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Consumer Discrimination: The Limitations of Federal Civil Rights Protection

Deseriee A. Kennedy*

Every day that you live as a black person you're reminded how you're perceived in society. . . . So, every day you realize [you're black]. Even though you're not doing anything wrong; you're just existing. You're just a person. But you're a black person perceived in an unblack world.¹

I. INTRODUCTION

Lloyd Morrison and his six-year-old son were shopping for children's clothes in Bloomingdales' department store when they were surrounded by security guards in the middle of the store and accused of stealing two pairs of pants.² Although Mr. Morrison denied taking the goods, the guards demanded that Mr. Morrison and his son accompany them downstairs.³ When he refused, the guards threatened to handcuff him and forcibly take him downstairs.⁴ With Morrison's son screaming and crying, they reluctantly accompanied the guards downstairs and Mr. Morrison was frisked.⁵ When the guards found nothing, they demanded that Morrison pull his pants down. Again finding no evidence of stealing, they then demanded that Mr. Morrison pull his son's pants down.⁶ While he initially refused, he complied with their request after being threatened with arrest.⁷ The guards found no evidence of stealing, and two weeks later Mr.

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1. Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 111-12 (1991).

2. See 20/20: *Under Suspicion Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998) [hereinafter 20/20 Broadcast]. The Bloomingdales was located in New Jersey. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Morrison received an apology from the store's chief of security.⁸ Mr. Morrison did not exhibit any behavior that should have made him the target of suspicion, nor should he have been subjected to a search. Yet, his encounter exemplifies the differential treatment experienced by numerous black shoppers.

Retail stores historically have been a racialized space in which the politics of race privilege and oppression have been played.⁹ A myriad of rules, formal and informal, have policed "consumer space by imposing racially based rules on entry and participation."¹⁰ These racialized rules often lead to differential surveillance and treatment of African American shoppers. Recently, the practice of differential surveillance and treatment of African American shoppers has become known as "consumer racism" or "consumer discrimination."¹¹ Consumer discrimination has a long history, and unfortunately for many African Americans ordinary "everyday activities" such as shopping still frequently can lead, without warning or justification, to allegations of wrongdoing, intrusive searches, and in some instances, arrest.¹²

Targeting African Americans for differential treatment in retail settings is not unusual or rare.¹³ Slightings and differential treatment that are racial in nature occur frequently, if not every day, for African Americans. The daily assaults of racism become an integral part of the lives of African Americans.¹⁴ Nor is the

8. *Id.* Mr. Morrison is in the process of suing the store and the guards. *Id.*

9. See PAUL R. MULLINS, *RACE AND AFFLUENCE* 3 (1999); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM* 21 (1994) ("[A] significant dimension of modern racism is the racially motivated 'blocking of space.'").

10. See MULLINS, *supra* note 9, at 1.

11. See Eric Siegel, *Tables Turn on Stores*, BALT. SUN, May 24, 1999, at 1B; see also Jamie Smith Hopkins & Lisa Respers, *Racial Profile Suit To Go To Trial June 5*, BALT. SUN, May 12, 2000, at 1B (reporting that black teenagers were detained and searched twice before being able to leave mall). See generally *Allen v. Columbia Mall, Inc.*, 47 F. Supp. 2d 605 (D. Md. 1999) (holding that the plaintiffs' claim that security guards' stop and search of teenagers in store and subsequent stop in the mall did not violate Section 1983 of the Civil Rights Act). Note that this Article uses the terms "consumer racism" and "consumer discrimination" interchangeably.

12. 20/20 Broadcast, *supra* note 2. According to the featured security consultant, targeting shoppers because of race "occurs every day. It's an everyday problem." 20/20 Broadcast, *supra* note 2. However, retailers assert that false accusations of shoplifting are rare occurrences. See Siegel, *supra* note 11, at 1B. The National Association of Retailers asserts that "major retailers forbid discriminatory practices" because "[i]t's just not good business." Todd Shields, *Teenager Sues Waldorf Mall, Alleges Guard Assaulted Him*, WASH. POST, May 12, 1999, at B04.

13. See Feagin, *supra* note 1, at 107; *J.C. Penney Is Sued On Claims It Focuses Surveillance on Blacks*, WALL ST. J., July 8, 1999, at B8 [hereinafter *J.C. Penney Is Sued*] (reporting that the department store Dillard's, Inc., faced with a number of suits claiming differential treatment based on race, met with religious and civil-rights leaders in Kansas City, Missouri).

14. See Clifford L. Broman et al., *The Experience and Consequences of Perceived*

phenomenon limited to particular groups or classes of African Americans. All African American shoppers are potential targets of everyday racism, such as consumer discrimination. And, as a result, the effects of living with daily racial assaults have received increased focus and attention in a variety of disciplines. Studies to examine the impact of daily racism have been proposed and social scientists are analyzing the effect of such racism on African Americans' physical and mental health.¹⁵ Links between African Americans' daily encounters with race discrimination and the onset of several stress-related diseases including high blood pressure, hypertension, stroke, and cardiovascular disease have been established.¹⁶ The evidence demonstrates that the continual assaults of racial bias negatively affect African Americans' life satisfaction and self-esteem.¹⁷

Racial Discrimination: A Study of African Americans, 26 J. BLACK PSYCHOL. 165, 175 (2000). In an exploratory study of African Americans' perceived experiences of isolate racial discrimination and its impact, the authors found that sixty percent of African Americans perceived that they had been discriminated against in the past three years. *Id.* "The most common experience reported is experiencing discrimination while shopping in a store." *Id.* The authors found that "Blacks who perceive discrimination have lower levels of mastery and higher levels of psychological distress." *Id.* at 178. The authors conclude that their findings are consistent with "the Black experience" in American society stating, "[i]t is clear that one intended consequence of racism in the United States is that Blacks should not experience themselves as being powerful and having autonomy." *Id.* at 177; see also Feagin, *supra* note 1, at 114 (stating that an analysis of in-depth interviews with black middle-class respondents from several cities revealed that Black Americans continue to face discrimination in public facilities and accommodations, including retail stores). This Article uses the terms "African American" and "Black" interchangeably to refer to Americans of African descent. In addition, although other racial minorities are subjected to racism and consumer discrimination, this Article focuses primarily on the experience of African Americans. Other groups may face forms of prejudice that involve a complex combination of bias based on race, nationality, and language in such a manner to make the instances of discrimination against African Americans sufficiently distinct to warrant separate treatment.

15. See Sonya Ross, *Clinton Seeks \$10 Million Racism Study*, SUN-SENTINEL, Feb. 3, 1999, at 3A (President Clinton proposed a \$10 million research program to study anecdotal reports of racism and develop a means of measuring the impact of racial bias in everyday life. His advisory board on race "suggested that Clinton create an index called 'Citizens' Indicators of Racial Disadvantage' to measure the presence of bias by analyzing data on discrimination in housing, hiring, education and credit markets."); see also YANICK ST. JEAN & JOE R. FEAGIN, *DOUBLE BURDEN: BLACK WOMEN AND EVERYDAY RACISM* 3-40 (1998) (discussing ways that racism impacts the lives of black women every day by examining, for example, media representations of black women, workplace discrimination, and how contemporary standards of beauty affect black women).

16. See Shawn O. Utsey et al., *Racial Discrimination, Coping, Life Satisfaction and Self-Esteem Among African Americans*, 78 J. COUNSELING & DEV. 72, 72 (2000).

17. See Broman et al., *supra* note 14, at 177; Peggy C. Davis, *Law As*

The "excessive policing of black shoppers" creates an extra burden for blacks that does not exist for whites.¹⁸ Disparate security measures applied to black shoppers are an example of "everyday racism" that represents the intersection of individual and institutional racism.¹⁹ Many blacks discover that, "[n]o matter how affluent and influential, a [B]lack person cannot escape the stigma of being black, even while relaxing or shopping."²⁰ And, the consequences of the daily assaults of racial discrimination are cumulative and severe.²¹

Unfortunately, legal protection against such differential treatment in retail settings is spotty at best.²² While Section 2000a of the Civil Rights Act of 1964 explicitly prohibits discrimination on the basis of race by restaurants, hotels,

Microaggression, 98 YALE L.J. 1559, 1565 (1989) (Professor Davis notes that the daily racial encounters to which blacks are subjected are viewed by psychiatrists as "'incessant and cumulative' assaults on black self-esteem."); Utsey et al., *supra* note 16, at 72.

18. A study of coping strategies revealed that "Blacks reported more incidents of racial stress . . . and the recorded incidents were more active experiences than those reported by their White counterparts . . ." Deborah L. Plummer & Steve Slane, *Patterns of Coping in Racially Stressful Situations*, 22 J. BLACK PSYCHOL. 302, 311 (1996); see Feagin, *supra* note 1, at 107. According to an attorney who handles civil rights suits against retailers and restaurants, these racially discriminatory practices involve:

[A] statement which says, 'We don't trust you. You are not creditworthy in our eyes and, therefore, we don't really want to do business with you on the same terms that we do business with whites. We want to do business with you on our terms where we think it's safe.' And that's the pernicious aspect of the practice, and that's what makes it so racially discriminatory and so illegal.

Profile: Class-Action Lawsuit Filed Against KB Toys After Stores in Predominantly Black Neighborhoods Refused To Take Checks (National Public Radio, Inc., Mar. 6, 2000) [hereinafter *KB Toys*].

19. See Camara Phyllis Jones, *Levels of Racism: A Theoretic Framework and A Gardener's Tale*, 90 AM. J. PUB. HEALTH 1212, 1212-13 (2000) [hereinafter Jones, *Levels of Racism*]; Utsey et al., *supra* note 16, at 72 (citing JAMES M. JONES, PREJUDICE AND RACISM (2d ed. 1997) [hereinafter JONES, PREJUDICE AND RACISM]).

20. Feagin, *supra* note 1, at 107.

21. See Feagin, *supra* note 1, at 114-15. Feagin notes that "when blatant acts of avoidance, verbal harassment, and physical attack combine with subtle and covert slights [based on race], and these accumulate over months, years, and lifetimes, the impact on a black person is far more than the sum of the individual instances." Feagin, *supra* note 1, at 114-15. Feagin further asserts that "[t]he individual cost of coping with racial discrimination is great and . . . you cannot accomplish as much as you could if you retained the energy wasted on discrimination." Feagin, *supra* note 1, at 115; see also Broman et al., *supra* note 14, at 168 ("the mental health effects of discrimination are also profound").

22. See 42 U.S.C. §§ 1981, 1982, 1983, 2000a (1994); Joseph William Singer, *No Right to Exclude, Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1286 (1996).

theaters, gas stations, and in contracting, it does not specifically prohibit the racial dimension of the discrimination faced by Mr. Morrison and his son in Bloomington.²³ Instead, plaintiffs most frequently seek relief claiming a violation of the right to contract under Section 1981, as well as under state statutes and common law. Courts, however, unduly restrict their interpretation of Section 1981, resulting in the dismissal of many plaintiffs' claims before the presentation of evidence.

The lack of express protection against discrimination in retail settings may mean that the least amount of legal protection may be provided to potential plaintiffs in settings where blacks are most likely to be reduced to negative stereotypes.²⁴ Although blacks are subject to discrimination in private as well as public places, in comparison to work and school, public spaces may provide blacks the least amount of protection from racial stereotyping and discrimination.²⁵ In private settings, blacks, particularly middle-class blacks, are less likely to be reduced to racial caricatures and often have the protection of status and credentials.²⁶ In contrast, blacks in public settings are often reduced

23. Title II of the 1964 Civil Rights Act states that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a (1994).

24. See Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1493-97 (1997) (racial stereotyping is the result of unconscious cognitive processes). "According to [a 1993] National Science Foundation study, '[f]ifty-one percent of the white conservatives but also forty-five percent of the white liberals agreed with the statement that 'blacks are aggressive or violent.' . . . Twenty-one percent of the conservatives and seventeen percent of the liberals concurred that African-Americans are 'irresponsible.'" Deseriee A. Kennedy, *Radicalism, Racism and Affirmative Action: In Defense of A Historical Approach*, 27 CAP. U. L. REV. 61, 75 (1988). A 1981 survey revealed that twenty-one percent of whites surveyed thought that blacks were more likely to commit crimes than whites. *Id.* at 76.

25. See Feagin, *supra* note 1, at 114. "The sites of racial discrimination range from relatively protected home sites, to less protected workplace and educational sites, to the even less protected public places." Feagin, *supra* note 1, at 114. Shopping "is a highly public moment." PETER K. LUNT & SONIA M. LIVINGSTONE, *MASS CONSUMPTION AND PERSONAL IDENTITY* 86 (1992).

26. See Feagin, *supra* note 1, at 109. Many middle-class blacks have personally witnessed this effect of being considered an exception to a general (negative) rule about blacks. In these instances, middle-class or well-educated blacks may have been told at one time or another that they were different or special and "were not like other Blacks." The status confers a level of comfort in dealing with a particular African American that resulted from contact and personal knowledge. See Feagin, *supra* note 1, at 109. For further discussion of this phenomenon, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318, 341 (1987). Lawrence recalls an incident in which he was told by a college companion, "I

to common stereotypes of African Americans and therefore become easy targets for racial profiling.²⁷ As one woman explained, in public spaces "there's nothing that mediates between my race and what I have to do."²⁸

Black Americans frequently suffer discrimination because of negative associations and stereotypes, not because of inappropriate or improper conduct.²⁹ "Stereotypes can influence how information is construed or interpreted."³⁰ Store owners and security guards, armed with assumptions about links among race, gender, age, and criminality frequently feel justified in separating out African American shoppers for differential treatment.³¹ Moreover, as Professor Regina Austin has noted, underlying the targeting of African American shoppers is a

don't think of you as a Negro." *Id.* at 318. He notes that despite the "benign intention" of the speaker the statement holds the "racist implication" that "[t]o be thought of as Negro is to be thought of as less than human." *Id.*

27. See Feagin, *supra* note 1, at 107, 109. For a more in-depth discussion of racial stereotyping and unconscious racism, see Brown et al., *supra* note 24, at 1515; Lawrence III, *supra* note 26, at 318, 341. The term racial profiling is commonly used in conjunction with targeting of people of color for stops and frisks by police. See David A. Harris, *The Stories, The Statistics, and The Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 289, 324, 326 (1999); Anthony C. Thompson, *Stopping the Usual Suspects: Race and The Fourth Amendment*, 74 N.Y.U. L. REV. 956, 958 n.2 (1999).

28. Feagin, *supra* note 1, at 109. Feagin notes that many middle-class blacks attempt to use their status to protect them from racial stereotyping in public spaces. Many blacks "dress up" to go shopping or attempt to display the means to pay while shopping in order to avoid being stereotyped as a criminal. See Feagin, *supra* note 1, at 109-10.

29. See Davis, *supra* note 17, at 1561-62. Professor Davis notes that public encounters between whites and blacks often involve reliance on categories or stereotypes about the other. In American society "blacks are commonly regarded as incompetent. The traditional stereotypes of blacks include inferior mentality, primitive morality, emotional instability, laziness, boisterousness, closeness to anthropoid ancestors, occupational instability, superstition, care-free attitude, and ignorance." Davis, *supra* note 17, at 1561. According to Professor Davis, these stereotypes are assimilated and events are interpreted so as to "confirm, rather than unsettle" stereotyped beliefs. Davis, *supra* note 17, at 1562; see Lawrence III, *supra* note 26, at 323, 337. Lawrence notes that under the theory of cognitive psychology, discriminatory beliefs are tacitly transmitted through culture (media, parents, peers, authority figures) so that racial stereotypes and discriminatory beliefs are often unconscious. See Lawrence III, *supra* note 26, at 323; see also FEAGIN & SIKES, *supra* note 9, at 22 ("large proportions of whites candidly express racial prejudices and stereotypes").

30. JONES, PREJUDICE AND RACISM, *supra* note 19, at 192, 202.

31. See FEAGIN & SIKES, *supra* note 9, at 47 ("Another problem that black shoppers face, especially in department and grocery stores, is the common white assumption that they are likely shoplifters. This is true in spite of the fact that national crime statistics show that most shoplifters are white.").

sense that they are unworthy of engaging in behavior that whites regularly engage and that to many define the "Americanness of America."³²

Section 1981 cases concerning consumer discrimination are instructive in providing a window into the reality of everyday racism in contemporary American society. These cases offer a glimpse of the daily reality of life for African Americans. While employment and housing discrimination are severe forms of institutional bias that may occur frequently, these forms of prejudice do not affect every black American every day. On the other hand, the commercial interactions that take place in retail and grocery stores occur on a daily basis. The kinds of bias that occur in a retail setting are indeed "stunning and subtle" "microaggressions" that have far reaching effects.³³ These events cause racial stress that can produce severe psychological and medical harms, as well as economic losses. Moreover, examining consumer discrimination cases provides insight into how courts view allegations of racism that occur in everyday life. Focusing on these cases allows an inquiry into a form of racism that is often ignored, but which causes a great deal of emotional and physical harm to African Americans.

This Article argues that consumer discrimination is symptomatic of the myriad ways in which racism has become subtly muted and infused into everyday interactions. This "everyday racism," while carried out and experienced by individuals, is a result of social and institutional policies and, therefore, it represents a fusion of both individual and institutional racism. Despite the ubiquity of the experience, courts have been reluctant to directly address the harms that result from being the target of racial profiling in consumer settings using pre-trial dismissals and an unduly constricted reading of the Civil Rights Act to reject plaintiffs' claims. The courts' response to consumer discrimination cases is symptomatic of the widening gap between the rhetoric of civil rights and antidiscrimination principles and the reality of everyday life for African Americans.

32. See Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 147. Professor Austin asserts that "Blacks are condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought. Among the most significant of these activities is buying and selling goods and services." *Id.* She further notes that "[s]hopping and selling by blacks, or more broadly consumption and commerce, are in essence considered deviant activities by many whites and by many blacks as well." *Id.* at 147-48. For the importance of consumption in American life generally, see Juliet B. Schor, *What's Wrong with Consumer Society? Competitive Spending and the "New Consumerism"*, in CONSUMING DESIRES, CONSUMPTION, CULTURE, AND THE PURSUIT OF HAPPINESS 37 (Roger Rosenblatt ed., 1999) [hereinafter Schor, *New Consumerism*]; JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* (1998) [hereinafter SCHOR, *THE OVERSPENT AMERICAN*].

33. See Davis, *supra* note 17, at 1565 (Professor Davis defines microaggressions as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders.").

Part II of this Article briefly examines the history of consumer racism in the United States and discusses several consumption theories that help to explain the role of consumption in African American life.³⁴ Part III discusses contemporary illustrations of consumer discrimination and lays out the harms that flow to plaintiffs from differential treatment in retail settings. Part IV provides a conceptual framework for understanding consumer racism and it posits that consumer discrimination is a hybrid of both individual and institutional racism that is best defined by theories that center on the phenomenon of "everyday racism." Part V examines consumer discrimination cases decided under Section 1981.³⁵ Further, this section critiques the narrow approach taken by the majority of courts in Section 1981 cases and recommends a broader interpretation of the statute. Finally, Part VI concludes with recommendations for change.

II. HISTORY OF CONSUMER RACISM

Professor Charles Lawrence III asserts that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role."³⁶ The pervasiveness of racism reflects the fact that:

We have inherited in our society a complex set of beliefs about race. These beliefs strongly state or unmistakably imply that non-white racial groups generally and blacks in particular, are inferior to whites, lack the values systems whites hold, and may be either threatening to society . . . or undeserving of full status and participation in U.S. society.³⁷

This inheritance includes the legal and de facto use of segregation in places of public accommodations and retail stores.³⁸ Nineteenth century history is replete with stories of African Americans being excluded from stores, restaurants, movie theaters, and other public places. African Americans were forced to use back entrances to businesses and were denied service at lunch counters up until the

34. Part II relies on sociological and anthropological resources. "Confronted with a problem as complex as racism, we cannot afford to let ourselves be constrained by the boundaries of specific disciplines." PHILOMENA ESSED, UNDERSTANDING EVERYDAY RACISM 1 (1991).

35. Part V focuses on the details of the individual cases and recites the facts of these cases in detail because these "'accounts of racism' are not just stories about racist events, they contain elements of knowledge about racism." ESSED, *supra* note 34, at 289.

36. Lawrence III, *supra* note 26, at 322.

37. JONES, PREJUDICE AND RACISM, *supra* note 19, at 136.

38. African Americans resisted white exclusion and control and "a host of small merchants marketed a wide range of essential goods and services to African Americans and helped African Americans articulate their shared desire for material and social self-empowerment denied in White consumer space." MULLINS, *supra* note 9, at 98.

1960's.³⁹ In fact, one of the most powerful images and lasting legacies of the civil rights movement of the 1960's is that of young college students at sit-ins at lunch counters across the south.⁴⁰ While the lunch counters represent the most familiar imagery of protest against the exclusion of blacks from public spaces, retail stores were also common spaces of racial segregation and discrimination.⁴¹ Consumption and racial hierarchies were inextricably intertwined.⁴² Thus, blacks who "accumulat[ed] even modest wealth and possessions" might be targets of racial aggression and violence.⁴³ "If you were black, you were not supposed to have either time or money, and if you did, you ought not show it."⁴⁴ Up until the post civil rights movement, blacks frequently were denied service and denied the opportunity to try on merchandise before buying.⁴⁵ White shopkeepers frequently would wait on white customers before blacks and it was not unusual for whites to try and cheat black customers.⁴⁶ "Storekeepers also

39. See FEAGIN & SIKES, *supra* note 9, at 46.

40. The "sit-in" movement of the 1960's began when seventeen-year-old Joseph McNeil, a college student at North Carolina Agricultural and Technical College, approached three of his classmates and suggested that they demand service at the lunch counter of a Greensboro, North Carolina Woolworth's. See Claude Sitton, *Negro Sitdowns Stir Fear of Wider Unrest in South*, N.Y. TIMES, Feb. 15, 1960, at 1. Mr. McNeil and his friends began a form of protest that soon swept the nation and helped to weaken racial segregation in the south. See WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS 99 (1980); PAULA GIDDINGS, WHEN AND WHERE I ENTER 273 (1994); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 495-96 (7th ed. 1994); HOWELL RAINES, MY SOUL IS RESTED 80-81 (1977).

41. Cultural anthropologist Paul Mullins asserts that "consumer culture held out a powerful promise to many disenfranchised Americans." MULLINS, *supra* note 9, at 189. "In the wake of Emancipation, African Americans placed great conviction in the capacity of commodities to improve their lives, and they recognized the symbolic privilege of entering consumer space with the status of consumer citizenship." MULLINS, *supra* note 9, at 189. "This commitment to consumption was heightened by the collapse of Reconstruction, retrenched public racism, and the arrival of Jim Crow codes that circumscribed the potential to effect significant change in politics, business or labor." MULLINS, *supra* note 9, at 189.

42. See GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940, at 172 (1999). "General stores also solved the problem of inscribing racial difference within consumption by combining the old racial inferiority of plantations and paternalism within the new consuming world." *Id.*

43. LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 330 (1999).

44. *Id.*

45. *Id.*

46. See Austin, *supra* note 32, at 149. Some white proprietors "served Negroes but charged them higher prices; one Greek restaurant owner blandly informed a Negro customer that he would be glad to serve him but would have to charge him four times the regular price of a meal." KENNETH L. KUSMER, A GHETTO TAKES SHAPE: BLACK CLEVELAND, 1870-1930, at 179 (1976).

controlled the rituals of deference through which blacks were forced to make their purchases. African Americans often had to wait until all whites were served to take whatever grade of cornmeal, molasses, or sidemeat clerks would give them.⁴⁷ In fact, in an effort "to avoid consumer spaces in which they were subject to personal humiliation and marketing inequality," "African Americans often took advantage of mail order catalogues."⁴⁸ Public spaces, including retail stores, reflected the racial hierarchy in America. The treatment of blacks in public places was consistent with a caste system that assumed blacks' inferiority and placed them squarely at the bottom. And, it is clear, the racialized rules for public spaces and the racial caste system extended to consumption. The specific goods that were consumed and the places where they were purchased were evidence of social class and standing. Purchasing material goods and the site of purchase were other means by which whites could distance themselves from blacks.⁴⁹ Thus, in an effort to reduce mail-order sales, "[s]outhern general storekeepers . . . circulated the rumor that Sears and Roebuck was covertly managed by African Americans."⁵⁰ And, in an effort to maintain the stratification and the belief in the exclusivity of consumption as reserved for whites, Sears' officials began running a picture of their "[w]hite founder in the catalogue" in order to establish "that the firm was indeed run by (if not exclusively for) Whites."⁵¹ The conflict between storekeepers and mail order businesses reflected the "racial anxieties that permeated the continuing

47. HALE, *supra* note 42, at 172-73.

48. MULLINS, *supra* note 9, at 47. "Mail-order pricing likely was particularly attractive to African Americans, since mail firms used a one-price system, which eliminated the deceitful pricing merchants routinely inflicted on African Americans." MULLINS, *supra* note 9, at 47. It is interesting to note that in the early 1900's "the country's largest employer of black clerical workers was Montgomery Ward, a mail order establishment whose personnel had no direct contact with the customers they served." JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW* 179 (1985); *see also* LITWACK, *supra* note 43, at 330. Litwack notes that blacks often would "resort to mail order to acquire possessions that might attract unwanted attention if purchased locally; some also deemed mail order less humiliating, as local stores would not, for example, permit blacks to try on clothes before purchasing them." LITWACK, *supra* note 43, at 330. So tightly circumscribed was black spending that, "even mail order [] had to be used with discretion, as black families feared reprisals if too many purchases were delivered by express." LITWACK, *supra* note 43, at 330; *see also* HALE, *supra* note 42, at 176-79.

49. For a discussion of the use of advertising to perpetuate a racial caste and hierarchy, *see* Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 642-44 (2000).

50. MULLINS, *supra* note 9, at 47 (citation omitted); *see also* HALE, *supra* note 42, at 179.

51. MULLINS, *supra* note 9, at 47-48. "Confronted by similar gossip, Montgomery Ward offered a reward to anyone who could identify the source of a rumor that he was a Mulatto." MULLINS, *supra* note 9, at 48 (citation omitted); *see also* HALE, *supra* note 42, at 179.

expansion of consumption. Catalogs placed the consuming practices beyond local white knowledge and control Money and white supremacy were both at stake," making policing the boundaries of racial hierarchy more difficult.⁵²

Professor Austin points out two critiques of black consumption.⁵³ According to Professor Austin, alienation theorists believe that "blacks consume conspicuously as a way of compensating for the humiliation and disappointments they incur by reason of being black, exploited, degraded and oppressed."⁵⁴ According to alienationists, the use of consumption in this way is problematic because "status is a moving target," consumption "diverts energy and resources" better spent in antidiscrimination efforts, and poorer blacks may be enticed into buying more than they can afford.⁵⁵ On the other hand, resistance critiques assert that consumption is "the site of a struggle to exploit the transformative potential of commodities."⁵⁶ Black consumers transform commodities by adapting them to their own use and style, subverting the "generally received meaning of the thing."⁵⁷ However, the ability to alter the meaning of goods is restricted by society's tendency to either "co-opt the styles" or "label the styles deviant and attempt to repress them."⁵⁸ Professor Austin critiques both perspectives, noting that "[b]oth the consumption as resistance and the consumption as alienation approaches ignore the fact that consumption is an exercise of economic power."⁵⁹ Professor Austin also highlights the historical struggle of blacks to "enhance their position in the sphere of commerce."⁶⁰

While it is unclear whether the alienation or resistance critiques of consumption accurately describe the relationship between blacks and the economic market, it is true that consumption is an exercise of economic power.⁶¹ It is equally true, however, that exercising the right to participate in the economic market through consumption of consumer goods has political as well as economic ramifications.⁶² African Americans' consumption may be a "rejection

52. HALE, *supra* note 42, at 179.

53. See Austin, *supra* note 32, at 156.

54. Austin, *supra* note 32, at 156.

55. Austin, *supra* note 32, at 156-57.

56. Austin, *supra* note 32, at 160.

57. Austin, *supra* note 32, at 160. Professor Austin cites "baggy jeans, reversed baseball caps, fade haircuts, [and] rap music" as examples of resistant consumption. Austin, *supra* note 32, at 160.

58. Austin, *supra* note 32, at 162.

59. Austin, *supra* note 32, at 165. Professor Austin includes a number of other critiques of both approaches. See Austin, *supra* note 32, at 163-66.

60. Austin, *supra* note 32, at 167.

61. See Austin, *supra* note 32, at 165.

62. Mullins states that:

[C]onsumption was an African-American sociopolitical statement of civil aspirations, material desires, and resistance to monolithic racist caricatures. Many African Americans viewed consumption as a significant symbolic and

of Black and American as incongruous identities,"⁶³ and the consumption of commercial goods by African Americans reflects a historical struggle of political as well as economic power. It represents efforts of empowerment and self-determination. "African Americans [have been] at the heart of consumer culture as laborers, entrepreneurs, and consumers: African Americans [are] central to maintaining American consumer space and often eager to reap its benefits, even though they [are] marginalized by racial ideologues who aspire[] to make public rights and privileges exclusive to Whites."⁶⁴

III. CONSUMER RACISM TODAY

Consumption continues to take a prominent role in modern American society and continues to serve as a means of establishing class alliances.⁶⁵ In fact, according to economist Juliet Schor, "[u]rbanization, formal education, and the disappearance of traditional social relationships render spending more salient in establishing social identity. Thus, in the modern consumer society, commodities take on a new kind of symbolic importance."⁶⁶

concrete privilege that augured a possible progression in African American labor and civil privileges. In some cases the hope vested in consumption was idealistic or naive, yet consumer space offered precious possibilities for African-American socioeconomic self-determination.

MULLINS, *supra* note 9, at 18. He goes on to state, "[i]t is not particularly radical to suggest that material consumption is politicized in the sense that material meanings are points of contention that can contest power relations, fuel oppositional perceptions of subjectivity, or simply register discontent." MULLINS, *supra* note 9, at 25.

63. MULLINS, *supra* note 9, at 188. In fact, the subjugation of blacks as consumers inspired, in part, the ideas of self-reliance articulated by Booker T. Washington and Marcus Garvey. See HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL 19-22*, 115-22 (1967); TONY MARTIN, *RACE FIRST: THE IDEOLOGICAL AND ORGANIZATIONAL STRUGGLES OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION 32-37*, 280-84 (1976).

64. MULLINS, *supra* note 9, at viii. Although Mullins' work is an anthropological study of black consumption in the early 1900's, the ideas he presents are equally applicable today. Despite the exclusion of blacks from various labor organizations in the late 1800's, blacks embarked on a program of "'Negro business enterprise' in which they undertook to be their own producers and employers." FRANKLIN & MOSS, *supra* note 40, at 283-85. For a discussion of black business activity for other periods in history, see FRANKLIN & MOSS, *supra* note 40, at 382-83, 400, 474-76. Franklin also discusses the rise of "mutual aid societies" that provided financial assistance and insurance to its members. FRANKLIN & MOSS, *supra* note 40, at 286-87. But see Austin, *supra* note 32, at 168 (quoting JAWANZA KUNJUFU, *BLACK ECONOMICS* 45 (1991)) (selling as deviance, "[t]here is a perception that Black businesses are marginal, require too much work for too little income, and that it's more lucrative, less demanding and more financially rewarding to work for someone else than to own your own business").

65. See SCHOR, *THE OVERSPENT AMERICAN*, *supra* note 32, at 3-4, 7-11.

66. Schor, *New Consumerism*, *supra* note 32, at 41.

Despite the increasing importance of consumption, the historic struggles for the right to shop in America,⁶⁷ and the existence of antidiscrimination laws, blacks continue to face discrimination in retail establishments as well as in places of public accommodation.⁶⁸ Unfortunately, the race of a customer often influences how they will be treated while shopping.⁶⁹ Customers of color are frequently faced with differential security measures based almost entirely on race.⁷⁰ Black customers are followed, stopped, searched, and threatened for looking suspicious, displaying nervous behavior, avoiding sales help, and shopping in darkened, deserted areas of the store.⁷¹ Race becomes a

67. See Austin, *supra* note 32, at 165-67 (Professor Austin discusses measures used by blacks to gain economic power in the consumer marketplace such as "black dollar days" and black consumer boycotts of the Great Depression and the Civil Rights Era.).

68. Claims of differential treatment while shopping arise from conduct attributed to security guards and other store personnel. Claims are asserted against department stores under the doctrine of respondeat superior. See *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1275 (D. Kan. 1998) (finding "substantial evidence that Dillard's knew about and ratified a policy of targeting African-Americans, and that [the security guard] carried out that policy").

69. "A recent survey of African American consumers by research company Yankelovich Partners and Chicago-based Burrell Advertising, a black-owned agency, found that fifty-nine percent agreed with the statement: 'When African-Americans go shopping, they are usually not treated with respect by white sales people.'" *Some Companies Seem To Go Out of Their Way To Alienate Black Consumers*, PR CENTRAL ONLINE NEWS & INTELLIGENCE 3 [hereinafter *Black Consumers*]. Professor Austin underscores the magnitude of the problem.

Blacks are treated as if they were all potential shoplifters, thieves, or deadbeats. There can hardly be a black person in urban America who has not been denied entry to a store, closely watched, snubbed, questioned about her or his ability to pay for an item, or stopped and detained for shoplifting.

Austin, *supra* note 32, at 148-49; see also PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-46 (1991) (Williams' story illustrates the point that neither socio-economic class nor ability to pay exempts blacks from being labeled potential shoplifters or lawbreakers.); Fred Kaplan, *Meter Is Running on Giuliani's Crackdown on Cabbies*, BOSTON GLOBE, Nov. 12, 1999, at A3 (Hollywood actor Danny Glover's inability to hail a taxi in New York City highlights the ubiquitous nature of discrimination against black males by New York City taxi drivers.).

70. In a fairly extreme example of targeting black customers for differential security measures and surveillance, the Pennsylvania State Police issued a directive to banks and other financial institutions to photograph suspicious black males or females entering their premises. See *Hall v. Pa. State Police*, 570 F.2d 86, 88 (3d Cir. 1978) (plaintiff's claims under Sections 1981 and 1983, *inter alia*, survived a motion to dismiss). Despite the assertion that enhanced surveillance of black customers is, in large part, motivated by racial stereotypes, the negative associations are part of Americans' "cultural heritage" that may be suppressed and may go unacknowledged. See Davis, *supra* note 17, at 1564-65.

71. See *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 368 (D. Del. 1996) (granting defendant's motion for summary judgment on Section 1981 and 1983 claims for

predominant concern in deciding whether to watch customers, and retail store personnel place African Americans under heightened surveillance noting aspects of their dress and behavior that go unnoticed in non-black customers.⁷² Consumer discrimination is quite often based on unsubstantiated stereotypes and is similar to racial profiling by law enforcement officers.⁷³ "Blacks are seen as shoplifters, as unclean, as disreputably poor."⁷⁴ In fact, this effect has been documented by news organizations that have used testers and video surveillance

differential treatment while shopping in J.C. Penney). In *Hampton v. Dillard Department Stores, Inc.*, 18 F. Supp. 2d 1256 (D. Kan. 1998), the court noted:

[T]he jury learned the astoundingly innocuous nature of conduct which Dillard's viewed as "suspicious" when committed by minority shoppers—whether black, hispanic, or otherwise. For example, the entries on the [security] log included "two black females in dresses [department] . . . four black males and one black female made purchase and left without incident . . . two groups of black females in better dresses [department] . . . and two black females walking around with a list of some kind."

Id. at 1273 n.12 (citations omitted). The logs indicated the race and sex of the customers under surveillance even though there appeared to be no business purpose for doing so. Brief of Appellee Hampton and Cross-Appellant Cooper at 13, *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256 (D. Kan. 1998) (No. CIV.A.97-2182-KHV). The assertion that shop keepers and security guards act on the basis of stereotypes is consistent with the work of cognitive psychologists who assert that people are drawn to categorization "in order to make sense of experience." Lawrence III, *supra* note 26, at 337. Unfortunately, these categories are influenced by an American "cultural heritage in which racism . . . plays a dominant role." Lawrence III, *supra* note 26, at 337. "Furthermore, there is little in our environment to counteract [these categories]; indeed, our culture often supports and rewards individuals for making hostile misjudgments that exaggerate the differences between themselves and members of a racial outgroup." Lawrence III, *supra* note 26, at 338.

72. See *Hampton*, 18 F. Supp. 2d at 1267. In resolving a matter involving allegations of racially discriminatory treatment of a black customer, the court noted that the security guard's report included:

[A] space for the race of each subject. The narrative part began with . . . [the] statement that he was "watching two black females with two kids and a stroller." It explained that "[t]he black female that had on a dark leather coat [had a pair of pants]" and that "[t]he other black female left the area with the children."

Id. at 1267 n.5. Significantly, the court noted that the guard "used the term 'black female' twelve times in the 1½ page hand-written report." *Id.* at 1267 (citation omitted). Professor Austin asserts that "Blacks are condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought." Austin, *supra* note 32, at 147; Davis, *supra* note 17, at 1567 ("The more frequent and more insidious microaggressions, however, are unavoidable in that they are neither initiated by blacks nor based in any apparent way on the behavior of blacks.").

73. See *supra* note 27.

74. Feagin, *supra* note 1, at 107.

to document differential treatment of shoppers based on race.⁷⁵ In one such experiment, two women of the same age and similar dress were sent to shop in a department store in a suburban shopping mall.⁷⁶ One woman was white and the other black.⁷⁷ According to the demonstration, the sales clerk targeted the black shopper for surveillance almost immediately after she entered the store, while paying no attention to the white shopper.⁷⁸ When the women used the fitting room, the clerk counted and recounted the clothes the black woman intended to try on and peeked through the fitting room door several times in order to spy on the black woman while she tried on garments.⁷⁹ The white shopper received vastly different treatment: her items were not counted nor was her fitting room inspected.⁸⁰ The only explanation for the differential treatment appears to be the race of the shoppers.⁸¹

Evidence of the differential treatment based on race is most apparent in cases involving black and white consumers. The experiment conducted by the news team is mirrored in real life experience. Linda Sebell, who is white, and Roni Lewis, who is black, were shopping together in a J.C. Penney in Newark, Delaware.⁸² The women were accompanied by Lewis' son and daughter and her son's friend.⁸³ Lewis' son and his friend shopped separately but met the women outside the exit door of J.C. Penney when the store closed.⁸⁴ The women made a number of purchases at the store and shopped until the store closed.⁸⁵ While

75. 20/20 Broadcast, *supra* note 2. According to Wade Henderson, executive director of the Leadership Conference on Civil Rights, "[t]he use of racial profiling in retail loss-prevention efforts is apparently widespread." Siegel, *supra* note 11, at 1B; *J.C. Penney Is Sued*, *supra* note 13, at 38 (Class action alleges J.C. Penney targets African American customers for enhanced surveillance.).

76. 20/20 Broadcast, *supra* note 2. In another such experiment, a Minneapolis, Minnesota news team "conducted a field study of discrimination against black shoppers in several local department stores." FEAGIN & SIKES, *supra* note 9, at 47. The study, which took place over several months in 1991, "showed how many black customers became the targets of intensive surveillance from white security guards, who neglected white shoppers when black shoppers were in the store." FEAGIN & SIKES, *supra* note 9, at 47.

77. 20/20 Broadcast, *supra* note 2.

78. 20/20 Broadcast, *supra* note 2.

79. 20/20 Broadcast, *supra* note 2.

80. 20/20 Broadcast, *supra* note 2.

81. 20/20 Broadcast, *supra* note 2 (According to the security consultant interviewed for the show, "'the shopper was targeted because of her skin color,' which he says is not only unfair, it's also ineffective in reducing shoplifting . . . [because] 'most of the people that are arrested for shoplifting are white.'").

82. See *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 368 (D. Del. 1996).

83. *Id.*

84. *Id.*

85. *Id.*

Sebell and Lewis were shopping, security guards began following them.⁸⁶ They followed the women because, according to the guards, "they displayed nervous behavior, avoided sales help and were shopping in darkened, deserted areas of the store."⁸⁷ The guards also "noticed several black males waiting outside the exit door."⁸⁸

After the women left the store and were approaching Lewis' car, the security guards approached them and asked them to return to the store to allow the guards to inspect their bags.⁸⁹ The children were not permitted to reenter the store and were left locked outside the door.⁹⁰ The guards searched the women's bags near the entrance "in full view of anyone walking in or out of the store."⁹¹ Lewis and Sebell asserted that the women were treated differently by the guards.⁹² The guards searched Lewis' bag, asked her for identification, and questioned her about a discrepancy on her forms of identification.⁹³ According to Lewis, "[t]he officer simply looked at Ms. Sebell's bag without asking that the bag be emptied and he glanced at the receipt."⁹⁴ The view that the women were treated differently was echoed by Sebell, who "asserted . . . that the guards more or less ignored her until Lewis pointed that out, and asked, 'Are you checking both of us?'"⁹⁵ In Sebell's opinion, "she was searched only because she was with Lewis."⁹⁶ According to the court, "the guards then made a cursory search of Sebell's bags, despite the fact that Sebell had accumulated far more merchandise than Lewis, and was therefore the more likely shoplifting suspect."⁹⁷

Consumer discrimination has no class boundaries and has been reported by blacks of all social strata.⁹⁸ The nature of the discrimination varies from heightened surveillance to the use of threats or violence to exclusion. Professor Patricia Williams has eloquently detailed her experience of being excluded from a Benetton retail store when a young white male sales clerk refused to "buzz" her

86. *Id.*

87. *Id.* at 369.

88. *Id.* at 368.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 369.

93. *Id.* at 368.

94. *Id.* at 369.

95. *Id.*

96. *Id.*

97. *Id.*

98. 60 Minutes: *Widespread Allegations of Racial Profiling at Dillard's* (CBS television broadcast, Mar. 25, 2001) [hereinafter 60 Minutes] (Bradley noted a discussion of consumer racial profiling at a meeting of the National Conference of Black Mayors.).

into the store.⁹⁹ In describing her reaction to being excluded from doing her Christmas shopping at Benetton, Williams stated:

I was enraged. At that moment I literally wanted to break all the windows of the store and take lots of sweaters for my mother. In the flicker of his judgmental gray eyes, that saleschild had transformed my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me.¹⁰⁰

In this story, the exclusion was an attempt to regulate public space—to control the possibility that Williams might shoplift or otherwise engage in wrongdoing. While exclusion from public arenas is a common historical black experience, contemporary retailers frequently will not choose to exclude, but instead rely on heightened surveillance as a means of controlling black shoppers' conduct and preventing possible wrongdoing.¹⁰¹ Had Williams been admitted to Benetton to do her Christmas shopping, it is likely that the racially discriminatory conduct would have continued. It is possible that she would have been followed, subjected to increased surveillance, or perhaps subjected to the indignities faced by Mr. Morrison and his son while being searched.

According to Professor Austin, "the obstacles Blacks encounter in trying to spend their money in white-owned stores and shops are legendary."¹⁰² She opines that shopping and selling by blacks are considered deviant activities for which they are targeted by white store owners for differential treatment.¹⁰³

99. See WILLIAMS, *supra* note 69, at 44-45. Williams explains that the buzzer system is a screening device used by stores ostensibly as a safety measure. See WILLIAMS, *supra* note 69, at 44. She also notes that ironically Benetton's advertising campaign, "United Colors of Benetton" stresses diversity. See WILLIAMS, *supra* note 69, at 45. Williams goes on to explain how the retelling of the story was revised and edited by others so as to question the validity of her perspective. See WILLIAMS, *supra* note 69, at 46-51.

100. WILLIAMS, *supra* note 69, at 45.

101. Note that the federal public accommodations statute, which prohibits exclusion on the basis of race, does not apply to retail stores. See 42 U.S.C. § 2000a (1994 & Supp. 1998); Singer, *supra* note 22, at 1295.

102. Austin, *supra* note 32, at 148.

103. See Austin, *supra* note 32, at 147. This Article asserts that black consumption, like all consumption, is central to the American economy and culture. However, black behavior while shopping or consuming continues to be tightly controlled. For example, even the well-known cases involving the segregation of railway cars involved maintaining a racial caste system that kept blacks in their place, not a refusal to allow blacks to engage in commerce. See *generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

While she notes that prosecution of shopkeepers for engaging in "discriminatory and disrespectful treatment" is possible, she is not optimistic that the law will change the way sellers treat blacks.¹⁰⁴ She instead focuses on developing a black public sphere that would encourage the expansion of black production.¹⁰⁵ According to Professor Austin, increasing blacks' economic power might increase their worth as consumers to shop owners and might result in better treatment.¹⁰⁶

Reports of retail bias against black customers are becoming increasingly commonplace.¹⁰⁷ Some assert that a well-publicized case against Eddie Bauer spawned a number of consumer discrimination claims. In the Eddie Bauer incident, which took place in 1995, three black high school students were stopped by security guards after they finished shopping and were leaving an Eddie Bauer store.¹⁰⁸ One of the students, Alonzo Jackson, was stopped by a security guard and asked if he had purchased the shirt he was wearing and asked him to produce a receipt.¹⁰⁹ Jackson had purchased the shirt at the store a day earlier and could not produce a receipt.¹¹⁰ The guard demanded that Jackson take off the shirt and leave.¹¹¹ Jackson returned with the receipt and retrieved his shirt, and later sued.¹¹² A jury found that the store defamed and falsely

104. Austin, *supra* note 32, at 173. While Professor Austin briefly notes the inadequacy of legal remedies for blacks who suffer mistreatment "in pursuit of consumption," her focus is on the non-legal methods of redress. Austin, *supra* note 32, at 173-77.

105. See Austin, *supra* note 32, at 173.

106. See Austin, *supra* note 32, at 176. The focus of Professor Austin's article is on economic justice and efficiency. "For me, the most disturbing aspect of the discriminatory service blacks experience in ordinary commercial transactions is the economic exploitation such behavior represents." Austin, *supra* note 32, at 150.

107. See Philip P. Pan, *More Blacks Suing Over Retail Bias*, WASH. POST, Oct. 8, 1997, at A01. Pan reports, "Ted Williams, an attorney for two Prince George's County residents who sued a women's lingerie store near Baltimore over a strip search, said his office receives about 15 calls a week from young black men with complaints about retailers." *Id.*; see Broman et al., *supra* note 14, at 177; see also Feagin, *supra* note 1, at 107 ("This excessive surveillance of blacks' shopping was reported by several respondents to our study and in recent newspaper accounts."); Brad Knickerbocker, *New Face of Racism in America Retailers Denying Checks and Cab Drivers Refusing Rides in Minority Neighborhoods*, CHRISTIAN SCI. MONITOR, Jan. 14, 2000, at 1 ("several high-profile instances of what's being called retail racism have arisen in recent months").

108. See Courtland Milloy, *Community Demands Apology*, WASH. POST, Nov. 19, 1995, at B01.

109. *Id.*

110. *Id.*

111. *Id.*

112. See *id.*; DeNeen L. Brown & Margaret Webb Pressler, *A Problem That's Hard to Pin Down; Bauer Case Highlights Difficulty of Fingering Bias in Retail Security*, WASH. POST, Oct. 11, 1997, at C01.

imprisoned the young men and negligently supervised its security guards.¹¹³ Jackson was awarded \$850,000 in compensatory and punitive damages while the other two plaintiffs were awarded \$75,000.¹¹⁴ The jury did not, however, find that Jackson's civil rights had been violated.¹¹⁵ While the young men received monetary relief for their damages, the award did not recognize the true nature of the harm—differential treatment because of their race. They further asserted that an award for false imprisonment and defamation failed to acknowledge the racial dimensions of the store and the guards' conduct insulating such behavior from legal intervention. The loss of dignity and the humiliation uniquely suffered by those falsely accused remained unaddressed.¹¹⁶ What remained was the degrading suggestion that Jackson was stopped because of his race.¹¹⁷

There are numerous instances of differential treatment in retail stores based on race.¹¹⁸ African Americans repeatedly report experiences that illustrate differential treatment that may be manifested in widely divergent ways. For example, when attempting to purchase a Washington Redskins jacket at a Foot Locker store, Shaun Jackson was told that the store did not accept checks from banks located in Washington, D.C. However, when Jackson, who is black, sent her white roommate to buy the coat moments later, the store immediately approved her roommate's Washington, D.C. check.¹¹⁹ In another suit, a black customer at Home Depot reported that "a white manager spent more than an hour scrutinizing her \$1,000 gift certificate and then . . . refused to honor it."¹²⁰ In yet another case, a sixteen-year-old girl alleged that J.C. Penney security

113. See Dorothy S. Boulware, *Jackson and Friends Win Suit Against Eddie Bauer*, BALT. AFRO-AM., Oct. 18, 1997, at A1. The jury rejected claims that the differential treatment was based on race. See Brown & Pressler, *supra* note 112, at C01.

114. See Brown & Pressler, *supra* note 112, at C01. Eddie Bauer agreed not to appeal the jury award and the case was settled for an undisclosed amount. See Siegel, *supra* note 11, at 1B.

115. See Siegel, *supra* note 11, at 1B.

116. See Brown & Pressler, *supra* note 112, at C01. After the trial, Jackson is quoted as saying, "I'm happy we won, but it doesn't give you your dignity back." *'Consumer Racism' Suit Ends in Million Dollar Judgment*, Oct. 13, 1997, available at <http://www.aclu.org/news/v101397c.html> [hereinafter *Consumer Racism*].

117. A plaintiff in a consumer discrimination suit against J.C. Penney says "she bears emotional scars" from the incident and is "scared to go into department stores." Siegel, *supra* note 11, at 1B.

118. For a discussion of case law involving differential treatment in retail stores based on race, see *infra* Part V.

119. See Pan, *supra* note 107, at A01. In a similar case, plaintiffs alleged that Kay-Bee Toys refuses to accept personal checks at stores located in predominantly black neighborhoods. See Knickerbocker, *supra* note 107, at 1; Stephanie Stoughton, *Suit Alleges Bias by KB Toys*, WASH. POST, Dec. 16, 1999, at A01; *KB Toys*, *supra* note 18.

120. Pan, *supra* note 107, at A01.

guards forced her to take off her outer blouse and empty her purse before admitting that she was falsely accused of shoplifting.¹²¹

Social science studies support the conclusion that consumer discrimination is a pervasive problem. More than half of black Americans surveyed had, in the three years prior to the study, experienced individual acts of racial discrimination in shopping, in the workplace, and in interactions with the police.¹²² Yet, many instances of differential treatment in retail settings are not formally challenged by the victim.¹²³ Often feeling as helpless as Professor Williams in her encounter with Benetton, victims absorb these daily assaults and integrate them as part of the African American experience. Of those cases challenging the discriminatory treatment, many are resolved informally or settled.¹²⁴

Despite well-publicized accounts of racial discrimination in retail settings, doubt remains as to the seriousness or magnitude of the harms that result. It is important to note that consumer discrimination is an example of everyday racism that includes "not just isolated incidents . . . but a lifelong series of such incidents."¹²⁵ These acts are harmful in large part because they "may reinforce the sense of relative powerlessness Blacks possess in American society."¹²⁶

121. See Siegel, *supra* note 11, at 1B.

122. See Broman et al., *supra* note 14, at 175. The authors of the study refer to this type of "non-institutional discrimination" as "isolate discrimination." Broman et al., *supra* note 14, at 166.

123. See Pan, *supra* note 107, at A01; Siegel, *supra* note 11, at 1B (reporting that a lawyer involved in several consumer discrimination suits against retailers stated, "[n]inety percent of these cases are cases where the person walks out the door and never shops there again"). According to Deborah Jeon, a lawyer with the ACLU, "[i]n the past, most customers would make a complaint but then let it go and just choose not to shop at that store." *Consumer Racism*, *supra* note 116. Professor Austin reports that blacks view complaining as an ineffectual response to the problem and, instead, have devised a number of resistance tactics designed to prove themselves "worthy shoppers," such as dressing up to go shopping and flashing credit cards. See Austin, *supra* note 32, at 154.

124. See Pan, *supra* note 107, at A01. In a study of public discrimination against middle-class blacks, Feagin found that "middle-class strategies for coping with discrimination range from careful assessment [of the situation] to withdrawal, resigned acceptance, verbal confrontation, or physical confrontation." Feagin, *supra* note 1, at 103. For example, in 1992, Nordstrom Department Stores was sued after a black customer was accused of shoplifting after returning clothing without a receipt. *Black Consumers*, *supra* note 69, at 4. Defying company policy, the sales clerk refused to accept the goods for return and called security. Nordstrom settled the suit with the plaintiff and began to provide diversity training for staff in the department involved. It even hired the black-managed firm of Nesby & Associates to train its managers on cultural diversity. *Black Consumers*, *supra* note 69, at 4.

125. Feagin, *supra* note 1, at 109. Feagin notes that these racial stresses have a cumulative impact and "can be viewed as a series of 'life crises,' often similar to other serious life crises, such as the death of a loved one, that disturb an individual's life trajectory." FEAGIN & SIKES, *supra* note 9, at 16.

126. Broman et al., *supra* note 14, at 177.

Echoing that sentiment, a respondent to a study on discrimination in public places notes that whites forget that blacks "live lives of quiet desperation generated by a litany of *daily* large and small events that whether or not by design, remind us of our 'place' in American society."¹²⁷ One respondent noted that these individual acts of racial discrimination that:

[M]ight seem minor to white observers, are freighted not only with one's past experience of discrimination but also with centuries of racial discrimination directed at the entire group, vicarious oppression that still includes racially translated violence and denial of access to the American dream. Anti-black discrimination is a matter of racial-power inequality institutionalized in a variety of economic and social institutions over a long period of time. The microlevel events of public accommodations and public streets are not just rare and isolated encounters by individuals; they are recurring events reflecting an invasion of the microworld by the macroworld of historical racial subordination.¹²⁸

Disparate security and other differential practices that target African Americans and other shoppers of color create experiences that are embarrassing, humiliating, and degrading and result in emotional distress and psychological harm.¹²⁹ Being stopped and searched is insulting and grossly inconvenient and

127. Feagin, *supra* note 1, at 114.

128. Feagin, *supra* note 1, at 115. One respondent to Feagin's study stated: [One problem with] being Black in America is that you have to spend so much time thinking about stuff that most white people just don't even have to think about. . . . I worry when I walk into a store, that someone's going to think I'm in there shoplifting. And I have to worry about that because I'm not free to ignore it. And so, that thing that's supposed to be guaranteed to all Americans, the freedom to just be yourself is a fallacious idea. And I get resentful that I have to think about things that a lot of people, even my very close white friends whose politics are similar to mine, simply don't have to worry about.

Feagin, *supra* note 1, at 114.

129. Disparate security practices would include a practice of treating African American shoppers or other shoppers of color differently from white shoppers by subjecting the non-white shoppers to surveillance based on activities that would not subject whites to surveillance, heavier surveillance, more frequent stops and searches, more detentions and investigative stops and/or more aggressive and less polite treatment. Researchers have formulated a conceptual framework of coping strategies for stressful situations, which asserts that encounters with racism, unlike other categories of stress-causing events, will be viewed as a threat to the individual or as involving harm or loss. See Utsey et al., *supra* note 16, at 73. Under this model, encounters with racism are never viewed as irrelevant, benign, or positive. See Utsey et al., *supra* note 16, at 73; see also Davis, *supra* note 17, at 1565-66 ("[M]icroaggressions . . . erode self confidence.

may result in a substantial degree of anxiety about shopping at that particular store in the future, or about shopping in general.¹³⁰ Moreover, treating black shoppers differently from white shoppers is a form of economic exploitation.¹³¹

In some instances, stopping shoppers of color for suspected shoplifting has resulted in violence.¹³² In June 2000, an African American male, Frederick Finley, was killed by Lord & Taylor security guards.¹³³ The guards had accused the man's eleven-year-old stepdaughter of stealing a four dollar bracelet. The security guards followed Finley to the parking lot, tried to detain him, and

... They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks. . . . The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation." It is interesting to note that Professor Harris finds that similar harms affect victims of racial profiling by police. See Harris, *supra* note 27, at 273-74, 288-89.

130. Paula Hampton, a plaintiff in a consumer discrimination complaint, found being accused of shoplifting in front of her children so distressing that she has changed her shopping habits—she no longer shops at Dillard's and no longer has her children accompany her on shopping trips. Her daughter suffers frequent nightmares as a result of the incident and Hampton is unwilling to risk subjecting her daughter to the possibility of being falsely accused of shoplifting again. See Brief of Appellee Hampton and Cross-Appellant Cooper at 15, Hampton v. Dillard Dep't Stores, Inc., 18 F. Supp. 2d 1256 (D. Kan. 1998) (No. CIV.A.97-2182-KHV).

131. See Austin, *supra* note 32, at 151 (Consumer discrimination is also a form of economic exploitation. "If blacks pay the same prices as everyone else and get less in the way of service or merchandise, they are being cheated.").

132. See Shields, *supra* note 12, at B04 (Black male alleges that a mall security guard slammed his head into a wall, struck him, handcuffed him and detained him for forty minutes before releasing him.). In the Waldorf Mall matter, the teenager was stopped for being in a large group; according to the lawsuit, the youths were ordered to split into smaller groups. See Shields, *supra* note 12, at B04. Similarly, a NAACP study of a Omaha, Nebraska mall found that black teenagers were kicked out of the mall for walking four abreast and that during a ten-month period the mall banned fifty-two blacks, eleven whites, and two Hispanics. See Angie Brunkow, *Racial-Bias Complaints Drop at Crossroads Mall*, OMAHA WORLD-HERALD, Apr. 12, 1999, at 1; see also *60 Minutes*, *supra* note 98 (Bradley reported on two Dillard's shoppers who were killed by Dillard's security guards.). It is interesting to note that the Dillard's chain pulled advertising from CBS affiliates after the *60 Minutes* show regarding consumer discrimination aired. *Dillard's Cuts NBC Ads After Show*, N.Y. TIMES, Apr. 12, 2001. For a discussion of the relationship between race and advertising, see Kennedy, *supra* note 49.

133. See Andrea Cecil, *Shoppers Say Racial Profiling at Dearborn Stores Is Nothing New*, AP NEWSWIRE, July 6, 2000. According to the AP wire, the Michigan ACLU "routinely fields complaints by minority shoppers who say they were subjected to unreasonable force and detention in area stores simply because of their race." *Id.* At least one security guard has been criminally charged in the matter. See *Security Guard Charged in Death at Michigan Mall*, NEWS & OBSERVER, July 7, 2000, at A1. In response to the event, Congressman John Conyers is reported as saying that "Finley was a victim of racial profiling, which . . . was as rampant in retailing as on highways." *Id.* Whether the stop was based on racial profiling or suspected shoplifting is disputed. *Id.*

ultimately put him in a choke hold.¹³⁴ He died of asphyxia due to suffocation.¹³⁵ In 1991, a Los Angeles shopkeeper accused a young black girl, Latasha Harlins, of attempting to steal a bottle of orange juice. They exchanged words, fought, and the shopkeeper shot the girl in the back of the head, killing her instantly.¹³⁶

Most commonly, the constant fear of being accused of wrongdoing creates a psychological stress and burden disproportionately felt by blacks.¹³⁷ The fear of dealing with such incidents, as well as actually dealing with them, "comes with a heavy personal cost" because having to continually "craft strategies for a broad range of discriminatory situations" creates a recurring strain.¹³⁸ One woman described her experience of dealing with "recurring racial incidents as 'little murders' that daily have made her life difficult."¹³⁹ The assaults and slights accumulate and "the impact on a black person is far more than the sum of the individual instances."¹⁴⁰

The disparate treatment is largely the result of cultural beliefs or stereotypes about blacks and whites.¹⁴¹ Black consumers are often devalued and are

134. See Cecil, *supra* note 133.

135. *Security Guard Faces Charge for Man's Death at Lord & Taylor Store*, WALL ST. J., July 7, 2000, at C11 (a Lord & Taylor security guard was charged with involuntary manslaughter after a man detained by the guard died from strangulation).

136. See Austin, *supra* note 32, at 26 n.29; Reginald Leamon Robinson, "The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans, 67 S. CAL. L. REV. 15, 87-94 (1993). A firestorm of protest was set off when the shopkeeper was granted probation after being convicted of voluntary manslaughter in the shooting death. See Philip Hager, *Justices Uphold Karlin's Ruling in Slaying of Latasha Harlins*, L.A. TIMES, July 17, 1992, at 1.

137. Stress has been defined as "'a particular relationship between the person and the environment that is appraised by the person as taxing or exceeding his or her resources and endangering his well-being.' . . . [A]s stressors occur, depending on one's view of the impending threat and the resources at their disposal to handle the threat, an individual can be overwhelmed." Utsey et al., *supra* note 16, at 73 (quoting RICHARD S. LAZARUS & SUSAN FOLKMAN, *STRESS, APPRAISAL, AND COPING* 19 (1984)); Plummer & Slane, *supra* note 18, at 311.

138. Feagin, *supra* note 1, at 107; Broman et al., *supra* note 14, at 177; Davis, *supra* note 17, at 1566.

139. Feagin, *supra* note 1, at 107; see also WILLIAMS, *supra* note 69, at 73 ("[A] fundamental part of ourselves and of our dignity depends on the uncontrollable, powerful, external observers who make up a society Spirit murder is [showing] disregard for others whose lives qualitatively depend on our regard.").

140. Feagin, *supra* note 1, at 115.

141. See John M. Conley & William O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5, 9 (1997). The authors assert that contemporary sociologists and anthropologists "see culture as a shared set of resources These resources are embodied in and available from such things as stereotypes and widely shared stories." *Id.* at 10; Davis, *supra* note 17, at 1561.

impacted by lingering stereotypes about race.¹⁴² The differential treatment is quite likely a manifestation of unconscious beliefs that blacks are more likely to commit crimes than whites.¹⁴³ Security guards and sales clerks rely on these cultural assumptions about blacks in deciding how to behave.¹⁴⁴ The enhanced surveillance associated with consumer discrimination is quite similar to other harms based on stereotypes. Currently, the most infamous form of racial stereotyping is the racial profiling used by police officers to stop and search people of color.¹⁴⁵ Commonly known as "driving while black," racial profiling "means that anyone who is African-American is automatically suspect Skin color becomes evidence, and race becomes a proxy for general criminal propensity."¹⁴⁶ Consumer discrimination cases are also similar to allegations that

142. Linked to discrimination against black customers in retail stores are allegations that black consumers are devalued by retailers and other advertisers who refuse to purchase advertising time on black radio stations or who insist on paying "urban discounts" for advertising on minority stations. See KOFI ASIEDU OFORI, FCC, OFF. OF COMM. BUS. OPP., CIV. RTS. FORUM ON COMMS. POL'Y, *When Being No. 1 Is Not Enough: The Impact of Advertising Practices on Minority-Formatted Broadcast Stations* Aug.-Sept. 2000, at 23, available at http://www.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/. These advertisers insist on paying less to reach the same number of listeners than they would on a station geared towards predominantly white listeners. *Id.* at 1-2. A 1998 internal memorandum from the Katz Media Group gained national attention for advising against putting ads on "urban stations" because businesses want "prospects, not suspects." *Id.* at 36. Although the Katz Group later apologized for the memorandum, the memo brought national attention to a kind of hidden racism and bias tied to the consumer market. *Id.* Fears of this kind of disparity prompted a radio campaign by syndicated disc jockey Tom Joyner and radio personality Tavis Smiley to have his primarily African American listeners mail him cash register receipts for any purchasers made at CompUSA in an effort to convince the company to purchase advertising time on black radio stations. See Jack E. White, *Racism in Advertising? Two Radio Stars Score a Victory for Black-Run Media*, TIME, Nov. 1, 1999, at 90. In response to the pressure, CompUSA "plans to increase its advertising in black media and will hire a black-owned ad agency." Katherine Yung, *Facing Boycott Threat, CompUSA Mounts Marketing Plan for Black Buyers*, KNIGHT-RIDDER TRIB. BUS. NEWS: DALLAS MORNING NEWS, Oct. 20, 1999; *CompUSA Bows to Black Power*, NEWSDAY, Oct. 20, 1999, at A48. The Ofori study also documented the direct economic impact of racial stereotypes. Advertisers may refuse to purchase advertising time on minority stations because "pilferage will increase," or it would "bring too many Black people to [the] business," or because "Hispanics don't bathe as frequently as non-Hispanics." OFORI, *supra*, at 9, 19, 29-30, 35-36.

143. See Kennedy, *supra* note 24, at 75-76.

144. See Conley & O'Barr, *supra* note 141, at 10. While Conley and O'Barr conclude that law would be ineffective against claims of race-based price discrimination, this Article asserts that law can and would be effective in curtailing consumer discrimination in retail settings.

145. See Harris, *supra* note 27, at 266; Thompson, *supra* note 27, at 957 n.1, 958 n.2, 988-90.

146. Harris, *supra* note 27, at 268; see Angela J. Davis, *Race, Cops, and Traffic*

New York City taxi drivers frequently refuse to pick up black passengers made famous by actor Danny Glover and former New York City Mayor David Dinkins.¹⁴⁷ However, blacks are not the only racial group to be adversely affected by racial stereotypes in the consumer marketplace. Other groups such as Latinos are similarly targeted as probable shoplifters.¹⁴⁸ Even faced with explicit statements such as "Spanish people come [to the Wal-Mart store] to steal," plaintiffs often find themselves without a remedy.¹⁴⁹

Consumer discrimination, like much of racism historically, has an economic dimension. Differential treatment in retail settings, while uniquely harmful, is also part of a larger scheme of economic discrimination and racialized rules that infect the economic marketplace.¹⁵⁰ Consumer discrimination is integrally tied to other forms of economic disparities and biases based on race such as redlining, avoidance of minority or poor neighborhoods by service providers, race-based price differentials, stereotypical and patronizing advertising, and reduced advertising rates based on the race of the target audiences. Historically, African Americans have been, and continue to be, denied opportunities to obtain home ownership through redlining, a practice that undervalues black neighborhoods.¹⁵¹ The Department of Justice recently filed suit against the

Stops, 51 U. MIAMI L. REV. 425, 426 (1997); Thompson, *supra* note 27, at 957 n.1, 958 n.2, 988-90. Professor Paul Butler also reports the phenomenon of "walking while black," or being stopped by police officers on account of race while walking. Paul Butler, "Walking While Black," *Encounters with the Police on my Street*, 20 LEGAL TIMES 23 (1997). The ACLU has issued a report on racial profiling. See David A. Harris, *Driving While Black, Racial Profiling on Our Nation's Highways*, An American Civil Liberties Union Special Report (June 1999), at <http://www.aclu.org/profiling/report/index.html>. For the poll released on racial profiling by the Gallup Organization released, see Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE (Dec. 9, 1999), at <http://www.gallup.com/poll/releases/pr991209.asp>.

147. See Loren Page Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation Under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 342 (1996); Tara George & Michael R. Blood, *10 Cabbies Snagged in Crackdown on Bias*, N.Y. DAILY NEWS, Nov. 13, 1999, at 5; Kaplan, *supra* note 69, at A3.

148. See *Cedeno v. Wal-Mart Stores, Inc.*, No. CIV.A.98-CV-479, 1999 WL 1129638 (E.D. Pa. Nov. 30, 1999) (granting defendant's summary judgment motion dismissing plaintiff's Section 1981 claim based on alleged differential treatment while shopping).

149. *Id.* at *1.

150. See Austin, *supra* note 32, at 150 (consumer discrimination is a form of economic exploitation).

151. See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 51-55 (1993); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 620-27 (1999); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, The Violence of Neighborhood Purity*,

Chevy Chase Federal Savings Bank for redlining.¹⁵² The Justice Department found that from 1990 to 1992 the share of mortgages originating in predominantly black census tracts ranged from 0.2% to 0.4%.¹⁵³ The bank signed a consent decree in which it agreed to spend eleven million dollars to open four branch offices in minority neighborhoods and to provide "special financing to residents of African American census tracks that were redlined."¹⁵⁴

Similarly, some businesses practice "place" discrimination.¹⁵⁵ Place discrimination may consist of retail stores avoiding what they define as "high crime" or "high risk" areas with the result that many minority neighborhoods often lack basic retail services. Place discrimination can also result in stores located in African American neighborhoods providing inadequate or poor services.¹⁵⁶ For example, a recent lawsuit charged that Kay-Bee Toy stores

and the Master Narrative of Black Inferiority, 37 WM. & MARY L. REV. 69, 96 (1995). Through a series of programs, the federal government institutionalized and spread the practice of redlining black neighborhoods. See MASSEY & DENTON, *supra*, at 51-54; Nier, *supra*, at 620-28. For example, during the 1940's and 1950's the Federal Housing Authority ("FHA") encouraged the purchase of new suburban homes rather than remodeling existing structures in cities. See MASSEY & DENTON, *supra*, at 53. Further, until the 1950s, the FHA encouraged the use of racially restrictive covenants and encouraged racially homogeneous neighborhoods. See MASSEY & DENTON, *supra*, at 54. As a result, "many blacks were denied access to traditional sources of housing finance by institutionalized procedures." Nier, *supra*, at 626, 635-36. In fact, companies other than banks and mortgage lenders have been accused of redlining. For example, MCI WorldCom has been named as a defendant in a lawsuit that alleges that the company blocks long distance calls using calling cards and made from minority neighborhoods. See Jane Hadley, *Suit Accuses MCI of 'Redlining' Calls*, SEATTLE POST-INTELLIGENCER, Apr. 8, 1999, at B2.

152. See Nier, *supra* note 151, at 656-57. The suit, filed in 1994, alleges that defendant's "policies and practices are intended to deny, and have the effect of denying, an equal opportunity to residents of African American neighborhoods, on account of racial identity of the neighborhood, to obtain mortgage financing and other types of credit transactions." Nier, *supra* note 151, at 656-57. The Justice Department filed a similar suit against Albank Federal Savings Bank in 1997. The Department alleged that Albank engaged in redlining. See Nier, *supra* note 151, at 660-61. Albank also agreed to a consent decree that would require it to provide mortgage loans below the prevailing interest rate within previously redlined areas. See Nier, *supra* note 151, at 662.

153. See Nier, *supra* note 151, at 659-60.

154. Nier, *supra* note 151, at 659.

155. See Harald Bauder, *Guilty of Living in Detroit*, Z MAG., July-Aug. 2000, at 23. According to the article, place discrimination occurs when businesses and employers associate certain places or neighborhoods with minorities and the negative cultural stereotypes that have been identified with those groups. *Id.* at 24; see also Robinson v. Power Pizza, Inc., 993 F. Supp. 1462, 1465 (M.D. Fla. 1998) (enjoining pizza delivery company from refusing to deliver pizzas to residents of a predominantly black neighborhood).

156. For example, a study of pharmacies in predominantly nonwhite

refused to accept checks from customers in stores located primarily in predominantly black neighborhoods.¹⁵⁷ A recent empirical study revealed that new car dealerships practice price discrimination resulting in blacks paying significantly higher prices for the same goods as whites.¹⁵⁸ In that study, Professor Ian Ayres established that new car dealerships in Chicago “offered significantly lower prices to white male testers than to similarly situated black

neighborhoods shows that they failed to stock pain relievers in sufficient quantities to treat patients. See R. Sean Morrison et al., *“We Don’t Carry That”—Failure of Pharmacies in Predominantly Nonwhite Neighborhoods to Stock Opioid Analgesics*, 342 NEW ENG. J. MED. 1023, 1025 (2000) (“Only 25 percent of pharmacies in predominantly nonwhite neighborhoods . . . had opioid supplies that were sufficient to treat patients in severe pain, as compared with 72 percent of pharmacies in predominantly white neighborhoods.”). While businesses frequently point to higher crime rates as support for differential treatment of customers in nonwhite neighborhoods, according to the study, even “[a]fter adjustment for rates of burglary, robbery, and illicit-drug-related arrests at the precinct level . . . pharmacies in predominantly nonwhite neighborhoods were also significantly less likely to have adequate opioid supplies than were pharmacies in predominantly white neighborhoods.” *Id.* at 1025. In a similar vein, studies have revealed that black Americans often receive inferior health care, which may account for “the reason why the rates of death from some diseases are higher among blacks than among whites.” Harold P. Freeman & Richard Payne, *Racial Injustice in Health Care*, 342 NEW ENG. J. MED. 1045, 1045 (2000). These studies show that “Hispanics and blacks were substantially undertreated for pain from fractures of long bones,” “that blacks are less likely than whites to receive curative surgery for early-stage lung, colon, or breast cancer,” “blacks with chronic renal failure are less likely to be referred to transplantation and are less likely to undergo transplantation than are whites,” and “[b]lacks are also not as likely as whites to undergo a thorough diagnostic evaluation for symptoms that suggest the presence of life-threatening coronary artery disease.” *Id.* at 1046. Like racial profiling by police officers and security guards, the findings result from “a subtle form of racial bias on the part of medical care providers.” *Id.* The authors of the editorial aptly sum up the issue in this way: “Americans . . . perceive, value, and behave toward one another through a lens of race. This lens can create false assumptions that result in unintended but serious harm to members of minority groups—especially those who are powerless and vulnerable.” *Id.*; see also Jones, *Levels of Racism*, *supra* note 19, at 1212 (Jones “developed a [theoretical] framework for understanding racism” in order to help analyze “race-associated differences in health outcomes.”).

157. See Erin Texeira, *KB Toys Facing Bias Lawsuit*, BALT. SUN, Dec. 16, 1999, at 1B.

158. See Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 109 (1995). Professor Ayres’ 1991 study of new car dealerships established that “white female testers were asked to pay 40% higher markups than white male testers; black male testers were asked to pay more than twice the markup of white male testers; and black female testers were asked to pay more than three times the markup of white male testers.” *Id.* A follow-up study “confirm[ed] the previous finding that dealers systematically offer lower prices to white males than to other tester types.” *Id.* at 110. But unlike in the previous study, “the black male testers were charged higher prices than the black female testers.” *Id.*

and-or female testers."¹⁵⁹ Although in many consumer discrimination cases the actual monetary harm to any one plaintiff is often quite small, the cumulative economic impact on the African American community is significant. Moreover, the events are imbued with the fundamental characteristics of racism—stereotyping and subordination.

IV. A CONCEPTUAL FRAMEWORK

Consumer racism is a form of "everyday racism."¹⁶⁰ Everyday racism "involves . . . systematic, recurrent, familiar practices" and "socialized attitudes and behavior."¹⁶¹ Under this view, "racism is more than structure and ideology . . . [I]t is routinely created and reinforced through everyday practices."¹⁶² This approach to understanding racism stands in contrast to the conceptual framework that generally divides racism into institutional racism and individual racism.¹⁶³ Individual racism involves racial discrimination carried out and experienced on a personal level.¹⁶⁴ Institutional racism is "a result of social and institutional

159. *Id.* at 109. Professor Ayres' studies challenge the idea that actors in the free market and competition work to eliminate racial bias as inefficient. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 821-22 (1991).

160. See ESSED, *supra* note 34, at 2 (noting that "many studies have identified the mechanisms of racism at a societal level, but few have revealed its pervasive impact on the daily experiences of Blacks"); ST. JEAN & FEAGIN, *supra* note 15, at 133-34.

161. ESSED, *supra* note 34, at 52. Essed asserts that "[t]heories about the meaning of 'the everyday' have been developed in the fields of philosophy, phenomenology, social psychology, symbolic interactionism and ethnomethodology, where it has often been referred to intuitively as a 'known in [the] common world.'" ESSED, *supra* note 34, at 47. In a similar analysis, Feagin states that "modern racism must be understood as a *lived experience*." FEAGIN & SIKES, *supra* note 9, at 15. He notes that racism is a "recurring experience" and not an abstract concept. FEAGIN & SIKES, *supra* note 9, at 15. But Feagin goes on to assert that "the daily experiences" of racism "are the constituent elements of the interlocking societal structures and processes called 'institutionalized racism.'" FEAGIN & SIKES, *supra* note 9, at 17.

162. ESSED, *supra* note 34, at 2.

163. See Utsey et al., *supra* note 16, at 72. Similarly, Camara Phyllis Jones has developed categories of racial discrimination. Her categories vary slightly from Utsey's and they are: institutionalized, personally mediated, and internalized. See Jones, *Levels of Racism*, *supra* note 19, at 1212; ESSED, *supra* note 34, at 36-37.

164. See Utsey et al., *supra* note 16, at 72 (citing JONES, PREJUDICE AND RACISM, *supra* note 19). Camara Phyllis Jones uses the term, "personally mediated racism" which she defines as "prejudice and discrimination." Jones, *Levels of Racism*, *supra* note 19, at 1212. She differentiates prejudice ("differential assumptions about the abilities, motives, and intentions of others according to their race") from discrimination ("differential actions toward others according to their race."). Jones, *Levels of Racism*, *supra* note 19, at 1212-13. Both authors define differential treatment of shoppers based on race as individualized racism. See Jones, *Levels of Racism*, *supra* note 19, at 1213;

policies that exclude [African Americans] from full participation in the benefits offered to other members of society."¹⁶⁵

A limitation of this dual framework is that many forms of racism are a hybrid of both forms of racism. The distinction between individual and institutional racism "places the individual outside the institutional, thereby severing rules, regulations, and procedures from the people who make and enact them, as if it concerned qualitatively different racism rather than different positions and relations through which racism operates."¹⁶⁶ The contrast is particularly problematic because the term individual racism "is a contradiction in itself because racism is by definition the expression or activation of group power."¹⁶⁷ "Everyday racism transcends the traditional distinctions between institutional and individual racism" and "acknowledges the macro (structural-cultural) properties of racism as well as the micro inequities perpetuating the system."¹⁶⁸ The concept of everyday racism acknowledges the interrelationship between structural systems and how those systems impact everyday life.¹⁶⁹ Everyday racism perpetuates itself—it becomes integrated into everyday situations and becomes "part of the expected, of the unquestionable, and of what is seen as normal by the dominant group."¹⁷⁰ The routinization of racist practices in everyday life makes them particularly difficult to eliminate.

Retail stores present a situs for the intersection of institutional and individual racist practices. Consumer discrimination presents characteristics of both individual and institutional racism. The disparate treatment African Americans report receiving in stores and places of public accommodation is

Utsey et al., *supra* note 16, at 72; *see also* JONES, PREJUDICE AND RACISM, *supra* note 19, at 13-14. Jones notes that "individual racism . . . suggests a belief in superiority of one's own race over another and in the behavioral enactments that maintain those superior and inferior positions." JONES, PREJUDICE AND RACISM, *supra* note 19, at 13-14.

165. Utsey et al., *supra* note 16, at 72 (citing JONES, PREJUDICE AND RACISM, *supra* note 19). Camara Phyllis Jones defines institutionalized racism as "differential access to the goods, services, and opportunities of society by race." Jones, *Levels of Racism*, *supra* note 19, at 1212; *see also* JONES, PREJUDICE AND RACISM, *supra* note 19, at 13-14. Jones asserts that institutional racism is "the institutional extension of individual racist beliefs, consisting primarily of using and manipulating duly constituted institutions so as to maintain a racist advantage over others" and "the byproduct of certain institutional practices that operate to restrict—on a racial basis—the choices, rights, mobility, and access of groups of individuals." JONES, PREJUDICE AND RACISM, *supra* note 19, at 13-14.

166. ESSED, *supra* note 34, at 36.

167. ESSED, *supra* note 34, at 37.

168. ESSED, *supra* note 34, at 37-38.

169. *See* ESSED, *supra* note 34, at 38-39.

170. ESSED, *supra* note 34, at 50. The dominant group often acts upon unstated and unconscious assumptions and stereotypes. Feagin notes that recent opinion polls reveal that significant numbers of whites still maintain "very negative and exclusionary" attitudes toward blacks. FEAGIN & SIKES, *supra* note 9, at 22.

representative of the myriad of ways in which stereotypical ideas and beliefs are infused into everyday activities. In cases of consumer racism, individual security guards and store clerks may rely upon stereotypes and assumptions about black criminality and wealth, which results in targeting African American consumers for increased surveillance.¹⁷¹ These practices may be the result of store policy, but more often institutions quietly acquiesce in the treatment of blacks as unworthy shoppers.

V. CONSUMPTION AND THE LAW

Plaintiffs alleging race based consumer discrimination in retail settings can rely on a hodgepodge of legal claims to obtain relief. The primary remedy for consumer discrimination is found under Section 1981 of the Civil Rights Act.¹⁷² The Act as amended in 1991,¹⁷³ provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

For the purposes of this section, *the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.*¹⁷⁴

171. See ESSED, *supra* note 34, at 222-24; FEAGIN & SIKES, *supra* note 9, at 48.

172. 42 U.S.C. § 1981(b) (1994). Neither Section 1981 nor Section 1982 proscribes discrimination on the basis of gender. See *Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 55 (D.D.C. 1994) (neither Section 1981 nor Section 2000a prohibits discrimination on the basis of gender); Ayres, *supra* note 159, at 821.

173. The 1991 Amendment was a reaction to "recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991); see also 137 CONG. REC. S15483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth); H.R. REP. NO. 102-40 (I), at 90 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 628; H.R. REP. NO. 102-40 (II), at 37 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 730-31.

174. 42 U.S.C. § 1981(a), (b) (1999) (emphasis added). Section 1981 was originally enacted as the Civil Rights Acts of 1866. See Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (1866); see also *Jones v. Alfred H. Meyer*, 392 U.S. 409, 413 (1968) (Section 1982 bars both private and public racial discrimination and is a valid exercise of Congress' power under the Thirteenth Amendment to identify the badges and incidents

Section 1981 reaches private as well as public acts of discrimination.¹⁷⁵ In order to state a claim of race discrimination in the making or enforcing of contracts under Section 1981, plaintiffs must allege that they are members of a racial minority, that defendants intentionally discriminated against them on the basis of their race, and that the discrimination was directed toward one or more of the activities protected by the statute.¹⁷⁶ Courts find intentional discrimination when the differential treatment was based on race. Plaintiffs can prove intentional discrimination through either direct, indirect, or circumstantial evidence. Absent direct evidence of intentional discrimination, courts allow plaintiffs to establish discrimination by relying on the burden shifting framework of *McDonnell Douglas Corp. v. Green*.¹⁷⁷ Under the *McDonnell Douglas* framework, a consumer discrimination plaintiff has the burden of establishing a prima facie case of racial discrimination.¹⁷⁸ Plaintiffs can meet this burden by showing that (i) they are a member of a protected class; (ii) they attempted to make, enforce, or secure the performance of a contract; and (iii) they were denied the opportunity to make, enforce, or secure the performance of a contract for goods or services that remained available to similarly situated persons outside the protected class.¹⁷⁹ The burden of production then shifts to the defendant to

of slavery and to legislate to end them.). According to the Supreme Court in *Jones v. Alfred H. Meyer*, in enacting the Civil Rights Act of 1866, Congress "had an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups" that "were understood as illustrative of the evils that the Civil Rights Act of 1866 would correct." *Jones*, 392 U.S. at 427-28. The Court went on to quote Senator Trumbull, the sponsor of the bill which later became the Civil Rights Act of 1866, as stating, "[t]his measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom." *Id.* at 431; see also Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 545, 550 (1989) ("The Civil Rights Act of 1866 was intended to reach private, as well as official, discrimination."). Sullivan asserts that the 1866 Congress was moved by testimony concerning the ways in which private individuals continued to deprive freedmen of their freedom after the Civil War. *Id.* at 549, 552, 554, 556.

175. See 42 U.S.C. § 1981 (1994 & Supp. 1999); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); see also *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (Section 1981 prohibits discriminatory refusal of private school to contract with a black student and "constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment"); *Jones*, 392 U.S. at 421 (Section 1981 reaches private as well as public racial discrimination in the purchase, lease, or sale of real property). Further, the doctrine of respondeat superior applies to Section 1981 claims. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389 (1982).

176. See *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 389, 391; *Ackaa v. Tommy Hilfiger Co.*, No. CIV.A.96-8262, 1998 WL 136522, at *3 (E.D. Pa. Mar. 24, 1998); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 370 (D. Del. 1996).

177. 411 U.S. 792 (1973).

178. *Id.* at 802.

179. *Id.*

"articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection."¹⁸⁰ Finally, the burden shifts back to the plaintiff to establish that the defendant's response is a pretext for discrimination.¹⁸¹

Seemingly, a black person has a viable Section 1981 claim when denied the same opportunity to shop as a white person. However, the meaning and scope of the Act is a major source of tension for plaintiffs seeking relief under Section 1981 for alleged differential treatment while shopping. Under a narrow reading of the statute, consumers alleging race discrimination under Section 1981 must show that they were discriminated against in "making and enforcing contracts" in order to recover.¹⁸² Courts have been largely unsympathetic toward claims of "the existence of an unstated, unwritten contract between commercial establishments and the public."¹⁸³ In other words, courts routinely reject the assertion that all shoppers must be treated equally while engaged in shopping activities regardless of race or to claims that Section 1981 applies to post transaction activities. Most courts do not recognize as viable claims of black plaintiffs to the same right to shop as whites. Consumers who allege discriminatory treatment in the form of being followed or subjected to heightened surveillance, without more, frequently fail to articulate a viable cause

180. *Id.* The burden of persuasion remains with the plaintiff. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1980).

181. *McDonnell Douglas Corp.*, 411 U.S. at 804. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), the Supreme Court found that in order to overcome defendant's articulation of a legitimate nondiscriminatory reason for its conduct, a Title VII plaintiff must establish that the defendant's reasons were a pretext and the existence of invidious discrimination. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), the Court clarified its holding in *Hicks* finding, "a plaintiff's prima facie case, combined with sufficient evidence to find the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Thus, at least within the context of employment discrimination, the Court reasons that while "the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff . . . it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 146-47.

182. See 42 U.S.C. § 1981(a) (1999). According to the Act "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (1999); *Bagley v. Ameritech Corp.*, No. 99 C 1449, 1999 WL 1069113, at *4 (N.D. Ill. Nov. 17, 1999) (plaintiff failed to allege a Section 1981 claim because he failed to "allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities").

183. *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371 (D. Del. 1996) (allowing Section 1981 claims to be based upon on an implied contract between shoppers and a retail store would "transform[] the statute into a general cause of action for race discrimination in all contexts"); *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1059 (D. Kan. 1997) (granting summary judgment for defendants because plaintiffs were unable to identify a contract with which the security guard interfered).

of action under Section 1981. Under a narrow view of the scope of Section 1981, such retail discrimination claims are unsuccessful primarily on the basis that, unless a shopper was prevented from completing a transaction or making a purchase, the claims are not viable.¹⁸⁴

Restricting relief under Section 1981 to the "making and enforcing of contracts" is consistent with the reading given to the statute by the Supreme Court in *Patterson v. McLean Credit Union*¹⁸⁵ prior to the Civil Rights Act of 1991.¹⁸⁶ In *Patterson*, the petitioner, a black woman, alleged that her employer violated her civil rights under Section 1981 by engaging in a pattern of racial harassment during her employment, failing to promote her, and then discharging her.¹⁸⁷ The Supreme Court held that the language of Section 1981, "make and enforce contracts," does not prohibit racial harassment on the job and other forms of race discrimination occurring after the formation of the contract "because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."¹⁸⁸ The Court shied away from allowing a broad application of Section 1981 and instead stated that, "Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts."¹⁸⁹ Under this narrow interpretation of the statute the Supreme Court made it clear that its analysis of Section 1981 had no application "to problems that may arise later from the conditions of continuing employment . . . including breach of the terms of the contract or imposition of

184. See 42 U.S.C. § 1981 (1994 & Supp. 1999); *Lewis*, 948 F. Supp. at 371; *Flowers v. TJX Companies*, No. 91-CV-1339, 1994 WL 382515, at *2. (N.D.N.Y. July 15, 1994) (plaintiffs' Section 1981 claim dismissed on summary judgment because they were able to complete their purchase before being approached by a police officer and asked to leave the T.J. Maxx retail store).

185. 491 U.S. 164, 164-65 (1989).

186. *Id.*

187. *Id.* at 169. In *Patterson*, the court of appeals affirmed the district court's holding that "a claim for racial harassment is not actionable under § 1981." *Id.* at 169-70.

188. *Id.* at 171; H.R. REP. NO. 102-40 (II), at 37 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 730-31. At the same time the court found that *Runyon v. McCrary*, 427 U.S. 160 (1976), should not be overruled and reaffirmed "that § 1981 prohibits racial discrimination in the making and enforcement of private contracts." *Patterson*, 491 U.S. at 172. The *Runyon* Court, holding that Section 1981 "'prohibits racial discrimination in the making and enforcement of private contracts,'" found that Section 1981 prohibited private schools from excluding children from admission solely on the basis of race. *Id.* at 171 (quoting *Runyon*, 427 U.S. at 168). Interestingly, at the same time, the *Patterson* Court refused to apply Section 1981 to post-contract formation conduct, it acknowledged that "*Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin." *Id.* at 174.

189. *Patterson*, 491 U.S. at 176.

discriminatory working conditions.”¹⁹⁰ Turning to petitioner’s claim that, in addition to subjecting her to racial harassment her employer exhibited racial bias in failing to promote her, the Court again restricted the reach of Section 1981. The Court stated that the “plaintiff could prevail on her promotion claim only if she could establish that the promotion ‘involved the opportunity to enter into a new contract with the employer.’”¹⁹¹

The dissent rejected the majority’s constricted reading of Section 1981, instead finding that the majority “gives this landmark civil rights statute a needlessly cramped interpretation.”¹⁹² Instead, the dissent stated that the legislative history of Section 1981 requires a broader interpretation of the Act than given by the majority.¹⁹³ In reviewing Section 1981’s history, the dissent noted the forms of intimidation, violence, and threats of violence that historically were used to prevent freedmen from enjoying the full benefits of the freedom to contract, including creating discriminatory working conditions.¹⁹⁴ The dissent then concluded that it would find that harassment is actionable under Section 1981.¹⁹⁵ Justice Stevens, in a separate concurrence, disapproved of the majority’s restrictive reading of Section 1981 noting, “[a] contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings.”¹⁹⁶

190. *Id.* at 176-77; H.R. REP. NO. 102-40 (II), at 37. The Court further noted that the Section 1981 guarantee “of the same right . . . to . . . enforce contracts . . . as is enjoyed by white citizen’s embraces “protection of a legal process, and of a right or access to legal process, that will address and resolve contract-law claims without regard to race.” *Patterson*, 491 U.S. at 177.

191. H.R. REP. NO. 102-40 (II), at 37 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989)).

192. *Patterson*, 491 U.S. at 189 (Brennan, J., dissenting; Marshall & Blackmun, JJ., joining dissenting opinion; Stevens, J., joining Part II-B, II-C and III, concurring in judgment in part, dissenting in part). Justice Brennan asserted that American society has a deep commitment to eradicating discrimination on the basis of race and “that commitment . . . is the product of a national consensus that racial discrimination is incompatible with our best conception of our communal life, and with each individual’s rightful expectation that her full participation in the community will not be contingent upon her race.” *Id.* at 191.

193. *Id.* at 206.

194. *Id.*

195. *Id.* at 207-08. The dissent also noted that the “imposition of discriminatory working conditions on black employees will tend to deter other black persons from seeking employment.” *Id.* at 208 n.13. Justice Brennan disagreed with the majority’s conclusion that Section 1981 also applies to promotion claims if the plaintiff establishes that the promotion would create a new contract. Justice Brennan expressed doubt that any promotion would not involve a new contract and stated that “it may well be . . . that promotion claims will always be cognizable under § 1981.” *Id.* at 218-19.

196. *Id.* at 221.

Patterson's impact on race discrimination claims was disastrous.¹⁹⁷ According to a House Report on Section 1981, more than two hundred Section 1981 race discrimination claims were dismissed because of *Patterson*.¹⁹⁸ As a result, Congress acted to overrule *Patterson* and codify *Runyon v. McCreary*¹⁹⁹ by enacting the Civil Rights Act of 1991.²⁰⁰ According to the Congressional Report, the Civil Rights Act of 1991 was designed to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions . . . [and] to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence."²⁰¹ The Amendment "reaffirms that the right 'to make and enforce contracts' includes 'the making, performance, modification and termination of contracts', and 'the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.'"²⁰² Thus, the 1991 Amendment broadened the language of Section 1981 in extending the statute's reach beyond merely the making and enforcing of contracts.²⁰³ Furthermore, the legislative history indicates that the list of covered conduct was "intended to be illustrative and not exhaustive."²⁰⁴

Despite the seemingly broad nature of the 1991 Amendment to the Civil Rights Act, courts frequently continue to adhere to a *Patterson*-type reading of

197. See H.R. REP. NO. 102-40 (II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 730-31.

198. See H.R. REP. NO. 102-40 (II), at 37. The report noted that "the damage caused by *Patterson* has not been limited to the employment context. Complaints that have alleged intentional racial discrimination in insurance, auto repair, and advertising contracts, have been dismissed because of *Patterson*." See H.R. REP. NO. 102-40 (II), at 37. The report underscored the point that "the term 'contract' as used in Section 1981 prohibits discrimination in all contracts including all types of business and commercial contracts." See H.R. REP. NO. 102-40 (II), at 37.

199. 427 U.S. 160 (1976).

200. See H.R. REP. NO. 102-40 (II), at 38 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731-32.

201. H.R. REP. NO. 102-40 (II), at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694-95.

202. H.R. REP. NO. 102-40 (II), at 37-38 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 730-32.

203. See *Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1019 (4th Cir. 1999) (at-will employment contracts are contracts that can give rise to Section 1981 violations because the 1991 Act amended Section 1981 to broaden the definition of "make and enforce contracts").

204. H.R. REP. NO. 102-40 (II), at 38 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 731-32. The Amendment "applies to all phases and incidents of the contractual relationship." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994) (discharged workers who alleged violation of contract rights under Section 1981 were unable to recover because the Civil Rights Act of 1991 did not apply retroactively to claims filed before the Amendment was passed).

Section 1981 in deciding consumer discrimination cases. These courts construe the "make and enforce contracts" language of Section 1981 to restrict relief to instances when the plaintiffs can establish that they were denied admittance, denied service, or were asked to leave a store before they could complete a retail transaction.²⁰⁵ In *Morris v. Office Max, Inc.*,²⁰⁶ "within minutes of entering" the store the plaintiffs were approached by police officers who were responding to a call about suspected shoplifters.²⁰⁷ Although plaintiffs had completed one purchase, they were browsing and examining other merchandise when stopped by the police.²⁰⁸ Plaintiffs' contention was that the store and officers interfered with their prospective contractual relations.²⁰⁹ In other words, the plaintiffs alleged that they were denied the same opportunity to engage in pre-contractual behavior (browsing) as whites.²¹⁰ "They do not assert . . . that Office Max refused to sell the items; rather they contend that by summoning the police to 'check out' African-American patrons like themselves, the store discouraged and dissuaded them from making the purchase."²¹¹ The court rejected this argument as a valid claim under Section 1981, reasoning that plaintiffs had no evidence that "they had anything more than a general interest in that merchandise [Plaintiffs] failed to demonstrate that they would have attempted to purchase the [merchandise they were examining] even if they had not been approached by the

205. See *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (plaintiffs' Section 1981 claim failed to survive summary judgment because they were not deprived of the right to make a purchase); *Bagley v. Ameritech Corp.*, No. 99 C 1449, 1999 WL 1069113, at *4 (N.D. Ill. Nov. 17, 1999) ("It is insufficient to show that Ameritech only interfered with prospective contractual relations Bagley must present evidence of a specific contract that Ameritech refused to enter into or enforce."); *Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 WL 617165, at *4 (N.D. Ill. Oct. 23, 1996) (Section 1981 claim survived summary judgment because plaintiff was escorted from store before he was able to complete his purchase); *Flowers v. TJX Companies*, No. 91-CV-1339, 1994 WL 382515, at *6 (N.D.N.Y. July 15, 1994) (no Section 1981 claim because plaintiffs asked to leave store after they completed their purchase).

206. 89 F.3d 411 (7th Cir. 1996).

207. *Id.* The officers responding to a call of "two male blacks acting suspiciously," questioned plaintiffs, asked for identification, apologized, and left. *Id.* at 411-12. Plaintiffs countered the claim that they were acting suspiciously by asserting that they were conservatively dressed and were frequent Office Max shoppers. *Id.* at 412.

208. *Id.* One of the plaintiffs reported that an officer explained the stop by stating "that the store had been having a problem with black people coming in near closing and taking computers out and other supplies." *Id.* An officer is further reported as stating, "guys, unfortunately you are guilty by association." *Id.*

209. *Id.* at 414.

210. *Id.*

211. *Id.*

police.”²¹² According to the court, making a customer feel uncomfortable or unwelcome does not create a Section 1981 claim.²¹³

Some courts so tightly adhere to the notion that plaintiffs must establish an interference with the right to contract that plaintiffs must allege more than just a general interest in the merchandise even if stopped before being able to complete a purchase.²¹⁴ In *Sterling v. Kazmierczak*,²¹⁵ Sterling entered a Sportmart store to purchase air rifle cartridges.²¹⁶ After he entered the store, a security guard stopped Sterling and asked him about the athletic shoes he was wearing.²¹⁷ Sterling informed the guard that he had purchased the shoes several days earlier from a different store.²¹⁸ The guard accused Sterling of stealing, removed the shoes from his feet, and called the police.²¹⁹ The police arrested Sterling, who was later tried for shoplifting and found not guilty when he produced a receipt for his shoes.²²⁰ Sterling sued Sportmart for violating his civil rights under Section 1981. The court dismissed the claim stating:

Sterling Jr. simply alleges that he went to the Sportmart store ‘for the purpose of purchasing air rifle cartridges.’ There are no allegations that Sterling Jr. ever found the cartridges for which he was looking and that he was prepared to buy such cartridges before he left the store. In addition, there are no allegations that Sterling Jr. had the air rifle cartridges in hand when confronted by [the guard]. The allegations simply establish that Sterling Jr. was browsing about the store.²²¹

212. *Id.* at 413-14. *Morris*’ holding that plaintiffs’ claim failed for failure to “allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities” rests on a pre-1991 Civil Rights Act Amendment case, *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262 (10th Cir. 1989). See *Morris v. Office Max, Inc.*, 89 F.3d 411, 414-15 (7th Cir. 1996).

213. See *Bagley v. Ameritech Corp.*, No. 99 C 1449, 1999 WL 1069113, at *5 (N.D. Ill. Nov. 17, 1999).

214. See *Sterling v. Kazmierczak*, 983 F. Supp. 1186, 1191 (N.D. Ill. 1997) (plaintiff’s Section 1981 claim denied because, according to the court, plaintiff failed to establish that the retailer interfered with an opportunity to complete a contract).

215. 983 F. Supp. 1186 (N.D. Ill. 1997).

216. *Id.*

217. *Id.* at 1188.

218. *Id.*

219. *Id.*

220. *Id.* It is interesting to note that even after Sterling was found not guilty, Sportmart continued to refuse to return the pair of shoes that were taken from him. *Id.* at 1188-89.

221. *Id.* at 1191-92.

The court goes on to characterize the harm as a "possible loss of future contract opportunity," which according to the court, cannot provide grounds for relief under Section 1981.²²²

Perhaps in recognition of courts' adherence to a narrow construction of Section 1981, consumer discrimination cases reveal a pattern of security guards waiting until a customer completes a transaction before affirmatively raising shoplifting accusations.²²³ Delaying the stop and search process until after the completion of the customers' sale takes claims of differential security surveillance and treatment out of Section 1981's range.²²⁴ For example, in *Ackaa v. Tommy Hilfiger Co.*,²²⁵ a recent case in the eastern district of Pennsylvania, the plaintiffs alleged that security guards followed and accosted them because they were black. The district court dismissed plaintiffs' public accommodation claim and the assertion that they had experienced racial discrimination in contracting.²²⁶ On January 21, 1995, Ann Ackaa and Lara Okeshola were shopping in a Tommy Hilfiger store in the Reading Outlet Center when security guards employed by the store followed them around the store.²²⁷ Ackaa and Okeshola and their two friends were the only black customers in the store and asserted that "the security guards paid particularly close attention to them for that reason alone."²²⁸ Okeshola and her friends noted that while they were shopping two men always seemed to be near them and that one of the guards actually approached Okeshola to solicit her opinion on a shirt.²²⁹ The women were accused of stealing socks, the City of Reading police were summoned, and the women were forced to leave the store under threat of arrest for trespass.²³⁰ Ackaa and Okeshola sued Tommy Hilfiger Company alleging, *inter alia*, racial discrimination in the making or enforcing of contracts.²³¹ After the public

222. *Id.* (citing *Morris v. Office Max, Inc.*, 89 F.3d 411, 414-15 (7th Cir. 1996)).

223. *See, e.g.*, *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1059 (D. Kan. 1997) (court granted defendants' summary judgment motion on plaintiffs' Section 1981 claim on the ground that the term "contractual relationship" under Section 1981 refers only to circumstances surrounding a specific transaction and not conduct that occurs subsequent to the purchase).

224. *See id.* at 1057 (security guard began his surveillance of plaintiffs while they were browsing but did not interrupt them until they had completed their initial transaction); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 368-69 (D. Del. 1996) (although store guards followed plaintiff while she was shopping, they did not stop and detain her until after she left the store).

225. No. CIV.A.96-8262, 1998 WL 136522, at *1 (E.D. Pa. Mar. 24, 1998).

226. *Id.* at *6. Plaintiffs asserted, *inter alia*, a claim of discrimination in a place of public accommodation under Section 2000a(b) and a claim of discrimination in the making or enforcing of contracts under Section 1981. *Id.* at *1.

227. *Id.*

228. *Id.* at *3.

229. *Id.*

230. *Id.* at *4-5.

231. *Id.* at *1. Plaintiffs' discrimination in contracting claim arose under Section

accommodation claim was dismissed, the plaintiffs alleged a negligence claim and Ackaa alleged a claim under the Pennsylvania Human Relations Act.²³²

In response to the plaintiffs' claims, defendants moved for summary judgment. In concluding that Hilfiger was entitled to summary judgment on the Section 1981 claim, the court found that the plaintiffs had failed to "demonstrate that they were denied the enjoyment of all rights, privileges, terms and conditions of a purported contractual relationship" with Hilfiger.²³³ The court found that Ackaa and Okeshola were able to establish that they were members of a racial minority and that defendants intended to discriminate against them on that basis.²³⁴ Ackaa and Okeshola's claims of racial discrimination and differential treatment were bolstered by testimony from a friend of one of the security guards, who asserted:

Martinez regularly used an offensive racial epithet in conversation and targeted black customers as the object of 'pranks' he perpetrated while on duty as a security guard Martinez and defendant Ortiz follow[ed] black customers in the Hilfiger store, prompting numerous complaints to management by such customers.²³⁵

Thus, according to the court, "the evidence cited could support the inference that in conformity with their common practice of singling out black customers for close observation and mild harassment, the security guards targeted plaintiffs because they were the only black customers in the store."²³⁶ Yet, the court concluded that the plaintiffs had failed to establish a *prima facie* case of discrimination in contracting because they could not establish that the discriminatory conduct *affected a right protected under the statute*.²³⁷ According to the court, Ackaa and Okeshola needed to present evidence of conduct beyond what was needed to establish an intent to discriminate against them on the basis of race.²³⁸ They needed to claim more than that "they were denied the right to . . . browse, examine and purchase merchandise without harassment, to leave the store without being subjected to accusations of theft, and to reenter the store at

1981. *Id.* Plaintiffs also claimed discrimination in a place of public accommodation under Section 2000a(b), and assault and battery under Pennsylvania state law. *Id.*

232. *Id.* Plaintiffs' other claims were dismissed. See Pennsylvania Human Relations Act, 18 PA. CONS. STAT. ANN. § 3929(d) (West 2000).

233. Ackaa v. Tommy Hilfiger Co., No. CIV.A.968262, 1998 WL 136522, at *5 (E.D. Pa. Mar. 24, 1998).

234. *Id.* at *3. According to the court, Section 1981 claims "are analyzed under the same burden-shifting standards utilized in Title VII discrimination cases." *Id.*

235. *Id.* at *4. The assertions were made by means of an affidavit attached to Plaintiffs' Response to Defendants' Motion for Summary Judgment. See *id.*

236. *Id.* at *3-4.

237. *Id.* at *6.

238. *Id.* at *3, *5.

will for additional shopping, return or exchange of merchandise."²³⁹ According to the court, Ackaa and Okeshola did not present a prima facie case of racial discrimination in contracting because they were able to complete their transactions in the store for that day and were not prevented from entering the store or denied service.²⁴⁰

Similarly in *Flowers v. TJX Companies*,²⁴¹ the plaintiffs were stopped by a police officer and were asked to leave the store for suspicion of shoplifting while shopping at T.J. Maxx. However, the claims were dismissed on summary judgment because the plaintiffs had completed their retail transactions "despite the alleged discrimination of defendants."²⁴² In an analysis of Section 1981, very similar to that of the *Patterson* Court, the court in *Flowers* concluded that "[b]ecause no interference with the formation of an implicit retail contract took place, plaintiffs can not recover damages under § 1981."²⁴³ Even in claims in which the plaintiff is successful in alleging a Section 1981 violation, courts require that plaintiffs establish the "actual loss of a contract interest."²⁴⁴ Claims that plaintiffs have been inconvenienced or otherwise suffered a delay in service, which they attribute to racial discrimination, generally have not been successful.²⁴⁵

239. *Id.* at *5. In these ways, the plaintiffs argued that they were "denied the right to enjoy all the terms, benefits and privileges of an implied contract between a retail establishment and its customers." *Id.*

240. *Id.*

241. No. 91-CV-1339, 1994 WL 382515, at *1 (N.D.N.Y. July 15, 1994).

242. *Id.* at *6.

243. *Id.* Earlier on the evening that plaintiffs were escorted from the T.J. Maxx store, the store manager reported to the local police that three black men were shoplifting. *Id.* at *1. An hour later, another store manager placed a second call to the local police reporting that the shoplifters were back in. *Id.* After arriving at the store, the officer asked an African American couple to leave the store and then approached the plaintiffs and said "Are we done shopping?" intending to ask plaintiffs to leave the store if they did not do so soon. *Id.* at *2. It appears as though the apprehension of one black shoplifter created an atmosphere of wrongdoing that clouded the activity of subsequent African American shoppers in the store.

244. *Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 WL 617165, at *3 (N.D. Ill. Oct. 23, 1996) (plaintiff's Section 1981 claims survived summary judgment when security guards' shoplifting accusations prevented plaintiff from completing his transaction). In *Henderson*, the court found a viable Section 1981 claim because when the security guard stopped plaintiff, he was "midstream in the process of making a contract for the goods purchase . . . [the guard] interrupted his return to the cashier and plaintiff was ultimately led out of the store in handcuffs, unable to complete his purchase." *Id.*; see also *Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1289-90 (N.D. Cal. 1988) (blacks stated a Section 1981 claim where store used racially disparate security practices to prevent blacks but not whites from shopping in the store).

245. See *Robertson v. Burger King, Inc.*, 848 F. Supp. 78, 80-81 (E.D. La. 1994) (claim that Burger King employee served several white males who were behind plaintiff

Thus, under a narrow construction of Section 1981, plaintiffs who are accosted by store clerks or security guards when they first enter a store or after they complete a purchase are unable to recover. Courts are insistent that Section 1981 plaintiffs produce evidence that they were denied an opportunity to complete a retail transaction even when the transaction may be negligible.²⁴⁵ Thus, in *Hampton v. Dillard Department Stores, Inc.*,²⁴⁷ the plaintiffs' ability to recover hinged on whether they were prevented from redeeming a free coupon by security personnel. In *Hampton*, Paula Hampton and Demetria Cooper alleged disparate and racially based treatment by a security guard at Dillard Department Stores in Overland Park, Kansas.²⁴⁸ Hampton and Cooper were observed by a store security guard shortly after they began shopping with their young children for children's clothing.²⁴⁹ The guard followed them to the fitting room and asked a fellow employee to continue watching them.²⁵⁰ After the women completed their purchase, the security guard stopped them, accused Cooper of shoplifting, and asked to see the contents of her bag.²⁵¹ In complying with the request, Hampton told the guard that "she did not appreciate being accused of shoplifting and that she spent a great deal of money at Dillard's and did not deserve to be treated 'this way.'"²⁵² The guard's response was to tell

in line before serving him amounted only to a delay in service and was not actionable under Sections 1981 or 2000a) (citing *Bermudez Zenon v. Restaurant Compostela, Inc.*, 90 F. Supp. 41, 44 (D.P.R. 1992); *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 718 (D.P.R. 1992)). Thus, behavior calculated to make blacks feel unwelcome or to discourage their patronage stops short of a narrow view of the reach of the Civil Rights Act. See, e.g., *Stearnes v. Baur's Opera House, Inc.*, 788 F. Supp. 375, 377-78 (C.D. Ill. 1992) (plaintiffs' claim that club owner stated that only certain types of music were played in order to "keep blacks out," referred to "the area on the dance floor where the black patrons would dance as 'Zimbabwe West' and would tell the disc jockeys that it was 'too dark in here' when there were too many blacks in the bar" was dismissed on summary judgment because plaintiffs were not barred from the club or the dance floor).

246. See *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1058 (D. Kan. 1997); *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371 (D. Del. 1996).

247. 985 F. Supp. 1055 (D. Kan. 1997).

248. *Id.* at 1058. The original complaint set forth claims for violations of the plaintiffs' civil rights under Section 1981, false imprisonment and defamation per se. See *Petition, Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055 (D. Kan. 1997) (No. 97-2182).

249. See *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1261 (D. Kan. 1998).

250. See *Hampton*, 18 F. Supp. 2d at 1261; *Hampton*, 985 F. Supp. at 1058 (The security guard testified that he observed Cooper with a "rolled-up dark cloth item in her hand." He asked another Dillard's employee to watch plaintiffs while they were in the fitting room. This employee told the guard that she was "'positive' she had observed Cooper putting something underneath her coat.").

251. See *Hampton*, 985 F. Supp. at 1058.

252. *Id.*

Hampton to "calm down or he would call the Overland Park Police and have plaintiffs removed from the store."²⁵³ The court then noted that the security guard "'shoved' the bag and merchandise at Hampton, remarking 'that's fine.'"²⁵⁴ Security guards conducted surveillance of these black customers based upon evidence as slim as having observed them "looking toward the ceiling and looking around,"²⁵⁵ or "displaying nervous behavior,"²⁵⁶ and "avoiding sales help."²⁵⁷ The district court refused the plaintiffs an opportunity to go forward on their Section 1981 claim unless they could first establish that the defendants had interfered with a contract or the benefit of a contract.²⁵⁸

The women, however, were on their way to redeem coupons for free men's cologne samples that they received for making their purchases when they were accosted by the security guard.²⁵⁹ Based on the inability to redeem the coupons, the jury awarded Hampton \$56,000 in compensatory damages and \$1.1 million in punitive damages.²⁶⁰ Hampton established that the coupons were a privilege or benefit of the required "bargained-for-exchange" that triggered Section 1981 protections against the alleged discriminatory treatment.²⁶¹ Hampton was able

253. *Id.*

254. *Id.*

255. *Id.* at 1057 (The security guard testified that he interpreted these actions as "checking to see if someone was watching.").

256. *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 368 (D. Del. 1996).

257. *Id.*

258. *See Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1058 (D. Kan. 1997).

259. *Id.* at 1059-60.

260. *See Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1261 (D. Kan. 1998). Hampton alleged that "Dillard's deprived her of her right to enjoy all benefits, privileges, terms and conditions of her contractual relationship with Dillard's" when she was prevented from redeeming her coupon. *Id.* She further asserted that this conduct was part of a pattern and practice of discrimination against African American customers at the store. *Id.* at 1260. In denying defendant's *Motion for Judgment as a Matter of Law, or Alternatively for a New Trial or Remittitur*, the court noted that "the term 'make and enforce contracts' includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Id.* at 1262 (citing 42 U.S.C. § 1981(b) (1994)).

261. *Id.* (reasoning that the free sample was a benefit or privilege of the "bargained-for exchange [that] was plaintiff's money in return for Dillard's Easter outfit; the consideration was money and clothing"). The court noted that the Civil Rights Act of 1991 expanded Section 1981 to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." *Id.* The court then stated: "This language provides that once a contractual relationship exists, a benefit or privilege of that relationship may not be withheld based on the race of one party to the contract—even if the benefit or consideration was not the consideration for the contract." *Id.* at 1262-63. Thus, even though "the free sample was not the bargained-for exchange, it could be a

to persuade the fact-finders that the defendant's interference with her right to contract was based on race and was therefore unlawful. Doing so requires proof that the interference was not a result of legitimate shoplifting concerns. In other words, consumer discrimination plaintiffs must establish that a storekeeper's stated rationale for stopping a plaintiff-shopper is a pretext for discrimination.²⁶²

A. Establishing a Pattern and Practice of Discrimination

At trial, evidence of an ongoing pattern and practice of targeting African American customers at a store, beyond the incident involving the plaintiff, helps to establish that a defendant's stated explanation for stopping the plaintiff is a pretext and is key in establishing a plaintiff's claim.²⁶³ The plaintiff in *Hampton* was able to offer evidence "that for at least nine years before her incident, security guards and employees at Dillard's focused upon African-Americans in a discriminatory manner."²⁶⁴ Hampton was able to establish a "practice of

privilege or benefit of the contractual relationship." *Id.* at 1263.

262. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). According to the Court, "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive." *Id.* at 134. If *Reeves* is applicable to consumer discrimination cases, plaintiffs who can meet the narrow reading of Section 1981 and prove that the store's justification for interfering with the plaintiffs' activities are a pretext would be able to present their case to the fact-finder. *Id.* at 135. *Reeves* is unlikely to change the result in most of these cases, however, unless a broader reading of Section 1981 is permitted.

263. The centrality of this evidence of a pattern and practice of racially discriminatory conduct is particularly noteworthy because when deciding the summary judgment motion, the district court in *Hampton* mentions the fact, without comment, that deposition testimony was offered from "past and present security officers that African-American shoppers were treated differently than white shoppers; that sales associates identify them as shoplifting suspects with no articulated basis other than race and presence in a particular department; and that African-American shoppers have complained to store management about racially discriminatory treatment of this kind." *Hampton*, 985 F. Supp. at 1058. The court was similarly unpersuaded by plaintiffs' allegation that their seizure constituted false imprisonment. *Id.* at 1060. It found that the store was immune under Kansas law, which provides a statutory merchants' defense under Section 21-3424 for stops based on probable cause of shoplifting. KAN. STAT. ANN. § 21-3424 (1995). In *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978), evidence of a policy of racially based differential treatment also seemed to persuade the court of the value of plaintiff's claim for violation of his Section 1981 rights.

264. *Hampton*, 18 F. Supp. 2d at 1269. Hampton also offered testimony from another customer, Sondra Samuels, who testified that even though she was dressed in a business suit and was not carrying any bags, she was followed the entire time she shopped at Dillard's. *Id.* at 1271. "Samuels testified that she believed she was followed because she was black" and that she reported the incident to management but did not

calling security codes when African-American customers entered the store, watching them, following them and stopping them more often than white customers."²⁶⁵ Testimony obtained directly from guards who had engaged in and witnessed this conduct provided a compelling picture of differential treatment of black shoppers over time as opposed to an isolated event.²⁶⁶ Critical to the success of the plaintiff's case was testimony like that offered by a former five year security guard who opined that "minority customers . . . had been stereotyped as shoplifters."²⁶⁷ Another former guard testified that "sales associates routinely reported black customers coming into the store and asked him to follow them for no reason."²⁶⁸ A third asserted that "on many occasions African-Americans were closely watched while white customers were allowed to freely engage in similar behavior."²⁶⁹ In an interesting twist, a former security guard not only supported the view that Dillard's targeted black customers for investigation more frequently than white customers, but stated that "he was working plain clothes security and received a call reporting that a black man was walking around the store. It soon dawned on him that he was the subject of the report, even though he had done nothing suspicious."²⁷⁰ Importantly, three out

receive an apology. *Id.*

265. *Id.* at 1270. Plaintiff also admitted "statistical evidence of the race of persons involved in arrests and other incidents," which was developed from Dillard's incidence log, "which included racial codes." *Id.* at 1272. The court concluded that this "was indirect evidence that Dillard's had a corporate policy which targeted African-American and other minority shoppers for security purposes." *Id.* at 1273. Plaintiff's appellant brief asserted that Dillard's security referred to female African American customers as Code 3s and male African American customers as Code 4s. See Brief of Appellee Hampton and Cross-Appellant Cooper at 12-13, Hampton v. Dillard Dep't Stores, Inc., 18 F. Supp. 2d 1256 (D. Kan. 1998) (No. CIV.A.97-2182-KHV). No coding was used for white customers. *Id.* at 13. According to the brief, a Dillard guard reported that when asked what African American customers did to merit surveillance the response from Dillard employees was, "[t]hey're walking through the store." *Id.*

266. See Hampton v. Dillard Dep't Stores, Inc., 18 F. Supp. 2d 1256, 1270 (D. Kan. 1998) (Michael Imber testified that "he quit his security job at Dillard's because he 'didn't like the way that Dillard's, some of the associates and security personnel treated black customers.')." Plaintiff suggests that Dillard's engaged in a practice of scheduling "work shifts for security officers based in part on how many people they apprehended" and that this "was a factor in Imber's decision to quit." *Id.* at 1272.

267. *Id.* at 1270-71 (Darrold Conrad worked as a security guard from 1986 through early 1992.).

268. *Id.* at 1270 (David Cole testified that he quit his security job, in part, because of this differential treatment.).

269. *Id.* at 1271 (Gregory Powell worked as a Dillard's guard from 1987 to 1994.).

270. *Id.* (Byron Pierce was a security guard from 1990 to 1992 and in 1997.). The court also noted that "Pierce also testified about an incident in which a Dillard's security officer without probable cause took clothing from an African-American shopper who had gone to her car, and told her she could not have it back unless she produced a receipt." *Id.*

of the five former guards who testified asserted that they brought the disparate treatment of black customers to the attention of store management.²⁷¹

Consumer discrimination plaintiffs often find establishing discrimination difficult and the absence of evidence of such a pattern and practice of discrimination against black shoppers has proven to be fatal to a number of Section 1981 claims. Courts may accept store owners asserted justifications for stopping, searching, and questioning customers, or may find that the actions were nothing "more than 'the isolated act of an individual employee.'"²⁷² Thus, courts' reluctance to embrace 1991 Amendment's expansion of the terms "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship," along with the difficulty in establishing pretext makes recovery by consumer discrimination plaintiffs difficult.²⁷³ In fact, it is the narrow construction of Section 1981 that prevents recovery in the majority of consumer discrimination cases.²⁷⁴

B. Developing a Broader Construction of Section 1981

"Making and enforcing contracts" may involve not only entering the retail premises and offering legal tender in exchange for goods, but could include inspecting the goods displayed for sale as well as comparing the goods and

271. *Id.* at 1270-71 (Former Dillard's security guards Michael Imber, Darrold Conrad, and Gregory Powell all testified that they either reported concerns about differential treatment of shoppers of color or suggested to management that some kind of diversity training would be useful or both.).

272. *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 372 (D. Del. 1996); *cf.* *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1186 (5th Cir. 1997) (without testimony of circumstances, or "without examples of blacks who were scrutinized while similarly-situated whites were not," conclusory statements that blacks were closely "watched" in employment setting were incompetent to establish pattern of discrimination). *See generally* *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1055 (D. Kan. 1997).

273. 42 U.S.C. § 1981(b) (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 308 (1994). Congress intends the Civil Rights Acts to be broadly construed. *See* H.R. REP. NO. 102-40 (II), § 11, at 34, *reprinted in* 1991 U.S.C.C.A.N. 549, 727-28. "Congress intends that when the statutory terms in civil rights law are susceptible to alternative interpretations, the courts are to select the construction which most effectively advances the underlying congressional purpose of that law." H.R. REP. NO. 102-40 (II), § 11, at 34.

274. *See Hampton*, 985 F. Supp. at 1060 (quoting *Lewis*, 948 F. Supp. at 371-72). Like the court in *Ackaa*, the *Hampton* court rejected the theory that a Section 1981 claim could be based on the denial of the "benefit or privilege of a merchant's implied contractual offer to let them shop in its store." *Id.* at 1059. Such an interpretation would require a broader reading of the amended Section 1981 than is generally accepted by most jurisdictions.

prices. It is sensible to conclude that these pre-transaction activities are included in the 1991 Amendment to Section 1981 language that making and enforcing contracts includes, *inter alia*, "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."²⁷⁵ This broader reading of Section 1981 may include the right to be free from racially discriminatory security practices as a benefit or privilege of a merchant's implied contractual offer to allow customers to shop in her store.²⁷⁶ In *Hall v. Pennsylvania State Police*,²⁷⁷ the Third Circuit articulated a standard of relief under Section 1981 that would allow a plaintiff to recover for the differential conditions surrounding the contractual relationship without regard to whether a transaction had been completed.²⁷⁸ In *Hall*, the plaintiff established that the state police had issued a directive to banks and other financial institutions to photograph, for surveillance purposes, any black males or females that entered their premises who might look suspicious.²⁷⁹ In vacating the dismissal of plaintiff's complaint, the court found that "Section 1981 obligates commercial enterprises to extend the same treatment to contractual customers 'as is enjoyed by white citizens.'"²⁸⁰ The plaintiff in *Hall* did not allege that the security measures prevented him from completing his transactions at the bank, but that they subjected him and all other African Americans to differential security measures.²⁸¹

275. 42 U.S.C. § 1981(b) (1994).

276. The *Lewis* court rejected this claim. See *Lewis*, 948 F. Supp. at 371-72. This claim was also asserted by the *Hampton* plaintiffs but rejected by the court on defendant's summary judgment motion. See Memorandum and Order at 5, *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055 (D. Kan. 1997) (No. CIV.A.97-2182-KHV), available at <http://www.bensonlaw.com/hampton/Memo.htm>.

277. 570 F.2d 86 (3d Cir. 1978).

278. *Id.* at 92; see also *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1047-48 (N.D. Ill. 1998) (Black patrons of Pizza Hut articulated a viable Section 1981 claim that they were denied the benefits and privileges of their contractual relationship when defendants failed to provide them with the proper utensils with which to eat their pizza and racially harassed them.). While the *McCaleb* court recognized the broader reading of Section 1981 pursuant to the 1991 Amendment of the Civil Rights Act, it distinguished the results in *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996), and *Flowers v. TJX Companies*, No. 91-CV-1339, 1994 WL 382515 (N.D.N.Y. July 15, 1994), because the plaintiffs were permitted to enter the store and make their purchases before being falsely accused of shoplifting or asked to leave the store, respectively. See *McCaleb*, 28 F. Supp. 2d at 1048. Similarly, the court distinguished cases in which the plaintiffs were subject to a delay in service rather than denied service as in *McCaleb* because of their race. *Id.* (citing *Robertson v. Burger King, Inc.*, 848 F. Supp. 78, 80-81 (E.D. La. 1994); *Harrison v. Denny's Restaurant, Inc.*, No. C-96-0343 PJH, 1997 WL 227963, at *1 (N.D. Cal. Apr. 24, 1997)).

279. See *Hall*, 570 F.2d at 88.

280. *Id.* at 92.

281. *Id.*

In a more direct statement of the permissible breadth of Section 1981 a Maryland district court refused to grant summary judgment on a claim of racially disparate conditions while shopping. In *Williams v. Cloverleaf Farms Dairy*,²⁸² the plaintiff alleged that she was subjected to racial slurs while making a purchase at a convenience store.²⁸³ Over the defendant's objection, the court correctly concluded that the plaintiff articulated a claim for relief under Section 1981 even though she was able to complete her transaction.²⁸⁴ According to the court, "[S]ection 1981 violations need not be extended or unmitigated to qualify the plaintiff for damages . . . the fact that an act of contractual discrimination was short or de minimis does not make it any less a violation."²⁸⁵

Implying a contract between the retail stores and consumers to prohibit differential treatment on the basis of race would provide a basis for recovery for plaintiffs under Section 1981. The idea of implying an antidiscrimination principle in contract law is not unique to Section 1981 litigation and at least one author has suggested that the *Restatement (Second) of Contracts* be revised to include a prohibition of discrimination in basic contract law.²⁸⁶ Unfortunately, courts have usually rejected attempts by plaintiffs to articulate such a basis for relief. According to the *Lewis* court, allowing such an implied contract "would come close to nullifying the contract requirement of 1981 altogether, thereby transforming the statute into a general cause of action for race discrimination in all contexts."²⁸⁷

The narrower reading of Section 1981 also absolves stores and their security guards of liability under the Civil Rights Act for post transaction conduct.²⁸⁸ It immunizes the harassment of shoppers on suspect grounds. When courts require interference with the completion of a contract for Section 1981 relief they rob plaintiffs who were falsely accused of shoplifting only after having completed a transaction with a store of civil rights relief.²⁸⁹

282. 78 F. Supp. 2d 479 (D. Md. 1999).

283. *Id.* at 482-83.

284. *Id.* at 485.

285. *Id.* at 485-86 (Importantly, the court recognized that the issue of the extent of the Section 1981 violation was a matter of damages and was not sufficient to deny the plaintiff an opportunity to survive summary judgment and try her case.).

286. See Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 207 (1993). Williams suggests that contract law should include an antidiscrimination principle that would prohibit discrimination "on the basis of race in the formation, performance, enforcement, or termination of a contract." *Id.*

287. *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 371-72 (D. Del. 1996).

288. Although plaintiffs may be able to recover under state false imprisonment claims, the inability to obtain relief under the Civil Rights Act works to suppress the racially motivated nature of the actions and resulting harms.

289. See *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1059 (D. Kan.

Holding that Section 1981 does not protect the right to browse and leave the store without interference from racially motivated security practices frees pre contractual and post contractual activities from civil rights scrutiny. Exempting pre and post contract conduct from scrutiny insulates many disparate security practices in retail stores from attack. Stores are able to continue to follow African American customers immediately upon their entering the store, apply heightened scrutiny to their activities while present in the store, and stop and search them after they have completed their transactions. This exemption allows discrimination against African Americans engaged in the process of conducting activities integrally related to completing their retail transactions. It is artificial to separate out those acts inimical to shopping from the exchange of tender for goods at the cash register.

Furthermore, this narrow view of claims of differential treatment in retail settings allows retail stores and their poorly trained security guards to escape liability for apparently discriminatory conduct. Marginalizing differential treatment of consumers based on race has the effect of decriminalizing the behavior of security guards who follow, question, and accost shoppers on account of their race.²⁹⁰ Profiling consumers based on stereotypes²⁹¹ is similar to the practice of racial profiling. Consumer discrimination allows "official entities" to target particular groups for differential treatment because of assumptions about behavior that are associated with appearance.²⁹² It legitimizes a practice of racial intimidation and subordination. At the same time, it criminalizes the non-criminal behavior of black shoppers.²⁹³ The non-liability approach legitimizes and "reproduces the idea that Blacks are a danger to society, cannot be trusted, and steal from Whites."²⁹⁴ Thus, in *Hampton*, as in

1997). The court in *Hampton* concluded that the security guard did not interfere with a purchase or contract right for purposes of Section 1981 when he stopped and searched plaintiff after she completed her purchase.

290. See Austin, *supra* note 32, at 152.

291. In the employment context, the Supreme Court has frowned on the use of gender stereotypes. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court concluded that it was unlawful for employers to base promotion decisions on gender stereotypes. *Id.* at 250-52.

292. For a definition of racial profiling, see *infra* note 27.

293. See Austin, *supra* note 32, at 152 ("Despite the ubiquity of blacks' experiences of discrimination, case law suggests that storeowners have rarely been charged with watching, detaining, or deterring shoppers in a racially-biased way."). In a recently filed case, security guards at Ward Parkway Shopping Center, Kansas City, Missouri, targeted African Americans for removal from the mall parking lot despite the fact that they had purchased movie tickets, were waiting for the movie to begin, and similarly situated whites were treated differently. See *McGowan v. Ward Parkway Shopping Center Co.*, No. 98-0836-CV-W-9 (filed W.D. Mo.) (on file with author). For a similar analysis of the "criminalization of blackness" by police, see Harris, *supra* note 27, at 291.

294. ESSED, *supra* note 34, at 223.

many of these cases, the plaintiffs were engaged in behaviors that should not, in and of themselves, raise suspicions of shoplifting.²⁹⁵ Store employees are applying subjective standards of evaluating behavior that appears to be affected by factors other than the actual conduct of the plaintiffs. Hampton's "looking around" and Lewis' appearing "nervous" become suspect and potentially criminal behaviors that the guards then use as a basis for selectively accosting, accusing, and threatening customers when the shoppers are black.²⁹⁶ This reductionist approach is then legitimized by courts that interpret these facts and probable harms through a narrow Section 1981 lens.

In a number of incidents, the accused consumers respond not with historical deference of blacks toward whites in authority, but instead with verbal protests.²⁹⁷ Thus, black customers may question the guards' authority, judgment, or actions. The security guards often react by threatening police intervention.²⁹⁸ It is possible that white security guards and store clerks may be accustomed to black subservience, acquiescence, or withdrawal from white "authority" and, therefore, provide an extreme and escalated response to perceived suspicious behavior of black shoppers and their protestations to shoplifting accusations.²⁹⁹

Another limitation on Section 1981 recovery is the requirement that even plaintiffs who have been prevented from completing a transaction at a retail establishment must prove that the inability to do so stemmed from purposeful

295. See *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1057 (D. Kan. 1997). The guard observed plaintiffs looking at the ceiling and one of the women holding a "rolled-up dark cloth item in her hand." *Id.* at 1058. These observations became the basis for conducting a surveillance of the plaintiffs. Another Dillard employee testified that she later saw one of the women "push a rolled-up cloth item into her jacket." *Id.*

296. *Id.*; *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 369 (D. Del. 1996).

297. See Feagin, *supra* note 1, at 102-03, 106. Feagin explains that prior to the civil rights movement many blacks often responded to public place discrimination by showing deference to whites. He notes that although "[d]eference rituals can still be found today between some lower-income blacks and their white employers. . . . [M]ost discriminatory interaction no longer involves much asymmetrical deference, at least for middle-class blacks." Feagin, *supra* note 1, at 103; see also Davis, *supra* note 17, at 1567 ("[T]he most striking form of . . . 'caste behavior' is deference, the respectful yielding exhibited by the Negroes in their contacts with whites.") (quoting A. DAVIS ET AL., *DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS* 22-23 (1941)). In a recent study of black women and everyday racism, Yanick St. Jean recounts the experience of a black woman who received inadequate service at a grocery store. St. Jean notes the customer's "gentle way" of raising the mistreatment stating, "fussing might also have triggered in these clerks the misrecognition of the black woman as threatening, as a 'violent black.' Indeed, such a black reaction might have been what the white clerks anticipated or wanted." ST. JEAN & FEAGIN, *supra* note 15, at 133.

298. See *Hampton*, 985 F. Supp. at 1057; *Cedeno v. Wal-Mart Stores, Inc.*, No. CIV.A.98-CV-479, 1999 WL 1129638 (E.D. Pa. Nov. 30, 1999).

299. See Feagin, *supra* note 1, at 106.

conduct.³⁰⁰ In *Cedeno v. Wal-Mart Stores, Inc.*,³⁰¹ Awilda Cedeno and her daughter were shopping at a Wal-Mart in Lancaster, Pennsylvania, when they ran into Cedeno's sister and nephew, Jason Echevarria.³⁰² At some point, Echevarria was accused of shoplifting, and after the group was asked to leave the store, the assistant manager stated, "Spanish people come [to the Wal-Mart store] to steal."³⁰³ All four were told that they were prohibited from returning to the store, even though only one of the four had been accused of shoplifting and Awilda and her daughter had shopped separately from Echevarria and his mother.³⁰⁴ About one week later, when Cedeno, her daughter, and several others (but not Echevarria) returned to the store, the assistant manager called the police upon noticing them.³⁰⁵ The police requested that members of the group provide identification and called for "back-up assistance" after which time "[a] crowd of onlookers formed, and more officers arrived on the scene."³⁰⁶ The plaintiffs were arrested and escorted to the police station.³⁰⁷ Despite the explicitly racial nature of the manager's intervention, which led to the criminalization of shopping, the court concluded that the plaintiffs had not stated a cognizable legal claim.³⁰⁸ In a minimizing stroke, the court characterized the assistant manager's derogation as a "single regrettable and unacceptable comment."³⁰⁹ It further opined that aside from this, the case presented a "straightforward picture of a retail store responding to incidents of shoplifting."³¹⁰ Despite the global nature of the statement and the excessive way in which a single accusation of shoplifting was handled, the court characterized the conduct as an isolated event that lacked evidence of purposeful discrimination.³¹¹

The confined construction of the statute makes it difficult to recover under Section 1981.³¹² Many courts limit the application of the statute to a limited time

300. See *Cedeno*, 1999 WL 1129638, at *2.

301. No. CIV.A.98-CV-479, 1999 WL 1129638 (E.D. Pa. Nov. 30, 1999).

302. *Id.* at *1.

303. *Id.*

304. *Id.*

305. *Id.* at *1-2.

306. *Id.* at *2. According to the court, two members of the group "claimed that because they were minors, they did not have any [identification.] Cedeno, who is not fluent in English, apparently did not understand." *Id.* The court then characterized this set of facts as a "lack of cooperation" that led to a request for "back-up assistance." *Id.*

307. *Id.* Members of the group were charged with disorderly conduct, and defiant trespass. *Id.*

308. *Id.* at *1.

309. *Id.* at *2. In a two page opinion, the court quickly dispensed with the plaintiffs' claims.

310. *Id.*

311. *Id.*

312. Professor Ayres doubts the ability of private litigation to combat discrimination in pricing. Instead, he supports adoption of a no-haggle selling policy for

frame during which a plaintiff has identified a particular object to purchase and the completion of her transaction. The unwillingness to view Section 1981 broadly results, in part, from viewing shopping or engaging in consumptive behavior as situated between public and private conduct. Consequently, the law's response to consumptive behavior has been somewhat fragmented. While shopping is an integral part of the American market economy, the stereotypical assumptions about black's propensity to commit crimes and their inability to afford goods have become so normalized in American culture that it becomes difficult to attach a racial discrimination label to those actions based upon these unstated assumptions.³¹³ As a result, the enhanced surveillance and targeting of black customers becomes justified and normalized.³¹⁴ In addition, even where the racist character of the conduct is clear, defendants can escape liability if they can establish a rationale for the intervention. The law then operates not to prohibit and discourage race based behavior, but to create a space in which subtle and muted racism can take place. Moreover, despite the varied and cumulative harms that result from suffering daily racial stresses, the individual wrongs that befall black shoppers involve small monetary amounts and transitory events that occur in fairly brief time periods. These factors and others make it difficult for plaintiffs to convince courts that they have viable Section 1981 claims.

C. Questioning Plaintiffs' Credibility

Consumer discrimination cases also reveal courts' reluctance to ascribe credibility to plaintiffs' perception of events. This is consistent with the general unwillingness to give credibility to claims of racial discrimination in everyday interactions.³¹⁵ Whites are less likely to perceive racial discrimination and have suggested that blacks are paranoid about racial discrimination and frequently attribute racial motivations to actions when there are none.³¹⁶ This effect is reflected in courts' reluctance to believe plaintiffs' testimony concerning, and

car dealerships and greater pricing disclosures. See Ayres, *supra* note 158, at 142-44.

313. See ESSED, *supra* note 34, at 50.

314. See ESSED, *supra* note 34, at 52.

315. "Whites are also significantly less likely than Blacks to perceive that racial discrimination against minorities exists, although this is not a surprising result given that they are often not the victims of such discrimination." Broman et al., *supra* note 14, at 166 (citation omitted); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 251 (2d ed. 2000) ("U.S. Black women's experiences as well as those of women of African descent transnationally have been routinely distorted within or excluded from what counts as knowledge."). Collins states that black women are faced with intersecting oppressions, "[b]ut expressing these themes and paradigms has not been easy because Black women have had to struggle against White male interpretations of the world." COLLINS, *supra*, at 251.

316. See Broman et al., *supra* note 14, at 166; Feagin, *supra* note 1, at 103.

perception of, the relevant events.³¹⁷ Whether being followed, watched, stopped, and searched by security guards while shopping is a result of race seems to puzzle courts. Unsure of how to measure or identify racism in consumer settings absent explicit defining terminology or conduct, courts wrestle with evidentiary issues and the admission of testimony. Corroboration by others is particularly important to courts charged with the responsibility of weighing the discriminatory nature of behavior that can be described in race neutral terms.³¹⁸

In order to be successful, a plaintiff must establish that the defendant lacked a legitimate nondiscriminatory reason for its actions and instead the differential treatment was based on race. Yet, corroboration of a plaintiff's assessment that

317. In contrast, in *Ackaa v. Tommy Hilfiger Co.*, No. CIV.A.96-8262, 1998 WL 136522 (E.D. Pa. Mar. 24, 1998), applying the Pennsylvania Human Rights Act to a claim of consumer discrimination, the court denied summary judgment stating:

[A] reasonable jury could conclude that the security guards' contention that plaintiff Ackaa made a suspicious movement is merely a post haec [sic] rationalization for labeling plaintiff a potential shoplifter, for subjecting her to exceptional scrutiny and to an unfounded accusation of shoplifting, all of which were actually based primarily, if not solely, upon her race.

Id. at *8. The court seemed to find persuasive evidence that plaintiffs were the only black customers in the store, no other shoppers were accused of shoplifting or subjected to a search at the time of the incident, and the security guards began following plaintiffs before they even began looking at the socks they were accused of stealing. *Id.* at *4, *7.

318. Plaintiffs' belief that when they entered the restaurant and were falsely told that the stove was not working, was on account of plaintiffs' race, was insufficient to prove racial discrimination. See *Laroche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999). "The law is clear, however, that suspicion, perception, opinion and belief cannot be used to defeat a motion for summary judgment." *Id.* (citing *Local No. 48, United Bhd. of Carpenters & Joiners v. United Bhd. of Carpenters & Joiners*, 920 F.2d 1047 (1st Cir. 1990)). "The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Jackson v. Tyler's Dad's Place, Inc.*, 850 F. Supp. 53, 55 (D.D.C. 1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)). The court continued to state, "In seeking relief under § 1981, plaintiffs must do more than simply 'invoke [their] race in the course of a claim's narrative [to] automatically be entitled to pursue relief.'" *Id.* (quoting *Bray v. RHT*, 748 F. Supp. 3, 5 (D.D.C. 1990), *aff'd*, 976 F.2d 45 (D.C. Cir. 1992)) (citing *Jaffe v. Fed. Reserve Bank of Chi.*, 586 F. Supp. 106, 109 (N.D. Ill. 1984)). "To defeat even summary judgment, plaintiffs must allege some facts 'establishing a reasonable inference that the defendant's proffered explanation is unworthy of credence.'" *Clifton Terrace Assoc. v. United Techs. Coop.*, 929 F.2d 714, 722 (D.C. Cir. 1991); see also *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (plaintiffs must allege some facts demonstrating that race was the reason behind defendant's actions). The court then concluded that the "[p]laintiffs failed to allege any facts supporting their charge that they were denied seating in the main dining room because of their race." *Jackson*, 850 F. Supp. at 55-56. The court was unconvinced that a restaurant with empty tables, which refused to seat African American patrons at a table, and instead offered space at the bar was evidence of racial discrimination even though there were no other African American customers or staff. *Id.* at 56.

differential treatment was motivated by race is often difficult to obtain in consumer discrimination cases because of the transitory nature of the events.³¹⁹ The cases usually involve a fleeting encounter with a sales clerk or security guard. Quite often, the plaintiff is alone or accompanied by close friends or relatives. Rarely are there objective witnesses to the events. The plaintiff is more likely to be successful if she is able to establish evidence of a store policy or practice of discrimination. But, most plaintiffs are left with having to persuade the court that their perception of the events is accurate and establishes discriminatory intent.

Related to the issue of plaintiff credibility is whether the acts are racial in nature. In responding to the defendant's challenge to the jury verdict in favor of the plaintiff and various court rulings, the court in *Hampton* wrestled with the question whether the security guard in that case was "racist."³²⁰ "Cooper testified that she believed Wilson's acts were racist because he was 'snotty.'"³²¹ Hampton testified that her belief that she was stopped by the guard because of her race was "based on her observation that he appeared angry, was 'red in the face,' and 'his whole attitude was how dare you question me this way.'"³²² The court reasoned that while it might have erred in admitting evidence concerning whether the guard was racist, Dillard's was permitted to cross-examine the witnesses and any such error did not entitle Dillard's to a new trial.³²³ The court concluded that given evidence corroborating plaintiff's story of mistreatment, "the self-serving testimony of plaintiff and Cooper on this issue had no material effect on the jury."³²⁴ Hampton may have relied on her personal cumulative experiences with racism in interpreting the events, as well as the shared stories of others. These courts give little weight to or fail to "take judicial notice" of, the fact that African Americans' experience with racism makes them uniquely qualified to interpret and identify conduct that is a result of anti-black sentiment.³²⁵

319. See Ambinder, *supra* note 147, at 347 (noting the transitory nature of taxi cab discrimination against African American passengers).

320. See *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1271-72 (D. Kan. 1998). Dillard's asserted that "the Court abused its discretion because it admitted without sufficient foundation lay testimony that Wilson was racist." *Id.* at 1272.

321. *Id.*

322. *Id.* at 1271-72.

323. *Id.* at 1272. In so noting, the court acknowledged that "the credibility of the opinion testimony and the weight to be given it are questions for the jury." *Id.* (citing *Brown v. McGraw-Edison, Co.*, 736 F.2d 609, 616 (10th Cir. 1984)).

324. *Id.* In *Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341 (1st Cir. 1995), the court noted that despite the fact that observations that certain witnesses were unfriendly and acted angrily were compatible with race-based animus, there was no foundation for such an inference. *Id.* at 347.

325. See *Brown et al.*, *supra* note 24, at 1514-15.

The disbelief that seems to follow claims of race-based treatment in stores is inconsistent with sociological data that indicates that middle-class blacks "often evaluate a situation carefully before judging it discriminatory and taking additional action."³²⁶ 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."³²⁷ These evaluations are based on past experiences both real and vicarious.³²⁸

In light of the lack of weight given to plaintiffs' perceptions, it may be difficult for plaintiffs to accumulate objective evidence concerning racism that may be useful in establishing consumer discrimination claims.³²⁹ Contemporary racism often lacks the overt nature that has often been attributed to racist behavior. "Today, racists 'have learned to express themselves in ways that appear to be nonracist, in ways that appear to be tolerant.'"³³⁰ Expert testimony concerning racial stereotypes and assumptions, the subtle ways in which racism is manifested, and its ubiquitous nature might help fact-finders interpret underlying facts at trial.³³¹ Expert witness testimony on "rape trauma syndrome," "battered woman's syndrome,"³³² and cultural defenses to crimes have become accepted in many instances. Expert testimony on identifying racism would be similarly helpful. Although many of us believe that we understand the nature and character of racism, "lay people do not know much about cognitive psychology," "of the overwhelming evidence of widespread discrimination,"³³³ or of its cumulative effects. Expert witness testimony could provide objective information about the manifestations of racism and help to

326. Feagin, *supra* note 1, at 103, 108. "We have seen in the previous incidents some tendency of blacks to assess discriminatory incidents before they act." In fact, blacks "may be more practiced and perhaps more flexible in coping with [racial] stress[es]." Plummer & Slane, *supra* note 18, at 312.

327. Feagin, *supra* note 1, at 109.

328. See Feagin, *supra* note 1, at 103.

329. See Brown et al., *supra* note 24, at 1515.

330. Josh Richman, *Expert's Testimony Helps Win Bias Case, Criteria for Racism Outlined to Jurors*, OAKLAND TRIB., Oct. 7, 2000 (Sociology Professor David Wellman provided expert testimony on decoding hidden racism on behalf of the plaintiff in a successful employment discrimination suit. The plaintiff's attorney noted that "the challenge of this case [was that]—there was absolutely no direct evidence of race, religious or national origin discrimination" . . .).

331. See Brown et al., *supra* note 24, at 1515. But note that the authors go on to state that, "[w]e offer expert testimony as the least desirable alternative because the use of experts can be time consuming and costly at both the pretrial and trial stages of litigation." Brown et al., *supra* note 24, at 1517. The authors prefer a jury instruction on cognitive stereotyping. See Brown et al., *supra* note 24, at 1517. Also, expert witness testimony only becomes useful if the plaintiffs survive summary judgment. See Brown et al., *supra* note 24, at 1518.

332. See Brown et al., *supra* note 24, at 1515.

333. Brown et al., *supra* note 24, at 1515; see Feagin, *supra* note 1, at 109.

interpret ambiguous events. Such testimony would assist the fact finder in identifying inconsistencies in the treatment of people of color because of their race.

D. Black Consumers and Creditworthiness

Differential treatment of black consumers may be rooted in perceptions of a lack of "creditworthiness." For example, a St. Charles, Missouri Wal-Mart recorded the race of its customers on the checks received in payment for goods.³³⁴ Cashiers stamped the back of the check with a rubber stamp, which included a designation of the sex and race of the customer writing a check.³³⁵ Based on their observations, cashiers wrote a "B" on the back of checks received from a black customer, a "W" for a white customer, an "H" for an Hispanic customer, and an "A" for an Asian customer.³³⁶ In dismissing the plaintiffs' claims for relief under Sections 1981 and 1982 of the Civil Rights Act, the court asserted that because the cashiers recorded the race of all customers who paid by check, "[t]here was no evidence that black customers who paid by check were treated differently than white customers who paid by check."³³⁷ Nor was evidence presented that the store refused to complete a transaction with a customer because of her race.³³⁸

In addition to adopting the construction of Section 1981 that ignores racially based pre and post contractual behavior, the court rejected the plaintiffs' contention that the system of "identification of race is a precursor to discrimination" stating that the plaintiffs failed to explain how the practice could lead to discrimination "when the identification of the customer's race occurred at the close of the retail transaction."³³⁹ While acknowledging the history of race discrimination in America, the court reduced that history to a matter of emotion. It asserted that given that history, "it is understandable . . . that a black customer may become more upset that [sic] a white customer when her race was recorded on the back of a check."³⁴⁰ There is little recognition by the court that racial

334. See *Roberts v. Walmart Stores, Inc.*, 769 F. Supp. 1086, 1087-88 (E.D. Mo. 1991).

335. *Id.* at 1088.

336. *Id.* at 1088-89. Cashiers did not record the race of customers who paid with cash or credit cards. *Id.* at 1089 n.4.

337. *Id.* at 1089. The plaintiffs' claims that their rights under the Thirteenth Amendment and Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2000), were violated were dismissed for failure to state a claim. See *Roberts v. Walmart Stores, Inc.*, 736 F. Supp. 1527, 1529 (E.D. Mo. 1990). The district court later granted defendant's motion for summary judgment dismissing plaintiffs' claims for relief under Sections 1981 and 1982. See *Roberts*, 769 F. Supp. at 1090.

338. *Roberts*, 769 F. Supp. at 1088-89.

339. *Id.* at 1090.

340. *Id.*

designations have been an historical means of subjugating blacks and that the effects of doing so do not equally affect whites. The court adopted the framework that blacks are oversensitive about race, reducing the effect to an emotional harm and minimizing the cumulative impact of racial stresses.

Such a narrow construction of Section 1981 that exempts from scrutiny pre and post transaction activity facilitates the dismissal of many cases. Plaintiffs' claims that they were subjected to differential treatment but not prevented from completing an immediate and specific purchase are typically found to be beyond the scope of Section 1981, which would include the right to browse in a store without being subjected to enhanced surveillance. A broader construction of the Civil Rights Act would permit plaintiffs to present their facts to a jury.

E. The Appropriateness of Summary Judgments in Civil Rights Cases

Consumer discrimination cases brought under Section 1981 frequently are dismissed on summary judgment grounds.³⁴¹ This is true despite the view that "[c]ases involving major constitutional or civil rights acts questions . . . are not very suitable for summary judgment."³⁴² The moving party, in a motion for summary judgment, must establish that "there is an absence of evidence to support the nonmoving party's case."³⁴³ In Section 1981 cases, defendants most often assert that plaintiffs' claims do not fall within the ambit of the Civil Rights Act in that they either did not attempt or were not denied the opportunity to make, enforce or secure the performance of a contract for goods or services.

341. Under Federal Rule of Civil Procedure 56, summary judgments are granted in cases where "there is no genuine issue as to any material fact and . . . [the] moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 317 (1986) (Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). The evidence and inferences when drawn must be construed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *see also Roy L. Brooks, Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 105 (1994) (The author notes that "[f]ederal courts have applied the federal pleading rules in a manner that has resulted in the early dismissal of civil rights cases." The article further notes that the result of this is subjecting Section 1983 claims to a heightened pleading standard.); *Brown et al., supra* note 24, at 1489-90 ("The growing number of summary judgments and directed verdicts in favor of defendants in Title VII cases indicates judicial antipathy for finding that employer behavior has been motivated by racial prejudice.").

342. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2732 (3d ed. 2000). The authors note, however, that nothing in Rule 56 or in the Advisory Committee Note provides for "the special handling of a motion for summary judgment in complicated cases or suits that involve important public issues." *Id.*

343. *Celotex Corp.*, 477 U.S. at 324.

Defendants offer as a "legitimate non-discriminatory reason" for any alleged interference with the right to complete a purchase that there was a suspicion of shoplifting and that any surveillance was not due to the customer's race.

Viewing Section 1981 broadly enough to include pre and post transaction activities in a retail setting would defeat defendants' attempts to prematurely dismiss Section 1981 claims. Finding that unwarranted heightened surveillance and stops and searches were covered under the Civil Rights Act would deflate attempts to assert that many of these claims may be decided as a matter of law because the remaining issue in most of these cases would be whether the defendant's actions were based on the customer's race.

Whether a particular plaintiff was stopped while in a retail setting because of her race necessarily "presents an inquiry into the state of mind" of the defendant and its employees and "claims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication."³⁴⁴ Consumer discrimination cases would then necessarily involve genuine issues of material fact unsuitable for determination on summary judgment.³⁴⁵ Questions of fact would remain as to whether plaintiffs were interrupted in their attempts to complete a transaction, and whether they were subject to increased surveillance, stopped, and searched because of their race and not because of a legitimate suspicion of shoplifting.

344. WRIGHT ET AL., *supra* note 342, at § 2732.2; see *Perry v. Burger King Corp.*, 924 F. Supp. 551 (S.D.N.Y. 1996); *Jackson v. ABC Liquors*, 983 F. Supp. 1388 (M.D. Fla. 1997).

345. WRIGHT ET AL., *supra* note 342, at § 2732.2. "[D]espite the general presumption against using summary judgment to resolve the largely factual questions concerning discriminatory intent, . . . it is possible for the defendant to present such strong evidence of a nondiscriminatory rationale that summary judgment is warranted." *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 950 (11th Cir. 1991) (citing *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 596 (11th Cir. 1987); *Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984)). "As the plaintiff argues, seldom is there direct evidence of intentional racial discrimination." *Brown*, 939 F.2d at 950 (citing *Grigsby*, 821 F.2d at 595) ("McDonnell Douglas-Burdine test is designed to ease burdens on discrimination plaintiffs when direct evidence of discrimination is lacking."). In *Perry v. S.Z. Restaurant Corp.*, No. 95 CIV.5424(RO), 1998 WL 778394 (S.D.N.Y. Nov. 6, 1998), the plaintiff alleged racially discriminatory access to restrooms and stated a cause of action under Section 1981. *Id.* at *1. The plaintiff alleged that he was told the restrooms were not in working order, denied their use and subjected to "inappropriate racial epithets." *Id.* Even though the defendant responded to plaintiff's allegations by asserting that plaintiff was denied access to the restroom because it was, in fact, out of order, and two police officers who were called to the restaurant at the time of the incident both submitted sworn declarations that the restrooms were out of order, the court denied defendant's motion for summary judgment. *Id.* The court reasoned that "[a]ssessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." *Id.* at *2 (quoting *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996)).

Under the current constrictive reading given Section 1981, most courts not only view many of plaintiffs' claims as beyond the scope of the Act, but view plaintiffs' interpretations of the facts with some skepticism. Faced with differing accounts of whether and how plaintiffs were followed, stopped, and searched by store personnel, courts, with little explanation, appear to discredit plaintiffs' accounts of the events in favor of the defendant.³⁴⁶ Allegations of being treated differently on the basis of race in retail settings—of being followed, stopped, searched, and in other ways treated differently from other consumers—are often viewed as isolated incidents involving maverick security guards or salespersons.³⁴⁷ Moreover, little credence is given to the cumulative experience of individual plaintiffs in experiencing and interpreting discrimination.³⁴⁸ Viewing these incidents as aberrational, as opposed to evidence of a pattern or policy of discrimination against customers based on race, makes it difficult, if not impossible, for plaintiffs to survive a motion for summary judgment on a Section 1981 claim.³⁴⁹

Resolving consumer discrimination cases on summary judgment is problematic because many of these cases raise credibility issues that are preferably submitted to a jury.³⁵⁰ In addition, these cases are of great public

346. See Lawrence III, *supra* note 26, at 380 ("Judges are not immune from our culture's racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs. . . . [T]his difficulty inheres in all judicial interpretation."). Professor Davis notes that minority jurors sense that "racial stereotypes and assumptions of white superiority permeate society to create cognitive drifts in the direction of findings of black culpability and white victimization . . . black immorality and white virtue . . . blacks careless and in need of control and whites in control and controlling, blacks as social problems and whites as valued citizens." Davis, *supra* note 17, at 1571. According to Professor Davis, these racial dichotomies infiltrate the judicial system. Davis, *supra* note 17, at 1571; Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 371 (1996) (racial stereotypes about defendants and victims may influence jurors and legal decisionmakers).

347. See *Lewis v. J.C. Penney Co.*, 948 F. Supp. 367, 372 (D. Del. 1996).

348. FEAGIN & SIKES, *supra* note 9, at 53. "Years of cumulative experiences gives these middle-class black Americans the 'second eye' . . . the ability to sense prejudice or discrimination . . . however, many whites accuse blacks of being paranoid in seeing racism in such incidents." FEAGIN & SIKES, *supra* note 9, at 53. Compare this with the view that many judges may be subject to unconscious stereotypes and prejudices. See Brown et al., *supra* note 24, at 1517.

349. See *Lewis*, 948 F. Supp. at 372 (The court asserted that the plaintiff had "not alleged, or provided any facts suggesting J.C. Penney had a discriminatory policy. . . . Section 1981 does not provide that remedy.").

350. See *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1061 (D. Kan. 1997). As an example, in granting defendant's motion for summary judgment on the false imprisonment claim, the court made a point of noting that not only did the guard have probable cause to stop Hampton and Cooper, but that there was no evidence to suggest that the security guard's statement of events was not credible. The court

import and deserve to have a full and fair hearing before an empaneled jury. Short-circuiting the process through summary judgment does not allow community involvement in resolving these issues and inhibits the development of the meaning of the scope of the 1991 Amendment to Section 1981. In addition, there is the fear that all fact-finders, including judges, are susceptible to the effects of cognitive stereotyping, and "judges, being human, are prone to the same prejudices as the rest of us."³⁵¹

Hampton provides an example of the harms that result from allowing these claims to be prematurely dismissed. In *Hampton*, only the small question whether defendants prevented plaintiffs from redeeming a free coupon remained for trial. Yet, at trial, the jury clearly recognized the nature and extent of the harm. This is evident not only in the size of the award, but in the fact that the jury foreperson came up to Hampton at the end of the trial and kissed her on the forehead.³⁵²

In trying the coupon issue the jury was permitted to hear a wealth of information about the store's practice of engaging in disparate security measures. The jury was able to hear from former Dillard's security guards about what they perceived to be a store policy of targeting African American consumers and testimony of other Dillard's customers who had similarly experienced a pattern of discriminatory treatment. In addition, Hampton was given the opportunity to express her rage and pain as a result of the treatment she received while shopping.³⁵³ It was clear to the jury, and even to the judge by this point, that the

accepted without question the guard's conclusion that he had probable cause to stop Cooper because she was "looking toward the ceiling and looking around." Brief of Appellee Hampton and Cross-Appellant Cooper at 22, *Hampton v. Dillard Dep't Stores, Inc.*, 985 F. Supp. 1055, 1061 (D. Kan. 1997) (No. CIV.A.97-2182-KHV). Furthermore, the court noted that although the plaintiffs argued that a jury issue existed as to the guard's credibility that, "plaintiffs' evidence, taken together, is insufficient to establish a reasonable inference that Wilson's testimony is unworthy of belief." *Id.* Despite Cooper's refutation of the guard's conclusion, the court determined the credibility issue in the guard's favor. Plaintiffs' claim that their race and not their conduct aroused the guard's suspicion and triggered the heightened surveillance and search was summarily disposed of by the judge. The willingness of the court to accept the guard's recitation of the facts makes it nearly impossible for the plaintiffs to establish that the guard's suspicion of plaintiffs' conduct was a mere pretext or coverup for race discrimination. See *Hampton*, 985 F. Supp. at 1061.

351. See Brown et al., *supra* note 24, at 1515.

352. See *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 2d 1256, 1276 (D. Kan. 1998) (The court concluded that the foreperson's conduct was "not evidence of passion and prejudice.").

353. The court noted that "plaintiff gave eloquent and emotionally moving testimony that Wilson disgraced and humiliated her, in front of her children, that she was too emotionally distraught to drive and that she had to call her husband for a ride home. Immediately after the incident she was crying and she was so upset that she could not write out a customer comment card, and a Dillard's employee filled it out for her. She

harms that result from discriminatory treatment while shopping result not from the inability to complete a transaction or enter into a contract with the store, but from the same rage, humiliation, and pain that employees feel while working in a racially or sexually hostile work environment.³⁵⁴ However, plaintiffs suing retailers and security guards are not always successful in establishing the existence of racial bias and differential treatment.³⁵⁵ Establishing intentional discrimination and the absence of probable cause for the stop and search are difficult hurdles for plaintiffs to overcome.³⁵⁶ Absent Section 1981 relief, plaintiffs are left, therefore, seeking recovery under a patchwork of state statutory and common law claims.

F. Other Means of Federal Statutory Protection

Although alternative means of recovery are possible under Sections 1982, 1983, and 2000a of the Civil Rights Act, these provisions do not provide more effective relief than that available under Section 1981, nor are they well suited for retail discrimination claims in most cases. Section 1982 of the Civil Rights Act provides, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."³⁵⁷ Section 1982 can be applied to lost contractual rights, but it is applied no more broadly than Section 1981.³⁵⁸

testified that 'I don't feel that my life will ever be the same.'" *Id.* at 1275-76 (citation omitted).

354. Members of the jury were obviously moved by Hampton's assertions. *See supra* text accompanying note 352.

355. *See* Eric Siegel, *Jury Finds Hecht's Not Liable in Civil Suit; Teen Sued After Security Accused Him of Shoplifting*, BALT. SUN, Jan. 13, 2000, at 3B (In rejecting the teenager's claim that he was unlawfully detained and accused of shoplifting by Hecht's security guards, the jury found that the security guards had "probable cause" to stop the teenager.).

356. Many states have statutes that exonerate retailers from liability if "probable cause" existed for the search. ALA. CODE § 15-10-14 (1985); ARIZ. REV. STAT. ANN. § 13-1805 (West 2001); COLO. REV. STAT. ANN. § 18-4-407 (2000); DEL. CODE ANN. tit. 11, § 840(c) (1995); IND. CODE ANN. § 35-33-6-2 (Michie 2000); KAN. STAT. ANN. § 21-3424 (1995); MINN. STAT. ANN. § 629.366 (West Supp. 2001); N.J. STAT. ANN. 2C:20-11 (West Supp. 2000); N.Y. GEN. BUS. § 218 (McKinney Supp. 2001); S.C. CODE ANN. § 16-13-140 (Law. Co-op. 1985); UTAH CODE ANN. § 78-11-18 (1996).

357. 42 U.S.C. § 1982 (1994 & Supp. 2000). Courts generally treat Sections 1981 and 1982 the same. *See* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973); Hampton v. Dillard Dep't Stores, Inc., 985 F. Supp. 1055, 1059 n.3 (D. Kan. 1997) ("[T]o the extent plaintiffs seek relief for defendant's interference with their right to purchase personal property they could have sought relief under 42 U.S.C. § 1982.")

358. *See* Roberts v. Walmart Stores, Inc., 736 F. Supp. 1527, 1529 (E.D. Mo. 1990); Battle v. Dayton-Hudson Corp., 399 F. Supp. 900 (D. Minn. 1975).

Section 1983 poses a significant hurdle to its use in this context.³⁵⁹ The Supreme Court has held that, "to state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and the laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."³⁶⁰ Although it is not necessary to establish that the defendant is an officer of the state, a plaintiff must prove that the private actor is "jointly engaged" with a state official in the alleged violation.³⁶¹ Consumer discrimination and customer profiling usually involve private store owners, salespeople, and security guards. Rarely are these private individuals acting in concert with state officials to profile, search, and stop African American customers.³⁶²

Nor are retail stores public accommodations for the purposes of providing protection to consumers under Section 2000a of the Civil Rights Act.³⁶³ Places of public accommodation include hotels, motels, restaurants, gas stations, theaters, concert halls, and sports arenas.³⁶⁴ Courts reason that Congress did not intend to cover every type of business establishment in the Civil Rights Act, but

359. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994 & Supp. 2000).

360. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Allen v. Columbia Mall, Inc.*, 47 F. Supp. 2d 605, 609 (D. Md. 1999).

361. *See Dennis v. Sparks*, 449 U.S. 24 (1980); *Cruz v. Donnelly*, 727 F.2d 79 (3d Cir. 1984) (suspected shoplifter who was strip-searched by police on orders of the store managers failed to state a Section 1983 claim); *Allen*, 47 F. Supp. 2d at 609.

362. *See Cruz*, 727 F.2d at 79 (suspected shoplifter strip-searched by police on orders of the store managers failed to state a Section 1983 claim); *Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978); *Allen*, 47 F. Supp. 2d at 610 (plaintiff's Section 1983 claim failed because the security guards who stopped and searched the plaintiffs were private security guards); *Chapman v. Acme Mkts., Inc.*, No. CIV.A.97-6642, 1998 WL 103379, at *1 (E.D. Pa. Feb. 24, 1998).

363. Section 2000a provides: "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a (1994 & Supp. 2000); *see Singer, supra* note 22, at 1286, 1423.

364. 42 U.S.C. § 2000a(b) (1994 & Supp. 2000) (establishments that serve the public are places of public accommodation if their "operations affect commerce or if discrimination or segregation by it is supported by State action"). The Act includes eating establishments even if they are "located on the premises of any retail establishment" but does not include the retail stores themselves. 42 U.S.C. § 2000a(b)(2) (1994 & Supp. 2000).

instead focused on the “most flagrant and troublesome areas of discrimination” with the expectation that by so doing “the less bothersome would disappear through voluntary action and public effort.”³⁶⁵ Professor Joseph Singer persuasively argues that public accommodations laws should expressly include a prohibition against exclusion from retail stores on the basis of race.³⁶⁶ Furthermore, he resists the notion that arguments explaining the exclusion of retail stores from the statute outweigh those in favor of inclusion.³⁶⁷ In so doing, he asserts that prior to the Civil War public businesses had a duty to serve the public and that the right to exclude patrons began only after the Civil War, when civil rights were extended to African Americans.³⁶⁸ While Professor Singer’s arguments are compelling and persuasive, the issue of retail discrimination on the basis of race goes beyond exclusion. Even if the public accommodations statutes were interpreted to include retail establishments and, therefore, to require equal access to retail establishments, it is not clear that the statute would cover and provide relief to plaintiffs who suffer other race based behaviors. While there have been contemporary examples of retail customers being excluded, most likely because of their race, most recent claims of retail discrimination involve differential treatment, including being subjected to surveillance, stopped, questioned, and searched. In addition, those plaintiffs who have been excluded have been so after being accused of shoplifting. Therefore, retail establishments would argue that they were excluded for cause. It is not clear that the “full and equal enjoyment” language of Section 2000a would extend to the right to browse in retail settings. However, until courts adopt this approach, consumer discrimination plaintiffs are limited in their ability to rely on Section 2000a.

365. *United States v. Baird*, 865 F. Supp. 659, 661-62 (E.D. Cal. 1994), *rev’d*, 85 F.3d 450 (9th Cir. 1996) (quoting *Cuevas v. Sdrales*, 344 F.2d 1019, 1021 (10th Cir. 1965)) (In a case in which five defendants were charged with conspiracy against civil rights, the court reviewed whether a 7-Eleven retail convenience store is a public accommodation under the meaning of Section 2000a of Title II of the Civil Rights Act.). Nor is Congress “obligated to solve all problems at once.” Singer, *supra* note 22, at 1417. In addition, Singer argues that the statute could represent a compromise between competing interests and the majority of categories concern the right to travel. See Singer, *supra* note 22, at 1417-19.

366. See Singer, *supra* note 22, at 1295.

367. See Singer, *supra* note 22, at 1415-21. Arguing that the statute should be interpreted to include retail establishments, Singer asserts *inter alia*, that the statute arguably is ambiguous and could represent an illustrative rather than an exhaustive list of categories of establishments to be included in the Act; that the language can be read more broadly than it currently is; and that “statutes should not be interpreted literally where this will defeat the manifest purposes underlying the statute.” Singer, *supra* note 22, at 1421.

368. See Singer, *supra* note 22, at 1293.

*G. Finding Protection From Consumer Discrimination
Under State Law*

It is important to note that states may provide both statutory and common law relief for potential retail discrimination plaintiffs. A number of states have civil rights or human rights statutes that mimic the language of the Civil Rights Acts.³⁶⁹ Some of these statutes are drafted more broadly than the Civil Rights Acts and extend public accommodation protections to retail store consumers.³⁷⁰ State law may also provide for retailer immunity if there was probable cause to believe that the accused was stealing merchandise from the store.³⁷¹

Plaintiffs left without statutory recourse instead must rely upon state common law claims such as false imprisonment, defamation, assault, negligent

369. See, e.g., CAL. CIV. CODE §§ 51-52 (West 1982 & Supp. 2001) (The California Unruh Civil Rights Act prohibits discrimination in business on the basis of sex, race, color, religion, ancestry, and disability.); D.C. CODE ANN. §§ 1-2501 to -2556 (1999) (The Washington D.C. Human Rights Act prohibits direct discrimination on the basis of, *inter alia*, sex, race, age, and religion.); 775 ILL. COMP. STAT. ANN. §§ 68/1-102 (West 1993) (The Illinois Human Rights Act secures "for all individuals . . . the freedom from discrimination against any individual because of, [*inter alia*,] his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap."); FLA. STAT. ANN. §§ 760.01-.11, 509.092 (West 1997 & Supp. 2001) (The Florida Civil Rights Act of 1992 prohibits discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.); MICH. COMP. LAW § 37.2101 (1985 & Supp. 2000) (The Michigan Civil Rights Act contains a prohibition against discrimination in places of public accommodations, which includes businesses open to the public. Violations under the Act include the denial of services to customers based on race but the Act does not include stopping and searching customers.); 43 PA. CONS. STAT. ANN. § 951 (West 1991 & Supp. 2000) (The Pennsylvania Human Relations Act prohibits discrimination because of, *inter alia*, race, color, religious creed or national origin in, *inter alia*, public accommodations.); see also *Laroche v. Denny's, Inc.*, 62 F. Supp. 2d 1366 (S.D. Fla. 1999); *McCaleb v. Pizza Hut of Am., Inc.*, 28 F. Supp. 2d 1043, 1048-49 (N.D. Ill. 1998); *Clarke v. K Mart Corp.*, 495 N.W.2d 820, 822 (Mich. Ct. App. 1992).

370. See N.J. STAT. ANN. §§ 10:5-4 to -12 (West 1993 & Supp. 2000) (defining "public accommodations" to include all retail stores and prohibits discrimination in retail stores and other places of public accommodation based on race, creed, ethnicity, gender, and sexual orientation). Claims under the New Jersey statute can be brought under a disparate treatment or disparate impact theory. See James L. Fennessy, *New Jersey Law and Police Response to the Exclusion of Minority Patrons from Retail Stores Based on the Mere Suspicion of Shoplifting*, 9 SETON HALL CONST. L.J. 549, 573 (1999). "There are no published opinions on the issue of whether New Jersey law and the LAD prohibit a retail store from summarily excluding individual minority shoppers based on a mere subjective suspicion of shoplifting." *Id.* at 575.

371. See, e.g., Pennsylvania Retail Theft Act, 18 PA. CONS. STAT. ANN. § 3929(d) (West 1991 & Supp. 2000); *Ackaa v. Tommy Hilfiger Co.*, No. CIV.A.96-8262, 1998 WL 136522, at *6-7 (E.D. Pa. Mar. 24, 1998).

training and supervision, and negligence.³⁷² While each of these causes of action provide viable avenues for obtaining monetary relief,³⁷³ they fail to provide a means of articulating the true nature of the harm.³⁷⁴ By suppressing or marginalizing the racial aspect of the claims, reliance on state law claims perpetuates the belief that profiling customers is an appropriate means of protecting a business.

Relying upon common law unfair practices, false imprisonment, and other state claims for relief ignores the centrality of race in determining the retailer's actions. While some plaintiffs have been able to recover in state court under these and other state law claims, they have been denied the opportunity to have the racial component of their harms recognized and responded to. Filing a lawsuit is a public declaration of harms that seeks out public reconciliation of those wrongs. The absence of a claim that allows plaintiffs to articulate the racial nature of their pain inhibits that public resolution. When plaintiffs are forced to rely on common law claims for relief, the harms that result from consumer discrimination become personalized and individualized. The lawsuits become refocused on whether the events were caused by "bad actors" making poor choices or by the inability of the plaintiff to correctly assess the nature of the situation. Under either interpretation, the racial and institutional components of the allegations become marginalized and confined to a private space that denies them the imprint of legitimacy created by litigation.

VI. CONCLUSION

An interpretation of Section 1981 that places the heightened surveillance and unjustified stops and searches of African American shoppers because of their race beyond the reach of the Civil Rights Act too narrowly constricts its meaning. A more expansive reading of the Act that includes the right to shop

372. See *Allen v. Columbia Mall, Inc.*, 47 F. Supp. 2d 605, 607 (D. Md. 1999). The plaintiffs sued the Columbia Mall for, *inter alia*, false imprisonment, defamation, assault, negligent training and supervision, and negligence. To maintain an action for false imprisonment, plaintiffs must establish that they were restrained of their liberty by words or acts that they feared to disregard and that there was no legal excuse for the restraint. *Id.* Most jurisdictions provide a "merchant's defense" to merchants who are attempting to protect their goods. *Id.*; W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984).

373. The plaintiff in the Eddie Bauer case recovered against the defendant at trial on the ground of false imprisonment. See Boulware, *supra* note 133, at A1. The jury rejected claims that the differential treatment was based on race. Brown & Pressler, *supra* note 112, at C01. But see *Hampton v. Dillard Dep't Stores, Inc.*, 18 F. Supp. 1256, 1276 (D. Kan. 1998) (dismissing plaintiffs' claim for false imprisonment).

374. In addition, the absence of federal statutory protection frequently removes the possibility of a federal forum for litigating the claims. Absent federal question jurisdiction plaintiffs would have to rely on establishing diversity.

and browse unmolested would be more consistent with the intent of the original Act and the 1991 Amendment to Section 1981. Further, it would recognize the significant and cumulative harms that impact African Americans as a result of consumer racism.³⁷⁵ Doing so would discourage the overuse of summary judgments to dismiss these matters and would provide greater opportunities for jury trials. In addition, if these lawsuits were tried, expert testimony about the nature and effects of racism would help fact-finders reach fair and just decisions in these cases. Presenting these cases to a jury, along with the inclusion of expert testimony, would provide a community airing of the issue of consumer discrimination that should increase awareness of the significance and pervasiveness of the problem. In fact, there should be a presumption of the inappropriateness of summary judgments or other pre-trial dismissals in these and other civil rights actions.³⁷⁶

375. In taking a cultural perspective on corporate misconduct, Professors John M. Conley and William O'Barr conclude that the kind of consumer discrimination that results in price discrimination is a product of individual decision-making and not corporate culture. See Conley & Barr, *supra* note 141, at 19-20 (examining three separate studies of corporate wrongdoing: Professor Ayres' car dealer discrimination study, Archer Daniels Midland, and the tobacco litigation documents). According to the authors, these actions are based on cultural resources and because of this the problem lies in society and, therefore, is not resolvable through the legal system. See Conley & Barr, *supra* note 141, at 11-12, 19-20. Non-legal solutions might include greater reliance on diversity training for sales clerks and security guards. See Angie Brunkow, *Racial-Bias Complaints Drop at Crossroads Mall*, OMAHA WORLD-HERALD, Apr. 12, 1999, at 1 (complaints about racial discrimination at the mall led to diversity training for security officers, which led to a drop in complaints, but some assert that discrimination still takes place).

376. In addition to strengthening support for these actions under the Civil Rights Act, expanding other consumer protection laws, including the Federal Trade Commission Act, the Unfair Trade Practices Act, and the Uniform Deceptive Trade Practices Act, to include differential treatment of consumers in retail settings on the basis of race should also be explored.

