick Jr. et al., *supra* note 18; see generally Christine L. Williams & Catherine Connell, “Looking Good and Sounding Right”: *Aesthetic Labor and Social Inequality in the Retail Industry*, 37 *WORK & OCCUPATIONS* 349 (2010).

Black customers, “selling [herself] in order to be sold to.”<sup>42</sup> Similarly, Black journalist Ernest Owens reports that he has “made it a point to prepay at restaurants”—tip included—to avoid being racially profiled and “treated like an inconvenience” or with suspicion while dining out.<sup>43</sup>

Discrimination in customer service, in both its blatant and more subtle forms, also has broader implications, because it connects to and exacerbates a larger set of issues. First, it is just another example in a wide range of daily mistreatments and microaggressions<sup>44</sup> that people of color experience regularly, and experiences of this kind have psychic and material effects. Studies have shown the significant harms that these mundane and routine experiences inflict, including serious, negative health effects.<sup>45</sup> In addition, the dynamics described in this Article are just one example of the ways in which some groups come to be designated and accepted as suitable targets for disregard and mistreatment. That disregard and mistreatment range from the kinds of everyday indignities described here, to disproportionate attention from and abusive treatment by law enforcement, to threats and violent crime.<sup>46</sup>

More fundamentally, these mundane affronts constitute attacks on the very dignity and sense of worth accorded persons of color.<sup>47</sup> As sociologist Elijah Anderson has explained, these ordinary encounters are actually “ritual offenses” that operate to “put [a per-

42. Regina Austin, “A Nation of Thieves”: Securing Black People’s Right to Shop and to Sell in White America, 1994 UTAH L. REV. 147, 154 (1994) (“I sometimes give a waiter or cab driver a generous tip despite poor service in an effort to debunk the common complaint that blacks do not tip; I hope that the next black patron will reap the benefit of my generosity.”).

43. Ernest Owens, *Dining While Black: Race and the Philly Food Scene*, PHILADELPHIA (June 30, 2018), <https://www.phillymag.com/foobooz/2018/06/30/black-dining-philadelphia/>.

44. See generally DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION (2010); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

45. See generally Gilbert C. Gee, et al., *Racial Discrimination and Health Among Asian Americans: Evidence, Assessment, and Directions for Future Research*, 31 EPIDEMIOLOGIC REV. 130 (2009) (reviewing empirical studies assessing the relationship between racial discrimination and health among Asian Americans); David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20 (2009) (providing an overview of existing and needed research on the role of perceived discrimination in health); Linda Villarosa, *Why America’s Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES MAG. (April 11, 2018) (reporting on studies of Black infant and maternal mortality).

46. See generally Lu-in Wang, “Suitable Targets”? Parallels and Connections Between “Hate” Crimes and “Driving While Black”, 6 MICH. J. RACE & L. 209 (2001) (discussing ways in which the social environment designates certain social groups as accepted or suitable targets for mistreatment, including hate crimes and racial profiling and abuse by law enforcement officers).

47. Cf. Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J. L. & POL’Y 705, 707 (2014) (examining “the dignitary harm that results when businesses turn away LGBT individuals based on the owners’ religious beliefs”).

son] in his or her place.”<sup>48</sup> Seemingly trivial issues such as these “can become fraught with racial meaning or small behaviors can subtly teach or remind the black person of her outsider status, showing onlookers and bystanders that she does not really belong, that she is not to be regarded and treated as a full person in the white space.”<sup>49</sup>

Constitutional scholar Christopher A. Bracey has described this aspect of dignity—the “universal and undifferentiated respect for social value”—as operating at the communal level, with “*inclusion*” as its essence.<sup>50</sup> Far from being an abstract concept, Bracey explains that “[r]elational perceptions of dignity inform a great deal of our social interactions,” and that “dignity can be understood in instrumental terms: as providing a necessary precondition to economic inclusion and material empowerment.”<sup>51</sup> In “the context of race relations,” Bracey asserts, “dignitary concerns of inclusion and community are arguably worthy of elevated importance.”<sup>52</sup> He explains:

Because an emphasis on dignity necessarily historicizes, contextualizes, and deepens, it begins to make relevant a host of considerations routinely thought to be “off limits” in contemporary race jurisprudence[, which] has proven incapable of addressing aspects of American life that have a remarkably oppressive quality: the widespread acceptance of destructive stereotypes; the disabling consequences of seemingly innocuous and subtle forms of racial bias—not full blown racist acts, but acts of racial carelessness; and the unexamined acceptance of so-called societal discrimination.<sup>53</sup>

In thinking about “so-called societal discrimination,” attention must be paid to the structural conditions that promote and facilitate discrimination in those “deceptively ordinary interactions and negotiations of everyday life.”<sup>54</sup> This Article highlights one such condition, by examining one way in which the dignitary interests of people of color intersect with those of customer service workers

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48. Anderson, *supra* note 4, at 15.

49. *Id.* at 15–16.

50. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. Pa. J. CONST L. 669, 679–80 (2005) (describing communal dignity as “second-order dignity,” as distinguished from its first-order “twin,” personal or individualistic dignity, which is “perhaps best understood as a sense of perspective on self-worth”).

51. *Id.* at 676.

52. *Id.* at 702.

53. *Id.* at 703–04 (footnotes omitted).

54. Anderson, *supra* note 4, at 15.

whose “racial carelessness”<sup>55</sup> and “random acts of disrespect” operate “to put [a person of color] in his or her place.”<sup>56</sup> Specifically, we argue that interactive service workers themselves are routinely treated with disrespect that undermines their sense of dignity and personal worth, as a built-in feature of their prescribed roles within a customer-focused work environment. Servers often react to the stress and indignities of their work by exercising their limited agency to differentiate in how they extend service—in particular their emotional labor—to their clientele. In service cultures like those of many restaurants, where they are negatively stereotyped and explicitly denigrated, Black customers are identified as the acceptable recipients of indifferent and inauthentic customer service. Although these dynamics operate to deprive customers of color of the interpersonal warmth and care that are integral to the full and equal enjoyment of a service establishment, this particularly modern form of racial discrimination evades accountability under current legal standards.

## II. DIGNITY LEGISLATED: THE RIGHT TO FULL AND EQUAL ENJOYMENT

All customers have the legal right to equal treatment and dignity in public accommodations such as restaurants.<sup>57</sup> But the type of race discrimination in restaurant service that is most prevalent today is not likely to be actionable under current law because it is largely subtle and ambiguous. Indeed, given the inherent ambiguity of emotional labor, a key component of interactive customer service, current law actually permits this modern form of discrimination in public accommodations.

Congress has explicitly recognized and protected the dignitary interest in receiving customer service on a nondiscriminatory basis in two civil rights statutes from different periods. First, a Reconstruction Era statute, 42 U.S.C. § 1981, protects against race discrimination in customer service, among other contractual rights.<sup>58</sup> Section 1981 provides “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens” and has been amended to include in that right “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relation-

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55. Bracey, *supra* note 50, at 704.

56. See Anderson, *supra* note 4, at 15.

57. See 42 U.S.C. §§ 1981 and 2000a.

58. See, e.g., *Callwood v. Dave & Buster’s, Inc.*, 98 F. Supp. 2d 694, 707 (D. Md. 2000).

ship.”<sup>59</sup> In the restaurant service context, the protected right includes more than just the ability to purchase a meal; it includes the right to “be[] served in an atmosphere which a reasonable person would expect in the chosen place”—that is, “the opportunity to experience the full and equal enjoyment of the . . . dining experience.”<sup>60</sup>

In addition, Title II of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000a, provides for “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of” public accommodations such as restaurants without discrimination or segregation on the basis of race, color, religion, or national origin.<sup>61</sup> As the Supreme Court explained shortly after its enactment, “the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>62</sup> The gravamen of a claim under § 2000a includes denial of both access to and “full and equal enjoyment of” the services offered by an establishment.<sup>63</sup>

Courts apply substantially the same proof models to establish claims under both statutes for race discrimination in restaurants and other service settings.<sup>64</sup> Plaintiffs have the best chance of advancing their claims—that is, surviving motions to dismiss or for summary judgment, or receiving favorable judgments after trial—when they can present direct, “smoking gun” evidence of discriminatory intent and can show that they received plainly unacceptable service. Accordingly, plaintiffs’ claims do best when they have evidence of blatantly discriminatory statements or behavior—for example, that a server or manager used racial slurs or provided a ra-

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59. 42 U.S.C. § 1981(a) and (b). Section 1981 applies in a broader range of settings than § 2000a, including the employment context. *See, e.g.*, *CBOS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (recognizing claim for retaliation in employment context).

60. *Charity v. Denny’s, Inc.*, 1999 WL 544687, at \*3, \*6 (E.D. La. 1999); *see also, e.g.*, *Arguello v. Conoco, Inc.*, 330 F.3d 355, 360 (5th Cir. 2003) (distinguishing the restaurant context from the retail setting involved in that case); *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1357–58 (N.D. Ga. 2005); *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998); *Perry v. Burger King Corp.*, 924 F. Supp. 548, 552 (S.D.N.Y. 1996).

61. In part, § 2000a provides:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. § 2000a(a). Restaurants are among the covered places of public accommodation, § 2000a(b), and injunctive relief is available for a violation, § 2000a-3(a).

62. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872 at 16–17 (1964)).

63. *McLaurin v. Waffle House, Inc.*, 178 F. Supp. 3d 536, 545 (S.D. Tex. 2016).

64. *See, e.g.*, *Jackson v. Waffle House, Inc.*, 413 F. Supp. 2d 1338, 1360–62 (N.D. Ga. 2006).

cially discriminatory explanation for mistreatment of the plaintiff<sup>65</sup>—and can show that they received obviously deficient or unequal service. Examples of the latter include being refused service outright, being subjected to abusive treatment, or receiving terms or levels of service that were objectively inferior to those provided to similarly situated customers of other races.<sup>66</sup>

But when discrimination is subtle and ambiguous—for example, when it takes the form of “service with a smirk”—plaintiffs will find it far more difficult and perhaps impossible to prevail. As elaborated below, the requirements for proving such a claim align almost perfectly to exclude liability for that kind of discrimination. Consequently, the type of race discrimination in restaurant service that is most common today is not likely to be actionable under current law.

Such cases would be analyzed under the *McDonnell Douglas v. Green* burden-shifting model for proving discrimination based on circumstantial evidence,<sup>67</sup> because rarely will the underlying facts provide direct evidence of discrimination. Although, as noted above, the explicit expression of racial bias is shockingly pervasive in full-service restaurants, those expressions are largely confined to backstage areas of the establishment, out of customers’ earshot, as servers more commonly engage in “two-faced” rather than direct racism.<sup>68</sup>

Under the familiar *McDonnell Douglas* framework, the burden of producing evidence shifts between the plaintiff and defendant, with the plaintiff bearing the initial burden of showing a *prima facie* case to create an inference of discrimination in the provision of service, upon which the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for the adverse treatment alleged. The plaintiff bears the final burden of creating a genuine issue of material fact that the defendant’s asserted reason was a pretext for discrimination.<sup>69</sup>

The standards that courts have developed under the burden-shifting model operate to exclude claims based upon subtle discrimination that denies customers of color the benefits of authen-

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65. See, e.g., *Kinnon v. Arcoub, Gopman & Assoc., Inc.*, 490 F.3d 886, 891 (11th Cir. 2007); *McCaleb*, 28 F. Supp. 2d at 1046–47; *Bivins v. Wrap It Up, Inc.*, 2007 WL 3047122 (S.D. Fla. Oct. 18, 2007); *Charity*, 1999 WL 544687.

66. See, e.g., *Jackson*, 413 F. Supp. 2d at 1358–59; *Slocumb v. Waffle House, Inc.*, 365 F. Supp. 2d 1332, 1340 (N.D. Ga. 2005); *Brooks v. Collis Foods, Inc.*, 365 F. Supp. 2d 1342, 1347–48 (N.D. Ga. 2005); *McCaleb*, 28 F. Supp. 2d at 1046–48; *McKinnon v. Yum! Brands, Inc.*, 2017 WL 3659166 (D. Idaho Aug. 24, 2017); *Bivins*, 2007 WL 3047122.

67. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* was an employment discrimination case under Title VII of the Civil Rights Act of 1964.

68. See discussion *infra* Part V.

69. See, e.g., *McLaurin v. Waffle House, Inc.*, 178 F. Supp. 3d 536, 545 (S.D. Tex. 2016).



tic emotional labor. First, the plaintiff will encounter difficulty immediately, in attempting to meet the requirements of the *prima facie* case. To establish a *prima facie* case, the plaintiff must show that:

- 1) he or she is a member of a protected class;
- 2) the plaintiff attempted to contract for the services of a public accommodation;
- 3) the plaintiff was denied those services; and
- 4) the services were made available to similarly situated persons outside her protected class.<sup>70</sup>

The first three prongs are generally not difficult to satisfy, but, as some courts have noted, the traditional fourth prong will often be difficult or impossible for plaintiffs to meet. Those courts have explained that, due to the “itinerant” nature of the clientele, plaintiffs can have difficulty producing the requisite comparator in a “commercial establishment” context, as contrasted with an employment context.<sup>71</sup> Accordingly, a number of courts have modified the fourth prong to allow for an alternative showing, that “the plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.”<sup>72</sup>

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70. See, e.g., *id.* at 546.

71. The first court to introduce this modification noted the intended flexibility of the *McDonnell Douglas* proof model and explained that the typical comparator requirement would prevent “bona fide victims of discrimination . . . in a restaurant setting or similar place of public accommodation” from succeeding on their claims. *Callwood v. Dave & Buster’s, Inc.*, 98 F. Supp. 2d 694, 706 (D. Md. 2000). The court drew a sharp contrast between the public accommodations and employment contexts, noting that in the public accommodations context, interpersonal interactions are “ephemeral,” while in the employment setting, “decisions, by and large, are regularized and periodic, are made by supervisory personnel, and by their very nature are almost always documented and thus preserved for sober examination.” *Id.* The court explained that “[i]n the restaurant context, in contrast, the interactions of a highly mobile public with hostesses, waitpersons and managers are necessarily ad hoc and transient, are almost never with higher-ranking personnel of the enterprise, and are almost never documented in any meaningful sense.” *Id.*

72. See, e.g., *Christian v. Wal-Mart Stores, Inc.* 252 F.3d 862, 869–73 (6th Cir. 2001) (citing *Callwood*); *Lizardo v. Denny’s, Inc.*, 270 F.3d 94, 101–02 (2d Cir. 2001) (agreeing with *Christian* and *Callwood*); *Callwood*, 98 F. Supp. 2d at 705–08; see also *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1145 (9th Cir. 2006) (stating that it finds the reasoning of *Christian* “compelling” but need not decide whether its modification of the fourth element is required because the plaintiff offered clear evidence that met the unmodified fourth prong). *But see*, e.g., *Hammond v. Kmart Corp.*, 733 F.3d 360, 365, n.6 (1st Cir. 2013) (declining to apply the modified fourth prong); *Fahim v. Marriott Hotel Services, Inc.*, 551 F.3d 344, 350, n.2 (5th Cir. 2008) (declining to decide whether to apply the modified test).

Factors that are relevant to the alternative showing include “whether the conduct of a merchant or her agents is “(1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination.” *Christian*, 252 F.3d at 871 (citing *Callwood*, 98 F. Supp. 2d at 708).

Even this more generous alternative showing, however, would be difficult or impossible to meet in bona fide cases of discriminatory service that take a more modern and subtle form. That is, even the modified standard dooms a claim from the outset by requiring a plaintiff to show that the service received was so far outside the bounds of acceptability that it could be considered “markedly hostile” and “objectively discriminatory.” First, mistreatment need not be blatant in order to deny customers their legally projected rights. As one court observed, “in light of the clear illegality of outright refusal to serve, a restaurant which wishes to discourage minority customers must resort to more subtle efforts to dissuade.”<sup>73</sup>

In addition, as will be explored below,<sup>74</sup> performing emotional labor empowers servers to exercise discretion and tailor their performance to meet the needs and desires of individual customers. It thereby both expands and blurs the parameters of customer service, extending it beyond mechanical or technical aspects that can be defined or assessed objectively. In restaurants, for example, a server’s work goes beyond taking and retrieving customers’ orders to include making them feel welcomed and cared for—but what that means or requires is not entirely clear because it varies from customer to customer and is delivered differently from server to server. Accordingly, when emotional labor is a substantial component of the service provided, the lines between what is and is not acceptable service are obscured. As long as it stays within a broadly and objectively acceptable “work-to-rule” range, there is no clear right or wrong way to deliver customer service.

This lack of clarity regarding the “right” or “wrong” way to act constitutes a “normatively ambiguous” situation.<sup>75</sup> Social scientists have shown that this is the very kind of situation in which discrimination is both more likely to occur and harder to see, sometimes because it is easier to hide.<sup>76</sup> People are more likely to discriminate in normatively ambiguous than in normatively clear situations because in the latter case they are more aware of their egalitarian ideals and therefore more careful to guard against discriminating. Further, in a situation where right and wrong are clear, discriminatory actions are easier to both recognize and avoid. In other words, normative ambiguity promotes discrimination because in those sit-

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73. *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1324 (N.D. Ga. 2004); *see also*, e.g., *Brooks*, 365 F. Supp. 2d at 1356 (referring to ability of defendants to “devise[] creative means to harass and intimidate customers”); *Laroche v. Denny’s Inc.*, 62 F. Supp. 2d 1375, 1384 (S.D. Fla. 1999) (stating “[d]iscrimination is often simply masked in subtle forms”).

74. *See* discussion *infra* Part III.A.

75. *See* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 37–38 (2006).

76. *See id.* at 37–42.

uations, people do not guard against but instead act on their prejudices—whether because they do not recognize that they are doing so or because they can more easily get away with doing so or both. The dilemma presented is that normative ambiguity simultaneously promotes and obscures discrimination.<sup>77</sup>

Discriminatory “service with a smirk” is a nearly textbook example of the kind of behavior that normative ambiguity facilitates. This bare-bones service delivery lacks the rapport-building and socially immediate gestures that make customers feel welcomed and esteemed, but even so, it might not be clearly substandard and might even be quite effective in a technical sense. Yet such lackluster service undoubtedly has adverse effects on the dining experiences of customers, and holding back on emotional labor is one way servers can differentially deliver hospitality according to the race of their customers without its being obvious that they are discriminating.<sup>78</sup>

As difficult as it will be for plaintiffs to establish a *prima facie* case, defendants will find that showing easy to rebut. In rebuttal, defendants bear an “exceedingly light” burden of production to show a nondiscriminatory reason for the challenged conduct.<sup>79</sup> Courts have accepted a wide range of reasons in rebuttal, including that the restaurant was busy at the time of the events in question,<sup>80</sup> that an apparently open table was already taken by or reserved for another customer,<sup>81</sup> and that the plaintiff’s behavior was difficult or disruptive.<sup>82</sup> As is the case in other common settings for race discrimination, however, negative treatment such as the provision of less warm or engaging service—and sometimes even objectively inferior service—often can be justified on some basis other than the customer’s race.<sup>83</sup> Further, justifications that appear to be nonracial may in fact align with racial stereotypes that magnify their power. In fact, as Part IV will explain, racialized workplace cultures promote the stereotype that Black customers in particular are difficult and demanding.<sup>84</sup>

To overcome the defendant’s asserted nondiscriminatory reason, a plaintiff needs to present evidence sufficient to create a genuine issue of material fact that the asserted reason is false or

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77. See *id.* at 44.

78. See discussion *infra* Part V.

79. *Slocumb*, 365 F. Supp. 2d at 1340.

80. *E.g., id.*

81. *E.g.,* *McLaurin v. Waffle House, Inc.* 178 F. Supp. 3d 536, 547 (S.D. Tex. 2016).

82. *E.g.,* *Lizardo v. Denny’s, Inc.*, 270 F.3d 94, 102–03 (2d Cir. 2001).

83. This point illustrates a second form of normative ambiguity, when a clearly negative action can be justified on some basis other than race. See WANG, *supra* note 75, at 37–42.

84. See discussion *infra* Part IV.

unworthy of belief and that the challenged conduct more likely than not was motivated by discriminatory animus. On these points, courts have rejected evidence of plaintiffs' subjective feelings, perceptions, and beliefs and required objective evidence of discriminatory intent.<sup>85</sup> Again, this requirement will often be impossible to meet. First, even plainly inferior and actually discriminatory service may be delivered with an apparent lack of discriminatory intent, because servers often engage in "two-faced racism," exhibiting their openly racist behavior exclusively in the backstage. Second, the delivery and effects of emotional labor are inherently subjective, because, as Part IV.A. explains, the very purpose and value of emotional labor lie in the feelings it engenders in the recipient.

To reject a plaintiff's subjective perception as "mere feelings" undermines the perceived legitimacy of claims of discrimination in a situation where how the customer feels about the service is part and parcel of the value that service provides and fails to recognize the "deprivation of personal dignity"<sup>86</sup> that the denial of emotional labor can, and sometimes is intended to, inflict. When the legal model fails to account for these subtle and ambiguous, modern forms of discrimination in customer service, the protection that the law provides for the enjoyment of public accommodations is hardly full and equal.

### III. DIGNITY TRADED: EMOTIONAL LABOR AND THE COMPLEXIFIER<sup>87</sup> OF TIPPING

Discrimination in customer service is not a simple matter of an individual server's attitude toward or treatment of a single customer. Rather, it must be understood in its structural context. Interactive customer service is delivered within a three-sided relationship, known as the "service triangle," that includes the customer, the server, and the firm that sells to the customer and employs the

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85. See, e.g., *McLaurin*, 178 F. Supp. 3d at 548–52 (citing cases that required plaintiffs to produce evidence that the defendant's reason was pretextual and capable of raising a factual issue regarding discriminatory intent).

86. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citing S. Rep. No. 872, at 16–17 (1964)).

87. This French word means "to make something more complex or complicated." Kevin Granville, *Complexifier, Mr. Bezos? It Is a Real Word, Just Not in English*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/business/complexifier-meaning-definition.html> (quoting Amazon founder and CEO Jeff Bezos as stating in a blog post concerning his accusations of blackmail and extortion against American Media, Inc., the publisher of the *National Enquirer*: "Here's a piece of context: My ownership of the Washington Post is a complexifier for me. It's unavoidable that certain powerful people who experience Washington Post news coverage will wrongly conclude I am their enemy").

server. Although the service encounter directly involves just the server and customer, it is the absent third party who creates the organizational framework for their interaction.<sup>88</sup>

Customers, the focal point of the service triangle, want more than an economic exchange; they want an emotional connection—to feel welcomed, cared for, and esteemed. They want to be treated with dignity. To produce in customers their desired state of mind, service workers must perform “emotional labor”: the work of managing their own feelings to “create a publicly observable facial and bodily display” in exchange for a wage.<sup>89</sup> For restaurant servers, emotional labor requires that they manage their feelings and control their display of emotion through facial expression, tone of voice, and physical movement to give customers “the feel of simple civility or caring,”<sup>90</sup> perhaps through “a moment of cheerful banter and an illusion of friendship.”<sup>91</sup> This work is integrated into the server’s physical and mental labor and is regarded by all points of the service triangle as being at least as important, albeit for different reasons. As important as it is to all parties, moreover, emotional labor affects the parties differently as well.

#### A. *The Value and Cost of Emotional Labor*

Customers respond to emotional labor in ways that show they value it. Studies have found, for example, that restaurant customers reward servers’ expressions of genuine warmth and caring with significantly higher tips.<sup>92</sup> Further, customers have been shown to be capable of distinguishing between the authentic expression of caring (i.e., deep acting) and fake or superficial displays of emotion (i.e., surface acting).<sup>93</sup> They respond favorably to deep acting because they infer from the server’s emotional expression that he or she takes their needs and wishes seriously and wants to help ful-

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88. See, e.g., Wang, *supra* note 7, at 255–56.

89. HOCHSCHILD, *supra* note 5, at 29.

90. ALBRECHT & ZEMKE, *supra* note 39, at 20.

91. GRETA FOFF PAULES, DISHING IT OUT: POWER AND RESISTANCE AMONG WAITRESSES IN A NEW JERSEY RESTAURANT 151 (1991).

92. See Nai-Wen Chi et al., *Want a Tip? Service Performance as a Function of Emotion Regulation and Extraversion*, 96 J. APPLIED PSYCH. 1337, 1340, 1343 (2011); Ute R. Hulsheger et al., *When Regulating Emotions at Work Pays Off: A Diary and an Intervention Study on Emotion Regulation and Customer Tips in Service Jobs*, 100 J. APPLIED PSYCH. 263, 267, 274 (2015).

93. See Markus Groth et al., *Customer Reactions to Emotional Labor: The Roles of Employee Acting Strategies and Customer Detection Accuracy*, 52 ACAD. MGMT. J. 958 (2009). The authentic performance of emotional labor to which customers respond positively is known as “deep acting” and is to be distinguished from less effective “surface acting,” in which the server “suppress[es], amplif[ies], or fak[es]” emotional expression. Chi et al., *supra* note 92, at 1337–38.

fill them. Customers also catch the server's good mood and are moved to respond more generously themselves.<sup>94</sup> In addition, customers report greater satisfaction with *firms* when they feel that they have been the recipients of authentic and caring service.<sup>95</sup>

Moreover, effective emotional labor does more than just make customers *feel* better about the firm that employs the server. Customers' satisfaction with workers' emotional labor redounds to the economic benefit of their employers, because customers evaluate firms more favorably, spread more positive word-of-mouth, and are more loyal to firms when they are pleased with the emotional labor they receive.<sup>96</sup> Effective emotional labor thereby boosts a firm's bottom line, by enhancing its competitiveness and financial success. Service-oriented firms recognize that emotional labor is an important part of what they sell<sup>97</sup> and, consequently, an important part of what they "buy"<sup>98</sup> and manage. They attempt to control employees' emotional displays through hiring, training, and supervision—including by dictating scripts and procedures for their interactions with customers and in how they respond to customer complaints.<sup>99</sup> Employers accordingly control not just servers' physical and mental work activities, but their emotional activities, as well—and they have a financial interest in doing so.<sup>100</sup>

For service workers, emotional labor can be rewarding,<sup>101</sup> but it is often very difficult. To perform emotional labor effectively, servers must simultaneously, and somewhat paradoxically, control their displays of feeling and convey authenticity. As we have seen, customers value sincere displays or "deep acting," and can detect false or "surface acting," and their satisfaction depends on their perception that they have received the former rather than the latter.

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94. See, e.g., Hulsheger et al., *supra* note 92, at 265.

95. See, e.g., Groth et al., *supra* note 93, at 936, 969; Hulsheger et al., *supra* note 92, at 274, 275.

96. See, e.g., Groth et al., *supra* note 93, at 969.

97. See INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD 4 (Marion G. Crain, Winifred R. Poster, & Miriam A. Cherry eds., 2016) (stating that "emotions become commodities for employers in the service economy").

98. See HOCHSCHILD, *supra* note 5, at 7 n.\* (stating that "emotional labor is sold for a wage and therefore has *exchange value*") (emphasis in original).

99. See generally, e.g., Wang, *supra* note 7, at 265–74 (describing ways in which firms select for and manage service workers' emotional and aesthetic presentation to please customers and facilitate and validate customer mistreatment of service workers).

100. See Pamela K. Adelman, *Emotional Labor as a Potential Source of Job Stress*, in ORGANIZATIONAL RISK FACTORS FOR JOB STRESS 371–72 (Steven Sauter & Lawrence R. Murphy, eds., 1995); PAULES, *supra* note 91, at 160 (noting that restaurants try to control the personalities of servers by "furnishing the waitress with the script, costume, and backdrop of a servant").

101. See, e.g., Adelman, *supra* note 100, at 378–79 (describing a study in which restaurant servers reported experiencing extrinsic and intrinsic rewards of performing emotional labor).

Moreover, to effectively perform emotional labor takes skill and judgment given the variability of customers' desires and preferences and the need for workers to identify each customer's wishes and tailor their behavior accordingly.<sup>102</sup>

Not surprisingly given these demands, emotional labor can take a toll on interactive service employees. Indeed, the costs associated with emotional labor can be more consequential than the physical and mental demands of the job, which themselves may be considerable.<sup>103</sup> Remarking on a series of interviews with restaurant servers, sociologist Karla Erickson noted that, "when discussing the difficulties of waiting tables, they emphasized almost exclusively emotion management rather than tired feet or dirty aprons."<sup>104</sup> The paradox and dissonance of being required to constantly display a warm and caring demeanor regardless of how one actually feels is itself a source of job stress.<sup>105</sup> This stress can be particularly hard on workers who depend on tips, especially women.<sup>106</sup>

Further, even the friendliest of interactions between customer and server takes place within a "lopsided" relationship of unequal status and power.<sup>107</sup> Although customer and server interact to create the service experience together, the server bears full responsibility for its success or failure. Firms' intense focus on pleasing customers promotes a norm of "customer sovereignty" under which not only is the customer's satisfaction paramount, but the customer is thought to be always right.<sup>108</sup> Under such a regime, the customer's behavior is subject to few constraints, but the behavior of the worker, whose role is to serve and please, is severely restricted. Even the terms that identify the parties—"guest" for the customer and "server" for the worker—along with the servant-like uniforms the workers often wear, convey the differences in status and expect-

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102. See Wang, *supra* note 7, at 266–67.

103. See, e.g., PAULES, *supra* note 91, at 7–8 (describing the many physically and mentally exhausting tasks a restaurant server must perform routinely).

104. See, e.g., Karla Erickson, *To Invest or Detach? Coping Strategies and Workplace Culture in Service Work*, 27 *SYMBOLIC INTERACTION* 549, 553 (2004); Adrienne Green, *The Emotional Labor of Waitressing*, ATLANTIC (Nov. 19, 2016), <https://www.theatlantic.com/business/archive/2016/11/waitress/507842/> (quoting restaurant manager and former server Marie Billiel who, after describing the physical demands of serving, said in reference to emotional labor, "[f]or me, that's always been more tiring than the actual labor").

105. See Glenda M. Fisk & Lukas B. Neville, *Effects of Customer Entitlement on Service Workers' Physical and Psychological Well-Being: A Study of Waitstaff Employees*, 16 *J. OCCUPATIONAL HEALTH PSYCHOL.* 391, 397 (2011); Adelman, *supra* note 100, at 379.

106. See Sarah B. Andrea et al., *Associations of Tipped and Untipped Service Work with Poor Mental Health in a Nationally Representative Cohort of Adolescents Followed into Adulthood*, 187 *AM. J. EPIDEMIOLOGY* 2177 (2018).

107. See Fisk & Neville, *supra* note 105, at 401.

108. Marek Korczynski, *Understanding the Contradictory Lived Experience of Service Work: The Customer-Oriented Bureaucracy*, in *SERVICE WORK: CRITICAL PERSPECTIVES* 73, 78 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009).

tations for each.<sup>109</sup> In short, and as eloquently stated by sociologist Greta Foff Paules,

Employees of service industries are encouraged to treat customers with unflinching reverence and solicitude; to regard their concerns and needs as paramount; to look upon them as masters and kings. But to accept this image of the other requires that one adopt a particular image of self. If the customer is king (or queen), the employee by extension is subject, or servant.<sup>110</sup>

Perhaps inevitably given their exalted status, customers too often mistreat or even bully servers.<sup>111</sup> Restaurant customers, for example, sometimes make unreasonable demands, insist on being served before other customers or by servers who have not been assigned to their tables, snap their fingers, engage in verbal aggression, throw food and money, and worse.<sup>112</sup> The problem of sexual harassment of restaurant servers by customers (as well as by managers and co-workers), for example, is well known.<sup>113</sup> Entitled and even abusive behavior by customers is for many service workers a fact of life that they are forced to accept given the view that the customer is always right.<sup>114</sup> When management tolerates abusive behavior in the name of customer service, it confers social legitimacy on that behavior. Although some service workers resist and challenge bad behavior from customers,<sup>115</sup> many accept management's view as right and appropriate.<sup>116</sup>

109. See, e.g., Kaitlyn Matulewicz, *Law and the Construction of Institutionalized Sexual Harassment in Restaurants*, 30 CAN. J. L. & SOC'Y 401, 409 n.16 (reflecting on her own experience as a restaurant worker being corrected by managers when she referred to "customers"). Matulewicz quotes a restaurant worker who describes the hierarchy as follows: "[a] lot of people think of it as the servants industry. So they're like, 'Oh yeah, you don't matter you're just here to serve me.'" *Id.* at 409.

110. PAULES, *supra* note 91, at 131–32.

111. See, e.g., Fisk & Neville, *supra* note 105, at 394 (noting that "[s]ervers reported interacting with an average of two entitled customers per typical shift").

112. See *id.*

113. See generally THE REST. OPPORTUNITIES CTNS. UNITED FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (2014), <http://rocunited.org/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>. In fact, in that industry sexual harassment is so common as to be considered simply "'kitchen talk,' a 'normalized' part of the work environment." *Id.* at 1.

114. See, e.g., Fisk & Neville, *supra* note 105, at 398.

115. See PAULES, *supra* note 91, at 153–58 (including anecdotes of service workers resisting rude or abusive customers).

116. See, e.g., Victoria Bishop & Helge Hoel, *The Customer Is Always Right? Exploring the Concept of Customer Bullying in the British Employment Service*, 8 J. CONSUMER CULTURE 341, 354–56, 359 (2008); Dana Yagil, *When the Customer Is Wrong: A Review of Research on Aggression and Sexual Harassment in Service Encounters*, 13 AGGRESSION & VIOLENT BEHAV. 141, 150 (2008).



Even if it is accepted, however, the behavior of entitled customers is a “chronic source of physiological arousal and strain”<sup>117</sup> that inflicts a range of physical and psychological harms on servers, causing such negative effects as burnout (characterized by “exhaustion, cynicism, and a lack of confidence” as well as “feelings of inefficacy or diminished personal accomplishment”), feelings of injustice and dehumanization, and physical and mental illness.<sup>118</sup> Perhaps it goes without saying that the “sense of being treated as an instrument for fulfilling patrons’ wants” can lead servers to feel like “nonentities”<sup>119</sup> and would deprive servers of a sense of personal dignity.

Despite these difficulties and strains, servers are required to maintain a pleasant, congenial demeanor on the “front stage,” where they interact with customers. The imposition of heavy handed management controls, such as prescribed scripts and procedures for interaction, can further limit servers’ options for how to act and can itself be a source of frustration and stress.<sup>120</sup> As noted, the very dissonance between “what must be displayed and what is really felt”<sup>121</sup> is a source of job stress.<sup>122</sup> Consequently, servers need to develop ways of alleviating stress in “backstage” areas out of customers’ earshot, such as break rooms.

In contrast to the front stage where emotional labor is performed, the backstage is open to a wider range of conduct and therefore provides an important space for servers to show their true feelings about their work and, more to the point, customers. How servers act on the front stage can diverge dramatically from their behavior in the backstage, for servers are often very skilled at both controlling their front stage demeanor and turning it off as soon as they enter the backstage.<sup>123</sup> There, not only are servers free to let loose by complaining to co-workers about customers, but they also get a morale boost from the camaraderie built by sharing those gripes with an appreciative audience who endure the same difficult work conditions.<sup>124</sup> “Venting, joking, and bantering about

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117. Fisk & Neville, *supra* note 105, at 400.

118. *Id.* at 399.

119. *Id.* at 401.

120. See, e.g., Zachary W. Brewster & Jeremiah B. Wills, *The Institution of Tipping as a Source of Employee Agency: The Case of Restaurant Servers*, 46 SOC. FOCUS 193, 196 (2013).

121. Adelman, *supra* note 100, at 372.

122. See *id.* at 379 (reporting findings of study of restaurant servers); Fisk & Neville, *supra* note 105, at 397.

123. See PAULES, *supra* note 91, at 150–51.

124. “Venting” to co-workers is one of several ways in which service employees deal with difficult customers, sometimes with negative consequences for the firm. See Jeffrey J. Bailey & Michael A. McCollough, *Emotional Labor and the Difficult Customer: Coping Strategies of Service Agents and Organizational Consequences*, 20 J. PROF. SERVICES MARKETING 51, 69 (2000).

customers” to co-workers—as well as giving support to and receiving support from others who do the same—is an important way for service workers to bond, engaging in a kind of “group therapy” to create a “community of coping.”<sup>125</sup>

As much as servers’ behavior on the front and back stages differ, however, those spaces are hardly impermeable to one another. To the contrary, a feedback loop runs between the two spaces. Certainly, servers’ frustrations on the front stage find release through their behavior in the backstage. In turn, backstage banter shapes the values and norms of the workplace and accordingly defines what behavior is expected and appropriate on the front stage. On the front stage, where servers’ behavior is more constrained, one of the few ways they can exercise agency and attempt to rebalance the power between themselves and customers is by choosing how much emotional energy to exert. In other words, one of their few freedoms is to differentiate among customers in their delivery of emotional labor.<sup>126</sup>

As Part IV will show, backstage discourse can validate servers’ discrimination in the delivery of service, because engaging in racist discourse is one way servers cope with the stresses of their work. Backstage talk often takes the form of venting about categories of customers, particularly customers of color, describing them as inferior and unduly demanding. This discourse in turn justifies delivering inferior service to them. The pervasiveness and regularity of that discourse then send the message that discrimination in service delivery is normal and acceptable. That process is facilitated by the structural conditions and incentives built into restaurant service work.

### B. *Tipping as a Complexifier*

The pleasure and pain of emotional labor<sup>127</sup> may be especially acute for restaurant servers, the vast majority of whom rely primarily on tips for compensation. The salience of the tip intensifies the interaction between server and customer and brings into sharp relief the disparity in status between the parties. Indeed, probably nothing illustrates this inequality in entitlement and power as

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125. See, e.g., Marek Korczynski, *Communities of Coping: Collective Emotional Labour in Service Work*, 10 *ORG.* 55, 58 (2003).

126. As Brewster, Lynn, and Cocroft have noted, this situation is paradoxical to the extent that discriminating in service delivery is a way for servers to resist the constraints of organizational control structures, such as “company-specified interactional scripts . . . that are intended to ensure equitable service.” Brewster, Lynn, & Cocroft, *supra* note 11, at 488 n.17.

127. Korczynski, *supra* note 125, at 57.

much as the tip: While the server depends on it for her very livelihood, the customer controls both whether and how much to tip. Although social norms place some constraints on the tipping decision, the customer is under no real obligation to tip at all, let alone a particular amount, and tipping decisions may at times be made—or at least seem to be made—on no basis other than the customer’s mood or whim.<sup>128</sup> Moreover, tips not only determine servers’ economic well-being, but they also can affect their emotional state and sense of self-worth.<sup>129</sup>

Servers are only being rational, therefore, when they fixate on the potential tip in approaching the service encounter. The relationship between server and customer has been compared to that of a creditor and debtor,<sup>130</sup> in the sense that the server must extend credit to the customer in the form of her physical and emotional labor before she knows how much or even whether the customer will tip—an “act of trust in anticipation of reciprocity”<sup>131</sup> with the ever-present risk of customer default for which there is no recourse. Accordingly, servers seek to reduce their vulnerability by increasing the predictability of, and their control over, the outcome of the transaction. To do so, they act as “experts and managers of [the] service encounter.”<sup>132</sup> As experts, servers predict the tip they are likely to receive from a given customer. This presumed ability allows servers to engage in “credit selection” to distinguish good credit risks from bad, which in turn enables them to manage their expectations and determine how to approach the customer.<sup>133</sup> As managers, servers then calibrate their efforts to maximize their relative returns.<sup>134</sup> A server might, for example, provide a perceived good credit risk with better service and more attention while limiting the time and effort she spends on someone she expects to tip poorly.

As experts and managers, servers draw on a number of factors to predict how generously particular customers will tip or how much work customers will require, and accordingly how to adjust service delivery. These predictions often go hand in hand. First, being a difficult customer is similar to being a stingy tipper for two reasons:

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128. See, e.g., Matulewicz, *supra* note 109, at 407.

129. See, e.g., Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL'Y & L. 101, 115 (2014).

130. See *id.* at 118.

131. Suellen Butler & James K. Skipper, Jr., *Working for Tips: An Examination of Trust and Reciprocity in a Secondary Relationship of the Restaurant Organization*, 22 SOC. Q. 15, 16 (1981).

132. Rachel Barkan & Aviad Israeli, *Testing Servers' Roles as Experts and Managers of Tipping Behaviour*, 24 SERV. INDUS. J. 1, 2 (2004).

133. Butler & Skipper, *supra* note 131, at 16.

134. See, e.g., Barkan & Israeli, *supra* note 132, at 2, 16.

such a customer requires greater effort to serve (thereby reducing the relative payoff for the server), and he impedes the server's ability to attend to other customers and quickly "turn" the table to increase the number of customers served and tips received.<sup>135</sup> Second, those who are predicted to be poor tippers also are generally expected to be difficult customers.<sup>136</sup>

In industries where service providers are economically dependent on customers' tips, the content of employees' back stage venting often centers on an inadequate tip that an employee has received or expects to receive from a client.<sup>137</sup> When they anticipate being inadequately tipped, restaurant servers will often, in a tone of indignation, announce the event to coworkers and managers, who will then typically inquire about the identity of the customer in question. According to Greta Paules, "identification is crucial for it allows sympathizers to join the waitress in analyzing the cause of the stiff, which is assumed a priori to arise from some shortcoming of the party, not the waitress."<sup>138</sup> In these venting incidents, the offending customers are often described using a variety of pejorative terms signaling that the customer in question is a member of a social category that are stereotypically thought to be poor tippers.<sup>139</sup>

The factors that servers rely on to make their predictions about customers' behavior might include situational clues to customers' moods, under the theory that a happy customer or one who is celebrating a special occasion will be more generous than one who is feeling down or sour, or assumptions about customers' dining and tipping practices based on regional, linguistic, or class-based characteristics.<sup>140</sup> Additionally, international customers, women, teenagers, elderly adults, groups with small children, Christians, Jews, Asians, Hispanics, and those bearing coupons are all among the customers who are expected to leave an inadequate tip.<sup>141</sup> These

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135. See Zachary W. Brewster, *Racialized Customer Service in Restaurants: A Quantitative Assessment of the Statistical Explanatory Framework*, 82 SOC. INQUIRY 3, 9–10 (2012).

136. See Brewster & Rusche, *supra* note 20, at 363, 371–73.

137. See MARY ELIZABETH GATTA, *JUGGLING FOOD AND FEELINGS: EMOTIONAL BALANCE IN THE WORKPLACE* (2002).

138. PAULES, *supra* note 91, at 35.

139. See *id.*

140. For a fuller discussion of how servers assess customers and act on those assessments in managing the service encounter, see Wang, *supra* note 129, at 119–20, 139–40.

141. See generally Zachary W. Brewster, *Perceptions of Intergroup Tipping Differences, Discriminatory Service, and Tip Earnings Among Restaurant Servers*, 46 INT'L. J. HOSPITALITY MGMT. 15 (2015) (finding that servers who harbor negative attitudes about customer types stereotypically thought to be poor tippers are also more likely to report that they discriminate in their service delivery but that discriminatory service based on these predictions may not enhance their tip earnings); Zachary W. Brewster, *The Effects of Restaurant Servers' Perceptions of Customers' Tipping Behaviors on Service Discrimination*, 32 INT'L. J. HOSPITALITY MGMT. 228 (2013) (assessing how server sensitivity to demographic tipping differences affects their proclivities to discriminately provide either excellent or poor service); Leigh J. Maynard & Malvern

common expectations can have far reaching effects when workplace lore concerning particular social groups' tipping and dining behavior interacts with the strains of service work and servers' economic dependence on tips to set the stage for the delivery and normalization of discriminatory customer service.

#### IV. DIGNITY DEGRADED: EMOTIONAL LABOR AND THE RACIALIZED WORKPLACE

Of the countless factors that may inform servers' predictions of customers' tipping intentions and dining behaviors, perhaps the most widespread and potent stereotype is of African American customers. Many servers admit that they regard African Americans as both poor tippers and difficult customers that they dislike serving. Servers share these opinions openly in social media forums and have described their own and co-workers' views in research surveys and interviews. In one study of restaurant workers, the researchers reported that, "[i]n every one of the interviews, the shared sentiment and 'common knowledge' among white restaurant workers was that black Americans do not tip well and as such, servers should not 'waste their time' on these customers."<sup>142</sup> In a separate, survey-based study of predominantly White restaurant servers, respondents "overwhelmingly" rated Blacks their "least ideal" racial category of customers to serve.<sup>143</sup> Overall, respondents reported that they perceived White customers to be comparatively better tippers and easier to wait on than Black customers. Their responses showed significant differences in the mean ratings of Black and White customers, with mean ratings of Black customers failing even to reach a rating of "average" and in some cases even falling lower than a rating of "below average."<sup>144</sup>

These racist views often emerge in backstage talk among front of the house workers, including servers, hostesses, and even managers—all categories of employees who tend to be White—despite the fact that it rarely is necessary to talk about customers in racial terms.<sup>145</sup> Open racial talk generally occurs *only* in the backstage,

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Mupandawana, *Tipping Behavior in Canadian Restaurants*, 28 INT'L. J. HOSPITALITY MGMT. 597 (2009) (discussing several common stereotypes held by restaurant servers in Canada); Michael McCall & Ann Lynn, *Restaurant Servers' Perceptions of Customer Tipping Intentions*, 28 INT'L. J. HOSPITALITY MGMT. 594 (2009) (a survey of restaurant servers revealing, *inter alia*, that regular patrons and males were thought to be the best tippers and teenagers the worst).

142. Dirks & Rice, *supra* note 19, at 269.

143. Rusche & Brewster, *supra* note 30, at 2013.

144. Brewster & Rusche, *supra* note 20, at 372–73.

145. *See id.*

“behind closed doors,” however—allowing servers to engage in “two-faced racism”<sup>146</sup> that preserves a non-racist front stage appearance.<sup>147</sup>

Of course, servers often complain about customers in general and denigrate other groups of customers in stereotypical terms. Also like venting about customers in general, engaging in racialized backstage banter seems to be one way servers cope with the demands and frustrations of emotional labor. That is, racialized talk provides a way for servers to seek and provide support to one another, creating a sense of in-group solidarity in a racially hegemonic community of coping.<sup>148</sup>

The way servers view and talk about Black customers, however, differs from their negative talk about other groups in significant ways. For instance, in a discourse analysis of interviews with restaurant servers, researchers identified a variety of cues (e.g., style of dress, table manners, etc.) that servers used to cognitively categorize poor Whites as undesirable patrons.<sup>149</sup> In contrast, servers’ disparaging discourse about Black customers was shown to be the outcome of a more or less one-dimensional categorization scheme in which the only operant customer characteristic was their perceived race.<sup>150</sup> That is, black or brown skin alone seemed to be a sufficient characteristic to evoke a gamut of culturally entrenched stereotypes in the minds of restaurant servers that led them to categorize Black Americans as undesirable customers.<sup>151</sup> In addition to stereotyping them as poor tippers, servers have been shown to endorse historically entrenched stereotypes depicting Blacks as “uncivilized and hedonistic.”<sup>152</sup> This view is evident in their discursive depiction of Blacks being overly demanding and discourteous in their behavior and dishonest when lodging complaints about the quality of their food or service in an effort to get free things.<sup>153</sup> Anecdotes of such stereotypes can easily be found in online comment threads, discussion boards, Facebook feeds, and other online me-

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146. See generally LESLIE HOUTS PICCA & JOE R. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE x (2007) (discussing the “significantly *divergent* racial performances by white Americans in public (multiracial) and private (all-white) areas”) (emphasis in original).

147. See discussion *supra* Part I.

148. As Billingsley states in describing her findings: “the emotional labor that servers engage in the frontstage is processed in backstage spaces where servers interact out of the earshot of customers. In this space, servers mitigate the stress associated with the emotional labor demands from the frontstage by relying on racialized and classed discourse about their customers . . . .” Billingsley, *supra* note 19, at 1.

149. See Mallinson & Brewster, *supra* note 19, at 799.

150. See *id.*

151. *Id.*

152. See, e.g., Brewster & Rusche, *supra* note 20 at 378.

153. See, e.g., *id.* at 377–78.

dia where current or former restaurant servers and bartenders openly express their negative sentiments toward Black customers.<sup>154</sup>

Racialized discourse is more than just a way for servers to let off steam: by showing how workers perceive the culture of the workplace, the discourse in turn shapes that culture. The openness with which the speakers express racist sentiments reflects their assumptions that listeners share their experiences and views.<sup>155</sup> And even if they do not feel the same, when listeners fail to challenge racist statements and behavior, they tacitly encourage them.<sup>156</sup> Furthermore, server culture defines what behavior is acceptable not just in the backstage but also on the front stage. Racialized discourse is often coupled with racially discriminatory service, and servers sometimes use racialized discourse to justify providing discriminatory service.<sup>157</sup>

Racist discourse defines workplace norms even for workers who themselves do not participate in racist talk about customers. A recent study found that servers who observed others engaging in racialized discourse—whether it be explicitly racist or covert and coded—were more likely to report that they discriminated on the basis of customers' race in their own service delivery, and that hearing managers' racist talk was especially influential.<sup>158</sup> Furthermore, even those servers who themselves refrained from engaging in racialized workplace discourse nonetheless were more likely to self-report racially discriminating in their service delivery when they were employed in restaurants where they often heard their coworkers denigrating Black customers.<sup>159</sup> These findings suggest that hearing racist discourse in the workplace—especially when management participates and even when the discourse is subtle or coded—makes the racial stereotypes it conveys seem acceptable and the discriminatory service it rationalizes seem normative. Consequently, and regardless of whether they participate in racist talk

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154. See, e.g., *Exploring Race: Do Black Customers Demand More, Tip Less?*, CHI. TRIB. (Oct. 16, 2008, 9:23 AM), <https://newsblogs.chicagotribune.com/race/2008/10/do-black-custom.html>; *Is It True that Waiters Dislike Serving Black/African-American Patrons Because of Bad Tipping?*, QUORA, <https://www.quora.com/Is-it-true-that-waiters-dislike-serving-black-african-american-patrons-because-of-bad-tipping> (last visited Nov. 12, 2019); Gravmi-a, *Does Anyone Else's Restaurant Have a Serious Race Problem?*, REDDIT, [https://www.reddit.com/r/TalesFromYourServer/comments/88omla/does\\_anyone\\_elses\\_restaurant\\_have\\_a\\_serious\\_race/](https://www.reddit.com/r/TalesFromYourServer/comments/88omla/does_anyone_elses_restaurant_have_a_serious_race/) (last visited Mar. 12, 2020).

155. Billingsley, *supra* note 19, at 650–53.

156. *Id.* at 655.

157. See, e.g., *id.* at 651; Brewster, Lynn, & Cocroft, *supra* note 11, at 478.

158. Zachary W. Brewster & Sarah N. Rusche, *The Effects of Racialized Workplace Discourse on Race-Based Service in Full-Service Restaurants*, 41 J. HOSPITALITY & TOURISM RES. 398, 403–07 (2017).

159. *Id.* at 404, 407; see also, e.g., Billingsley, *supra* note 19, at 654.

themselves, many servers go along with and conform their behavior to the values expressed and embodied in such discourse.

Furthermore, a feedback loop also seems to be in play, through which racist backstage discourse strengthens the very stereotypes on which it draws. A recent study suggests that racist discourse in the workplace reinforces and exacerbates the negative stereotypes that servers use to justify providing inferior service to people of color.<sup>160</sup> That study found that servers who worked in a racialized culture—where it was common “to observe Black diners being discriminated against” or “being described in pejorative terms”<sup>161</sup>—were especially prone to exaggerate the magnitude of the difference between the tipping practices of Black and White diners.<sup>162</sup> Perhaps not surprisingly, the study found that servers who had greater antipathy towards Black Americans also tended to inflate the difference.<sup>163</sup> Conversely, servers who neither worked in racialized environments nor scored high for racial prejudice themselves tended to “outright reject” negative stereotypes about Black customers’ tipping.<sup>164</sup> This study provides compelling evidence that racialized work environments significantly shape servers’ propensities to deliver race-based service through their endorsement of stereotypes depicting Black customers as poor tippers.<sup>165</sup>

Notably, the way servers describe how they and their colleagues approach Black customers resembles the way some servers in other studies have reported that they respond to “entitled” customers who have mistreated them: by taking a “minimal” or “work-to-rule” approach in which the server fulfills basic requirements but declines to go “above and beyond to provide service-related extras.”<sup>166</sup> In other words, they engage in surface acting and provide “service with a smirk.” An important distinction is that discriminatory service is often delivered *anticipatorily*, and not just as a response to the customer’s own bad behavior.

Surface acting has been described as a “bad-faith approach” to emotional labor,<sup>167</sup> and not surprisingly, customers find it unsatisfy-

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160. See Zachary W. Brewster & Gerald Roman Nowak III, *Racial Prejudices, Racialized Workplaces, and Restaurant Servers’ Hyperbolic Perceptions of Black-White Tipping Differences*, 60 CORNELL HOSPITALITY Q. 159 (2019).

161. *Id.* at 162.

162. *Id.* at 163–67. While the available published evidence of diners’ actual tipping practices indicates the “estimated unconditional Black-White tipping difference” to be 3.30 percentage points, servers who worked in racialized workplaces were estimated to predict a Black-White tipping difference that was between two and four times larger than the estimated actual difference in Black and White customers’ tipping behaviors. *Id.*

163. *Id.*

164. *Id.* at 168.

165. *Id.* at 164.

166. Fisk & Neville, *supra* note 105, at 397.

167. Chi et al., *supra* note 92, at 1343.



ing because they perceive it as phony and lacking in genuine caring.<sup>168</sup> Deep acting, in contrast, is valued by customers because—as a “good-faith attempt to enhance customer’s experiences”<sup>169</sup>—it leads a server to put customers’ needs first and behave in a way that exceeds customers’ expectations. Customers also seem to “catch” the deep-acting server’s positive mood. Accordingly, and as noted above, when customers of color receive inauthentic emotional labor on a discriminatory basis, they receive comparatively less of the value of customer service itself because of their race.

In addition, as several commentators have noted, approaching customers of color with negative expectations and serving them without enthusiasm sets up a self-fulfilling prophecy that reinforces negative stereotypes when those customers receive poor service and respond by tipping poorly.<sup>170</sup> Further, engaging in “bad faith” surface acting is a counterproductive strategy for servers themselves. By making them seem phony, it undermines their economic rewards. It also sets up a vicious cycle in which their ineffective performance of emotional labor undermines their own moods and well-being. Surface acting depletes employees’ energy and their emotional and cognitive resources, and in turn affects their subsequent performance. It also is associated with employee burnout.<sup>171</sup>

Racist discourse disseminates and magnifies racist stereotypes, shapes workplace culture and defines norms of behavior, and identifies which groups of customers can acceptably be mistreated by withholding authentic service. When servers use racist talk to cope with the stresses of their work and then to justify providing inferior service to those they denigrate, the costs of performing emotional labor are shifted from the worker to customers from the denigrated group. The cumulative effect of racialized workplace cultures on customer service is to systematically deprive customers of color of the warm and caring service that is a hallmark of the full and equal enjoyment of a place of public accommodation.

## V. DIGNITY ELEVATED

The problem described in this Article is complex, but it is not intractable. The empirical research offers ideas both for using liti-

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168. *Id.* at 1339.

169. *Id.* at 1338.

170. *See, e.g.,* Wang, *supra* note 129, at 154. Conversely, delivering genuinely warm and caring service “pays off financially,” because customers perceive the server as prioritizing their wishes and “catch” the server’s good mood. Hulschegeer et al., *supra* note 92, at 274, 265.

171. *See* Chi et al., *supra* note 92, at 1339, 1343–44.

gation more effectively to redress individual cases of discrimination in customer service and for reforming structural conditions proactively to address the broader underlying dynamics.

Legal redress through litigation is unlikely to be the most effective way to address the concerns described in this Article, partly because of the piecemeal approach it entails and partly because of the misfit between the elements of the legal claim and the subtle form of modern racial discrimination in customer service, as discussed in Part II. Nevertheless, plaintiffs might use the lessons from social science research to improve their chances of success in litigation under the federal civil rights laws described.

First, the research on White server culture and racialized workplace environments described in Parts I and IV reveals that the explicit expression of racial bias is common in the backstage areas of many restaurants. Accordingly, plaintiffs and their lawyers should not confine their factual investigation and discovery to what was said to and about plaintiffs in open areas of the establishment during the incident in question; they also should look into what happened in the backstage. Interviewing workers who were in those areas around the time of the incident might, for example, turn up information about racial slurs or statements concerning the plaintiffs that will provide direct evidence of discriminatory intent in connection with the service provided on that occasion. Even if no “smoking gun” is discovered, learning about a racist workplace culture could lead to circumstantial evidence of discrimination that will help to advance the plaintiff’s narrative.

Second, research on the value of emotional labor can help plaintiffs and their lawyers educate the judges and juries who will assess their claims. Advocates should impart the insight that producing “mere feelings” of esteem and respect are the very purpose of emotional labor and articulate the ways in which even subtle forms of discrimination in customer service deprive a plaintiff of the full and equal enjoyment of the services and privileges of an establishment.<sup>172</sup> These lessons could begin as early as the pleading stage, when plaintiffs’ lawyers can provide a narrative of the claim that describes the dignitary harms and loss of value that accompany the delivery of discriminatory customer service.<sup>173</sup> The education can continue through the development and introduction of expert testimony on the importance of emotional labor in the hospitality industry, in terms of both how establishments define their product

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172. In addition, advocates can teach judges and juries about the effects of normative ambiguity in assessing claims of discrimination generally. *See supra* text accompanying notes 75–78, 83.

173. *See* discussion *supra* Parts I, III.A.

and what customers expect to receive.<sup>174</sup> Plaintiffs' lawyers also can explain in their arguments and requested jury instructions that to be treated with equal regard and dignity inheres in the right to the full and equal enjoyment of public accommodations.<sup>175</sup>

While litigation might prompt some establishments to improve their cultures and service, a more proactive, preventive approach would seem to offer greater promise of addressing the structural issues this Article has identified. Restaurant operators need to recognize the dissonance between the supposed "customer is king" approach and the experiences of many customers of color, as well as the ways in which that mentality can harm their employees. In other words, management needs to acknowledge its influential role in the service triangle and exercise greater responsibility to ensure that all customers and workers are treated with the dignity and respect to which they are entitled.

Most immediately and perhaps most obviously, restaurant operators should implement an unambiguous zero tolerance policy against racialized language in their establishments.<sup>176</sup> When servers observe their coworkers or managers using such language, it sends the unequivocal message that Black Americans and other customers of color are not valued and do not warrant the same level of regard for their dignity as Whites. No justification supports the use of racist and disparaging comments about Black restaurant customers. When such language is overlooked, minimized, and tolerated, restaurants can reasonably expect that their Black customers will disproportionately receive service with a smirk rather than the authentic and caring experience that epitomizes "value added" customer service. The comparatively lackluster service that customers of color sometimes receive will most often not cross the threshold of warranting even a complaint, let alone litigation. Nevertheless, establishments where employees routinely disparage and stereotype Black customers as undesirable patrons who are unworthy of warm and caring service should expect that more egregious incidents will occur and, in some cases, culminate in litigation.

A zero-tolerance policy against racialized workplace discourse should be just one part of a robust diversity training program that is delivered on a recurring basis. As Gerry Fernandez, founder and president of the Multicultural Foodservice and Hospitality Alliance, has advised, "[i]f you don't have money for training, I guarantee you'll find it if you get sued. Discrimination is pricey and

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174. See discussion *supra* Part III.A.

175. See discussion *supra* Part II.

176. See Zachary W. Brewster, *Racially Discriminatory Service in Full-Service Restaurants: The Problem, Cause, and Potential Solutions*, 53 CORNELL HOSPITALITY Q. 274, 278 (2012).

there are a lot of people who want you to pay. It can cost millions of dollars and, more importantly, damage to the brand.”<sup>177</sup>

At the same time, firms should provide service workers with training and support to more effectively deliver emotional labor and manage their own job-related stresses. As this Article has explained, the strains and indignities of performing emotional labor can negatively affect both servers’ well-being and the quality of their performance as well as increase their susceptibility to the influence of a racialized workplace culture. To help servers more effectively deliver emotional labor to all customers, management can provide training to develop deep-acting skills and emotion regulation, as well as on how to better manage conflicts with customers.<sup>178</sup> Management also can help servers learn more constructive ways of coping with the emotional dissonance of service work, both individually and communally, with support from coworkers.<sup>179</sup>

In addition, management should understand and embrace the importance of its own role in supporting service workers. Management should provide servers with “a sense of ‘organizational backup’” that can include social support, resources that enable them to resolve service-related problems on their own,<sup>180</sup> and the institution of processes for reporting and addressing instances of customer aggression.<sup>181</sup> If a firm truly values the emotional labor of its workers—and, consequently, if it understands the value that emotional labor returns to the firm—it should recognize the personal dignity of those workers as well, by providing work conditions to support them in delivering service with a smile to all.<sup>182</sup>

## CONCLUSION

The legal right to full and equal enjoyment of places of public accommodation recognizes personal dignity as being essential to

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177. Alicia Kelso, *How Can the Deeply Diverse Restaurant Industry Avoid Another “Starbucks Incident”?*, FORBES (Apr. 23, 2018, 9:00 AM), <https://www.forbes.com/sites/aliciakelso/2018/04/23/after-the-starbucks-incident-whats-next-for-the-deeply-diverse-restaurant-industry/>.

178. See, e.g., Hyo Sun Jung & Hye Hyun Yoon, *Antecedents and Consequences of Employees’ Job Stress in a Foodservice Industry: Focused on Emotional Labor and Turnover Intent*, 38 INT’L J. HOSPITALITY MGMT. 84, 87 (2014); Hulschegeer et al., *supra* note 92, at 275; Chi et al., *supra* note 92, at 1344; Fisk & Neville, *supra* note 105, at 402.

179. See, e.g., Adelman, *supra* note 100, at 379–80.

180. See Fisk & Neville, *supra* note 105, at 401.

181. See *id.* at 402.

182. See, e.g., Adelman, *supra* note 100, at 379 (“If an employer especially values worker emotional labor, the way to encourage it may be to offer an enlarged work role and better pay.”); Jung & Yoon, *supra* note 178, at 87 (listing organizational level benefits that can be provided to improve conditions for employees who perform emotional labor).

economic inclusion and empowerment.<sup>183</sup> Just as other areas of antidiscrimination law have grappled with developments in our understanding of how discrimination operates,<sup>184</sup> however, so must the law concerning discrimination in public accommodations reckon with the complex set of individual, organizational, and societal factors that interact to deprive people of color of dignity and equality by denying them the benefits of welcoming and caring customer service.

At the same time, the law alone has insufficient reach to encompass and reform the dynamics underlying discrimination in customer service. Interactive customer service encounters trade on the dignity of *both* customers and servers. They also take place within an organizational context where structural conditions and economic incentives combine with cultural norms and racial biases to identify and reinforce the designation of people of color as the customers onto whom servers can acceptably shift the costs of performing the difficult work of emotional labor. Meaningful and lasting change therefore must come at the organizational level, through the implementation of policies and practices to ensure that both customers and servers are treated with dignity and respect.

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183. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); Bracey, *supra* note 50, at 676.

184. Employment discrimination law is one prominent example of such growth and change. See *generally, e.g.*, CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* xxvii, 6–10 (9th ed. 2017) (discussing ways in which the law and legal scholars have addressed advances in social science research on the social psychological processes that contribute to discrimination in employment).