Discrimination in the retail market: field evidence

## Overview and Research Objectives

There is accumulating evidence that businesses often use rigid, clear-cut terms in their standardized agreements, but authorize their employees to exercise discretion when applying these terms vis-à-vis consumers on the ground.[[1]](#footnote-1) Key insights from economic theories of incomplete contracting suggest that sellers may use this strategy, rather than including all of the contingencies in the contract, because the existence of clear and unconditional terms on paper may allow them to fend off opportunistic buyers, who could exploit a more detailed and comprehensive contract to extract gains that the seller did not intend to offer.[[2]](#footnote-2) For example, a seller may adopt a stringent return policy, accepting only receipted returns of unopened merchandise within a limited time period, yet exhibit more accommodating or lenient behavior under certain circumstances.

The presence of an ostensibly rigid agreement or policy enables sellers to use information that they can observe only *ex post* (after consumers have entered into the transaction) to screen out opportunistic buyers, without having to bear the costs of verifying consumers’ opportunistic behavior with third parties, such as arbitrators or courts.[[3]](#footnote-3) Indeed, overcoming consumer misbehavior in this manner may be the main driver behind sellers’ selective enforcement of their formal terms and conditions. Yet, empirical evidence from other domains, including policing, prosecution, adjudication, and employment, suggests that decision makers often exercise their discretionary powers discriminatorily across gender and racial lines.[[4]](#footnote-4) This evidence raises the concern that sellers’ discretionary authority to depart from their formal agreements may be applied inconsistently, to the disadvantage of certain consumer groups, such as African-American and female customers. For example, sellers may exhibit more leniency towards white customers asking to make non-receipted returns than towards similarly situated African-American consumers. These subtler and more covert forms of discrimination in the marketplace, to the extent that they exist, might generate enormous socio-economic harm. Indeed, females, African-Americans, and other minority members spend billions of dollars shopping for goods and services each year. Yet, despite the anecdotal evidence about inequitable treatment of minorities in consumer markets, empirical research on sellers’ discretionary enforcement of contracts and its distributional implications is remarkably scarce. Drawing on insights from economics and social psychology, the proposed research will test whether, when, and to what extent sellers treat similarly situated consumers differently in their implementation of the terms and conditions governing their sales transactions.

The proposed research will rely on retail product returns as a first test-case. The case of retail returns is particularly important to scrutinize. The ability to withdraw from consumer transactions is valuable to consumers, as they frequently come to regret their purchases after the fact.[[5]](#footnote-5) About twenty percent of all purchases made in retail stores are ultimately returned to the sellers, resulting in hundreds of billions of dollars of returned merchandise each year.[[6]](#footnote-6) In view of the substantial economic impact of product returns on both consumers and sellers, it is imperative to explore both the actual implementation of sellers’ return policies vis-à-vis consumers and the distributional outcomes of this implementation.

This research will introduce and validate a new empirical paradigm through which to examine whether discretion in the execution of consumer contracts leads to discrimination. For this purpose, the research will use a mixed-methods approach that combines qualitative interviews with a series of field (audit) experiments. The foundations for the field work will be laid by interviews with store clerks and managers about their experiences. These interviews are expected to provide insights into sellers’ return practices by exploring whether and when store employees are given discretion to depart from the stores’ return policies. Building on the evidence provided in the interviews, a series of field experiments will be conducted to explore whether sellers exercise their discretionary authority to depart from the formal terms of the transaction inconsistently across racial or gender lines. The experiments will complement the interviews by identifying the factors associated with a more lenient treatment of consumers than that required by the formal policy, analyzing their interactions, and weighing their relative importance.

The experiments will be conducted in Los Angeles using an audit technique. For each study, the PI will recruit and train a team of 40 auditors (testers): 10 African-American males, 10 African-American females, 10 White males, and 10 White females. The testers will memorize and practice a bargaining script. They will then attempt to return merchandise they purchased in advance at each store to ~150 retail stores, with their returns failing to conform with the formal terms of the stores’ return policies.

In Study 1, testers will attempt to return items without receipts to stores that formally require receipts to make returns, and in Study 2, testers will attempt to return items outside of their original packaging to stores that formally require items to be returned unopened. The testers will follow a uniform script to the letter and will record their return outcomes at each store. Statistical analyses will then be conducted to test whether customers are treated differently based on gender, race, perceived socio-economic class (as signaled by difference in attire), or assertiveness in bargaining. This design will also allow for testing the roles of perceived class and assertiveness in moderating or exacerbating the effects of race and gender on sellers’ decisions and behavior.

Drawing on the results of preliminary interviews (n = 15 store clerks) and a pilot study conducted by this PI in Chicago in 2019 (n = 60 stores; 20 White and African-American female and male testers), the research predicts that a significant degree of discrimination exists in the retail market. If this prediction is corroborated in the findings, the proposed research will proceed to test for the sources of the observed discrimination. Two main forces are believed to be driving discriminatory practices: animus, or bias, against certain groups, and statistical discrimination, defined as the use of statistical inferences based on an individual’s group affiliation when other information about that person is limited. Animus-based theories of disparate treatment will be compared with theories of statistical discrimination and tested against the results of the study. Finally, the research will explore the legal and policy implications of the findings. In particular, the study will consider whether and how consumers could legally challenge any observed disparate treatment, either under current consumer protection laws or under existing civil and human rights statutes.

## Literature Review and Contribution to Prior Research

This research will bring together two current strands of research: the rapidly growing social sciences literature on discrimination in the marketplace and the more nascent law and social sciences research on “contracts in action.”

### Contribution to Research on Discrimination in Consumer Markets

To date, far too little is known about how race, gender, and socioeconomic status (SES) operate in consumer markets, particularly when compared to the considerable body of knowledge about discrimination in housing and employment.[[7]](#footnote-7) This paucity in the literature mirrors a legal lacuna as well. While race and gender discrimination in employment and housing is explicitly prohibited under the various civil rights laws of the 1960s, discrimination in consumer markets is left largely uncovered by these laws.[[8]](#footnote-8) The few studies to address discrimination against consumers by sellers have focused on only a handful of industries (e.g*.*, car sales, credit, and vacation rentals),[[9]](#footnote-9) using differential pricing or refusals to offer the good or service altogether as the main or sole measure of discrimination.[[10]](#footnote-10)

Very few studies have documented more subtle and covert forms of differential treatment of certain consumer groups, such as longer waiting times and lower-quality service, and most of this work has relied on qualitative interviews rather than on quantitative techniques.[[11]](#footnote-11) The proposed research will contribute to existing discrimination scholarship by investigating a potentially overlooked form of discrimination in consumer markets: selective enforcement of sellers’ formal terms and conditions. The study will explore the possibility that sellers enforce the formal terms of the deal, as set forth in their standardized policies or agreements, in a discriminatory fashion.

### Contribution to Consumer Contracts Scholarship: “Contracts in Action”

The proposed research will contribute to the literature on consumer contracts by shifting the focus from the study of texts of standardized agreements to a closer examination of their actual, on-the-ground, implementation. Drawing on original interviews and field experiments, this research will test the traditional assumption that a seller’s standardized agreement applies uniformly towards all consumers entering into the same kind of transaction with the seller.[[12]](#footnote-12) In fact, more recent theoretical work on incomplete contracting suggests that rather than writing all of the contingencies into the contract and abiding by it, sellers may actually prefer to complement rigid terms on paper with a concurrent internal policy of allowing concessions not required by the contract.[[13]](#footnote-13) The strategy of allowing employees discretion to deviate from the “paper deal” can be seen as an attempt to meet the expectations of most good faith buyers, while preventing opportunistic consumers from exploiting a more lenient written policy to extract gains that the seller did not intend to offer. In short, sellers may value terms that they can use at their discretion to penalize customers for undesirable behavior when such objectionable behavior is difficult to include in a contract due to the cost of its verification.[[14]](#footnote-14)

This study will contribute to the nascent law and economics literature on incomplete contracting by providing the missing empirical perspective. The study will explore the existence of significant disparities between the terms of retailers’ return policies and their actual implementation, as well as the factors underlying these disparities and their distributional consequences.

### Contribution to Economic Theories of Discrimination

If discrimination is detected in this study’s experiments, the proposed research will proceed to explore possible explanations for these findings. While discrimination can be observed in the lab and in the field, its causes are considerably more difficult to investigate. As a result, while the literature offers overwhelming evidence of pervasive discrimination against minority groups, there is very limited data on the causes of this discrimination.

The proposed research will contribute to the existing literature by expanding our knowledge on the relative strengths of the two main economic theories of discrimination: animus, or “taste-based” theories, and statistical theories. Taste-based theories posit that a particular group is treated significantly worse because it is disfavored or hated.[[15]](#footnote-15) In contrast, statistical theories of discrimination posit that disparate treatment stems not from distaste for or bias against certain minority groups, but rather from a seller’s desire to maximize profits in a situation of imperfect information.[[16]](#footnote-16) When information about specific individuals is limited, decision makers may draw statistical inferences based on an individual’s group affiliation.[[17]](#footnote-17) In order to shed light on the mechanisms underlying discrimination in the enforcement of return policies, this study will explore the effects of some plausible covariates, such as store location and store clerk demographics, on discrimination levels. If, for example, a significant interaction between the race of the store clerk and that of the tester is observed, this finding will provide support for the existence of taste-based discrimination, and the absence of any such race-based interaction will indicate taste-based discrimination was not a factor.

## Research Plan

The study will adopt a full‐cycle approach,[[18]](#footnote-18) whereby in-depth interviews with retail sellers, both store clerks and managers, will be used to determine the presence of tailored departures from contracts and to provide preliminary evidence as to whether such discretionary tailoring leads to differential treatment of consumers. The study will then turn to field experimentation to test and measure racial, gender, and SES discrimination in the enforcement of consumer agreements on the ground. The field experimentation will be followed by returning to the interviewees to corroborate the experimental findings and to further elucidate the dynamics and factors underlying the observed discrimination. A full-cycle approach will enable the PI to apply the insights gained from the in-depth interviews and the knowledge about how the actors being studied apprehended their experiences to the design of the field experiment. More importantly, it will allow for returning to these actors to further elucidate the mechanisms underlying the observed patterns.

### **Stage 1: Qualitative Interviews**

The research will include interviews with ~100 retail store clerks and managers in Los Angeles. Interviewees will be recruited using online platforms, including Craigslist and Facebook.[[19]](#footnote-19) Consistent with the goal of triangulating using multiple methods,[[20]](#footnote-20) the interviews will be semi-structured to permit follow-up questions and probes. The purpose of these interviews is to lay the foundations for the field experiments by exploring whether and when store clerks and managerial employees are given discretion to depart from the stores’ formal policies, and how they understand and exercise that discretion on the ground. Because the goal is to uncover interviewees’ subjective experiences and understanding of how they implement their discretionary power on the ground, it is imperative to allow them to use their own language and make their own connections.[[21]](#footnote-21) The interviews will generate testable narratives of sellers’ exercises of discretion. The interview schedule will be tested, and interviews will be recorded, transcribed, and subjected to thematic coding by at least three research assistants (RAs) to ensure inter-coder reliability.[[22]](#footnote-22) Based on this analysis, the hypotheses to be tested in the field experiment will be further formulated and developed.

The PI has already conducted 15 initial, or pilot, interviews to lay the groundwork for the study and to contribute to the formulation of the hypotheses to be tested in the field. The interviews conducted to date have revealed that sellers often use ostensibly rigid, unconditional terms in their standardized agreements for the purpose of distinguishing between different types of consumers, and that even clear, bright-line terms in consumer agreements are often selectively enforced, with store clerks exercising discretion on the ground.[[23]](#footnote-23) The interviews have also provided evidence that these discretionary departures disproportionately benefit white, upper-class consumers and discriminate against minority consumers. For example, a former store clerk at a high-end Chicago carpet store explained, in response to the PI’s question as to whether he had ever deviated from the store’s formal return policy, that:

Our policy was to charge a $100 delivery fee, but there might be something in the conversation […] where I’d say: “Ok, I’ll waive it for you” if they ask. […] Those who managed to get their fees waived were typically white baby-boomers. […] There are plenty wealthy people of color who buy rugs, but to my memory, the people who would get their fees waived were mainly white.[[24]](#footnote-24)

The insights gained by this handful of interviews illustrate the promising potential and intellectual merit of using a mixed methods approach for addressing the important questions on the discriminatory effects of sellers’ selective enforcement practices.

### **Stage 2: Field Experiments**

The research will include a series of field experiments, all aimed at testing discriminatory enforcement of return policies in the retail market. Field experiments combine experimental methods with field-based research, relaxing certain controls over environmental influences to better simulate real-world interactions, while retaining the key experimental features of matching and random assignment, which are essential for causality inferences.

Notably, while the audit technique has been used for the measurement of discrimination in housing and employment for decades,[[25]](#footnote-25) it has rarely been employed in contract law and consumer contracts scholarship. The proposed research aims to open the door for future field experimentation in these areas by undertaking the first attempt to assess the surprisingly overlooked discrepancies between contracts “on the books” and “in action” and their troubling discriminatory consequences.

Although in-person audits are time-consuming and require intensive supervision, this approach offers several advantages over online studies of discrimination, including correspondence studies. In-person audits provide a clear method for signaling race through the actual physical appearance of consumers, rather than relying on a white or black-sounding name; and they provide the opportunity to gather both quantitative and qualitative data, including information on whether the consumer receives the service, as well as on how he or she is treated in the process.

#### (a) Sample of Stores

To keep the project manageable, the study will be conducted in the Los Angeles retail market. To identify patterns within and across different types of sellers, the sample in each city will consist of ~150 retail stores from five different product markets: apparel, shoes, toys, general merchandise, and electronics.[[26]](#footnote-26) For each of the sampled stores, information on basic company characteristics, such as annual revenues and year of incorporation, will be collected using Bloomberg and Hoover’s Company Directories.[[27]](#footnote-27) Finally, in order to classify stores as high-end, casual, or discount, data on the median prices of all items listed on each store’s website will be computed using web scraping techniques.[[28]](#footnote-28)

### (b) Recruitment and Training of Testers

The study will use an audit technique in which testers will be trained to bargain uniformly and sent to make attempted returns of items that they will purchase in advance from each retail store. In order to minimize the possibility of non-uniform bargaining, attention will be paid to issues of uniformity and control. A major goal will be to choose testers who are alike in all observable characteristics other than gender and race, and to train them to behave and negotiate in a standardized manner. Testers will be chosen to satisfy the following criteria for uniformity:

1. *Age*: All testers will be twenty-two to twenty-five years-old;
2. *Education*: All testers will be undergraduate students with between one and four years of college education;
3. *Dress*: In Study 1, all testers will wear similar, casual attire during the audits: flat shoes, a pair of jeans and a t-shirt, and female testers will be instructed to wear minimal makeup. In Study 2, attire will vary to signal different SES.
4. *Name*: If asked by a store clerk, each tester will give a false name chosen from a short, pre-selected list of middle-class sounding names.
5. *Address*: If asked by a store clerk, each tester will provide a home address from a middle-class neighborhood.
6. *Profession*: If asked by a store clerk, each tester will say he or she is a young professional (e.g*.*, a marketing manager or a systems analyst).
7. *Attractiveness*: Applicants will be ranked by Amazon Mechanical Turk workers for “average” attractiveness.

All testers will attend several training sessions before visiting the stores. The training will include memorizing the script and participating in mock negotiations designed to help testers gain confidence and learn how to negotiate and answer questions uniformly. The training will emphasize uniformity in intonation, facial expressions, and body language. The script anticipates that store clerks may ask questions and will provide testers with a list of contingent responses to questions that might be asked. Testers will be accompanied to the stores by supervisors to ensure that testers are following the script and accurately reporting the results.

Despite the abovementioned attempts to control for tester characteristics and behavior, testers will inevitably diverge from one another in more than their skin tone and gender. Store clerks may treat some of the testers differently, not because of their gender or race, but because of other dissimilarities among them that may be unobservable to the researchers in advance. Indeed, it has been previously suggested that African-American, Hispanic, and white customers, or female and male customers, may differ along unobservable characteristics other than their race or gender that may influence decision makers (e.g., employers or sellers), even indirectly.[[29]](#footnote-29) The PI is not aware of any scientific basis for this theory, but in order to mitigate the concern that results are driven by unobservable differences between individual testers, at least ten testers of each race and gender will be recruited for each experiment, so that the study will include a total of 80 testers.

*D. Experimental Design*

### Study 1: Race, Gender, and Complaint-Based Discrimination

The main objective of Study 1 is to explore the role of race and gender in selective enforcement decisions. A secondary goal is to test the effect of complaining on selective enforcement practices, and the interaction between race, gender, and assertiveness in negotiations in shaping return outcomes. For these purposes, each store will be audited by four testers: one African-American male, one African-American female, one white male, and one white female. Testers will purchase identical items in each store and will try to return the items a few days later without the receipt, despite a formal receipt requirement for returns. Testers will be assigned one of two scripts, so that half of the stores will be audited by “complainers,” and half by “non-complainers.” In the “complainer” script, testers will complain about the quality of the product and ask to speak with a manager. In the “non-complainer” script, testers will merely ask to return the item because they “received it as a gift but do not actually need it,” without complaining or asking to speak with a manager. Testers will follow their memorized scripts to the letter and will report the return outcomes and other relevant information in post-audit survey forms.

Using chi-squared tests and multivariate regressions, the study will test four main issues. First, it is hypothesized that African-American consumers will be treated significantly worse than white customers, in that they will be significantly less likely to have their non-receipted returns accepted. Among those who succeed in having their returns accepted, African-American consumers are expected to be significantly more likely to be denied a cash refund and offered an exchange or store credit instead in comparison to white customers, and to be subject to longer investigations by the store clerks prior to having their returns accepted, such as questions concerning the reason for making the return.

Second, the research will test competing predictions as to the effect of gender on return outcomes. On one hand, there is considerable evidence that women are often treated less favorably than men in various markets and transactions. For example, Ayres and Siegelman have found that female testers presenting themselves as prospective car buyers are offered significantly higher prices for cars than are male testers.[[30]](#footnote-30) In contrast, in the specific context of product returns, women may be treated more favorably than men if they are perceived as responsible for the household purchases or as more trustworthy than males.

Third, this study anticipates that sellers will be significantly more likely to depart from their formal requirements when dealing with complaining consumers than with non-complainers, since complainers are more likely to generate reputational harm or to cease buying at the store than are consumers who relent and acquiesce. [[31]](#footnote-31) It is generally assumed that “the squeaky wheel gets the grease,”[[32]](#footnote-32) but, to date, there has been little experimental investigation into the ways in which consumer assertiveness shapes sellers’ behavior and decisions.[[33]](#footnote-33)

Finally, this study will examine the interaction between assertiveness in bargaining and consumer demographics. Existing social psychology research reveals a significant correlation between people’s demographics and their sense of entitlement: minority group members, such as women and African-Americans, typically feel less entitled and are less likely to complain than are individuals belonging to the majority.[[34]](#footnote-34) Race and gender were found to influence what people expect and feel they deserve, with African-Americans and women feeling significantly less entitled than do whites and men. In this respect, complaint-based segmentation of consumers might have regressive distributional effects because those who complain and consequently receive better treatment are those who are already better off.

Nevertheless, this study tests whether, even when minority consumers *do* complain, they are differentially treated compared to consumers belonging to the majority. It is hypothesized that race and gender will interact with the complaining effect, such that complaining will be significantly more beneficial for white customers than for African-Americans, and significantly more beneficial for white males than for white females. Sociological and psychological research has previously shown that women and African-American men are often penalized for displaying assertiveness and frequently encounter both social and financial backlashes when behaving assertively.[[35]](#footnote-35) For example, in a survey in which participants read a mock trial scenario, female litigants were evaluated more negatively when displaying aggressiveness than were similarly aggressive men.[[36]](#footnote-36) Similarly, studies on discrimination in the workplace have found that agentic and assertive women are often treated less favorably in the workplace or discriminated against in job searches.[[37]](#footnote-37)

In a pilot study conducted by the PI in the spring of 2019 (n = 60 stores in downtown Chicago, audited by 20 testers), a similar experimental design generated large and significant differences in return outcomes between African-American and white testers, indicating the potential of this experimental design for exploring long-standing questions related to racial discrimination in the retail market.[[38]](#footnote-38) The results of the pilot experiment also revealed a significant complaining effect: sellers were more than 50% likelier to accept consumers’ requests after consumers had complained than when consumers had not registered any complaints. Notably, the complaining effect interacted with gender and race, such that white customers benefited from complaining significantly more than did African-Americans, and white males benefited from complaining significantly more than did white women. However, African-American men benefited less from displaying assertiveness than did African-American women. If corroborated in the proposed study, the pilot study results will suggest that complaint-based segmentation of consumers exacerbate discrimination in consumer markets.

### 2. Study 2: Race, Gender, and Class-Based Discrimination

Study 2 will shift attention to discrimination based on perceived socioeconomic status (SES), and test the interaction between SES, race, and gender in the context of selective enforcement of return policies. In addition, in order to explore the external validity of the findings in Study 1, Study 2 will use a different scenario: returns of unpackaged items. Testers will purchase identical items in each store and will try to return the items a few days later without their original packaging, despite a formal requirement to return items “unopened, in their original packaging.” As in Study 1, each of the stores will be audited by four testers (one African-American male, one African-American female, one white male, and one white female) who will follow a uniform script. This study will differ from the first in that in this second study, each store will be randomly assigned to be audited by either higher or lower SES consumers, differing, in addition to race and gender, along four dimensions:(1) *Dress*: “higher SES” testers will wear expensive suits and shoes, while “lower SES” testers will be dressed in casual attire, such as flip-flops, jeans and a t-shirt; (2) *Names*: “higher SES” testers will use a false upper-class sounding name, while “lower-SES” testers will use a false lower-class sounding name;[[39]](#footnote-39)(3) *Address*: “higher SES” testers will give an address for an upper class neighborhood, while “lower SES” testers will give an address for a lower class neighborhood*;* and (4) *Profession*: “higher SES” testers will say that they are bank CEOs, while “lower SES” testers will say that they work in school maintenance.

Building on previous empirical evidence suggesting that higher SES consumers are often treated more favorably than are lower-SES consumers,[[40]](#footnote-40) the main prediction of this study is that store clerks will be more likely to depart from the policy and accept the return when dealing with higher SES customers than with their lower SES counterparts. A secondary question that this study will test is whether perceived SES can moderate the effects of race and gender on return outcomes. To the extent that racial discrimination of consumers is driven, at least in part, by statistical inferences about customers’ SES and their consequent value to the seller, we should expect to see less discrimination when the seller has strong signals as to consumers’ SES (since in these cases, sellers do not need to use race as a proxy for SES).

*E. Elucidating the Sources of Discrimination*

Drawing on the findings of Studies 1 and 2, the proposed research will proceed to examine the two main theories of discrimination: taste-based and statistical discrimination. In the context of product returns, bigoted store clerks may refuse to accept returns from minority customers, or make life more difficult for such customers by asking them more questions about the reasons for returning the item and for failing to conform to the store’s return policy. Yet, differential treatment of consumers seeking to make returns may also be driven by statistical discrimination. For example, if store clerks lack information about a specific buyer seeking to return a product, they may draw inferences about the likelihood that the customer is trying to abuse the store’s policy based on the buyer’s perceived race, gender, or class. Similarly, store clerks may use race, class, and gender as proxies for the value of the customer to the store. To illustrate, store clerks at a high-end store may rationally infer that higher income customers are likely to spend more money at their store than are lower-income customers. Store clerks working in stores in predominantly black neighborhoods may rationally infer that black customers are likely to spend more money at their store than are white customers, and so forth. To shed light on these potential explanations, the study will conduct the following tests:

### 1. Effects by Clerk Characteristics

### Under taste-based theories of discrimination, store clerks might be biased in favor of customers of the same race or gender. If discrimination is driven by in-group bias or bigotry, then the clerk’s race and gender should matter. To explore this prediction, testers will be asked to report the perceived race and gender of the store clerk in each store. The study will then test whether the findings change based on the store clerk’s demographics. If in-group bias is the primary explanation for the differential treatment of customers, African-American consumers should face higher return acceptance rates when interacting with African-American store clerks than when interacting with white clerks.

2. Effects by Location

Under statistical discrimination theories, if discrimination is driven by store clerks’ estimations of the likelihood that the specific customer will continue to buy at the store, then the store location should play a dominant role in shaping testers’ return outcomes. Sellers located in predominantly white neighborhoods may exhibit more discrimination towards African-American customers than do sellers located in predominantly black neighborhoods. To test this hypothesis, the study will merge data on neighborhoods by census tracts, and use regression analysis to test whether the extent of discrimination varies with the proportion of African-American residents located near the store.

### Effects by Store Characteristics

The proposed research will explore the effects of several store characteristics on discrimination levels. In particular, the study will test the effects of the following characteristics using a multivariate regression:

1. *Store prestige*. Previous research suggests that higher-end stores may be particularly likely to discriminate against African-American consumers.[[41]](#footnote-41) To examine this issue, data on the median prices of the items listed on each store’s website will be collected, using web scraping techniques, and each store will be classified as either high-end, mainstream (casual), or discount.
2. *Store Age* *(Experience)*. To the extent that discrimination is not economically efficient, it would be expected to see less discrimination among more experienced and established retailers in comparison to less experienced ones. To test this hypothesis, data on store age (years since date of establishment) will be collected and return outcomes will be regressed on store age, while controlling for all other observed characteristics (e.g., annual revenues and size).
3. *The Presence of a Return Policy Sign*. The study will test the hypothesis that when a return sign is conspicuously present in the store, discrimination is less likely to occur, because clerks are more likely to adhere to the formal policy terms, resulting in uniform treatment of consumers regardless of race, gender, or SES. For this purpose, testers will be instructed to report on the presence or absence of a return policy sign in each of the audited stores, and return outcomes will be regressed on policy sign presence (a binary variable), while controlling for all other observed store characteristics (e.g., annual revenues and size).

### **Stage 3: Final Set of Interviews**

After obtaining and analyzing the results of the field experiments, the PI will turn to the interviewees again in order to learn more about the factors underlying the results. To advance our understanding of the roles of bias and statistical inferences in shaping sellers’ decisions, the interviewees will be asked to evaluate why minority consumers are treated differently. Admittedly, some biases may be implicit or unconscious. The interviewees’ responses should therefore be complemented with additional quantitative work in the future.

## Significance and Intellectual Merit

The proposed research will make three unique contributions. The first is methodological. By using an innovative mixed-methods approach, this research will chart largely unexplored territory in empirical legal research. While traditionally, the mixed-methods approach has consisted of combining qualitative research with *lab* experiments, this research will combine interviews with *field* experiments, providing the advantage of studying market players’ real-world decisions and outcomes in their natural, everyday environments.[[42]](#footnote-42) Combining interviews with field experiments in this way will enhance the external validity of the findings, instilling confidence about their applicability to real-world decisions, and allowing for a more in-depth investigation of the mechanisms underlying them.

The second contribution is theoretical. The proposed research will expose a form of market discrimination that has so far been overlooked: discriminatory enforcement of consumer contracts. The study will exploit the database generated by the audits to explore two leading economic theories of discrimination: animus-based and statistical discrimination. In this way, the study will also contribute to existing debates on the sources of marketplace discrimination. At the same time, this research will bring legal realism to consumer contracts scholarship by shifting the focus from the study of the text of standardized agreements to the exploration of real-world interactions between consumers and sellers and their implications for consumer welfare.

The third contribution is doctrinal or prescriptive. To the extent that the pilot findings about the prevalence of discrimination against consumers are corroborated in the proposed study, the research will illustrate the importance of addressing a gaping yet neglected hole in existing legal doctrine. To date, there is no explicit prohibition on differential treatment of consumers based on race or gender in most markets and industries. While both the FTC Act and most state Unfair and Deceptive Acts or Practices (UDAP) statutes include broad prohibitions against “unfair” conduct,[[43]](#footnote-43) only a few state UDAP laws explicitly outlaw discrimination against minority consumer groups as an “unfair” practice, and, even then, these states prohibit only *price* discrimination, and only to the extent that it leads to unfair competition.[[44]](#footnote-44)

There are few specific areas in which discrimination of consumers based on race, sex and other suspect grounds is explicitly deemed unlawful. At the federal level, the Equal Credit Opportunity Act prohibits discrimination in credit transactions and residential real estate mortgage lending on the basis of suspect grounds, such as race, color, and sex.[[45]](#footnote-45) Similar prohibitions against discrimination are found in the Fair Housing Act.[[46]](#footnote-46)[[47]](#footnote-47) At the state level, various jurisdictions prohibit discrimination in the insurance, credit, and real estate markets.[[48]](#footnote-48) Yet, other than in California,[[49]](#footnote-49) there is no federal or state law (whether civil rights, human rights, or UDAP legislation) that explicitly protects consumers from racial or gender discrimination in consumer markets. The proposed research would bring this legislative omission to policymakers’ attention and call on them to revisit the current state of both federal and state anti-discrimination laws. Until legislative or executive action is taken, this research could influence courts to consider interpreting UDAP laws as prohibiting discrimination as “unfair” acts or practices.

## Broader Impacts

### Contribution to the advancement of scientific knowledge

Despite decades of scholarship, disagreement persists over the extent of marketplace discrimination in the United States, the explanations for such discrimination, and the normative implications for law and policy. In part, debate continues because discrimination is an enormously complex phenomenon, and both its history and continued existence are closely related to politics and ideology. However, some portion of this dispute can also be traced to the incomplete use of empirical tools to study marketplace discrimination. In this context, field experiments represent the golden standard and complement the conventional regression analysis approach. In the future, it is the PI’s expectation that field experiments will be applied more widely by legal scholars, economists, and sociologists interested in studying discrimination in the marketplace. The proposed research is expected to demonstrate the significance of carefully controlled field experiments as a research technique for the study of marketplace discrimination, with the purpose of advancing our scientific knowledge on discrimination in consumer markets, its sources, and potential solutions. In doing so, this research will contribute to an emerging literature that tests the core theoretical positions in the law and economics of discrimination literature. This scholarship, in turn, promises to advance our understanding of both the causes of and remedies for discrimination in the marketplace.

### Contribution to Activities that Advance Desirable Societal Outcomes

Discrimination is not the only cause of racial and gender disparities in the United States. Indeed, persistent inequality between racial and ethnic groups is the product of complex and multifaceted forces. Nevertheless, the weight of existing evidence suggests that discrimination does continue to affect the allocation of contemporary opportunities. Furthermore, given the often covert, indirect, and cumulative nature of these effects, our current estimates may in fact understate the degree to which discrimination contributes to the poor social and economic outcomes of minority groups.

Although great progress has been made since the early 1960s, the problem of racial and gender discrimination remains an important factor in shaping contemporary patterns of social and economic inequality. While even a few individual incidents represent debilitating experiences in and of themselves, the accumulation of such experiences over a lifetime may represent an important source of chronic stress or distrust of mainstream institutions.[[50]](#footnote-50) Indeed, the cumulative costs of racial discrimination are likely to be far higher than any single study can document. By empirically exploring discrimination in the marketplace, the proposed research may contribute to ongoing efforts to create a more equal society. The findings of the study will have important implications for legislatures, policymakers, and courts seeking to advance equality and eradicate discriminatory market practices.

This research could not be timelier. While discrimination was overt and widespread 50 years ago, today it is harder to assess the degree to which everyday experiences and opportunities may be shaped by ongoing forms of discrimination. Indeed, according to a 2019 national survey, the majority of white Americans (63%) believe that the country has gone far enough with respect to ensuring equal rights for African-American citizens (compared to only 22% of the African-American participants).[[51]](#footnote-51) Academic literature has likewise questioned the relevance of discrimination for modern-day outcomes, with the rising importance of skills, socioeconomic status, and other factors accounting for increasing levels of variance in individual consequences.[[52]](#footnote-52) Indeed, discrimination may not be the only force shaping contemporary opportunities. Nevertheless, it is crucial to understand when and how discrimination does play a role in the allocation of resources and in shaping people’s experiences and well-being. The proposed research will shed light on those issues and will assist policymakers in advancing a more equitable society.

1. *See, e.g.*, Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Houston L. Rev. 975, 977 (2005); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 Mich. L. Rev. 857, 858 (2006); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 69 (2019). [↑](#footnote-ref-1)
2. *See, e.g.*, Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L. Rev. 679, 704–12 (2004); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 828 (2006). [↑](#footnote-ref-2)
3. *See, e.g.*,Gillette 2004, at 704; Bebchuk & Posner, at 834; Johnston, at 882. [↑](#footnote-ref-3)
4. *See, e.g.*, Bushway, Shawn D., and Anne Morrison Piehl. "Judging judicial discretion: Legal factors and racial discrimination in sentencing." *Law and Society Review* (2001): 733-764; Paternoster, Raymond. "Prosecutorial discretion in requesting the death penalty: A case of victim-based racial discrimination." *Law and Society Review* (1984): 437-478; Applegate, Amy Grossman. "Prosecutorial discretion and discrimination in the decision to charge." *Temp. LQ* 55 (1982): 35; Price, Melynda J. "Performing discretion or performing discrimination: Race, ritual, and peremptory challenges in capital jury selection." *Mich. J. Race & L.* 15 (2009): 57; James, Heather R. "If you are attractive and you know it, please apply: Appearance based discrimination and employers' discretion." *Val. UL Rev.* 42 (2007): 629; Holmberg, Lars. "Discretionary leniency and typological guilt: Results from a Danish study of police discretion." *Journal of scandinavian studies in criminology and crime prevention* 1.2 (2000): 179-194. [↑](#footnote-ref-4)
5. According a recent consumer poll, 91% of consumers consider return policies as very important to their purchasing decisions. *See* Rimma Kats, *Many Consumers Avoid Retailers with Strict Return Policies*, eMarketer (Jan. 1, 2018), available at https://retail.emarketer.com/article/many-consumers-avoid-retailers-with-strict-return-policies/5a4c05a7ebd40008a852a26c; AllBusiness.com, *The Importance of a Good Return Policy*, N.Y. Times (July 10 2007), https://archive.nytimes.com/www.nytimes.com/allbusiness/AB4353479\_primary.html. On the importance of the right to withdraw to consumers, see alsoEyal Zamir & Doron Teichman, Behavioral Law and Economics 290–91 (2018) (arguing for the importance of the right to withdraw given that consumers may be subject to sellers’ deceptive “low-ball[ing]” and “bait-and-switch” tactics); Shmuel Becher & Tal Zarsky, *Open Doors, Trap Doors and the Law*, 74 L. & Contemp. Probs. 63, 72–73 (2011) (discussing how sellers often use generous “open door policies” allowing consumers to return purchases in order to attract consumers to buy at the store). [↑](#footnote-ref-5)
6. *See, e.g.*, Courtney Reagan, *A $260 Billion ‘Ticking Time Bomb’: The Costly Business of Retail Returns*, CNBC (Dec. 16, 2016), available at https://www.cnbc.com/2016/12/16/a-260-billion-ticking-time-bomb-the-costly-business-of-retail-returns.html; Aaron Orendoff, *The Plague of Ecommerce Return Rates and How to Maintain Profitability* (Feb. 27, 2019), available at https://www.shopify.com/enterprise/ecommerce-returns. Andrea Stojanovic, *60 Latest Retail Statistics to Help you Build Your Business* (Aug. 5, 2019), available at https://www.smallbizgenius.net/by-the-numbers/retail-statistics/#gref; *see also* Lucas Reilly, *By the Numbers: How Americans Spend Their Money*, Mental Floss(July 17, 2012), available at http://mentalfloss.com/article/31222/numbers-how-americans-spend-their-money. [↑](#footnote-ref-6)
7. *See, e.g.,* MarianneBertrand & Esther Duflo, *Field Experiments on Discrimination, in* Handbook of Economic Field Experiments (Abhijit Vinayak Banerjee & Esther Duflo eds., vol. 1, 2017) (reviewing the evidence on the prevalence of discrimination writ large, from field experiments literature); Peter A. Riach & Judith Rich, *Field Experiments of Discrimination in the Market Place*, 112 Econ. J. 480, 480 (2002) (reviewing the literature on marketplace discrimination); Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 Annals Am. Academy Pol. & Soc. Sci. 104 (2007) (noting the strength of evidence of race-based labor market discrimination, as found in field experiments); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004) (finding race-based discrimination in employment, based on a resume audit study); Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc’y 937 (2003) (finding race-based discrimination in employment for individuals having criminal records); Douglas Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 Urban Affairs Rev. 452 (2001) (finding race-based discrimination in housing markets). [↑](#footnote-ref-7)
8. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (1988); Civil Rights Act of 1968 [Federal Fair Housing Act], 42 U.S.C. § 3601 (1968). *But see* Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1974) (prohibiting credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, or because the consumer receives public assistance). [↑](#footnote-ref-8)
9. In the context of car sales, see, e.g., Ian Ayres & Peter Siegleman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 Am. Econ. Rev. 304 (1995) (finding, via an audit study, that car dealers regularly quoted white male testers lower prices for new vehicles, in comparison to the testers’ black and female counterparts); Pinelopi Goldberg, *Dealer Price Discrimination in New Car Purchases: Evidence from the Consumer Expenditure Survey*, 104 J. Pol. Econ. 622 (1996); Asaf Zussman, *Ethnic Discrimination: Lessons from the Israeli Online Market for Used Cars*, 123 Econ. J. F433 (2013) (examining car sales discrimination in Israel, with similar results). In the context of the sharing economy, see Tamar Krichely-Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, 2 Sci. Advances n/a (2016) (finding that female sellers receive significantly lower offers than males selling the same used product on eBay); Ian Ayres, Mahzarin Banaji, & Christine Jolls, *Race Effects on eBay*, 46 RAND J. Econ. 891 (2015) (finding that African-American sellers receive significantly lower offers than Whites selling the same used product on eBay); Benjamin Edelman, Michael Luca, & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 Am. Econ. J. 1 (2017) (finding that Airbnb hosts discriminate against guests with distinctively African-American names, such that the latter group is approximately 16 percent less likely to be accepted by a host than otherwise identical, distinctively white-named guests). Finally, in the context of credit and mortgage loans, similar results of discrimination have been found. *See, e.g.*, Myers and Chan (1995) (finding that about 70 percent of the racial gap in loan denial rates in New Jersey is attributed to racial discrimination); Andrew Hanson, Zach Hawley, Hal Martin, & Bo Liu, *Discrimination in Mortgage Lending: Evidence from a Correspondence Experiment*, 92 J. Urban Econ. 48 (2016) (finding, via an experimental study, that mortgage loan originators are more likely to respond with more information, and overall greater follow-up correspondence, to white potential applicants than to their African-American counterparts). For a meta review of the literature on discrimination in the marketplace, see generally Judith Rich, *What Do Field Experiments of Discrimination in Markets Tell Us? A Meta Analysis of Studies Conducted Since 2000* (Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor Discussion Paper No. 8584, 2014), available at http://ftp.iza.org/dp8584.pdf. [↑](#footnote-ref-9)
10. *See, e.g.*, Ayres & Siegleman, *supra* note 5; Goldberg, *supra* note 5; Krichely-Katz & Regev, *supra* note 5; Ayres et al., *supra* note 5; Edelman & Luca, *supra* note 5. [↑](#footnote-ref-10)
11. *See, e.g.*, Jennifer Lee, *The Salience of Race in Everyday Life: Black Customers’ Shopping Experiences in Black and White Neighborhoods*, 27 Work & Occupations 353 (2000) (finding, from 75 in-depth interviews, that black shoppers suffer prejudicial attitudes at the hands of businessowners, especially when in predominantly white neighborhoods); Edith F. Davidson, *Shopping While Black: Perceptions of Discrimination in Retail Settings* (2007) (unpublished Ph.D. dissertation, University of Tennessee), available at <https://trace.tennessee.edu/utk_graddiss/147/> (studying how African-American women perceive and experience discrimination in retail settings). There are substantially fewer examples of quantitative research on this issue. *See, e.g.*, Yanbo Ge, Christopher R. Knittel, Don MacKenzie, & Stephen Zoepf, *Racial and Gender Discrimination in Trnasportation Network Companies* (Nat’l Bureau Econ. Res. Working Paper No. 22776, 2016), available at http://www.nber.org/papers/w22776 (studying the shared transportation apps Uber and Lyft and finding that African-American passengers suffered more frequent cancellations and longer waiting times compared to whites, while women were offered more expensive, longer routes than men); Will You Help Me Please? The Effects of Race, Gender, and Manner of Dress on Retail Service (finding that African-American customers wait longer for customer service than do whites, and that males wait longer than females). [↑](#footnote-ref-11)
12. *See, e.g.*, Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1222–23 (1983) (explaining that “[t]he characteristics of firms counsel the adoption of standard forms and rigidify allegiance to them,” and arguing that the use of standard form contracts keeps “wayward sales personnel” in check by ensuring adherence to the terms of the form contract);Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DePaul Bus. & Com. L.J. 199, 201 (2010) (explaining how sellers typically do not allow sales representatives to modify or stray from the contract ex post thus assuming that firms intend to adhere to the form); Stewart Macaulay, *Private Legislation and the Duty to Read - Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 Vand. L. Rev. 1051, 1059 (1966) (noting that form contracts efficiently control salesmen because they put customers on notice “of the salesman’s limited authority” and that firms want “to avoid being legally bound to expectations its salesman has created by his conduct that are inconsistent with company policy”).  [↑](#footnote-ref-12)
13. Bebchuk & Posner; Gillette; Johnston; Hart; Hart & Moore; more research on incomplete contracts. [↑](#footnote-ref-13)
14. Few scholars have mentioned the issue of observability by courts in passing. *See, e.g.*,Gillette 2004, *supra* note **Error! Bookmark not defined.**, at 704; Bebchuk & Posner, *supra* note **Error! Bookmark not defined.**, at 834; Johnston, *supra* note **Error! Bookmark not defined.**, at 882. [↑](#footnote-ref-14)
15. For example, in the model originally developed by Gary Becker in 1957 for the context of the labor market, some employers may have a distaste for hiring minority group members, and some employees may have a distaste for catering to minority group members. Employers could, as a result, refrain from employing minority employees or pay them less, while businesses may charge minority customers higher prices as an “animus-compensating tax.” See G. Becker, The Economics of Discrimination 14-15, 39-54 (1957); Charles and Guryan 2008. [↑](#footnote-ref-15)
16. *See, e.g.,* Phelps, *The Statistical Theory of Racism and Sexism*, 62 Am. Econ. Rev. 659, 659 (1972); Arrow, 1973; Aigner and Cain, 1977. [↑](#footnote-ref-16)
17. *See, e.g.,* Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L Rev. 1311, 1319-20 (1989). [↑](#footnote-ref-17)
18. For a review of the process and advantages of the full-cycle approach, *see, e.g.*, Jennifer A. Chatman & Francis J. Flynn, *Full-Cycle Micro-Organizational Behavior Research*, 16 Org. Sci. 327 (2005); Chad R. Mortensen and Robert B. Cialdini, *Full-Cycle Social Psychology for Theory and Application*, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1751-9004.2009.00239.x>; Fine and Elsbach, Ethnography and Experiment in Social Psychological Theory Building: Tactics for integrating qualitative field data with quantitative lab data, Jounral of Experimental Social Psychology 36, 51-76 (2000). [↑](#footnote-ref-18)
19. While perfect representativeness of the interview sample is not necessary for the research design, as these interviews progress. The study will track basic demographic characteristics (e.g., gender, age, race, and ethnicity) of the interviewees, and should those characteristics diverge too greatly from the ACS data on demographics of retail workers in the city, a supplemental recruitment will target groups that were under-represented in the early interviews. [↑](#footnote-ref-19)
20. *See, e.g.*, Bruce L. Berg, Qualitative Research Methods for the Social Sciences 93 (Bruce L. Berg ed., 7th ed. 2007); Alan Bryman, *Sampling in Qualitative Research*, *in* Social Research Methods 415–29 (Alan Bryman ed., 4th ed. 2012). [↑](#footnote-ref-20)
21. *See, e.g.*, Christine Horrocks & Nigel King, *Interviews and Narrative*, *in* Interviews in Qualitative Research 213–32 (Christine Horrocks & Nigel King eds., 2010). [↑](#footnote-ref-21)
22. Berg, *supra* note 21, at 105; Horrocks & King, *supra* note 25, at 142–74. [↑](#footnote-ref-22)
23. For example, one interviewee has explained that “the policy was written down, because if not, people could use a purse for 20 years, and then try to bring it back saying they do not have a receipt. There were obviously cases of people who just lost their receipts, […] but there were cases in which people brought something back that was obviously used or damaged, [in which case] we would say that we cannot take it back without a receipt.” Interview #3 with a Marshall Field’s store clerk (recorded interview on file with the Author). Another interviewee has explained that “[i]t’s up-scale so they want to be very customer-friendly. So they were much more bendable with the rules, and they are an expensive store so they don’t want to lose a customer fighting over $30.” (Interview #7 with Saks Fifth Avenue store clerk (recorded interview on file with the Author)). [↑](#footnote-ref-23)
24. Interview #13 with a local rug store clerk (recorded interview on file with the Author). [↑](#footnote-ref-24)
25. The audit methodology was first pioneered in the 1970s with a series of audits conducted by the Department of Housing and Urban Development to test for racial discrimination in real estate markets. *See* John Yinger, Closed Doors, Opportunities Lost: the Continuing Costs of Housing Discrimination (1995); Ronald E. Wienk, Clifford E. Reid, John C. Simonson, & Frederick J. Eggers, *Measuring Racial Discrimination in American Housing Markets: The Housing Market Practices Survey* (U.S. Dept. of Housing & Urban Dev., April 1979); Jon Hakken, *Discrimination Against Chicanos in the Dallas Rental Housing Market: An Experimental Extension of the Housing Market Practices Survey* (U.S. Dept. of Housing & Urban Dev., 1979). The approach has since been applied to numerous settings, including mortgage applications, negotiations at a car dealership, and hailing a taxi. *See* Margery Austin Turner & Felicity Skidmore, Mortgage Lending Discrimination: A Review of Existing Evidence (1999); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 Am. Econ. Rev. 304 (1995); Stanley Ridley, James A. Bayton, & Janice Hamilton Outtz, *Taxi Service in the District of Columbia: Is it Influenced by Patrons’ Race and Destination?* (Washington Lawyers’ Committee for Civil Rights under the Law, 1989); Douglas Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 Urban Affairs Rev. 452 (2001); Harry Cross, Genevieve Kenney, Jane Mell, & Wendy Zimmerman, Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers(1990); Margery Turner, Michael Fix, & Raymond Struyk, Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring (1991); Marc Bendick, Jr., Charles Jackson, & Victor Reinoso, *Measuring Employment Discrimination Through Controlled Experiments*, 23 Rev. Black Pol. Econ. 25 (1994); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Quarterly J. Econ. 915 (1996). [↑](#footnote-ref-25)
26. The audited stores will be randomly selected from the databases at ReferenceUSA and Hoover’s Company Directories. [↑](#footnote-ref-26)
27. Data on whether the store is part of a chain will also be collected using publicly available online databases. A chain retailer is defined as any retailer with ten or more locations, in accordance with the definition of the Census Bureau. [↑](#footnote-ref-27)
28. Python will be used to scrape the stores’ websites. In a pilot study conducted on 95 clothing stores in Chicago, the PI discovered that some stores block access to their websites. In such cases and the median price of the stores’ items will be manually calculated. Median prices will be chosen instead of mean prices, as median prices—unlike mean prices—are not affected by outliers (i.e., extremely expensive or very cheap products). [↑](#footnote-ref-28)
29. *See, e.g.*, James J. Heckman, *Detecting Discrimination*, 12 J. Econ. Perspectives 101, 109 (1998) (expressing concern that if, on average, blacks and whites differ in the mean or variance on any unobserved productivity-related variable, estimates from matched-pair studies will be biased by design). *But see* Pager, *supra* note 2 (suggesting that this concern is not valid). [↑](#footnote-ref-29)
30. [↑](#footnote-ref-30)
31. Ayres & Siegelman, *supra* note *See, e.g.*,Janelle Barlow & Claus Moller, A Complaint is a Gift: Recovering Customer Loyalty When Things Go Wrong(2008) (suggesting that “the more dissatisfied customers become, the more likely they are to use word-of-mouth to complain about the business”). [↑](#footnote-ref-31)
32. *See, e.g.*, Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*,39 Pepp. L. Rev. 279 (2012); Arbel & Shapira, *supra* note 17 (suggesting that “nudniks” who complain often obtain better outcomes, as well as discipline sellers from misbehaving towards other consumers); Christian Homburg & Andreas Furst, *See No Evil, Hear No Evil, Speak No Evil: A Study of Defensive Organizational Behavior Towards Customer Complaints*, 35 J. Acad. Marketing Sci. 523 (2007); Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. on Reg. (2016); Anthony Dukes & Yi Zhu, *Why Customer Service Frustrates Consumers: Using a Tiered Organizational Structure to Exploit Hassle Costs*, 38 Marketing Sci. 500 (2019) (suggesting that sellers use complaints to screen less severe and illegitimate claims). [↑](#footnote-ref-32)
33. More generally, most of the empirical literature on consumer complaints focuses on the consumer side, while little is known on when and how sellers segment consumers or handle consumer complaints. *See, e.g.*, Torben Hansen, Ricky Wilke, & Judy Zaichkowsky, *How Retailers Handle Complaint Management*, 22 J. Consumer Satisfaction 1, 1 (2009) (“[W]hile many studies have investigated the complaint process from the consumer side, those from the side of business are few and far between.”). The preliminary interviews conducted by the PI offer preliminary support for the predicted complaining effect. Several of the interviewed store clerks explained that sellers often use consumer assertiveness to determine whether to depart from the contract in the consumer’s favor. For example, a former store clerk at Abercrombie & Fitch explained that “[p]olicy goes out the door when you have an unhappy customer. Policy goes out the door because you’re trying to keep that customer happy, so [you do] whatever you can do.” Interview #12 with Abercrombie & Fitch store clerk (interview transcript on file with the Author). [↑](#footnote-ref-33)
34. *See, e.g.*, John T. Jost, Mahzarin R. Banaji, & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psych. 881 (2004); Brett W. Pelham & John J. Hetts, *Underworked and Overpaid: Elevated Entitlement in Men’s Self Pay*, 37 J. Exper. Soc. Psych. 92 (2001); Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 Personality & Soc. Psych. Bulletin 34 (2014); Candace N. Joyner, *Entitled to Expect: System Justification Theory, Socioeconomic Status, and the Ultimatum Game* (2017) (unpublished B.S. thesis, University of Oregon), available at https://scholarsbank.uoregon.edu/xmlui/handle/1794/22862 (showing, based on an ultimatum game experiment, that socioeconomic status predicts expectations and sense of entitlement); Brenda Major, *From Social Inequality to Personal Entitlement*, 26 Advances in Exper. Soc. Psych. 293 (1994); Jie Hu, Yuan Cao, Philip R. Blue, & Xiaolin Zhou, *Low Social Status Decreases the Neural Salience of Unfairness*, 8 Frontiers in Behav. Neurosci. 402 (2014); Laurie T. O’Brien & Brenda Major, *Group Status and Feelings of Personal Entitlement: The Roles of Social Comparison and System-justifying Beliefs*, *in* Series in Political Psychology: Social and Psychological Bases of Ideology and System Justification(John T. Jost, Aaron C. Kay, & Hulda Thorisdottir eds., 2009); Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 Am. Soc. Rev. 747 (2002)(suggesting that middle and upper income white families raise their children with a sense of entitlement and assertiveness to get what they want later in life, while childrearing strategies among the lower-classes people and racial minorities tend to result in a lack of assertiveness or lack of a sense of entitlement, thereby limiting their access to educational and job opportunities later in life); Laurie T. O’Brien, Brenda N. Major, & Patricia N. Gilbert, *Gender Differences in Entitlement: The Role of System-Justifying Beliefs*, 34 Basic & Applied Soc. Psych. 136 (2012); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987). [↑](#footnote-ref-34)
35. *See, e.g.*, Catherine H. Tinsley, Sandra I. Cheldelin, Andrea K. Schneider, & Emily T. Amanatullah, *Women at the Bargaining Table: Pitfalls and Prospects*, 25 Negotiation J. 233, 233 (2009) (finding that, although women in general “encounter both social and financial backlash when they behave assertively,” this effect is mediated by situations in which certain gender stereotypes are/are not activated; e.g., if “a gender stereotype that prescribes communal, nurturing behavior by women is activated” in a situation, then the penalty women face for assertion is even higher); Robert W. Livingston, Ashleigh S. Rosette, & Ella F. Washington, *Can an Agentic Black Woman Get Ahead? The Impact of Race and Interpersonal Dominance on Perceptions of Female Leaders*, 23 Psychol. Sci. 354 (2012) (finding experimental evidence that, while dominant white female (and Black male) leaders face backlash for assertiveness, dominant *Black female* (and white male) leaders did not). [↑](#footnote-ref-35)
36. Michael E. Barber, Linda A. Foley, & Russell Jones, *Evaluations of Aggressive Women: The Effects of Gender, Socioeconomic Status, and Level of Aggression*, 14 Violence & Victims 353 (1999). [↑](#footnote-ref-36)
37. Victoria Brescoll & Eric L. Uhlmann, *Can an Angry Woman Get Ahead? Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 Psychol. Sci. 268, 273 (2008) (finding that women are penalized for expressing the anger, assertiveness, and dominance that is otherwise often deemed required for professional advancement; i.e., women exhibiting such traits were “accorded lower status and lower wages, and were seen as less competent, than angry men and unemotional women” whereas men experienced a status *boost* for exhibiting such traits); *see also* Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 Psychol. Rev. 573 (2002); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. Issues 743, 743 (2001) (finding analogously, through experimental evidence, that “a feminized job description promoted hiring discrimination against an agentic female because she was perceived as insufficiently nice,” and moreover that “this perception was related to participants' possession of an implicit (but not explicit) agency‐communality stereotype. By contrast, androgynous female applicants were not discriminated against. The findings suggest that the prescription for female niceness is an implicit belief that penalizes women unless they temper their agency with niceness”); Laurie A. Rudman, *Self-promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. Pers. Soc. Psychol. 629, 629 (1998) (finding, via experimental evidence, that “[s]elf-promotion may be instrumental for managing a competent impression, yet women who self-promote may suffer social reprisals for violating gender prescriptions to be modest;” displays of agency are viewed as violations of femininity); Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. Pers. Soc. Psychol. 1004 (1999) (finding a similar agency penalty to assertive women, insofar as “[a]gentic female job applicants were viewed as less socially skilled than agentic males, but this perception only resulted in hiring discrimination for the feminized, not the masculine, job. . . . [W]omen must present themselves as agentic to be hireable, but may therefore be seen as interpersonally deficient. Ironically, the feminization of management may legitimize discrimination against competent, agentic women”). [↑](#footnote-ref-37)
38. At the same time, the results of the pilot study have revealed no discrimination against women (if anything, men achieved marginally significantly worse return outcomes). [↑](#footnote-ref-38)
39. Cite the Airbnb study re names. [↑](#footnote-ref-39)
40. *See, e.g.*, Michelle can Ryn and Jane Burke, *The Effect of Patient Race and Socio-Economic Status on Physicians’ Perceptions of Patients*, Social Science & Medicine 50 (2000): p. 813-828 (finding that physicians tended to perceive African-Americans and members of low SES groups more negatively than they did Whites and upper SES patients). Ash-could you find more sources to cite here about discrimination in treatment of lower SES consumers/employees/tenants? [↑](#footnote-ref-40)
41. *See, e.g.*, Schreer et al., Shopping While Black: Examining Racial Discrimination in Retail Setting (finding that salespeople at high-end retail stores in New-York showed greater levels of suspicion when facing a request to remove security sensor from a pair of sunglasses from African-American consumers compared to white customers). Ash – can you look for more research suggesting that higher end sellers are more likely to discriminate? Or that minorities are discriminated in high-end stores? [↑](#footnote-ref-41)
42. See, e.g., Harrison and List, 2004 (cite from Ranganathan). [↑](#footnote-ref-42)
43. *See* Federal Trade Commission Act, 15 U.S.C.A. § 45 (West) (“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”). [↑](#footnote-ref-43)
44. *See*, for example,Utah’s Unfair Practices Act, Utah Code Ann. § 13-5-3 (West) (“(1)(a) It is unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the state and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.”). [↑](#footnote-ref-44)
45. *See* Equal Credit Opportunity Act, 15 U.S.C.A. § 1691 (West). [↑](#footnote-ref-45)
46. *See* Fair Housing Act, 42 U.S.C.A. § 3604 (West) (decreeing it “unlawful—(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin. (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination. (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin. . . . [and to engage in myriad other means of discrimination in housing]”). Similarly, in bankruptcy law, while cosigned consumer debts may be treated “differently,” it is unlawful to “unfairly discriminate” against consumer creditors holding cosigned debts. *See In re Russell*, 503 B.R. 788, 794 (Bankr. S.D. Ohio 2013) (interpreting the Bankruptcy Reform Act of 1978, 11 U.S.C.A. § 1322 (West)). [↑](#footnote-ref-46)
47. [↑](#footnote-ref-47)
48. *See, e.g.*, *See* Pennsylvania Human Relations Act,43 Pa. Stat. Ann. § 955 (West); *See* Tex. Ins. Code Ann. § 544.002 (West) (“A person may not refuse to insure or provide coverage to an individual, refuse to continue to insure or provide coverage to an individual, limit the amount, extent, or kind of coverage available for an individual, or charge an individual a rate that is different from the rate charged to other individuals for the same coverage because of the individual's:(1) race, color, religion, or national origin;(2) age, gender, marital status, or geographic location; or(3) disability or partial disability.”); .M. Stat. Ann. § 28-1-7 (West). [↑](#footnote-ref-48)
49. Unruh Civil Rights Act, Cal. Civ. Code § 51 (West) (“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”). [↑](#footnote-ref-49)
50. (Kessler et al. 1990) (Feagin & Sikes 1994, Bobo & Thompson 2006) [↑](#footnote-ref-50)
51. (Pager 2007a) In contrast, about eight-in-ten blacks (78%) say the country has not gone far enough when it comes to giving black people equal rights with whites (compared to only 37% of white participants), and fully half say it is unlikely that the country will eventually achieve racial equality (compared to only 3% of white participants). See <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/> [↑](#footnote-ref-51)
52. (Heckman 1998, Wilson 1978) [↑](#footnote-ref-52)