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PROCESSING CIVIL RIGHTS SUMMARY JUDGMENT AND CONSUMER DISCRIMINATION CLAIMS

*Deseriee A. Kennedy**

INTRODUCTION

On March 26, 1995, Denise Arguello and her father, Mr. Govea, stopped at a Conoco gas station.¹ While they were purchasing some items inside the station store, the cashier referred to Ms. Arguello as a “f***ing Iranian Mexican bitch,” began screaming racist remarks over the store’s intercom, and displayed several crude gestures.² Ms. Arguello and her father, too disgusted to complete their purchases, left the store.³ When Mr. Govea attempted to reenter the store, the cashier locked them out, while again laughing and making crude gestures.⁴ According to Mr. Govea, the cashier, “admitted she was discriminating against them as they spoke through the locked door.”⁵ Ms. Arguello and her father brought suit in a federal district court claiming the treatment they received violated § 1981 of the Civil Rights Act, which prohibits discrimination in contracting, and a jury awarded them \$550,000 in damages.⁶ In response to a motion for judgment as a matter of law, the district court judge set aside the verdict and the plaintiffs’ claims were dismissed.⁷ The result in *Arguello v. Conoco, Inc.* is in no way atypical. Plaintiffs in consumer discrimination cases

* Associate Professor, University of Tennessee College of Law. A version of this Article was first presented at the *DePaul Law Review* Symposium, Race as Proxy in Law and Society: Emerging Issues in Race and the Law. Portions of this discussion are adapted from Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001). Special thanks to Professor Michele Goodwin and the organizers of the *DePaul Law Review* Symposium. I would also like to thank Judy Cornett for her insightful comments, George White for his support, and Casandra Henley for her able research assistance. I am grateful to the University of Tennessee College of Law summer grant program for supporting the research for this Article.

1. *Arguello v. Conoco, Inc.*, No. 3:97-CV-0638-H, 2001 U.S. Dist. LEXIS 18471, at *2-3 (N.D. Tex. Nov. 9, 2001). The court identified Ms. Arguello and Mr. Govea as Hispanic. *Id.* at *2. It further states, “The Court notes that [the cashier’s] version of these events is almost entirely different.” *Id.* at *3 n.1.

2. *Id.* at *2-3.

3. *Id.*

4. *Id.* at *3.

5. *Arguello*, 2001 U.S. Dist. LEXIS 18471, at *3.

6. *Id.* at *4.

7. *Id.* at *14.

face significant substantive and procedural hurdles in articulating viable claims. This Article discusses the way in which the prevailing procedural standards undermine the ability of plaintiffs to pursue consumer discrimination claims. It raises the concern that premature dismissals of these claims unduly silence plaintiffs, hinder the ability of the Civil Rights Acts to fairly address issues of societal discrimination, and prevent a broader understanding of the subtle ways in which racism continues to be manifested.

II. CONSUMER DISCRIMINATION

There are myriad ways in which institutional and individual racism practices intersect to create and reinforce oppression. Retail settings are an important situs for social interaction between groups from differing racial and socioeconomic backgrounds. Consumer discrimination is representative of the ways in which stereotypical ideas and beliefs are infused into everyday activities that antidiscrimination principles find difficult to reach. There are frequent reports of disparate treatment in stores that reveal that the race of customers may affect how they will be treated while shopping.⁸ Customers of color may face heightened surveillance and accusations of theft based on fairly innocuous behavior. Nonwhite customers may be followed, stopped, searched, and threatened on such questionable bases as: looking suspicious, displaying nervous behavior, avoiding sales help, and shopping in darkened, deserted areas of the store. In this way, race often becomes a predominant concern in deciding whether to treat some customers as potential shoplifters.⁹ Interactions in retail settings in which people of color may be reduced to negative stereotypes reveal the unfortunate reality that racial stereotypes transcend

8. See, e.g., Ronald J. Hensen & Katie Merx, *Guard Charged in Mall Death*, DETROIT NEWS, July 7, 2000, at A1. In June 2000, an African-American male, Frederick Finley, shopping with his eleven-year-old stepdaughter was stopped by Lord & Taylor security guards. The guards accused the girl of stealing a bracelet and tried to detain Mr. Finley, putting him in a chokehold. As a result, Mr. Finley died of asphyxia due to suffocation. See Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275, 296-97. See also Caroline E. Mayer, *Car-Loan Rates Marked Up More for Blacks, Report Says*, WASH. POST, Oct. 1, 2003, at E1 (A recent study conducted at Vanderbilt University found that African-American car buyers financing their car loans through General Motors Acceptance Corporation (GMAC) are more likely to be charged a dealer markup and to pay more than 2.5 times the markup amount than white buyers.); GMAC recently settled a class action lawsuit brought by black consumers that alleged that its lending practices discriminated against black consumers. Michael Ellis, *GM Loan Unit Reaches Deal in Race-Bias Suit*, ORLAND SENTINEL, Jan. 31, 2004, at C3. Nissan Motor Co., Ltd. settled a similar lawsuit and Ford, Toyota, and DaimlerChrysler AG also face charges of discriminatory lending practices. *Id.*

9. For a more detailed discussion of the history of consumer discrimination, see Kennedy, *supra* note 8, at 287-88.

class. In fact, a participant in a survey on discrimination remarked, "No matter how affluent and influential, a black person cannot escape the stigma of being black."¹⁰

III. CONSUMER DISCRIMINATION DOCTRINE

The Civil Rights Acts are inexpertly drafted to accommodate claims of discrimination in the public sphere outside of public accommodations. While § 2000(a) of the Civil Rights Act explicitly prohibits discrimination on the basis of race by restaurants, hotels, theaters, gas stations, and in contracting, it does not specifically prohibit the racial dimension of the use of heightened scrutiny and surveillance of blacks in retail settings.¹¹ As a result, plaintiffs alleging discrimination in retail settings frequently resort to state tort law¹² or seek relief claiming violation of the right to contract under 42 U.S.C. § 1981.¹³ Section 1981 prohibits racial discrimination in "mak[ing] and enforc[ing] contracts"¹⁴ and is relied upon by plaintiffs seeking relief for discriminatory treatment in retail settings as well as in places of public accommodation, such as restaurants, theaters, and gas stations.¹⁵

10. Kennedy, *supra* note 8, at 278 (quoting Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 107 (1991)) (internal quotation marks omitted).

11. 42 U.S.C. § 2000a(b)(1)-(4) (2000).

12. Plaintiffs often rely on common law tort claims such as false imprisonment, malicious prosecution, intentional infliction of emotional distress, and state anti-discrimination statutes. *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001) (false imprisonment and malicious prosecution); *Ackaa v. Tommy Hilfiger, Co.*, No. 96-8262, 1998 WL 136522 (E.D. Pa. Mar. 24, 1998) (Pennsylvania Human Relations Act). However, dismissal of a plaintiff's federal claims often results in federal courts declining to exercise supplemental jurisdiction over the state claims under 29 U.S.C. § 1367 (2000). *See, e.g., Chu v. Gordmans, Inc.*, No. 8:01CV182, 2002 U.S. Dist. LEXIS 26623 (D. Neb. Apr. 12, 2002) (declining to exercise jurisdiction over the plaintiff's state law claim of intentional infliction of emotional distress); *Singh v. Wal-Mart*, No. 98-1613, 1999 U.S. Dist. LEXIS 8531 (E.D. Pa. June 10, 1999) (disposing of all state claims after granting the defendant's motion for summary judgment on the federal claims). Moreover, federal courts that have reviewed intentional infliction of emotional distress claims often find that the alleged conduct is not sufficiently extreme and outrageous. *See, e.g., Baltimore-Clark v. Kinko's, Inc.*, 270 F. Supp. 2d 695, 701 (D. Md. 2003) (Kinko's employee's commenting that "black people don't look right on pink paper" . . . does not meet the threshold for extreme and outrageous conduct required to state a claim for intentional infliction of emotional distress under Maryland law").

13. Plaintiffs also attempt to articulate claims under 42 U.S.C. § 1983 (2000). These claims frequently fail. *See Youngblood*, 266 F.3d at 853; *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 746 (5th Cir. 2001); *Lewis v. J.C. Penney, Co.*, 948 F. Supp. 367, 368 (D. Del. 1996).

14. 42 U.S.C. § 1981 (2000).

15. *See Arguello*, 2001 U.S. Dist. LEXIS 18471; *Mendez v. Pizza Hut of Amer., Inc.*, No. 02 C 1819, 2002 U.S. Dist. LEXIS 19231 (N.D. Ill. Oct. 3, 2002); *Thomas v. Nat'l Amusements, Inc.*, No. 98-71215, 1999 U.S. Dist. LEXIS 5188 (E.D. Mich. Feb. 24, 1999).

Jurisdictions vary in the breadth of their interpretation of the protections afforded consumer discrimination plaintiffs under § 1981. In order to state a prima facie claim of race discrimination in the making or enforcing of contracts under § 1981, plaintiffs in the majority of jurisdictions must allege: (1) they are members of a racial minority; (2) the discrimination against them was on account of race; (3) the discrimination was intentional; and (4) the discrimination was directed toward one or more of the activities protected by the statute.¹⁶ Most plaintiffs seeking to articulate a claim for retail discrimination under § 1981 face two primary difficulties: establishing to the satisfaction of the court that the treatment they received was on account of race and, therefore, evidence of discrimination,¹⁷ and that the discrimination was directed toward one or more of the activities protected by the statute.¹⁸ Because the statute protects contractual rights, the disputed issues in a majority of consumer discrimination cases are the nature, scope, and breadth of the contractual rights of retail consumers.

As a primary matter, plaintiffs must establish that the experiences that form the basis of their complaint are a result of racial discrimination. Claims of retail discrimination most often involve one-time encounters to which there are few, if any, witnesses. As a result, demonstrating discriminatory intent in the consumer setting often becomes an issue of credibility in which the plaintiff's assessment and

16. *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996); *see also* *Garrett v. Tandy Corp.*, 295 F.3d 94, 98-99 (1st Cir. 2002) (citing the *Morris* test with approval); *Chu*, 2002 U.S. Dist. LEXIS 26623 (adopting the prima facie test set forth in the text and relied on in the Second, Fifth, Seventh, and Tenth Circuits); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001). Circuits disagree with whether to apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to consumer discrimination cases. Circuits that adhere to the burden-shifting framework shift the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for its actions after the plaintiff articulates a prima facie case of discrimination. The plaintiff must then prove that the rationale offered by the defendant is a pretext for discrimination. *See* *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 868 (6th Cir. 2001).

17. *Morris*, 277 F.3d at 752 n.7 (noting but not addressing district court finding that plaintiff failed to offer evidence that she was discriminated against because of her race); *Singh*, 1999 U.S. Dist. LEXIS 8531 (granting motion for summary judgment when plaintiff failed to show intentional discrimination based on race); *Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53 (D.D.C. 1994); *Roberts v. Wal-Mart Stores, Inc.*, 769 F. Supp. 1086, 1088 (E.D. Mo. 1991) (Retailer's practice of noting race of customer on the back of checks did not discriminate against black customers since there was no evidence cashiers recorded the race of blacks disproportionately to whites.).

18. There is considerable debate about what consumer-related activities are protected by the statute. *See* *Garrett*, 295 F.3d at 93; *Morris*, 89 F.3d at 413; *Arguello*, 2001 U.S. Dist. LEXIS 18471; *Shawl v. Dillards, Inc.*, 17 Fed. Appx. 908, 911 (10th Cir. Aug. 27, 2001); *Bagley v. Ameritech Corp.*, No. 99 C 1449, 1999 U.S. Dist. LEXIS 18248, at *11 (N.D. Ill. Nov. 17, 1999); *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192, 1200 (D. Kan. 1999); *Ackaa*, 1998 WL 136522; *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371 (D. Del. 1996).

evaluation of events is directly challenged by the retailer and its employees. For example, in *Singh v. Wal-Mart*,¹⁹ the United States District Court for the Eastern District of Pennsylvania granted summary judgment to the defendant, concluding that the plaintiff failed to establish that the defendant's actions were racially motivated.²⁰ In *Singh*, the court resolved a dispute between Mr. Singh and Wal-Mart about whether the refusal to accept a return was based on race or the result of nonracial factors in favor of the defendant.²¹ Rejecting the plaintiff's assertions that Wal-Mart employees refused to accept a return because of his race, and therefore violated § 1981, the court found that the plaintiff failed to present evidence to establish that Wal-Mart's proffered rationale for its employees' actions was pretextual.²² The court concluded: "[O]ne cannot reasonably conclude that defendant's proffered reason is unbelievable or that defendant more likely than not refused to give plaintiff a refund on December 20th because of his race."²³

Second, plaintiffs must establish that the "consumer related" activities which are the basis of the suit are protected under the statute. Although the act was amended in 1991 to include "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship" in the Act's definition of "mak[ing] and enforce[ing] contracts," most courts continue to define narrowly the protected activities.²⁴ As a result, courts find a cause of action only in cases in which plaintiffs were affirmatively denied service, directly prohibited from completing a contractual transaction,²⁵ or suffered a differential con-

19. 1999 U.S. Dist. LEXIS 8531.

20. *Id.* at *27.

21. *Singh*, 1999 U.S. Dist. LEXIS 8531 (Plaintiff Singh describes his nationality as Guyanese and his race as Asian-Indian.).

22. *Id.* The court based its decision, in part, on the absence of proof of similarly situated consumers who were treated differently on account of their race. The Sixth Circuit has noted the difficulty in obtaining evidence of such "similarly situated" individuals in the commercial context, stating: "By holding plaintiff to the requirement that she produce similarly situated persons who were not discriminated against, we would be foreclosing other methods of proving intentional discrimination. This test is also particularly onerous because of the difficulty in replicating a particular shopper's experience." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001).

23. *Singh*, 1999 U.S. Dist. LEXIS 8531, at *20.

24. See *Youngblood*, 266 F.3d at 856-57 (Arnold, J., dissenting), *cert. denied*, 535 U.S. 1017 (2002) (asserting that majority's affirming of grant of summary judgment to defendant was based on a "narrow view of the scope of the contract right conferred by § 1981").

25. *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001) (affirming jury verdict for plaintiff who was prevented from redeeming a coupon for a free fragrance sample when stopped by guard and accused of shoplifting); *Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 U.S. Dist. LEXIS (N.D. Ill. Oct. 23, 1996).

dition of contracting not placed on whites.²⁶ While at least a few courts have applied a broader test of § 1981 that extends the reach of the statute to the receipt of “services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory,”²⁷ courts generally reject a broader interpretation of the Act. Allegations of a hostile or racially discriminatory atmosphere while shopping, heightened security surveillance, and a general interest in purchasing are usually found insufficient to allow relief.²⁸ Even plaintiffs who allege that an inability to contract resulted from a ra-

26. See, e.g., *Allen v. U.S. Bancorp*, 264 F. Supp. 2d 945 (D. Or. 2003) (defendant’s motion for failure to state a claim under Federal Rule of Civil Procedure Rule 12(b)(6) denied where plaintiff alleged bank supervisor required him to remove sunglasses but did not require white customer to remove their sunglasses); *Kelly v. Bank Midwest, N.A.*, 177 F. Supp. 2d 1190 (D. Kan. 2001) (plaintiff awarded \$40,000 in compensatory damages in bench trial where bank subjected him to heightened scrutiny in applying for a loan including a criminal background check; driving by his address and calling the police when he arrived at the bank); *Hill v. Shell Oil Co.*, 78 F. Supp. 2d 764 (N.D. Ill. 1999) (requiring African-American gas customers to prepay placed an impermissible condition on contracting).

27. See *Christian*, 252 F.3d at 871 (In reversing the district court’s dismissal under Federal Rule of Civil Procedure Rule 50, the court found a genuine issue of fact as to whether plaintiff received services in a markedly hostile manner.); *Callwood v. Dave & Buster’s, Inc.*, 98 F. Supp. 2d 694, 703 (D. Md. 2000). The *Callwood* court, rather than limiting relief under § 1981 to cases in which plaintiffs were affirmatively prevented from contracting, stated that plaintiffs must show that they

[d]id not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that (a) they were deprived of services while similarly situated persons outside the protected class were not deprived of these services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.

Id. See also *Lizardo v. Denny’s, Inc.*, No. 97-CV-1234 FJS GKD, 2000 WL 976808, at *3 (July 13, 2000).

28. See, e.g., *Garrett v. Tandy Corp.*, 295 F.3d 94 (1st Cir. 2001) (recognizing that the 1991 amendment of § 1981 broadened the reach of the statute, but saying, “Congress did not intend to convert § 1981 into a general prohibition against race discrimination”); *Morris v. Dillard Dep’t Stores, Inc.*, 277 F.3d 743 (5th Cir. 2001) (affirming Rule 56 dismissal and finding that banning the plaintiff from store did not constitute loss of an actual contract interest); *Shawl v. Dillard’s, Inc.*, 17 Fed. Appx. 908 (10th Cir. 2001); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996); *Baltimore-Clark v. Kinko’s, Inc.*, 270 F. Supp. 2d 695, 700 (D. Md. 2003) (Section 1981 does not provide relief for a racially charged contracting experience); *Mendez v. Pizza Hut of Amer., Inc.*, No. 02 D 1819, 2002 U.S. Dist. LEXIS 19231 (N.D. Ill. Oct. 3, 2002) (Court granted motion to dismiss for failure to state claim under Federal Rule of Civil Procedure Rule 12(b)(6) stating the plaintiff cannot maintain a § 1981 claim when the plaintiff was the party responsible for terminating the transaction even if the plaintiff left because of perceived racial animus. A § 1981 plaintiff must allege he or she was prevented—not just deterred—from making a purchase.); *Arguello*, 2001 U.S. Dist. LEXIS 18471; *Bagley v. Ameritech*, No. 99C 1449, 1999 U.S. Dist. LEXIS 18248 (N.D. Ill. Nov. 17, 1999); *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192 (D. Kan. 1999); *Hickerson, Ackaa v. Tommy Hilfiger, Co.*, No 96-8262, 1998 WL 136522 (E.D. Pa. Mar. 24, 1998); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996); cf. *Christian*, 252 F.3d at 872 (Section 1981 covers a hostile shopping environment).

cially hostile atmosphere face dismissal of their claims.²⁹ In addition, plaintiffs who are confronted by store personnel after they complete their transaction³⁰ or are banned from the store by store personnel³¹ cannot claim a violation of § 1981 even if the confrontation was racially motivated.

Section 1981 cases involving consumer discrimination claims are instructive in that they demonstrate serious shortcomings in the *process* of resolving civil rights claims.³² The reluctance of courts to accept plaintiffs' claims of discrimination and the narrow interpretation of § 1981 to exclude the disparate treatment of shoppers based on race that falls short of preventing the completion of a transaction means that few plaintiffs' civil rights claims have survived until trial. Courts that adhere to a narrow interpretation of § 1981 in the consumer discrimination context are receptive to defendants' attempts to summarily resolve the cases. These courts are willing to find that plaintiffs will be unable to establish that they were prevented from engaging in a protected activity even when plaintiffs assert that they had an intention to do so, evidenced in part by browsing or other "preshopping" activities, and they were thwarted by the racially motivated activities of the defendants. This raises important questions about the appropriate role of summary judgment and other pretrial and posttrial motions in civil rights actions as well as more fundamental questions about whether the early dismissal of these cases has greater societal effect, including the impact on the goals of the Civil Rights Acts.³³

29. See *Mendez*, 2002 U.S. Dist. LEXIS 19231 (Section 1981 claims were dismissed when the plaintiffs were responsible for terminating the transaction).

30. See *Youngblood*, 266 F.3d at 854-55; *Garrett*, 295 F.3d at 101 (accusation of theft and visit from police at plaintiff's home after purchase does not constitute a violation of § 1981); *Rogers v. Elliot*, 135 F. Supp. 2d 1312, 1314-15 (N.D. Ga. 2001) (allegations of theft made after purchase insufficient to articulate § 1981 claim).

31. See *Morris*, 277 F.3d at 752.

32. Courts rely on a variety of civil procedure devices to eliminate these claims including most frequently Federal Rules of Civil Procedure Rule 12(b)(6) dismissals for failure to state a claim, Rule 56 summary judgment, and Rule 50 judgment as a matter of law. See, e.g., *Mendez*, 2002 U.S. Dist. LEXIS 19231 (granting motion to dismiss for failure to state claim under Federal Rule of Civil Procedure Rule 12(b)(6)); *Morris*, 277 F.3d 743 (Rule 56 dismissal affirmed); *Arguello*, 2001 U.S. Dist. LEXIS 18471 (granting Rule 50 motion, vacating jury award finding substandard service, harassment, disparagement of ethnic background not actionable under § 1981).

33. The Civil Rights Acts were originally passed in large response to efforts by local governments to restrict the rights and movement of blacks through Black Codes. See DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (2d ed. 1980). The dissent in *Youngblood* noted that "civil rights legislation is designed to address invidious racial discrimination" and reflects "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." 266 F.3d at 857-58 (Arnold, J., dissenting). A broad interpretation of § 1981 is consistent with the view that "[t]he application of the Civil Rights Act of 1991 is not limited to the *fundamental* aspects of a contract. Rather, parties are prohibited from discrimi-

Pretrial dismissal means that not only are individual plaintiffs denied the opportunity to recover for their harms, but they are stripped of the right to publicly present their stories and have them “authenticated,” create a public record of the events, and have their cases decided by a jury. Furthermore, the educating function of public litigation is reduced when claims are dismissed prematurely.

IV. PREMATURE DISMISSAL OF CLAIMS

The Federal Rules of Civil Procedure provide for the involuntary disposition of matters without trial in a number of ways.³⁴ Judgment on the pleadings under Federal Rule of Civil Procedure 12(c), dismissal for failure to state a claim under Rule 12(b)(6), summary judgment under Rule 56, and judgment as a matter of law under Rule 50 all permit litigants and the court opportunities to end claims. Summary judgment allows a party to demonstrate that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”³⁵ The Rule further provides that when a motion is properly made and supported, the party opposing the motion may not rest on the mere allegations or denials of the pleadings and must respond with materials outside the pleadings that demonstrate a genuine issue for trial.³⁶ Significant judicial and scholarly debate has centered on the burdens of the moving and nonmoving parties as well as the appropriate judicial standard for determining when a court should summarily dismiss claims pursuant to Rule 56.

*Adickes v. S.H. Kress & Co.*³⁷ is frequently cited in discussions about the development of application of Federal Rule of Civil Procedure 56. In *Adickes*, a white school teacher from New York, Sandra Adickes, took her students from a Mississippi Freedom School on a field trip to the Hattiesburg, Mississippi Public Library.³⁸ The librarian refused to allow the students to use the library and asked them to leave.³⁹ The librarian called the Hattiesburg chief of police, who arrived and told Ms. Adickes and her students that the library was

nating in ‘all phases and incidents of the contractual relationship.’” *Allen v. U.S. Bancorp*, 264 F. Supp. 2d 945, 948-49 (D. Or. 2003) (quoting *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298 (1994)).

34. A defendant may move the court to dismiss the claims for failure to state a claim as a matter of law under Rule 12(b)(6), for a judgment on the pleadings under Rule 12(c), or for summary judgment under Rule 56.

35. FED. R. CIV. P. 56(c).

36. FED. R. CIV. P. 56(e).

37. 398 U.S. 144 (1958).

38. *Id.* at 149.

39. *Id.*

closed and ordered them to leave.⁴⁰ Ms. Adickes then accompanied her students to Kress's Department Store to eat lunch.⁴¹ After the group sat down to eat, a policeman entered the store and observed the group.⁴² A waitress took the children's orders, but refused to serve Ms. Adickes because "she was a white person 'in the company of Negroes.'"⁴³ The group left the store and the policeman who earlier had been in the store arrested Ms. Adickes on a charge of vagrancy.⁴⁴ Ms. Adickes sued the department store, alleging a violation of her civil rights under Title 42 of the United States Code, § 1983, alleging a conspiracy between the store and the Hattiesburg police.⁴⁵ The district court granted summary judgment on the conspiracy count and the United States Court of Appeals for the Second Circuit affirmed.⁴⁶ The United States Supreme Court reversed the grant of summary judgment and remanded.⁴⁷ The Court found that the plaintiff's circumstantial evidence was sufficient to create a triable issue of fact and that the movant had not met its burden of showing the absence of a genuine issue of material fact.⁴⁸ According to the Court, the plaintiff "created a substantial enough possibility of a conspiracy to allow her to proceed to trial, especially given the fact that the noncircumstantial evidence of the conspiracy could only come from adverse witnesses" and that the defendant failed to "foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service, and that this policeman reached an understanding with some Kress employee that petitioner not be served."⁴⁹ Further, "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds.⁵⁰

In a concurring opinion, Justice Hugo Black noted the importance of submitting factual issues to a jury, pointing out the constitutional dimensions of the right as well as the strategic differences between trial by affidavit and trial by jury in obtaining just results.⁵¹ The majority and concurring opinions make clear that the 1969 opinion was one of a series of cases decided by the Supreme Court involving the

40. *Id.*

41. *Id.*

42. *Id.*

43. *Adickes*, 398 U.S. at 149.

44. *Id.*

45. *Id.* at 147.

46. *Id.* at 148.

47. *Id.*

48. *Id.* at 157.

49. *Adickes*, 398 U.S. at 157.

50. *Id.* at 158-59.

51. *Id.* at 176.

role that local governments played in continuing and enforcing segregation as well as the need for federal intervention to protect civil rights.

Thus, *Adickes* represents a perception of summary dismissals of actions before trial as exceptions and disfavored in cases with great public policy implications like civil rights claims.⁵² This judicial reluctance to deny litigants an opportunity to try their cases remained fairly undisturbed until the 1980s, when the Supreme Court decided three cases that altered the summary judgment motion analysis and application.⁵³ A series of Supreme Court cases beginning in 1986, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,⁵⁴ *Anderson v. Liberty Lobby, Inc.*,⁵⁵ and *Celotex v. Catrett*,⁵⁶ led to an expanded use of summary judgment to dispose of cases before trial.⁵⁷

In *Matsushita*, American television set manufacturers brought suit against Japanese consumer electronics manufacturers, alleging anti-trust violations.⁵⁸ The district court granted summary judgment for the Japanese defendants and the United States Court of Appeals for the Third Circuit reversed the summary judgment.⁵⁹ The Supreme Court reversed, finding that the court of appeals failed to apply the proper summary judgment standard.⁶⁰ According to the Court, the nonmoving party has the burden of presenting "specific facts showing that there is a *genuine issue for trial*."⁶¹ Finding neither any direct evidence of a conspiracy nor any "rational economic motive to conspire," the Court concluded that the proffered evidence was insufficient to create a genuine issue for trial under Rule 56.⁶² The dissent pointed out that the Court reached this conclusion despite expert evidence shown by the plaintiffs, which offered an analysis of the harms suffered by the plaintiffs as a result of the defendants' anticompetitive behavior.⁶³

52. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1905, 1907 (1998).

53. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 79 (1990).

54. 475 U.S. 574 (1986).

55. 477 U.S. 242 (1986).

56. 477 U.S. 317 (1986).

57. See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988).

58. *Id.* at 577.

59. *Id.* at 579-80.

60. *Id.* at 582.

61. *Id.* at 587.

62. *Id.* at 597.

63. *Matsushita*, 475 U.S. at 601.

Anderson involved a summary judgment motion in a libel suit filed by a public official.⁶⁴ A series of articles published by *Investigator* magazine portrayed the plaintiffs, Liberty Lobby, Inc. and Willis Carto, as neo-Nazi, anti-Semitic, racist, and fascist.⁶⁵ The plaintiffs alleged that the articles were false and defamatory and the defendant filed a motion for summary judgment. The Court analogized the standard for deciding motions for summary judgment with those for directed verdicts under Federal Rule of Civil Procedure 50.⁶⁶ In so doing, the Court maintained: "The primary difference between the two motions is procedural."⁶⁷ The Court reasoned that the substantive law identifies what is material for the purposes of determining whether there is a genuine issue of material fact.⁶⁸ The Court found that the heightened evidentiary requirement in defamation cases involving public officials—that actual malice be proved by "clear and convincing" evidence—is required at the summary judgment level.⁶⁹ The Court directed district courts, in ruling on summary judgment motions, to "view the evidence presented through the prism of the substantive evidentiary burden,"⁷⁰ and to "bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*."⁷¹ The Court explicitly rejected the implication in Justice William Brennan's dissent that doing so denigrates the role of the jury or authorizes trial on affidavits.⁷² Thus, although "the movant has the burden of showing that there is no genuine issue of fact, the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict."⁷³

Celotex, decided the same day as *Anderson*, involved a wrongful death suit in which the plaintiff alleged that exposure to the defendant's asbestos products was the proximate cause of the decedent's injuries.⁷⁴ The Court in *Celotex* held that summary judgment can properly be entered against "the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which the party will bear the burden of proof at

64. 477 U.S. 242 (1986).

65. *Id.* at 244-45.

66. *Id.* at 250-51.

67. *Id.* at 251.

68. *Id.* at 248.

69. *Id.* at 247.

70. *Anderson*, 477 U.S. at 254.

71. *Id.*

72. *Id.* at 255, 266.

73. *Id.* at 256.

74. *Id.* at 319.

trial.”⁷⁵ The Court further asserted that the movant is not required to support its motion with evidence negating the opponent’s claim; it is sufficient, according to the Court, for the moving party to point out to the district court that there is an absence of evidence to support the nonmoving party’s case.⁷⁶

Taken together, the trilogy has made it easier for a movant to bring a motion for summary judgment, and more likely that a district court will grant the motion.⁷⁷ *Matsushita* suggests that courts may inquire as to motive and intent when disposing of implausible claims. *Anderson* imposes the same standard of proof necessary at trial on summary judgment motions, requiring the nonmovant to provide the court with affirmative evidence supporting its claims and equating summary judgment motions with Rule 50 motions for judgment as a matter of law.⁷⁸ Finally, *Celotex* requires the movant only to show an absence of evidence. The summary judgment trilogy has altered the summary judgment standard reflected in *Adickes* and the frequency of the use of pretrial motions to dispose of claims before trial.⁷⁹ Despite rhetoric by the Court to the contrary, the trilogy represents a drastically different view of the role and scope of summary judgment than that represented in *Adickes*.⁸⁰ Furthermore, at least one scholar has suggested that the trilogy approach to summary judgment has infected the use of other summary dismissals mechanisms, such as Rule 12(b)(6) dismissals for failure to state a claim, Rule 12(c) motions for judgment on the pleadings, and Rule 50 motions for judgment as a matter of law, and has encouraged courts to impose a higher standard than would seem required under the Rules.⁸¹

Reviews of the trilogy and subsequent summary judgment results reveal a wide-ranging critique of the effect the cases may have on litigation and litigants’ rights. Many scholars and judges applaud the changes and assert systemic benefits.⁸² Others have suggested that the

75. *Id.* at 322.

76. *Id.* at 324-25.

77. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984 (2003).

78. On a motion for judgment as a matter of law, the court must construe the case in the light most favorable to the nonmovant and find that “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” See FED. R. CIV. P. 50; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

79. Wald, *supra* note 52, at 1914; Miller, *supra* note 77, at 984.

80. Wald, *supra* note 52, at 1914; Miller, *supra* note 77, at 984.

81. Miller, *supra* note 77, at 1073.

82. *Id.* at 1044. A related issue is the use of a heightened pleading standard in civil rights claims that makes it more difficult for plaintiffs to articulate legally cognizable consumer dis-

post-trilogy approach may contribute to the high incidence of cases resolved before trial.⁸³ In fact, Judge Patricia Wald has stated: “Federal jurisprudence is largely the product of summary judgment in civil cases.”⁸⁴ Commentators also question whether the appropriate division of duties between judge and jury is being respected by the increasing reliance on summary procedures to dispose of plaintiffs’ claims as well as the overall effect of removing these cases from the province of juries.⁸⁵ These concerns include an effort to preserve the Seventh Amendment right to a jury trial,⁸⁶ and whether courts are respecting fairly the appropriate division of duties between judges and juries.⁸⁷ Additionally, observers raise concerns about the inability of the bench to fairly represent a diversity of views and community values.⁸⁸ The modern approach to resolving summary judgment motions may be more likely to affect plaintiffs adversely rather than defendants.⁸⁹ In fact, Professors Samuel Issacharoff and George Loewenstein’s analysis of summary judgment cases supports the conclusion that “summary judgment is a defendant’s motion.”⁹⁰ It has also been

crimination claims that can survive a pretrial dismissal. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1027-32 (2003).

83. Judge Wald notes the high incidence of cases terminated before trial in the District Court for the District of Columbia and asserts that “despite the high profile that ‘alternative dispute resolution’ has enjoyed . . . summary judgment may in fact be the more commonly used mode of disposition on the merits, outnumbering settlement by court-annexed arbitrations, mediation, early neutral evaluation, and other settlement techniques.” Wald, *supra* note 52, at 1915.

84. *Id.*

85. See Miller, *supra* note 77, at 1074-75.

86. Stempel, *supra* note 57, at 162 (suggesting the trilogy caused a “shift of power from juries to judges in derogation of the Seventh Amendment); but see Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards*, 63 NOTRE DAME L. REV. 770, 770-72 (1988) (arguing that so long as the summary judgment process is fair and comports with due process standards, there are no constitutional violations of a right to trial by jury).

87. Miller, *supra* note 77, at 1076; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 460 (1987) (noting that *Matsushita* transforms summary judgment proceedings into mini-trials).

88. M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 358-61 (1999) (arguing that the increased reliance of district courts on summary judgment to dispose of sexual harassment cases hampers the ability of juries to contribute community and workplace values to Title VII doctrine); Stempel, *supra* note 57, at 166 (stating that juries infuse community standards into litigation, promote public confidence in the judicial system and fairness of litigation results, and maintain democratic values and citizen access).

89. Wald, *supra* note 52, at 1925-26; McGinley, *supra* note 87, at 207-08.

90. Issacharoff & Lowenstein, *supra* note 53, at 92. The professors’ research supports the conclusion that defendants file more summary judgment motions than plaintiffs and defendants’ motions are granted more frequently. *Id.* The result is to alter “the balance of power between plaintiffs and defendants in the pretrial phases of litigation by raising both the costs and risks to plaintiffs at the summary judgment stage while diminishing both for defendants.” *Id.* at 93.

asserted that this creates a wealth advantage because “[d]efendants are disproportionately comprised of society’s ‘haves’ . . . [and] [p]laintiffs are disproportionately comprised of society’s ‘have nots.’”⁹¹ Furthermore, Judge Wald posits that trial judges may be using pretrial dismissal rules to terminate “cases they don’t think are worth trying.”⁹² Unfortunately, this frequently includes cases that involve novel issues of law as well as those cases in which factual evidence is not readily available to the plaintiff without discovery.⁹³

Consumer discrimination cases exemplify many of the concerns that critics have raised about the post-trilogy approach to summary judgment.⁹⁴ Plaintiffs may be discouraged from bringing consumer discrimination claims under § 1981, thereby inhibiting the development of the doctrine to address consumer discrimination claims. The pre-trial dismissal of consumer discrimination claims may also reflect an under-valuing of the claims that permits district court judges to resolve credibility and motivation issues before trial.

The aggressive use of pretrial dismissal of claims may deter plaintiffs from bringing consumer discrimination claims. The relative cost of defending pretrial dismissal motions falls disproportionately on the nonmovant or plaintiff,⁹⁵ which may discourage plaintiffs from asserting consumer discrimination claims under which their right to relief may be uncertain. Although seeking relief under § 1981 has historical roots, its use in retail settings by plaintiffs seeking redress for con-

91. Stempel, *supra* note 57, at 161.

92. Wald, *supra* note 52, at 1937.

93. *Id.* at 1943-44.

94. Commentators have questioned the impact of modern summary judgment principles on a variety of substantive areas. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (examining ADA appellate employment discrimination cases and concluding that “courts are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA”); Medina, *supra* note 88, at 358 (sexual harassment); see also Wald, *supra* note 52, at 1916. Wald states:

Marching under the Celotex banner, summary judgment has respected none of the boundaries of those sovereign territories which for so long had been thought immune from its invasions Freedom of Information Act and Privacy act cases, administrative law cases involving bank insolvency, insurance company liability cases, Federal Tort Claims Act cases, Federal Reserve Board regulation cases, libel, and defamation cases, federal election law disputes, Title VII cases alleging racially discriminatory employment actions, arbitration reviews in labor disputes, class actions based on allegedly miscalculated interest rates on home mortgages, cases involving alleged violations of the Labor-Management Reporting and Disclosure Act, constitutional tort claims brought by prisoners, airline claims for reimbursement from the Immigration and Naturalization Service, Federal Advisory Committee Act cases, and disparate-impact claims based on statistical evidence, brought under the Age Discrimination in Employment Act.

Id.

95. Miller, *supra* note 77, at 1043.

sumer discrimination is a fairly recent occurrence.⁹⁶ Recent judicial opinions addressing these claims frequently note the cases as ones of first impression in their districts or circuits.⁹⁷ Pretrial dismissal of these claims hinders the growth and development of § 1981 to address these claims. Courts that have adopted the narrowest interpretation largely apply an employment law framework to consumer cases. On the other hand, circuits that have seen these cases tried have developed a test for examining the sufficiency of plaintiffs' claims. That test appears to be better suited for the context in which many of these cases arise. As the Sixth Circuit in *Christian v. Wal-Mart*⁹⁸ aptly noted, the employment law approach fails to address the factual differences between employment and consumer discrimination cases, resulting in the dismissal of the plaintiffs' claims because they are unable to articulate cognizable causes of action.⁹⁹ A standard that allows plaintiffs to seek relief for a racially hostile environment in commercial settings represents a more nuanced approach that is more consistent with the policy underlying the original Civil Rights Acts as well as the 1991 amendments.¹⁰⁰

Judicial response to consumer discrimination claims may stem, in part, from an undervaluing of the claims. Although each individual instance of consumer discrimination may involve a fairly small economic injury, plaintiffs articulate significant emotional and psychological harms as a result of their experiences.¹⁰¹ The impact of being a

96. A recent LEXIS and Westlaw search revealed two consumer discrimination § 1981 cases before 1990.

97. *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 748 (5th Cir. 2001); *Baltimore-Clark v. Kinko's, Inc.*, 270 F. Supp. 2d 695, 698-99 (D. Md. 2003) (asserting that reliance on § 1981 for obtaining relief for consumer discrimination is more rare than its use in employment discrimination).

98. 252 F.3d 862 (6th Cir. 2001).

99. *Id.* at 869-72.

100. *Id.* at 872-73.

101. See, e.g., *Kelly v. Bank Midwest, N.A.*, 177 F. Supp. 2d 1190, 1208 (D. Kan. 2001). The *Kelly* court held that being subject to differential conditions based on race caused plaintiff

[a] great deal of embarrassment and humiliation, particularly because plaintiff, an individual who has made considerable efforts to "make it" as a business professional, was treated like a criminal in a place of business where he had gone to transact his business. He testified that the situation at the bank "overwhelmed" him, left him feeling "defeated," and caused him to distrust others and question himself.

Id. Other testimony in that case revealed that plaintiff was "more pessimistic, less self-confident, and tended to question his ability to interact in the business world . . . [had become] 'withdrawn' . . . more reserved and more hesitant in both business and personal respects." *Id.* See also *Hampton v. Dillard Stores, Inc.*, 247 F.3d 1091, 1114-15 (10th Cir. 2001) (The plaintiff testified that "she felt humiliated and disgraced" by being accused of shoplifting; "she was visibly upset after the incident," was too distraught to drive herself home, and "is now unable to shop with her children for fear of future ridicule and humiliation.").

victim of discrimination is substantial; plaintiffs may be the subject of numerous instances of having been treated differently because of their race. The phenomenon of the infusion of racism into the everyday has been become known as "everyday racism." The sociological study of everyday racism attempts to demonstrate the links between the structure and ideology of racism by focusing on the ways in which racism appears in everyday practices.¹⁰² It is designed to draw attention to how race is experienced in everyday life by focusing on common practices many take for granted, but which affect the life experiences of people of color on a daily basis.¹⁰³

Consumer discrimination cases also reflect the willingness of courts to weigh the credibility of the litigants and motives of the defendants pretrial. Credibility is most clearly relevant in determinations about whether the defendants were motivated by sound nondiscriminatory reasons for their treatment of the plaintiffs.¹⁰⁴ However, in deciding as a matter of law that the plaintiffs have not met their burden under § 1981 for failing to show that they intended to complete a purchase, district court judges are, in essence, making credibility judgments regarding the defendants' intentions.¹⁰⁵ For example, in *Morris v. Office Max, Inc.*,¹⁰⁶ the plaintiffs alleged that approximately one minute after they arrived at an Office Max store, the store manager summoned the police to report "two male blacks acting suspiciously."¹⁰⁷ The plaintiffs alleged that they were in the process of shopping for a time stamp among other items when they were stopped and questioned by the police. The court found that there was no § 1981 violation, stating that although plaintiffs "assert that the encounter with the police caused them to 'los[e] interest in the time stamps, they produced no evidence to suggest that they had anything more than a general inter-

102. PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM, AN INTERDISCIPLINARY THEORY 2 (1991).

103. Social scientist Philomena Essed defines everyday racism as those "systematic, recurrent, familiar practices" and "socialized attitudes and behavior" that "transcend the traditional distinctions between institutional and individual racism." *Id.* at 3, 37.

104. *See Singh v. Wal-Mart*, No. 98-1613, 1999 U.S. Dist. LEXIS 8531 (E.D. Pa. June 10, 1999) (concluding that the plaintiff failed to show a refusal to permit the return of purchased merchandise was on account of race); *Roberts v. Wal-Mart*, 769 F. Supp. at 1088 (finding that there was no evidence that the practice of recording a customer's race on the back of a check was racially motivated).

105. *Garrett v. Tandy Corp.*, 295 F.3d 94, at 102 (1st Cir. 2001) (While recognizing that "the right to return merchandise is incident to and, thus, part of, the prototypical retail contract," plaintiff's assertion that racially motivated accusation of shoplifting deterred him from returning merchandise was rejected by the court as a "theoretical loss of a possible future opportunity to modify the contract.").

106. 89 F.3d 411 (7th Cir. 1996).

107. *Id.* at 412.

est in that merchandise.”¹⁰⁸ The United States Court of Appeals for the Seventh Circuit concluded that the plaintiffs failed to show that they were prevented from making a purchase, stating, “The men failed to demonstrate that they would have attempted to purchase the time stamps even if they had not been approached by the police.”¹⁰⁹

Similarly, the court in *Arguello v. Conoco, Inc.* found no § 1981 violation despite construing the facts to find that plaintiffs Denise Arguello and her father were “harassed, insulted, and disparaged . . . due to [their] ethnic background.”¹¹⁰ Arguello alleged that a Conoco gas station cashier used the store’s intercom to scream racist remarks at her, and, at some point during the altercation, locked the entry to the store, preventing her father from reentering.¹¹¹ The district court entered judgment as a matter of law under Rule 50 in favor of the defendants, vacating a \$550,000 jury award to Arguello and her father. The court found that § 1981 was not violated because Arguello was not prevented from completing a sales transaction and purchasing goods.¹¹² The court reached this conclusion despite testimony from the plaintiffs that they intended to purchase items, but did not because of the Conoco employee’s behavior.¹¹³ The court concluded that the plaintiffs’ refusal to purchase was voluntary and they were not actually prevented from making their purchase.¹¹⁴ The court reached this conclusion without discussing whether locking the plaintiffs out of the store constituted a violation under § 1981.

Not only does this approach so narrowly construe the federal statute so as to make it difficult for plaintiffs to articulate a legally cognizable claim,¹¹⁵ but it discounts the plaintiffs’ assertions that they

108. *Id.* at 414.

109. *Id.*

110. *Arguello v. Conoco, Inc.*, No. 3:97-CV-0638-H, 2001 U.S. Dist. LEXIS 18471, at *10 (N.D. Tex. Nov. 9, 2001).

111. *Id.* at *2-3.

112. *Id.* at *10.

113. *Id.* at *11.

114. *Id.*

115. See *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001); see also *Callwood v. Dave & Buster’s, Inc.*, 98 F. Supp. 2d 694, 705 (D. Md. 2000). A narrow construction of § 1981 also results in courts dissecting plaintiff’s claims in a way that artificially separates historical facts about discrimination and discriminatory treatment of shoppers from facts concerning whether a contractual right was violated. This approach may lead to significant facts relating to nature of discrimination being excised from the courts’ discussion which then narrowly focuses on whether the case involved the violation of a protected activity. For example, in *Youngblood v. Hy-Vee Food Stores, Inc.*, the dissent noted that in detaining the plaintiff for shoplifting and in response to a request from the plaintiff for the return of goods for which he already paid for, the defendant’s employee stated, “You and your people have to pay back double the amount.” 266 F.3d 851, 858 (8th Cir. 2001) (Arnold, J., dissenting).

would have completed a purchase absent the racially motivated interference by store personnel, and thus draws inferences in favor of the defendant retailer.¹¹⁶ Courts appear to suggest a level of implausibility of plaintiffs' allegations¹¹⁷ and to require a level of proof of intent and motivation that is nearly impossible for these plaintiffs to provide, particularly at the pretrial stage.¹¹⁸ The courts that take this approach seem to suggest that it is improper to allow juries to determine whether plaintiffs were prevented from completing a purchase absent concrete evidence of a store's refusal to accept payment. In this way, the court's narrow construction of the "making and enforcing contracts" section of the statute may well be about the perceived lack of credibility of plaintiffs.¹¹⁹

V. SPECIALIZED KNOWLEDGE

Some social science research supports giving considerable credence to assertions of discrimination articulated by people of color because they are often uniquely situated to recognize racism in its increasingly more covert forms. Having gained a body of knowledge about racism directly through personal experiences, the experiences of others, academic study,¹²⁰ and the media, blacks and others who experience race-based discrimination have developed some specialized knowledge about racism and may be uniquely equipped to recognize and identify its occurrence.¹²¹

While many may have a general or academic knowledge of racism, the study of everyday racism suggests that those who have experienced racism have a heightened ability to identify and analyze race-based events.¹²² This specialized knowledge gains its unique strength in part from the fact that this knowledge is not static and is "continu-

116. See Miller, *supra* note 77, at 1064.

117. *Id.*

118. See *Christian*, 252 F.3d at 872; see also *Callwood*, 98 F. Supp. 2d at 705.

119. *Ackaa v. Tommy Hilfiger, Co.*, No. 96-8262 1998 WL 136522, at *6 (E.D. Pa. Mar. 24, 1998) (§ 1981 claims dismissed on summary judgment even though plaintiffs were banned from store, finding there was no evidence that plaintiffs wished to return any of the merchandise they purchased or were prevented from entering the store).

120. The need for expert testimony to understand the nature and manifestations of racism and racist events is recognized in *Sawyer v. Southwest Airlines, Co.*, in which the court overruled the granting of a motion in limine to defendant, excluding expert testimony as to the historical meaning of a phrase alleged to be racist. 243 F. Supp. 2d 1257, 1268 (D. Kan. 2003).

121. *ESSED*, *supra* note 102, at 3, 9, 58.

122. *ESSED* does not maintain that those who have not experienced racism cannot identify or understand racism, only that first-hand experience with racism creates a specialized knowledge and heightened awareness. She asserts that those who may not have personal experiences with racism can gain a greater understanding and awareness of its manifestations through various means including academic study. *Id.*

ally tested, adapted, and also structured by information from the social context.”¹²³ Furthermore, it assumes that repeat exposure to racism heightens awareness of the events and may sharpen the ability to recognize and analyze the relevant events.¹²⁴ Their experiences are necessarily multifaceted and may include personal experiences, knowledge of the experience of others such as family and friends, witnessing racist events, as well as a more general knowledge of racism that is based on academic study and the media.¹²⁵ This approach challenges assumptions that an understanding of racism is primarily emotive and reactionary, and suggests a more scientific process at work to analyze potentially race-based events.¹²⁶ Stopping short of identifying a formula that may be used to deconstruct relevant events, sociologist Philomena Essed suggests that those experienced in identifying racism carefully process the events, essentially applying a weighing or balancing test that allows an interpreter “to pose the relevant questions and to make goal-directed inferences and observations to substantiate the evaluation that racism is involved in that particular situation.”¹²⁷ “The more information about and more practice with the problem of racism one has, the more abstract, complex, and organized representations of racism become and the more sensitively this knowledge can be used in memory storage and retrieval.”¹²⁸

Thus, the variety of vantage points from which blacks, for example, can gain knowledge about racism makes them particularly well-suited to recognize discrimination when it occurs. In fact, Essed maintains, through prolonged practice in dealing with racism, people become experts. This means that their general knowledge of racism becomes organized in more and more complex ways, and their interpretive strategies become more elaborate and effective.”¹²⁹ Further, “highly involved subjects follow more complicated information processing procedures. They appear to be sensitive to schema-consistent as well as schema-inconsistent data in the processing of new information,

123. *Id.* at 72.

124. *Id.* at 119.

125. *Id.* at 4-5.

126. *Id.* at 120. “In many situations Black women are the only witnesses to racism. Yet their point of view is often dismissed as ‘subjective’ and, therefore invalid. Radically breaking with this perspective I will show that accounts of racism are not ad hoc stories. They have a specific structure based on rational testing and argumentation.” ESSED, *supra* note 102, at 120.

127. *Id.* at 117.

128. *Id.* at 76.

129. *Id.* at 74.

whereas low-involvement subjects are more inclined to remember only schema-consistent information.”¹³⁰

Despite an apparent wealth of subjective and objective knowledge of race, the identification of covert racism by people of color is often ignored or met with skepticism and doubt.¹³¹ Part of the reluctance of many to identify racism may also stem from the extent to which encountered events mirror our expectations.¹³² Essed suggests that any apparent unwillingness to give credence to allegations of racism made by people of color may have a number of sources. It may be due, in part, to the reluctance of many to admit to unconscious stereotyping due to race, despite significant social science data to support a tendency of people to stereotype on the basis of race. Significant moral, political, and legal pressures exist to denounce racism, at least in its more blatant forms.¹³³ Finally, many continue to associate moral culpability with racism and are reluctant to ascribe racially-based motivations to actors whom they consider to be “good people.”¹³⁴

VI. JURIES, JUDGES, DIVERSITY, AND FAIRNESS

In cases involving allegations of discrimination, scholars raise multiple concerns about the increased use of summary judgment, including that it may infringe upon the Seventh Amendment right to jury trials, that it may not fairly respect the division of duties between judge and jury, and that it inadequately represents community values. Critiques of the lack of diversity of the federal judiciary magnify those concerns.

130. *Id.* (citing S.T. FISKE & D.R. KINDER, INVOLVEMENT, EXPERTISE, AND SCHEMA USE: EVIDENCE FROM POLITICAL COGNITION (1981)).

131. Essed remarks that “generally little attention has been paid to the knowledge, beliefs, opinions, and attitudes of Blacks with respect to the meaning of racism.” *Id.* at 7. Essed suggests that any apparent unwillingness to give credence to allegations of racism made by people in color may have a number of sources. It may be due, in part, to the reluctance of many to admit to unconscious stereotyping due to race despite significant social science data to support a tendency of people to stereotype on the basis of race. There are also significant moral, political, and legal pressures exist to denounce racism, at least in its more blatant forms. ESSED, *supra* note 102, at 58-59. Finally, many continue to associate moral culpability with racism and are reluctant to ascribe racially-based motivations to actors whom they consider to be “good people.” *Id.* at 159.

132. Stereotypes about people and groups may work to help us test our understanding of events in ways which are consistent with our understanding of the world. Scholars across disciplines have wrestled with stereotypes. Particularly difficult to unravel are the ways in which stereotypical thinking and assumptions affect behavior resulting in discriminatory actions. The law has struggled with how to recognize and root out stereotypes that result in unlawful discriminatory conduct in a number of contexts. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

133. ESSED, *supra* note 102, at 59.

134. *Id.*

The aggressive use of pretrial motions in discrimination cases allows a judge who may be unable to comprehend the nature of the harms alleged in the complaint to prematurely terminate a plaintiff's right to seek relief.¹³⁵ This concern is supported by critiques of the federal judiciary as "a powerful tenured institution that is overwhelmingly white, male, and upper-middle class."¹³⁶ In her analysis of racial diversity on the bench, Professor Sherrilyn Ifill has noted that only 3.3% of the judges on our nation's federal, state, and local courts are African American, and over 90% of all federal appellate judges are white.¹³⁷ Moreover, the reality of the extent and nature of racial segregation in America today suggests that white judges may lack the experiences to be able to recognize the legal harms articulated in a consumer discrimination complaint.¹³⁸ That is, their experiences may have left them without the perspectives and values needed to identify sufficiently with the plaintiff's story so as to find the existence of a legal claim able to survive a pretrial motion. In fact, it is very likely that these are the same stores in which white upper-class males (like judges) shop without incident. Thus, the lived experiences of the judges directly contrast with those of the plaintiffs in consumer discrimination cases. Substantial social science data, for example, supports the conclusion that whites and blacks have vastly different experiences and perspectives on issues relating to race and racial discrimination—including differing definitions of discrimination.¹³⁹ These contrasting perspectives on race must necessarily affect the interpretation given to a set of facts in which the plaintiffs allege racially discriminatory treatment in retail settings.

On the other hand, presenting the facts to juries not only permits plaintiffs the opportunity to tell their story and to receive the validation that comes with that opportunity, but presents a greater possibil-

135. See, e.g., *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 858 (8th Cir. 2001) (Arnold, J., dissenting).

136. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 407 (2000).

137. *Id.* at 407 n.3.

138. *Id.* at 424-25.

139. Social science data supports findings that "whites are less likely to perceive racial discrimination" and believe that blacks are paranoid about racial discrimination and frequently attribute racial motives to actions when there are none." Kennedy, *supra* note 8, at 325. Whites tend to have a more narrow definition of racism than blacks, restricting discrimination primarily to intentional bad acts and viewing blacks as over-sensitive about racial issues. Similarly, blacks themselves tend to discount discriminatory events and "often evaluate a situation carefully before judging it discriminatory and taking additional action." In fact, some blacks may be "so sensitive to white charges of hypersensitivity and paranoia that they err in the opposite direction and fail to see discrimination when it occurs." *Id.* at 328 (citing Feagin, *supra* note 10, at 103, 108, 109).

ity that a juror will connect with a plaintiff's experience in a way that the bench may not connect. Naturally more diverse and representative than the pool of judges, members of the jury may be better equipped to recognize a plaintiff's harm. For example, in *Hampton v. Dillard*,¹⁴⁰ a consumer discrimination case against Dillard Department Stores, the plaintiff, having survived summary judgment, was given the opportunity to tell the jury her story and to express her rage and pain as a result of the treatment she received.¹⁴¹ Perhaps members of the jury shared similar experiences or had a shared cultural history from which they could draw upon to assess the credibility of the plaintiff, the likelihood that the treatment she received was on account of race, and the magnitude of the harm, because not only did the jury find in favor of the plaintiff, awarding her \$56,000 in compensatory and \$1.1 million in punitive damages, but at the end of the trial, the jury foreperson came up to the plaintiff and kissed her on the forehead.¹⁴²

VII. PUBLIC TELLING/AUTHENTICATION

As examples of ways in which everyday racism subtly affects opportunities and experiences of people of color, stories of consumer racism serve an important documenting function. While media reports publicize stories of consumer racism, these reports lack the legitimacy and public imprimatur provided by recorded decisions. When courts dispose of these claims through pretrial motions, they engage in silencing affected groups not only insofar as they prevent a plaintiff from moving forward in the litigation, but also in communicating the legitimacy of the plaintiff's claims—they declare, in essence, that blacks who suffer discriminatory surveillance and scrutiny do not have a claim that the law is bound to recognize.¹⁴³

Prematurely disposing of consumer discrimination cases based on the unwillingness to recognize that the events describe a legally cognizable harm insulates the stores from liability and labels the behavior

140. 247 F.3d 1091 (10th Cir. 2001).

141. *Id.*

142. See McGinley, *supra* note 87, at 208-09 (noting the aggressive use of summary judgment in civil rights cases "even though these cases most often turn on subtle questions of credibility and intent that only a factfinder faced with a live witness should decide").

143. A narrow construction of § 1981 has been criticized as not fairly recognizing the need for a broad interpretation of the statute "in keeping with its remedial purpose" and a broader interpretation has been advocated as consistent with the goals of the Civil Rights Acts as articulated by the court in *Brown v. Board of Education*, 347 U.S. 483 (1954), and Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). See *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 858 (8th Cir. 2001) (Arnold, J., dissenting).

as nondiscriminatory. Furthermore, it devalues African Americans' cumulative experiences, knowledge, and unique ability to interpret events and judge whether they are racial in nature. Finally, the premature disposal of consumer discrimination claims prevents a discussion of the events, their meaning, and their import in a public forum.

Pretrial disposal of these cases also limits the ability of plaintiffs to create a full public record of the events. Even cases in which plaintiffs are unsuccessful at trial create important public and historical records that not only document the events, but serve as markers by which we can judge racial progress or regression or political rights and social change. Thus, cases like *Dred Scott*¹⁴⁴ and *Plessy v. Ferguson*¹⁴⁵ are important to our understanding of racial oppression and the history of race in America. They are, in many respects, memorials to the plaintiffs and records of a constitutional analysis limited by a narrow perspective blind to the racial realities of the times. Early dismissal of these consumer discrimination cases often means the events are not being recorded in a way that will allow them to serve as public markers.

VIII. CONCLUSION

The general concerns raised about the increasing use of summary dismissal procedures to dispose plaintiffs' claims are illustrated by cases involving consumer discrimination allegations. The premature dismissal of these claims makes difficult the development of the Civil Rights Act to address fairly commercial transactions and demonstrates the willingness of courts to make credibility determinations in summary proceedings that are frequently decided in favor of defendants. The post-trilogy summary judgment standard, coupled with the narrow interpretation of § 1981, makes it difficult for plaintiffs to articulate claims that can survive summary dismissal. There are compelling reasons to broaden the reach of § 1981 to include "hostile environment" cases and to apply an *Adickes*-type summary judgment standard to a category of cases involving complex issues of fact and law, cases that raise issues of great public import. Civil rights cases, in particular, deserve the deference provided to plaintiffs under the pre-trilogy approach to engage in full discovery to the extent permitted under the Federal Rules of Civil Procedure and to have their cases tried before a jury. Any dangers that might result from relaxing the standard for summary judgment in civil rights claims would be largely

144. 60 U.S. 393 (1857).

145. 163 U.S. 537.

systemic: increasing frivolous lawsuits, decreasing judicial efficacy, and increasing litigation costs by flooding the federal docket. Serious questions have been raised about whether these systemic concerns are grounded in fact¹⁴⁶ and whether the substantive benefits of allowing these claims to go forward outweigh systemic concerns, given the importance of civil rights litigation. Statistics tend to show that judges frequently agree with jury decisions and there are sufficient means under the Rules for judges to amend incorrect jury decisions at trial and on appeal to limit harm to potential defendants.¹⁴⁷ The value to individual plaintiffs and to the development of antidiscrimination principles in law and society outweigh any potential for an increase in federal dockets.¹⁴⁸

146. See Miller, *supra* note 77, at 992-96.

147. Stempel, *supra* note 57, at 165 (asserting that, despite studies which establish that judges and juries reach similar results, the processes they use to reach their conclusions differ in "that the jury introduces elements of flexibility and equity in the application of otherwise rigid rules of law").

148. See Issacharoff & Loewenstein, *supra* note 53, at 73 (noting the expanded use of summary judgment as a response to docket pressures on the federal judiciary); *but see* Friedenthal, *supra* note 86, at 779 (arguing that a return to *Adickes* would "unnecessarily cripple the use of summary judgment" while noting the relevance of the civil rights issues to the denial of the summary judgment motion in the case). Professor Stempel questions the efficiency of the contemporary summary judgment standard. Stempel, *supra* note 57, at 170-72.