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Article

**\*1 SHOPPING WHILE BLACK: APPLYING 42 U.S.C. § 1981 TO CASES OF CONSUMER  
RACIAL PROFILING**

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**Abstract:** This Article describes the practice of Consumer Racial Profiling (CRP) by attempting to quantify it and to identify its causes and its effects. The author presents the case against Cracker Barrel Old Country Stores to illustrate the nature of modern-day consumer discrimination. The Article identifies the applicable laws and assesses the likelihood that plaintiffs will prevail under each theory. Concluding that § 1981 of the Civil Rights Act of 1866 offers CRP plaintiffs the best chance for recovery, the Article includes an analysis of the § 1981 claims against Cracker Barrel based on the case law developed since 1990. Noting the reasons why few CRP plaintiffs succeeded in cases of consumer harassment, the Article concludes that the federal courts must construe the statute more broadly to ensure, as set forth in a piece of civil rights legislation from 1866, "that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."

INTRODUCTION

In July 1999, Mr. and Ms. Pilson, both African Americans, visited the Suwanee, Georgia Cracker Barrel with four friends. Once they were seated, they waited approximately forty-five minutes for service, at which point Mr. Pilson complained to the manager. While waiting, they noticed that white customers who had arrived after them were already being served their meals. After Mr. Pilson complained, a white server, Sandy, came to their table and took the party's food and drink orders. The Pilsons and their friends waited an additional forty-five minutes for their food to arrive. After they received their food, Mr. Pilson asked Sandy for more napkins. In response, without speaking, \*2 Sandy threw the napkins onto their table. Shortly thereafter, Sandy walked by the Pilsons' table with a tray of water and dropped a glass, soaking Mrs. Pilson and one of her friends. She said nothing and kept walking. [\[FN1\]](#) Was this poor treatment aimed at the Pilsons because they are black? White Americans are largely unaware of their privileged status in the marketplace. Most of the time, white consumers can run errands, shop, dine out, and take in a show with the expectation of at least minimally appropriate service in the establishments where they spend their money. However, African-American consumers' patronage and money are somehow regarded as less valuable than that of the white consumer. [\[FN2\]](#) In fact, "shopping while black" involves some of the same risks associated with the better-known phenomenon of "driving while black." [\[FN3\]](#) Shoppers of color are viewed

with suspicion and, as a result, \*3 they are more likely to be watched, followed, harassed, and even denied service in the course of their daily roles as consumers.

[FN4]

The issue of racial profiling in retail stores gained national attention during the 1990s following two ABC television broadcasts ("True Colors" [FN5] on PrimeTime Live and an ABC News 20/20 investigative report) [FN6] and some highly-publicized lawsuits involving well-known establishments such as Eddie Bauer, [FN7] Dillard's Department Stores, [FN8] and Denny's Restaurants. [FN9]

\*4 Consumer Racial Profiling (CRP) [FN10] is defined as any type of differential treatment of consumers in the marketplace based on race or ethnicity that constitutes a denial or degradation in the product or service offered to the consumer. [FN11] In a retail environment, CRP can take many forms, ranging from overt or outright confrontation to very subtle differences in treatment, often manifested in forms of harassment. [FN12] Outright confrontation includes verbal attacks, such as shouting racial epithets, [FN13] and physical attacks, such as removing customers from the store. [FN14] Customer harassment includes slow or rude service, required pre-payment, surveillance, searches of belongings, [FN15] and neglect, such as refusing to serve African-American customers. [FN16]

\*5 This Article examines the phenomenon of Consumer Racial Profiling through a detailed case study of recent litigation against Cracker Barrel Old Country Stores. Part I discusses the prevalence of CRP and discusses some of its causes and consequences. Part II briefly reviews various laws, including § 1981 of the Civil Rights Act of 1866, that may provide redress to CRP plaintiffs, like the Pilsons. Part III considers a probable judicial approach to plaintiffs' claims against Cracker Barrel Old Country Stores under § 1981 of the Civil Rights Act of 1866. The Article concludes that a narrow construction of the statute is inconsistent with § 1981's plain language and inimical to its goals. Rather, a broad interpretation of the statute, one that prohibits racial harassment, must be adopted to achieve equality in the market-place.

## I. CRP: PREVALENCE, CAUSES, AND CONSEQUENCES

The social revolution of the 1960s fostered an increased awareness of the black experience in the United States. It cannot be disputed that significant efforts have been made since then to eradicate overt discrimination in most sectors of American society. Nevertheless, a pernicious breed of racism persists. Today, discriminatory conduct masquerades as legitimate business practice. Perhaps more damaging to the victim's psyche, subtle racial profiling defies detection and remains largely unchecked.

### A. Quantifying CRP

Anecdotal evidence reveals that CRP in the retail sector is alive and well at the beginning of the twenty-first century. [FN17] "There can hardly be a black person in 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." [FN18]

\*6 While there are no reliable data to confirm the regularity of consumer discrimination, a number of studies [FN19] provide some insight into the frequency with which African Americans experience this phenomenon. Although studies that rely on consumer self-reports admittedly fall short as exact measures, such surveys have some value in gauging the frequency of discrimination. [FN20] In 1997 a Gallup study asked African Americans whether they had "encountered discrimination" in the last 30 days. [FN21] Of those surveyed, 45% suffered at least one discriminatory experience, 30% said they had experienced discrimination while shopping, and 21% encountered discrimination while dining out (defined to include visiting bars, theaters, and other entertainment). [FN22]

Economist Peter Siegelman estimates from survey evidence that in everyday transactions, such as dining out and shopping, the probability of discrimination in any

given restaurant visit or shopping trip appears to be roughly one to five percent.

[FN23] Siegleman further qualifies this statistic as follows:

Despite the relatively low probability of encountering discrimination on any given shopping trip or restaurant visit, the frequency with which any individual experiences discriminatory treatment is relatively high: 10 to 30 percent of blacks report one or more discriminatory experience in a given month. This apparent paradox results from the fact that individuals do a lot of shopping and restaurant dining, so even though discrimination is relatively unlikely on any given trip, it is almost certain to occur if enough trips are taken. [FN24]

Professors Carol M. Motley of Howard University and Thomas L. Ainscough of the University of Wisconsin-Whitewater conducted a field \*7 audit study and found that in the retail industry, African Americans wait longer for customer service than whites of the same gender. [FN25]

Furthermore, a survey of 1,000 households revealed that African Americans are significantly more likely than white Americans to believe that there is racial discrimination in the marketplace. [FN26] Of those surveyed, 86% of blacks, compared to only 34% of whites, disagreed with the statement that all customers are treated the same in retail stores without regard to race. [FN27]

Lastly, judicial opinions contribute to an understanding of the scope of the problem of marketplace discrimination against African Americans. [FN28] The contribution is minimal, however, because the complaints filed are a "tiny and nonrandom fraction" of actual consumer discrimination. [FN29] Moreover, the cases that reach trial are a small and unrepresentative sample of the complaints filed. [FN30] Therefore, while they serve as an indicator, judicial opinions are similarly inexact in generating data on racial discrimination in the marketplace.

Despite the lack of precise data, there is a consensus among scholars that CRP is a pervasive fact-of-life for people of color in the United States today. [FN31] While efforts to level the playing field in the marketplace have been long neglected, the past decade marks a heightened focus on CRP by both scholars and commentators. Indeed, \*8 confronting consumer discrimination is perhaps the last frontier in dismantling traditional racial imbalances in our society.

## B. Causes of CRP

The literature suggests that overt and subconscious racism are the two primary causes of CRP. Several commentators identify overt racism as one of the fundamental reasons for which retailers discriminate against African-American customers. [FN32] Merchants operating under an "animus-based theory" treat African Americans differently because they dislike or even hate them. [FN33] White retailers may also wish to keep blacks "in their place." [FN34]

On the other hand, some statistical theories suggest that overt disparate treatment simply arises from a retailer's desire to maximize profits and minimize costs, and does not reflect animus towards a particular group. [FN35] A retailer who engages in "[r]evenue-based statistical \*9 discrimination" makes a presumption about the potential revenue he or she may receive from different types of customers and acts accordingly. [FN36] For example, some merchants cater to "the discriminatory preferences of customers who may ... be willing to pay a premium at exclusive restaurants, hotels, or clubs" to exclude blacks. [FN37] "Cost-based statistical discrimination" occurs when a merchant assesses the risks imposed by certain types of consumers. [FN38] In other words, some merchants target black shoppers because they perceive them to be shoplifters [FN39] or not creditworthy. [FN40]

Although much more difficult to identify and define, it is likely that many instances of CRP are based on "subconscious racism." [FN41] \*10 Unwittingly, some retailers make assumptions about their black customers based on stereotypes relating to the propensity of African Americans to commit crimes and their inability to pay for goods. [FN42] "Discrimination in modern society, frequently covert, unintended, and so often

fueled by ignorance and mistrust rather than by a conscious racist motive, is a much more complex phenomenon than the intentional model suggests." [\[FN43\]](#)  
The subconscious nature of modern-day racism creates an exceptional barrier to proving discrimination since few plaintiffs can meet the challenge of showing that a retailer's non-overt behavior was intentional discrimination. [\[FN44\]](#)

### C. The Consequences of CRP

CRP victims suffer economic harms in the form of opportunity costs, [\[FN45\]](#) increased search costs, and diminished shopping opportunities. [\[FN46\]](#) If shoppers of color pay the same prices and receive less in the **\*11** way of service or merchandise, they are cheated. [\[FN47\]](#) In addition, these customers may pay a "premium" for service in those shops that hold themselves out as being more willing to deal with shoppers of color. [\[FN48\]](#)

Most blacks compensate by proving themselves to be worthy shoppers, i.e., they sell themselves in order to be sold to. They dress up to go shopping in the hope that their appearance will convey the fact that they are both entitled to browse and capable of paying for any item they put their hands on. Some folks flash their credit cards or engage the salesperson in conversation designed to reveal the shopper's class position or sophistication regarding the product. Others will buy expensive goods they do not really want just to prove that they have been misjudged by a salesclerk. [\[FN49\]](#) Moreover, victims of CRP bear a psychological burden as a result of overt and subconscious discrimination. The repetitive nature of everyday consumer discrimination has a cumulative debilitating effect over the course of a person's lifetime. [\[FN50\]](#) Specifically, victims experience an erosion in their self-confidence, [\[FN51\]](#) as well as physical consequences such as stress-related illnesses. [\[FN52\]](#) The exclusion and alienation that targeted individuals experience result not only in individual harm but in societal harm. [\[FN53\]](#) Frustrated by reminders that they do not belong, some black youths further distance themselves from the society that rejects them through deviant behavior such as shoplifting.

## **\*12** II. LITIGATION INVOLVING CRP: THE CRACKER BARREL CASE AND POSSIBLE AVENUES FOR RELIEF

If CRP occurs so frequently and if the costs associated with CRP are so great, why aren't more consumers of color seeking redress through the courts? [\[FN54\]](#) Consumers do not seek redress primarily because it is very difficult to determine whether retailers are engaging in CRP. [\[FN55\]](#) "Should a black nightclub patron believe a doorman who tells her the club is closed for a private party? Should a restaurant patron dismiss poor service as nothing more than incompetence?" [\[FN56\]](#) Many reasons unrelated to the customer's race, such as the sales clerk's mood or incompetence, can explain poor service in a retail setting. [\[FN57\]](#) Making this determination is made even more difficult by the fact that racism today tends to be covert. Therefore, shoppers of color can never be certain whether the rude treatment or poor service they receive is due to their race. [\[FN58\]](#) Sociological data indicates that middle-class blacks "often evaluate a situation carefully before judging it discriminatory and taking additional action." [\[FN59\]](#) Recent research in the **\*13** field of psychology demonstrates that stigmatized people attribute their "failure" to discrimination only when they are virtually certain that they have been discriminated against. [\[FN60\]](#)

Similarly, the transitory nature of most retail transactions makes it difficult to discern whether retailers are engaging in CRP. [\[FN61\]](#) In many instances, the interaction is brief and few words are exchanged between sales- clerk and customer. Most significantly, from a legal perspective, few victims of CRP have the opportunity to observe the sales-clerk's treatment of similarly-situated white customers. Absent this comparison, it is nearly impossible to isolate the customer's race as the motivating factor among a multitude of explanations for following, harassing, or denying service to

the customer. [\[FN62\]](#)

**\*14** Even in cases where it is obvious that an African-American customer was treated differently than a white counterpart, many victims of consumer discrimination are discouraged from bringing suit due to the financial and emotional costs involved in litigation and the inadequacy or uncertainty of relief awarded in these cases. [\[FN63\]](#) Proving discrimination can be a challenge, given that plaintiffs are typically alone or only accompanied by close friends or relatives. [\[FN64\]](#) Thus, there are rarely objective witnesses to CRP. [\[FN65\]](#)

Furthermore, potential plaintiffs may believe isolated incidents of CRP are not important enough to justify taking action. [\[FN66\]](#) The perception that CRP is insignificant may be caused, in part, by the federal courts' failure to acknowledge that racial discrimination still exists in American society as a whole [\[FN67\]](#) and in consumer settings in particular. [\[FN68\]](#) In large measure, the federal courts have not credited CRP plaintiffs' perception of events. [\[FN69\]](#) They have imposed heightened pleading requirements on CRP plaintiffs, increased their evidentiary burdens, and "require[d] progressively higher culpability levels of civil rights defendants before affording a federal remedy." [\[FN70\]](#) Given the restricted **\*15** reading of the law, it is not surprising that litigation is rarely employed in combating CRP. [\[FN71\]](#)

Nonetheless, some cases of CRP do move toward litigation, as with the case against Cracker Barrel Old Country Stores, illustrated by the Pilson incident at the beginning of this Article. [\[FN72\]](#) Forty years ago, people of color were greatly restricted in their access to retail establishments. Modern retailers, recognizing that outright refusal to serve is illegal, resort to harassing non-white customers in a variety of more subtle ways. [\[FN73\]](#) Although plaintiffs who were denied entry have been somewhat successful in their claims against retailers and restaurateurs, a narrow reading of § 1981 of the Civil Rights Act of 1866 (§ 1981) has prevented victims of harassment from fully presenting the merits of their claims to a fact-finder. Analyzing the case against Cracker Barrel Old Country Stores will demonstrate the need for the federal courts to interpret the statute broadly in the context of marketplace discrimination.

#### A. Factual Background

The plaintiffs in this lawsuit are the National Association for the Advancement of Colored People (NAACP) and forty-two African-American, West Indian-American, and white individuals who were customers of Cracker Barrel Old Country Store. [\[FN74\]](#) Cracker Barrel, a Georgia corporation, owns and operates a chain of approximately 450 full service, "country store" restaurants, which are located in approximately 41 states, primarily in the Southeast, Midwest, mid-Atlantic, and Southwest United States. [\[FN75\]](#)

**\*16** Plaintiffs allege that they suffered racial discrimination while attempting to patronize Cracker Barrel restaurants. [\[FN76\]](#) Specifically, plaintiffs claim that, on the basis of race or color, Cracker Barrel denied, or effectively denied, service to African-American customers and their non-African-American associates; seated African-American customers and their non-African-American associates in a segregated area, often in the smoking section of the restaurant; allowed white servers to refuse service to African-American customers and their non-African-American associates; and required African-American customers and their non-African-American associates to wait longer to be seated or served than white customers not in the company of African Americans. [\[FN77\]](#) An impressive number of employee and customer witnesses corroborate plaintiffs' claims of discrimination at Cracker Barrel restaurants in 25 states. [\[FN78\]](#) Some of the witnesses observed Cracker Barrel employees forcing African-American customers to pay for their meals before being served and serving African-American customers food from a garbage can. [\[FN79\]](#)

Plaintiffs allege that Cracker Barrel denied them the same right to make and enforce contracts that is enjoyed by white citizens of the United States, in violation of § 1981. They also claim that Cracker Barrel denied them the full and equal enjoyment of their

goods, services, facilities, privileges, advantages, and accommodations on the basis of race, in violation of Title II of the Civil Rights Act of 1964. [\[FN80\]](#) Plaintiffs seek \$100 million in damages as well as a court order barring Cracker Barrel from engaging in future discriminatory conduct toward non-white customers. [\[FN81\]](#)

### **\*17** B. Applicable Laws

While a number of laws address the issue of race-based consumer discrimination, "racial profiling in the retail setting is not clearly defined in civil rights law." [\[FN82\]](#) Currently, CRP plaintiffs "must pick and choose from an assortment of claims" [\[FN83\]](#) that often provide inadequate redress. Causes of action based on common law, state law, and federal law offer the Cracker Barrel plaintiffs only limited hope of obtaining just compensation for the harms they suffered. For a number of reasons outlined below, federal statutory relief under § 1981 affords CRP victims the greatest likelihood of prevailing against most retailers. However, the courts' narrow construction of the statute has undermined its efficacy in combating the phenomenon of consumer discrimination.

#### 1. Common Law Claims

In general, common law claims do not allow plaintiffs to express the true nature of the harm they experienced. [\[FN84\]](#) Although these causes of action provide some measure of relief, they prevent the racial element of the retailer's conduct from being exposed. As a result, common law claims are imperfect vehicles for achieving just results. [\[FN85\]](#)

Some CRP plaintiffs rely--though seldom successfully--on a number of tort law claims. [\[FN86\]](#) A typical tort law claim arises when retailers **\*18** detain customers on suspicion of shoplifting. Under such circumstances, plaintiffs routinely sue the retailer for false imprisonment and/or assault and battery. [\[FN87\]](#) These plaintiffs, however, seldom prevail because merchant detention statutes allow storeowners to protect their goods by detaining and searching "in a reasonable manner shoppers reasonably suspected of shoplifting." [\[FN88\]](#) Retailers usually defend their conduct toward customers of color by presenting "objective evidence of shoplifter profiles ...." [\[FN89\]](#) In the Cracker Barrel case, plaintiffs do not allege facts that give rise to tort claims of false imprisonment or assault and battery; therefore, this avenue is unavailable to them.

Contract law is another potential common law basis for a CRP claim. Professor Neil Williams highlights two federal opinions from Maine that strongly suggest that race discrimination is inconsistent with the common law contractual requirements of good faith and fair dealing. [\[FN90\]](#) Professor Williams contends that the survival of racial discrimination in contract law advances the belief that private discrimination is morally acceptable. [\[FN91\]](#) He advocates changes in contract law that would "reflect contemporary society's disdain for racial discrimination" by prohibiting discrimination in the formation, performance, enforcement, or termination of a contract. [\[FN92\]](#) For now, however, it would be impractical for the Pilsons and other CRP victims to bring a claim under contract law because it is unclear that the law will evolve **\*19** to incorporate a proscription against racial discrimination into the duty of good faith and fair dealing. Moreover, even if such a change occurs, only a subset of CRP plaintiffs would benefit from bringing claims under contract law, because customers who were merely browsing in the store could arguably be characterized as not yet engaged in the formation, performance, enforcement, or termination of a contract.

A plaintiff could also bring a CRP claim based on property law, which historically protected customers in situations where the merchant violated the common law duty to serve the public. Under the eighteenth and nineteenth century "duty to serve" doctrine, "owners of any commercial property that was held open to the public had a duty to serve all patrons." [\[FN93\]](#) Since then, however, the common law rule has mutated so that it currently immunizes most businesses, except innkeepers and

common carriers, from the duty to serve. [FN94] As a result, property law is ineffective in protecting plaintiffs from racial discrimination in retail settings. Instead, most merchants can legally deny individuals access to their premises without justification. In his treatise, Professor Singer asserts that "the history of public accommodations law is the history of race relations." [FN95] He demonstrates that a merchant's modern power to exclude actually evolved in response to African Americans gaining the right of access to public accommodations. [FN96] Thus, one discriminatory rule of law was overcome, and another took its place. Consequently, for the Pilsons and the other \*20 plaintiffs, the common law "duty to serve" offers no recourse against Cracker Barrel.

## 2. State Statutes

Each of the fifty states and the District of Columbia has public accommodations statutes, but the protection they provide varies tremendously in terms of the individuals and the establishments that are covered. [FN97] Some states' statutes are drafted very broadly, [FN98] whereas other states have no statutes prohibiting race-based discrimination in retail stores. [FN99] State public accommodations statutes are underutilized, and consequently, they are criticized as ineffective. The statutes are infrequently employed because victims alleging CRP cannot file complaints at the local police department or municipal court. [FN100] Rather, complaints are referred to state civil rights agencies, where most are conciliated so that issues do not reach the courts [FN101] and where the remedies provided by law are insubstantial. [FN102] Consequently, CRP plaintiffs like the Pilsons do not typically rely on state public accommodations laws.

Another possible avenue for CRP plaintiffs is to bring a claim pursuant to statutes, enacted in some states, that mimic the Federal Trade Commission Act (FTC Act). [FN103] These laws prohibit "unfair or deceptive business practices." [FN104] A business practice is unfair if it \*21 causes, or is likely to cause, substantial consumer injury that a consumer could not reasonably avoid and that is not outweighed by any countervailing benefits to consumers or competition. [FN105] Deceptive practices involve acts such as false representations, misleading price claims, or sales of dangerous or systematically defective products or services without adequate disclosure. [FN106] Although few CRP cases give rise to claims brought under "little FTC Acts," the following example illustrates the application of Tennessee's Consumer Protection statute in a consumer discrimination case.

In *Berry v. South East Waffles, L.L.C.*, a group of African Americans brought suit under Tennessee's Consumer Protection Act of 1977, [FN107] alleging that defendant violated the Act when Waffle House employees closed the restaurant's doors to prevent African-American patrons from entering. [FN108] According to the complaint, defendants engaged in unfair or deceptive acts, violating T.C.A. § 47-18-104 (10), (14), and (27), by advertising goods or services for sale "24 hours a day, 365 days a year, including Thanksgiving and Christmas," but failing to disclose a limitation of quantity. [FN109] Unlike these fortunate plaintiffs, most individuals, including the Pilsons, cannot articulate a cause of action under consumer protection statutes when a merchant discriminates against them on the basis of their race.

## 3. Federal Statutes

Two federal civil rights statutes enable CRP plaintiffs to obtain injunctive or compensatory relief in certain cases. Although flawed, \*22 these statutes are more effective than common law remedies or state statutes in addressing the true nature of the harm suffered when consumers are treated unjustly in the marketplace. In 1964, racial discrimination continued to plague American society, even though such discrimination had been formally prohibited since 1866. This provided an impetus for Congress to pass a modern civil rights act.

### a. Title II of the Civil Rights Act of 1964

The explicit purpose [FN110] of Title II of the Civil Rights Act of 1964 [FN111] was to

"make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public." [\[FN112\]](#) Congress enacted the law pursuant to its power under the Commerce Clause to regulate commerce among the several states. [\[FN113\]](#)

Title II 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, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." [\[FN114\]](#) Legal commentary \*23 and litigation generated by Title II usually focus on what types of establishments are covered. [\[FN115\]](#) The allegations against Cracker Barrel fall within Title II's ambit because restaurants are explicitly included in the statute's list of "public accommodations." [\[FN116\]](#) Notably missing from the list of covered entities, however, are retail stores. [\[FN117\]](#) Senator Hubert Humphrey, a leading proponent of the Civil Rights Act, explained that retail establishments were not covered because legislators only intended to address the most urgent problems. [\[FN118\]](#) Covered entities included only those places where exclusion or segregation typically occurred, and arguably, retail establishments were not notorious for such practices. [\[FN119\]](#) Arguments have been formulated to include retail stores among the covered places of public accommodation. For example, commentators \*24 contend that the list is illustrative rather than exhaustive and that the list could be interpreted broadly in light of subsequent public accommodations statutes and current public policies. [\[FN120\]](#) The statute, however, clearly does not include retail establishments in the list of covered entities, [\[FN121\]](#) and the courts have refused to expand the statute's literal definition. [\[FN122\]](#) As a result, protection under Title II is available only to those plaintiffs who were discriminated against in certain types of establishments. While the Pilsons, whose allegations of discrimination are leveled against a restaurant, may benefit from Title II's protection, many other CRP victims cannot similarly depend on this statute as a remedy for the discrimination they have endured.

In addition, the statute's notification requirement precludes some plaintiffs from obtaining relief under Title II. While plaintiffs need not exhaust their administrative remedies, they must notify the \*25 appropriate state or local agency of the alleged discriminatory conduct prior to filing suit. [\[FN123\]](#) Courts typically dismiss claims for failure to meet the notification requirement. [\[FN124\]](#) In a case of first impression, however, a federal district court in Florida made an exception to the rule and ordered Domino's Pizza to deliver food to residents of American Beach, a community where the population is approximately 95 percent African-American. [\[FN125\]](#) The court held that the Title II plaintiffs' claim could proceed despite their failure to notify the Florida Commission on Human Relations (FCHR) because the FCHR provided no mechanism for obtaining the immediate relief they sought (a preliminary injunction). [\[FN126\]](#) Title II's applicability is further limited in terms of the remedies it affords. For example, [42 U.S.C. § 2000a](#) only permits the issuance of an injunction or declaratory relief. [\[FN127\]](#) The inadequacy of such relief has prompted some commentators to argue that the statute's utility \*26 would increase if amended to provide for compensatory damages. [\[FN128\]](#) Plaintiffs would have greater incentive to pursue their claims against merchants if monetary damages were available to them. Their failure to litigate CRP claims denies plaintiffs potential relief--however minimal--as well as the opportunity to expose prohibited conduct to the public.

#### b. The Civil Rights Act of 1866

Congress enacted the Civil Rights Act of 1866 [\[FN129\]](#) to ensure "that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white ...." [\[FN130\]](#) According to scholar Barry Sullivan, the 1866 Congress was moved by testimony concerning the means by which private individuals continued to deprive the recently freed slaves of their freedom after the Civil War. [\[FN131\]](#) The cruel discriminatory conduct included "physical violence, price fixing, lifetime contracts, and exorbitant rent and food charges that were equivalent to any wages the former slaves



might earn." [\[FN132\]](#)

The language of the Civil Rights Act of 1866 provides some protection from discrimination for shoppers of color. Section 1981 describes the "right to contract" and § 1982 describes the "right to purchase personal property." Although the federal courts routinely acknowledge that sections 1981 and 1982 must be construed broadly in accord with their remedial nature, [\[FN133\]](#) courts nevertheless "unduly \*27 restrict their interpretations of § 1981, resulting in the dismissal of many plaintiffs' claims before the presentation of evidence." [\[FN134\]](#)

Section 1981 of the statute 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, [\[FN135\]](#) 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 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.

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law. [\[FN136\]](#)

The text of § 1982 reads as follows: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by \*28 white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [\[FN137\]](#)

Courts interpret sections 1981 and 1982 in much the same way. [\[FN138\]](#) While both sections offer potential relief for victims of CRP, legal scholar Kennedy contends that § 1982 is usually not well-suited to retail discrimination claims. [\[FN139\]](#) Its application is limited insofar as courts seldom find that retailers engaged in conduct that completely prohibited African-American customers from purchasing products. [\[FN140\]](#) Giving short shrift to their analyses of § 1982 claims, courts typically grant a defendant's motion for summary judgment on a plaintiff's § 1982 claim "for the same reason it granted the motion on the § 1981 claim." [\[FN141\]](#) Although some CRP plaintiffs bring both sections 1981 and 1982 claims, a majority rely primarily on § 1981. [\[FN142\]](#) Despite its limitations, described in detail below, § 1981 offers victims of consumer discrimination their best hope for recovery under the law.

### III. ANALYSIS OF THE § 1981 CLAIM AGAINST CRACKER BARREL

To state a claim in the making or enforcing of a contract under § 1981, a preponderance of the evidence must prove [\[FN143\]](#) that: (1) the \*29 plaintiff is a member of a racial minority; (2) defendants intentionally discriminated against plaintiff on the basis of race; [\[FN144\]](#) and (3) the discrimination was directed toward one or more of the activities protected by the statute. [\[FN145\]](#)

The burden of production then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. [\[FN146\]](#) To prevail, the plaintiff must prove by a preponderance of the evidence that \*30 the defendant's proffered reason is not its true reason, but merely a pretext for discrimination. [\[FN147\]](#)

#### A. Prima Facie Case Part 1: Are Plaintiffs Members of a Racial Minority?

If the plaintiffs in the Cracker Barrel case can demonstrate that they are African Americans, West Indian-Americans, and white Americans who associated with African Americans, as alleged in their complaint, they can satisfy the first prong of their prima facie claim under § 1981. [\[FN148\]](#) It is well-settled that both whites and racial minorities may bring an action pursuant to § 1981 and that a claim of discrimination based on an interracial relationship or association is actionable under § 1981. [\[FN149\]](#)

## B. Prima Facie Case Part 2: Intentional Discrimination on the Basis of Race

The second prong on the plaintiff's prima facie case, discriminatory intent, may be established directly or indirectly. Direct evidence is evidence that, if believed, proves the existence of discrimination without inference or presumption. [FN150] In both retail and non-retail contexts, direct proof of intentional discrimination has been obtained \*31 through the use of "testers," individuals who act as prospective customers for the purpose of collecting evidence of discriminatory conduct. [FN151] Indirect evidence of discriminatory intent is circumstantial evidence from which racial motivation can be inferred. [FN152] The facts that give rise to CRP cases generally are not amenable to direct proof of intentional racial discrimination. [FN153] Rather, they often resemble the fact-pattern described in the Introduction. In such a situation, there is no direct evidence of intentional race discrimination. The Pilsons will be required to present circumstantial evidence to establish that the slow service and rude treatment they received while dining at Cracker Barrel was based on their race and not on other factors. Although a plaintiff may easily convince a jury that he was treated discourteously, \*32 it is much more difficult to prove the motivation that gave rise to the poor treatment. [FN154] Unlike most CRP plaintiffs, Mr. and Mrs. Pilson can present evidence that Cracker Barrel provided prompt service to similarly-situated white customers. Such evidence establishes a convincing claim of discrimination. [FN155]

Other plaintiffs may be able to satisfy this prong of their prima facie cases by presenting sufficient evidence that Cracker Barrel denied them entry to the restaurant while white customers were allowed to enter and receive service, [FN156] and/or that Cracker Barrel seated plaintiffs in segregated sections of the restaurant on the basis of their \*33 race. [FN157] Although a court may find such comparative evidence compelling, courts may also reject plaintiffs' circumstantial evidence as insufficient to prove intent of discrimination. In the retail setting, "the comparison will never involve precisely the same set of ... [conduct] occurring over the same period of time and under the same sets of circumstances." [FN158] A fact-finder may believe Cracker Barrel's contention that the treatment these customers received was based on reasons \*34 other than intentional discrimination. [FN159] For example, the defendant may claim that the number of people in a party, whether children are in the party, preference given to "regular" customers, or the amount and types of food and beverages ordered accounted for the disparate treatment. [FN160] As discussed below in Part III.C, courts are reluctant to find that a merchant's actions were motivated by racial animus even in cases where disparate treatment is accompanied by racial epithets.

Acknowledging the near-impossibility of proving differential treatment in the market setting, [FN161] the Sixth Circuit Court of Appeals recently adopted a new prima facie standard for § 1981 plaintiffs who allege racial discrimination in the marketplace. [FN162] Under the new \*35 standard, first articulated by a federal district court in *Callwood v. Dave & Buster's, Inc.*, [FN163] plaintiffs have the option of proving that they were deprived of services while similarly situated persons outside the protected class were not, [FN164] and/or that they received services in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory. [FN165]

Under this new Sixth Circuit Court of Appeals standard, more plaintiffs can successfully present a prima facie case of consumer discrimination. [FN166] For example, the Cracker Barrel plaintiffs may be able to convince the fact-finder that they received services in a "markedly hostile manner" when a Cracker Barrel employee, without speaking, threw napkins onto their table as she walked by and dropped a glass of water, unapologetically splashing Mrs. Pilson and one of her friends. [FN167] These facts arguably create the presumption of an intent to \*36 discriminate because, without explanation, these acts are more likely than not based on race. [FN168]

### C. Prima Facie Case Part 3: The Scope of the "Right to Make and Enforce Contracts"

The third prong of the prima facie case requires plaintiffs to show that the discrimination they experienced was directed toward one or more of the activities protected by the statute. [FN169] In this case, plaintiffs allege that Cracker Barrel denied them the right to "make and enforce contracts on the same basis as white citizens" [FN170] when Cracker Barrel refused to serve them, provided them with inferior service, and seated them in segregated sections, along with all or most of the restaurant's African-American customers and their non-African-American associates. [FN171]

The majority of consumer discrimination cases that have been pursued involved conduct that prevented the formation of the contract, [FN172] as opposed to conduct that affected the nature or quality of \*37 the contractual relationship. [FN173] Contrary to its express language and its legislative history, courts routinely dismiss § 1981 claims where defendants' behavior degrades--but does not completely deny--the goods or services plaintiffs sought to purchase. [FN174] For example, many courts find no interference with making and enforcing a contract--and thus typically dismiss claims--where store clerks or security guards harass customers by stopping them shortly after they enter the store or after they complete a purchase. [FN175]

\*38 In cases where shoppers are accosted while browsing, many courts characterize the shoppers' harm as an interference with their "prospective contractual relations" rather than as an actual contractual loss. [FN176] The rationale supporting these holdings is that no general implied contract exists under which shoppers have the right to browse in merchants' stores. [FN177] Therefore, no contract interest is at stake when a customer's shopping experience is interrupted. [FN178] Even when the store ejects a customer from the premises, courts find no infringement of a plaintiff's right to make and enforce contracts. [FN179]

\*39 Likewise, courts reason that once the purchase is completed, no contractual relationship remains between retailer and shopper. [FN180] Thus, according to this reasoning, violation of § 1981 can occur only during the short period of time when a shopper actually attempts to make a purchase. Therefore, harassing conduct that occurs after this point does not interfere with the individual's right to contract under § 1981. [FN181] "If store employees or other agents acted just moments earlier, \*40 however--during a price-check, an exchange of cash, pending credit card authorization, writing of the check--then a viable § 1981 claim would exist ...." [FN182]

A distinguishing "twist" in the facts of the notorious Dillard Department Store case allowed the Tenth Circuit Court of Appeals to uphold a \$1.2 million jury award (\$1.1 million in punitive damages) on the basis of harassment that occurred after the Plaintiff, Ms. Hampton, had made her purchases. [FN183] The stop and ensuing search of Ms. Hampton's belongings occurred after she had paid for her merchandise and as she attempted to redeem a coupon for a fragrance sample given to her by the sales associate. [FN184] The jury concluded that when the security officer detained her, the contractual relationship between Ms. Hampton and Dillard's had not ceased because Ms. Hampton received a coupon for a fragrance sample as a benefit of her purchase. [FN185] The Tenth Circuit Court of Appeals agreed that the store had a contractual duty to allow Ms. Hampton to redeem the coupon. [FN186] Preventing her from doing so amounted to a violation of her right to make and enforce contracts. [FN187] Even if non-white customers are ultimately allowed to complete the transaction (i.e., contract formation is achieved), a number of courts have concluded that they must endure harassment in the form of substandard service [FN188] and rude behavior (including overt confrontation \*41 through the use of racial epithets) at the hands of sales clerks. [FN189] Articulating the general rule regarding poor service, the Tenth Circuit Court of Appeals explained that there "must have been interference with a contract beyond the mere expectation of being treated without discrimination while

shopping." [\[FN190\]](#) As previously mentioned, several courts have specifically rejected the notion that consumers of all races have the right to a harassment-free shopping experience. [\[FN191\]](#)

Similarly, although the right to make and enforce contracts includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," [\[FN192\]](#) courts typically do not interpret this right as protecting minority shoppers against harassment manifested through a delay in service. [\[FN193\]](#) For example, when a sales clerk \*42 yelled at an African-American customer and told him to go back to the end of the line after he had waited in line for fifteen minutes, the court repeated the now-familiar refrain that "mere delay, even coupled with discourteous treatment, poor service, or racial animus, is insufficient to sustain a § 1981 claim." [\[FN194\]](#) Nevertheless, there are exceptions to the general "rule" that a § 1981 claim must fail if the plaintiff ultimately managed to complete his or her sales transaction (i.e., form a contract) with the defendant. Such an exception arises in cases where retailers imposed additional conditions on plaintiffs that were not imposed on white customers. For example, in some cases, defendants required African-American customers to pre-pay for their purchases, whereas white customers were not required to do so. [\[FN195\]](#) One court reasoned that the imposition of an additional condition "adversely affected the basic terms and conditions of [plaintiffs'] contract," [\[FN196\]](#) which directly implicates their right to contract and to enjoy "all benefits, privileges, terms and conditions of the contractual relationship." [\[FN197\]](#) Similarly, the court in *Joseph v. New York Yankees Partnership* found that an African-American woman, unlike non-minority patrons, was required to abide by the dress code in order to enter the Stadium Club. [\[FN198\]](#) Although Ms. Joseph was ultimately allowed to enter the Club after she changed her shirt, the court broadly held that placing additional conditions on minorities in contractual relationships denies their right to contract on the same terms and conditions as white citizens. [\[FN199\]](#)

\*43 Turning to the case at hand, those plaintiffs who present sufficient evidence that Cracker Barrel employees prevented them from entering the restaurant could prove that they suffered an actual contract loss. [\[FN200\]](#) Their argument, that they attempted to contract with Cracker Barrel but were actually prevented from doing so because they were denied entry into the restaurant, states a plausible cause of action under § 1981 if similarly situated caucasian customers were allowed entry. [\[FN201\]](#) "Refusal to allow a customer to enter the store is equivalent to a refusal to contract; it is a discriminatory refusal to \*44 deal. The license to enter the store is necessary to make good on the store's implicit invitation to deal." [\[FN202\]](#)

Some plaintiffs contend that they suffered a loss of contractual interest because they were effectively removed from a restaurant. [\[FN203\]](#) While no one was asked to leave a Cracker Barrel restaurant, many plaintiffs state that they waited to be served (sometimes for periods as long as an hour and a half); were not served, despite attempts to obtain service; and eventually decided to leave the restaurant. [\[FN204\]](#) Given that they were not refused access to or removed from the restaurant's premises, these plaintiffs face a difficult challenge in demonstrating that Cracker Barrel's neglect violated their right to contract with the restaurant. [\[FN205\]](#) Moreover, the defendant may successfully argue that the plaintiffs could have sought help from other servers. Some plaintiffs claim that Cracker Barrel engaged in prohibited conduct by failing to provide the complimentary bread that white patrons received. [\[FN206\]](#) These individuals can argue that the bread is a benefit of their purchase, which Cracker Barrel has a contractual duty to supply. [\[FN207\]](#) Like Ms. Hampton, the plaintiffs "completed the invited \*45 performance in accordance with the terms of the offer" [\[FN208\]](#) by accepting Cracker Barrel's offer to purchase meals at defendant's restaurants. Cracker Barrel's failure to meet its contractual duty, by depriving plaintiffs of complimentary bread, adversely affected the terms and conditions of its contract with plaintiffs in violation of § 1981.

In addition, Cracker Barrel faces charges that it seated plaintiffs in segregated sections of the restaurant. [\[FN209\]](#) Refusing to serve plaintiffs who did not tolerate the "special

condition" of dining in the back of the restaurant denied African-American patrons the right to contract on the same terms and conditions as is enjoyed by white citizens.

[FN210] To the extent that Cracker Barrel's seating practices imposed upon African-American customers conditions that were not similarly imposed on caucasian patrons, plaintiffs may succeed in establishing that Cracker Barrel denied them the same right to make and enforce contracts as it affords white customers. [FN211]

Where actual loss of a contractual interest is absent, some CRP plaintiffs may argue that they were subjected to a hostile shopping environment. A growing number of courts are concluding that "mere delay" or other harassment that does not amount to an outright denial of service is nonetheless actionable as denial of a right to make and enforce contracts on the same basis as white citizens. In a recent case, an African-American woman was subjected to a barrage of racial slurs from a white customer and the white sales clerk at a convenience store when she brought her purchase to the counter. [FN212] The customer also threw change at the plaintiff, spit in her face, and ran out of the store as he threatened to kill her. [FN213] Although the plaintiff was eventually able to purchase items from another cashier, the court held that "the delay in completing the transaction, coupled with the alleged racial attack," established a violation of § 1981. [FN214] The court found that "the fact that an act of contractual discrimination was short or de minimis does not make it any less a violation." [FN215]

\*46 In addition, some courts have recognized the plaintiffs' prima facie claims of race discrimination in suits against restaurants that allegedly engaged in harassing conduct. [FN216] For example, evidence that Dave & Buster's staff provided only limited services and that they did so in a manner that "went beyond poor service" demonstrated that the plaintiffs' contract with the defendant included terms and conditions that differed from those generally available to white persons. [FN217]

Another court found that the plaintiffs' claim was actionable because the defendant restaurant "failed to provide plaintiffs the full benefits of the contract" when poor service and a disturbing atmosphere eventually drove the plaintiffs out of the restaurant before finishing their meals. [FN218] Moreover, one court held that a contract with a restaurant includes "being served in an atmosphere which a reasonable person would expect in the chosen place." [FN219]

The outcomes in these cases suggest that some courts interpret § 1981 as prohibiting racially harassing conduct that results in the discriminatory denial of "the accoutrements that are ordinarily provided \*47 with a restaurant meal ...." [FN220]

These courts focused on the degradation of service that plaintiffs experienced to the extent that it differed from the service provided to white customers. In McCaleb, for example, the court analogized the defendant's harassing conduct to situations where the plaintiffs were denied the opportunity to purchase services altogether. [FN221] As a result, there is precedent for the proposition that § 1981 proscribes race-based harassment by retailers and restaurateurs when such conduct degrades--but does not completely deny--goods or services for customers of color.

Accordingly, the courts should apply this broader interpretation of the Act. Such an interpretation is more consistent with both the intent of the original Act and the goal of the 1991 Amendment to § 1981. [FN222] As one civil rights attorney has argued, It cannot plausibly be suggested that, in adding expansive language [in the Civil Rights Act of 1991] to rectify the Patterson Court's cramped reading of § 1981, Congress simultaneously intended that § 1981 would fail to protect persons broadly with respect to the benefits, privileges, terms and conditions under which they are afforded the opportunity to pursue and make contracts. [FN223]

The right to contract on the same terms as white shoppers includes the right to be free from harassment while shopping. [FN224] In the retail environment, making a contract may involve a number of events, such as inspection of the goods, comparison of goods and prices, inquiry \*48 into the terms and conditions, and negotiation. [FN225]

Harassing behavior by a merchant's security guards that prevents an individual from inspecting and comparing goods, for example, frustrates that individual's opportunity to make specific contracts or purchases. [FN226] Therefore, race-based harassment

interferes with the right of a shopper of color to contract on the same terms as white customers.

Although it is well-settled that § 1981 protects a victim of hostile environment harassment in the employment context, [\[FN227\]](#) to date, no federal court has expressly held that a claim of hostile environment harassment in the marketplace is actionable under § 1981. [\[FN228\]](#) An interpretation of the statute that prohibits racial harassment arising from a contract for employment while allowing racial harassment that arises from a contract for goods or services is entirely inconsistent. [\[FN229\]](#) In deciding CRP cases, the courts should follow the standard that applies in § 1981 employment cases.

The standard used in the employment context provides guidance to courts deciding claims of consumer harassment. The unambiguous language of § 1981 mandates that "All persons ... shall have the same right ... to make and enforce contracts ... [which includes] ... the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." [\[FN230\]](#) The Supreme Court has expressly held that very similar language creates a cause of action for hostile work environment under Title VII. [\[FN231\]](#) In *Patterson*, the Court explained that "harassment \*49 in the course of employment is actionable under Title VII's prohibition against discrimination in the 'terms, conditions, or privileges of employment.'" [\[FN232\]](#) Claims of racial harassment in employment are actionable under § 1981 based on the same reasoning. [\[FN233\]](#) It is therefore logical that § 1981 should create a cause of action for shoppers who are subjected to harassment as they attempt to enjoy the benefits, privileges, terms, and conditions of their contractual relationship with a retail establishment. The federal courts' express recognition of consumer harassment claims would reconcile the discrepancy that currently exists when harassed employees obtain redress under § 1981 but harassed consumers do not.

Returning to the allegations in the Cracker Barrel case, the restaurant employees provided plaintiffs with inferior service by engaging in harassing conduct, such as serving them cold or tepid food, requiring them to request silverware several times, subjecting them to rude and brusque treatment, and seating them in a section of the restaurant where a patron had vomited. [\[FN234\]](#) As mentioned above, some plaintiffs additionally claim that Cracker Barrel violated their rights under § 1981 by seating them in segregated sections of the restaurant. [\[FN235\]](#) These plaintiffs may argue that defendant's harassing and disruptive service created a hostile environment during their dining experience that was based on their race and that interfered with their right to enjoy \*50 the benefits, privileges, terms, and conditions of their contract with Cracker Barrel. [\[FN236\]](#) Even though the plaintiffs were not explicitly prevented from entering into a contract with Cracker Barrel, it is clear that the racial harassment they endured prevented plaintiffs from enjoying the "benefits, privileges, terms, and conditions of the contractual relationship" on the same basis as white customers. Failure to recognize harassment as a legitimate cause of action eliminates § 1981 as a viable remedy for racial discrimination at all stages and in all aspects of contracting and undermines the express purpose of the statute.

#### D. Defendant's Legitimate, Non-discriminatory Reason

Few courts have analyzed § 1981 cases beyond the plaintiff's prima facie case. [\[FN237\]](#) Defendants whose motions for summary judgment are denied typically agree to settle the claims. [\[FN238\]](#) If plaintiffs meet the challenge of establishing a prima facie case, the defendant merely needs to articulate a legitimate non-discriminatory reason for the adverse action to rebut the inference of discrimination raised by the plaintiff's prima facie case. [\[FN239\]](#) Defendant's burden is one of production, not of persuasion. [\[FN240\]](#)

\*51 Of course, there are countless reasons that may be offered to explain why shoppers were treated differently in retail establishments. [\[FN241\]](#) Typically, defendant's "legitimate non-discriminatory reason" for interfering with a shopper's

right to complete a purchase is that there was a suspicion of shoplifting [\[FN242\]](#) and that "any surveillance was not due to the customer's race." [\[FN243\]](#) In the specific context of a restaurant, "the number of people in a party, the presence or absence of children in **\*52** the party, preference accorded to 'regular' customers, or the amount and types of food and beverages ordered may be alleged by the defendant to have accounted for the disparate treatment." [\[FN244\]](#) In *LaRoche v. Denny's*, for instance, the court found that Denny's met its burden of production when it "introduced evidence from which one could infer that the plaintiffs were not served because Denny's overworked, stressed manager and host declined to serve customers who became verbally abusive upon learning that the restaurant was out of some food items." [\[FN245\]](#) Doubtless, Cracker Barrel will produce evidence of other reasons--besides plaintiffs' race--that motivated its employees to treat the plaintiffs as they did.

#### E. Pretext

After the defendant articulates a non-discriminatory reason for the adverse action, the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that he or she was the victim of intentional discrimination. [\[FN246\]](#) Plaintiff can demonstrate that the defendant's reasons are a pretext for discrimination by showing that the stated reasons had no basis in fact, that they were not the actual reasons, and that the stated reasons were insufficient to explain the defendant's action. [\[FN247\]](#) The Supreme Court has explained that the "fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." [\[FN248\]](#) In other words, the fact-finder must consider "whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [its] proffered legitimate reasons for its action that a reasonable fact-finder could find them unworthy of credence.'" [\[FN249\]](#)

**\*53** As previously mentioned, only a small number of federal courts have analyzed claims of consumer discrimination beyond the prima facie case. A review of cases filed since 1990 reveals that plaintiffs succeeded in rebutting defendants' "legitimate, non-discriminatory reasons" in two jury trials, [\[FN250\]](#) while two other juries did not believe that defendants' reasons were a pretext for intentional discrimination and found in favor of the defendants. [\[FN251\]](#) In a suit against Dillard's department store, the Tenth Circuit Court of Appeals affirmed the jury's finding in favor of the plaintiff, Ms. Hampton, because it concluded that, based on her presentation of evidence, the jury could reasonably infer that the defendant's justifications were pretextual. [\[FN252\]](#) Such "abundant" indirect evidence of discrimination included:

**\*54** [T]estimony from former Dillard's security officers that corroborated the racial/surveillance theory, testimony that African Americans were frequently "tracked" upon entering the store; that Dillard's implemented race "codes" that highlighted African-American shoppers as suspicious, [and] that African Americans were singled out as "suspicious" for returning merchandise without a receipt or for moving between departments while carrying merchandise .... As to Ms. Hampton specifically, she was noticed and placed under surveillance shortly after entering Dillard's ... [and the] "Security Report," despite being less than two pages long, reiterated Ms. Hampton's race twelve times, reflecting implementation of the store's policy and reflecting [the security officer's] motivation. [\[FN253\]](#)

Like Ms. Hampton, plaintiffs such as the Pilsons are more likely to prevail if they can establish that Cracker Barrel's practice of racial discrimination is part of an on-going pattern or store policy. [\[FN254\]](#)

A current split among the federal appeals courts indicates that at least some plaintiffs will be afforded the opportunity to present evidence of consumer discrimination to a trier-of-fact. The Fourth, Fifth, and Sixth Circuit Courts of Appeals have reversed and remanded district court decisions granting defendants' motions for summary judgment

or motions to dismiss plaintiffs' § 1981 claims. [FN255] The First, Second, Third, Seventh, Tenth, and D.C. Circuit Courts of Appeals, however, have affirmed such decisions in favor of the defendants. [FN256] Sadly, the case against Cracker Barrel restaurants is an "unpleasant reminder that society still has a long way to go before the promise of \*55 the civil rights acts will find fulfillment." [FN257] Courts must abandon a self-defeating, restricted construction in favor of a literal interpretation of the statute's clear language to achieve § 1981's goal of racial equality in the marketplace.

## CONCLUSION

One hundred years ago, mail-order catalogues offered African-American consumers an opportunity "to avoid consumer spaces in which they were subject to personal humiliation and marketing inequality." [FN258] Shopping online offers similar benefits today. [FN259] Nevertheless, Americans of all racial backgrounds are likely to continue patronizing brick-and-mortar retail stores and restaurants. Therefore, people of color remain vulnerable to unfair treatment while shopping. Although individual CRP incidents may appear benign, consumer discrimination is pervasive, affecting most--if not all--people of color on a regular basis. For young victims of CRP who are reminded, again and again, that they belong on the margins of American society, the problem is anything but innocuous. [FN260] Over time, alienation and hopelessness stemming from such marginalization can lead to destructive behavior harming both the individual and society. If African Americans and other people of color encounter hostility and abuse when they attempt to spend their money, it is partly because a restrictive reading of § 1981 has prevented the advancement of racial equality in the marketplace. Section 1981 currently protects \*56 consumers when merchants deny them access to their premises. Plaintiffs whose allegations fall short of complete denial of access, however, are usually unable to obtain compensation under the statute.

In addition, the federal courts' summary adjudication of racial harassment claims in retail establishments prevents African Americans and other people of color from publicly exposing the treatment they endure. [FN261] Courts fail to understand the subtle nature of modern discrimination when they require plaintiffs to establish that they were prevented from forming a contract with the defendant.

Unless federal and state public accommodation laws are amended, these statutes are poor vehicles for redress. Similarly, the common law inadequately addresses the specific harms alleged by CRP plaintiffs. Section 1981 currently presents the best opportunity for curbing the invidious racism that continues to deny equality to Americans of color. It was designed to ensure that the value of money would not be determined by its owner's identity. To realize the statute's goal, the courts must recognize that § 1981 guarantees to all Americans the right to be free from race-based harassment while shopping.

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[FN2]. This scenario reflects a situation encountered by Brenda and Clifton Pilson, two of the named plaintiffs in a recently filed lawsuit against Cracker Barrel Old Country Stores, Inc. See Amended Complaint ¶¶ 121-128, NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002). The Federal District Court has denied certification to the class of plaintiffs. The plaintiffs are deciding whether to appeal the decision.

[FN3]. Although most of the cases discussed herein involve African-American plaintiffs,



other people of color experience similar treatment in retail establishments. Deseriee A. Kennedy, [Consumer Discrimination: The Limitations of Federal Civil Rights Protection](#), 66 MO. L. REV. 275, 299 (2001). For example, a complaint was filed against Footaction, a shoe store chain, after an employee was accused of discriminating against a Dominican family. The employee allegedly refused to help the individuals because they spoke Spanish. Pursuant to a settlement agreement, Footaction must provide anti-discrimination training for its Massachusetts employees. Retailer Creates Anti-bias Plan, BOSTON HERALD, Aug. 9, 2002, at 28. Given that the majority of plaintiffs involved in Consumer Racial Profiling (CRP) lawsuits are African Americans, this Article employs the term "African-American" for the sake of simplicity and clarity. It is not intended to exclude the experience of other people of color. The laws discussed apply to members of all races. See *infra* Part II.

[FN3]. The designations "African-American" and "black" are used interchangeably throughout this Article, as are the terms "caucasian" and "white." "Driving while black (or brown)" (DWB) refers to the heightened possibility that law enforcement officers will target people of color for traffic stops. DWB traffic stops are the result of racial profiling that occurs when law enforcement agencies employ race-based suspect profiles. Amanda G. Main, Note, [Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief](#), 39 BRANDEIS L.J. 289, 289 (2000-01). "Profiles" are sets of personal and behavioral characteristics associated with individuals who tend to commit particular offenses. These profiles are intended to assist police officers in identifying criminal suspects. DAVID A. HARRIS, PROFILES IN JUSTICE: WHY RACIAL PROFILING CANNOT WORK 10 (2002). Such profiles may lead law enforcement officers to use race or color as a proxy for criminal propensity and consequently, to suspect anyone who is African-American, even absent any reasonable suspicion or probable cause. Kennedy, *supra* note 2, at 298; see DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION 15 (2002). Much political and legal discussion has focused on the unreasonable stops and searches performed as a result of racial profiling. [Nevin v. Citibank, N.A.](#), 107 F. Supp. 2d 333, 339 n.4 (S.D.N.Y. 2000); see [Illinois v. Wardlow](#), 528 U.S. 119, 133-34 n.10 (2000) (discussing allegations of unlawful racial profiling by the New Jersey State Police and the Boston Police Department).

[FN4]. Matt Graves, Note, [Purchasing While Black: How Courts Condone Discrimination in the Marketplace](#), 7 MICH. J. RACE & L. 159, 185 (2001); see KELVIN R. DAVIS, DRIVING WHILE BLACK: COVER-UP 23 (2001); Regina Austin, ["A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America](#), 1994 UTAH L. REV. 147, 149-50 nn.7-12; Kennedy, *supra* note 2, at 276, 288, 291 (comparing "consumer discrimination" to racial profiling used by law enforcement officers and indicating that both are based on unsubstantiated stereotypes); see also [Nevin](#), 107 F. Supp. 2d at 339 n.4 (noting that evidence of racial profiling in retail establishments has been reported by the media and is the subject of at least two other lawsuits in the Second Circuit Court of Appeals).

[FN5]. PrimeTime Live: True Colors (ABC television broadcast, Sept. 26, 1991). One black tester and one white tester were filmed covertly while performing commonplace retail activities. The documentary uncovered numerous incidents of racial discrimination. Peter Siegelman, Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out? in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69 (Michael Fix & Margery A. Turner eds., 1998). Peter Siegelman has taught at Yale Law School, the University of Connecticut Law School, and Amherst College. He has conducted empirical research on employment discrimination litigation, discrimination in the sale of new cars, the economics of crime, and externalities in the provision of radio broadcasting.

[FN6]. 20/20: Under Suspicion--Security Guards Unfairly Target Black Shoppers, (ABC television broadcast, June 8, 1998), [available at 1998 WL 5433617](#) (undercover investigation conducted in suburban shopping mall revealed that, in contrast with the minimal attention given to the white tester, the black tester was followed and watched while she shopped, closely scrutinized before entering the dressing room, and spied on while she was inside the dressing room).

[FN7]. See generally [Jackson v. Eddie Bauer, Inc., No. AW96-54, 1997 WL 802774 \(D.C. Md. Oct. 1997\)](#) (where jury found that plaintiff had suffered emotional distress when he and his companions were falsely imprisoned for shoplifting).

[FN8]. Main, supra note 3, at 290. See generally [Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 \(10th Cir. 2001\)](#), cert. denied, [534 U.S. 1131 \(2002\)](#) (concluding that plaintiff presented sufficient evidence that defendant intentionally discriminated against her on account of race and that this discrimination interfered with her redemption of a coupon for a free fragrance, which constituted a contract).

[FN9]. African-American customers filed two class action lawsuits against Flagstar, the parent corporation of Denny's Restaurants, for denying them full and equal service by refusing to seat and/or serve them in some of the defendant's restaurants. The suits alleged that these policies and procedures, not applied to white persons, included requiring black customers to pre-pay for their meals, pay a cover charge, and present identification to be served. The restaurants also allegedly denied free "birthday meals" to black customers and forcibly removed black customers from the establishments. Under the terms of two consent decrees, Denny's agreed to pay over \$54 million in damages to black customers. See *Dyson v. Flagstar Corp.*, No. DKC-93-1503, 1996 U.S. Dist. LEXIS 22685, at \*2, 3 (D. Md. July 17, 1996); [Order Denying Motion to Alter or Amend Judgment, Ridgeway v. Flagstar Corp., Nos. 93-20202 JW and 93-20208 JW, 1994 WL 669935, at \\*1 \(N.D. Cal. Nov. 18, 1994\)](#); Amended Consent Decree, *Ridgeway v. Flagstar Corp.*, (Nos. 93-20202 JW and 93-20208 JW), available at <http://www.usdoj.gov/crt/housing/documents/dennysettle2.htm>; Notice of Pendency and Settlement of Derivative Action and Settlement Hearing, *Dyson v. Flagstar Corp.*, No. DKC-93-1503 & *Ridgeway v. Flagstar Corp.*, Nos. 93-20202 JW and 93-20208 JW, available at <http://www.entwistle-law.com/news/cases/settled/pdf/flgnot.pdf>.

[FN10]. The terms "consumer racism" and "consumer discrimination" are also used to identify the practice of differential surveillance and treatment of African-American shoppers. Kennedy, supra note 2, at 276; see Austin, supra note 4, at 149. These terms will be used interchangeably with CRP throughout the Article.

[FN11]. Among the cases discussed in this Article, twice as many involved a degradation of a service/product rather than a complete denial. See infra Part III.

[FN12]. See infra Part III.

[FN13]. See, e.g., [Alexis v. McDonald's Rest. of Mass., Inc., 67 F.3d 341, 345 \(1st Cir. 1995\)](#) (verbal attack); [Rogers v. Elliott, 135 F. Supp. 2d 1312, 1313 \(N.D. Ga. 2001\)](#) (verbal and physical attack); [Williams v. Cloverland Farms Dairy, Inc., 78 F.Supp. 2d 479, 482-83 \(D. Md. 1999\)](#) (verbal and physical attack).

[FN14]. See, e.g., [Murrell v. Ocean Mecca Motel, Inc., 262 F.3d 253, 255 \(4th Cir. 2001\)](#) (removal from motel); [Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 864 \(6th Cir. 2001\)](#) (removal from store); [Bray v. RHT, Inc., 748 F.Supp. 3, 4 \(D.D.C. 1990\)](#), aff'd sub nom. [Bray v. Hebble, 976 F.2d 45 \(D.C. Cir. 1992\)](#) (removal from restaurant).

[FN15]. See, e.g., [Shawl v. Dillard's, Inc.](#), 17 Fed. Appx. 908, 909-10 (10th Cir. 2001) (rude service, surveillance, and harassment); [Hampton v. Dillard Dep't Stores, Inc.](#), 247 F.3d 1091, 1100 (10th Cir. 2001), cert. denied, 534 U.S. 1131 (2002) (search of customer's belongings); [Hill v. Shell Oil, Co.](#) 78 F. Supp. 2d 764, 767-68 (N.D. Ill. 1999) (pre-payment requirement); [Bobbitt by Bobbitt v. Rage, Inc.](#), 19 F.Supp. 2d 512, 519 (W.D.N.C. 1998) (pre-payment requirement); [Bermudez Zenon v. Restaurant Compostela, Inc.](#), 790 F. Supp. 41, 43 (D.P.R. 1992) (three hour delay in service).

[FN16]. See, e.g., [Middlebrooks v. Hillcrest Foods, Inc.](#), 256 F.3d 1241, 1244 (11th Cir. 2001) (refusal to serve African-American customers); [Watson v. Fraternal Order of Eagles](#), 915 F.2d 235, 239-40 (6th Cir. 1990) (refusal to serve soft drinks to plaintiffs); [Wilson v. Waffle House, No. CIV.A.97-W- 647-N, 1998 WL 1665880, at \\*3 \(M.D. Ala. Apr. 28, 1998\)](#) (refusal to serve African-American customers).

[FN17]. See generally Jerome D. Williams, Geraldine R. Henderson, & Anne- Marie Harris, Consumer Racial Profiling: Bigotry Goes to Market, 108 THE NEW CRISIS 22 (Nov/Dec. 2001).

[FN18]. Austin, supra note 4, at 148 n.4 (listing articles published in law journals and in the popular press); see Stephen E. Haydon, Comment, [A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations](#), 44 UCLA L. REV. 1207, 1210 (1997) (employing former New York City Mayor David Dinkin's difficulty in hailing a taxicab as an example of racial discrimination in everyday interactions).

[FN19]. Siegelman, supra note 5, at 70. "Although there is now a large body of research on the frequency and amount of discrimination in what are arguably the two most important markets in which most of us participate--employment and housing--we know very little about discrimination in other kinds of transactions." Id. Siegelman also notes the dearth of social science literature that directly addresses the frequency with which blacks encounter discrimination in the marketplace. Id. at 92 n.30.

[FN20]. Id. at 79.

[FN21]. Id. at 80. The study defined discrimination as "unfair treatment because of your race." Siegelman, supra note 5, at 80.

[FN22]. Id.

[FN23]. Id. at 72.

[FN24]. Id.

[FN25]. Thomas L. Ainscough & Carol M. Motley, Will You Help Me, Please? The Effects of Race, Gender and Manner of Dress on Retail Service, 11 MARKETING LETTERS 129, 135 (2000).

[FN26]. Id. at 130.

[FN27]. See Jerome D. Williams & Thelma Snuggs, Presentation at Multicultural Marketing Conference, American Marketing Association, Survey of Attitudes Toward Customer Service in Retail Stores: The Role of Race (Oct. 16- 19, 1996) (notes on file with author); see also Jerome D. Williams & Marye C. Tharp, African Americans: Ethnic Roots, Cultural Diversity, in MARYE C. THARP, MARKETING AND CONSUMER IDENTITY IN MULTICULTURAL AMERICA 165, 170, 194-95 (2001) (concluding that engaging in, or appearing to engage in, CRP may be detrimental to retailers associated with such practices in the minds of consumers); Haydon, supra note 18, at 1214 (discussing other

similar statistics).

[FN28]. See *infra* Part III. See generally Geraldine R. Henderson, Anne- Marie Harris, & Jerome D. Williams, *Legal Developments: Consumer Racial Profiling* (unpublished manuscript on file with authors) (reviewing more than eighty cases filed in federal court since 1990 involving allegations of race discrimination in retail settings).

[FN29]. Siegelman, *supra* note 5, at 82.

[FN30]. *Id.*

[FN31]. See Joe R. Feagin, *The Continuing Significance of Race: Anti- black Discrimination in Public Places*, 56 AM. SOC. REV. 101, 111-12 (1991); Kennedy, *supra* note 2, at 276; Joseph William Singer, [No Right to Exclude: Public Accommodations and Private Property](#), 90 NW. U. L. REV. 1283, 1286-88 (1996). There is, however, disagreement about the seriousness and magnitude of consumer racial profiling. Kennedy, *supra* note 2, at 294. Siegelman recommends that social scientists undertake the methodical study of quantifying occurrences of CRP. See Siegelman, *supra* note 5, at 88.

[FN32]. See Ian Ayres, [Fair Driving: Gender and Race Discrimination in Retail Car Negotiations](#), 104 HARV. L. REV. 817, 841 (1991); Kennedy, *supra* note 2, at 288; 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, 364 (1996).

[FN33]. Ayres, *supra* note 32, at 841. Under this theory, an actor might, for example, consciously desire to avoid interaction with African Americans. Ambinder, *supra* note 32, at 364. Accordingly, retailers who want to discriminate may charge higher rates to blacks as an "animus-compensating tax," or they may provide poor service to blacks. *Id.*; see Graves, *supra* note 4, at 185 (commenting that the most interesting conclusion of Ayres' study was the discovery that certain retailers simply enjoyed "sticking Black customers with a bad deal"). Siegelman refers to the Shoney's case as a "textbook example of racist management that discriminated against blacks, both as employees and as customers, as a matter of corporate policy." Siegelman, *supra* note 5, at 95 n.47. See generally [Haynes v. Shoney's, Inc., No. 89-30093-RV, 1993 WL 19915 \(N.D. Fla. Jan. 25, 1993\)](#) (Shoney's was sued for allegedly maintaining a widespread corporate policy of discrimination against its customers and employees and ultimately agreed to pay more than \$132 million to approximately 10,000 plaintiffs). Shoney's policy is unusual. Large chains are less likely to discriminate overtly because they risk losing customers nationwide if one location discriminates against blacks. Furthermore, such a sweeping policy of discrimination would be difficult to hide. Siegelman, *supra* note 5 at 86, 95 n.49.

[FN34]. "Even the well-known cases involving the segregation of railway cars involved maintaining a racial caste system ..., not a refusal to allow blacks to engage in commerce." Kennedy, *supra* note 2, at 291 n.103. One scholar, James Jones, argues that the term "racism" describes both the belief that one's race is superior to another and the actions attendant to that belief. JAMES JONES, *PREJUDICE & RACISM* 13 (2d ed. 1997); see Kennedy, *supra* note 2, at 302 n.164. Historian Leon Litwack contends that current forms of discrimination have roots in the antebellum North, where discrimination stemmed from the belief that blacks "constituted a depraved and inferior race which must be properly kept in its place in a white man's society." LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at viii (1961); see Singer, *supra* note 31, at 134.

[FN35]. Ayres, *supra* note 32, at 842. Often, retailers' actions result from their concern

about security and loss prevention. For example, during an interview conducted on condition of anonymity, an employee of a large national chain of clothing stores revealed that managers currently train their sales associates to follow black and Hispanic customers as they shop as a method of loss prevention. The employee believes that store management is responsible for developing and implementing such a policy at the North Shore Mall in a suburb north of Boston. No official policy can be traced to corporate headquarters. Interview with anonymous employee, North Shore Mall, Peabody, Mass. (Aug. 14, 2002). According to Michael Magill, a consultant in the Security and Loss Prevention field, loss prevention personnel who profile members of one race, age group, or sex are usually part-time employees who are either full-time police officers (inappropriately bringing their "street smarts" into the retail marketplace) or poorly trained loss prevention personnel who are ignoring the total "thief pool" in the store. During a panel discussion at the American Marketing Association's Marketing and Public Policy Conference, Mr. Magill (whose experience in the field spans forty years, thirty of which have been spent in retail) discussed data developed from hundreds of thousands of shoplifting arrests. He suggested that better indicators of the likelihood of theft, apart from race, should be used to identify potential shoplifters. Michael Magill, Panel Discussion at Marketing and Public Policy Conference, American Marketing Association, Consumer Racial Profiling: Legal, Practitioner, and Research Perspectives (May 17, 2002) (notes on file with author).

[FN36]. Ayres, *supra* note 32, at 843.

[FN37]. See Haydon, *supra* note 18, at 1211.

[FN38]. See Ayres, *supra* note 32, at 843.

[FN39]. Austin suggests that merchants who practice CRP "cannot discern a law-abiding black from a potentially law-defying black." Austin, *supra* note 4, at 152. They may also perceive the laws designed to deter and punish shoplifting as inefficient and ineffective. *Id.* at 151; see Graves, *supra* note 4, at 184.

[FN40]. See Austin, *supra* note 4, at 151; Kennedy, *supra* note 2, at 329; see also [Roberts v. Wal-Mart Stores, Inc., 769 F. Supp. 1086, 1087-88 \(E.D. Mo. 1991\)](#) (class of African-American plaintiffs alleged that Wal-Mart enforced a discriminatory policy based on assumptions about the lack of credit-worthiness of blacks when it required its cashiers to record the race of customers who paid for their purchases with a check). While this case against Wal-Mart was dismissed, this does not necessarily mean that the claim was not valid. One of the problems CRP victims face is that their experiences are not taken seriously because of such dismissals.

[FN41]. Where society will not tolerate overt racism, racist beliefs are repressed. See Graves, *supra* note 4, at 182. Some individuals' racist beliefs, however, "unconsciously manifest themselves in [their] decision-making processes." *Id.* at 183. Furthermore, psychoanalysts suggest that individuals fail to recognize their own subconscious racist ideas because those ideas do not conform to what society regards as racism, namely, overt racist acts. Given that few individuals perceive themselves as overt racists, subconscious racism must also be labeled as blameworthy to eradicate such attitudes. Barbara Flagg, "Was [Blind But Now I See](#)": [White Race Consciousness and the Requirement of Discriminatory Intent](#), 91 MICH. L. REV. 953, 989 (1993); see Kennedy, *supra* note 2, at 280; Haydon, *supra* note 18, at 1211.

[FN42]. See Kennedy, *supra* note 2, at 304, 325; see also FREDRICKSON & SILJANDER, *supra* note 3, at 104 (suggesting that cultural awareness is necessary for a thorough understanding of racial profiling and discrimination); James L. Fennessy, Comment, [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, 606 (1999) (arguing that disputes over discrimination in public accommodation involve public policy determinations that should not be decided by subjective, uninformed, and inconsistent police action).

[FN43]. 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, 228 (1994); see Austin, supra note 4, at 149; Haydon, supra note 18, at 1214-15.

[FN44]. See infra Part III.

[FN45]. Opportunity costs accrue when an individual chooses a less desirable alternative instead of a preferred alternative in order to avoid discrimination, such as taking a bus rather than a taxicab. Siegelman, supra note 5, at 91 n.23. Siegelman analyzed the data collected by the Washington Lawyers Committee for Civil Rights Under Law concerning taxicab discrimination and concluded that black individuals took seventy-two seconds longer than whites to successfully hail a cab. See Siegelman supra note 5, at 76, 77; see also Ambinder, supra note 32, at 359-64. Siegelman, valuing this time at twelve dollars per hour, estimated the average "cost" to be twenty-five cents. Of course, he notes that discrimination has an "important psychological dimension that is not adequately captured by a simple opportunity cost valuation such as this one." Siegelman, supra note 5, at 77.

[FN46]. Siegelman, supra note 5, at 77; see Williams, supra note 43, at 187; Main, supra note 3, at 310 (remarking that the legislative history of Title II indicates that discrimination "discourag[es] industry and neglect[s] the needs of an entire segment of the consumer market").

[FN47]. Austin, supra note 4, at 150-51.

[FN48]. Id.; see Williams, supra note 43, at 187; Haydon, supra note 18, at 1215 n.22.

[FN49]. Austin, supra note 4, at 154.

[FN50]. Williams, supra note 43, at 187; see Feagin, supra note 31, at 109; Kennedy, supra note 2, at 277-78, 294; Haydon, supra note 18, at 1215 n.22; see also PHILOMENA ESSED, UNDERSTANDING RACISM 2 (1991) (asserting that racism is not static ideology but a condition that is "routinely created and reinforced through everyday practices").

[FN51]. "[T]he 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." Kennedy, supra note 2, at 333-34. It is difficult, however, to measure the psychological costs of CRP. Siegelman, supra note 5, at 91 n.23.

[FN52]. Kennedy, supra note 2, at 277. Kennedy discusses research being conducted in a variety of disciplines (psychology, psychiatry, and social science) to study the effects of living with daily racial assaults on African- Americans' physical and mental health. Id.

[FN53]. Siegelman, supra note 5, at 95 n.54; Williams, supra note 43, at 187.

[FN54]. See Siegelman, supra note 5, at 82 (finding only 23 opinions in public accommodation cases since 1990, although there are tens of thousands of federal employment discrimination cases); Haydon, supra note 18, at 1215 (acknowledging that

victims of discrimination rarely initiate a lawsuit and the few that do seek to enjoin only the most "flagrant violations"). Siegelman utilizes a broad definition of "public accommodation" that does not correspond precisely to the definition provided in the federal public accommodations statute, 42 U.S.C. § 2000(a)(b). Siegelman, *supra*, note 5, at 70; see *infra* note 114. The author's search of federal court cases (based on [42 U.S.C. §§ 1981, 1982](#), and 2000(a) and decided between 1990 and 2002) generated approximately 80 published opinions.

[\[FN55\]](#). Haydon, *supra* note 18, at 1215 (explaining that victims usually do not recognize a civil rights violation absent overt racial prejudice); see Ambinder, *supra* note 32, at 347.

[\[FN56\]](#). Haydon, *supra* note 18, at 1215.

[\[FN57\]](#). Siegelman, *supra* note 5, at 80.

[\[FN58\]](#). Kennedy, *supra* note 2, at 328; Fennessy, *supra* note 42, at 602. Daniel Butler, Vice-President of Retail Operations at the National Retailers' Federation (NRF) states that: "Racial profiling isn't something people do obviously. It's not something that people do in a way that everyone else around you normally sees. It's more covert, and because of its covert nature, it's harder to detect ...." Timothy P. Henderson, Perception that Some Merchants Practice Racial Profiling Generates Debate, STORES ONLINE, at <http://www.stores.org/archives/jun01edit.html> (last visited Oct. 1, 2002). Siegelman posits: "In a world where race discrimination is illegal in most contexts and is widely considered to be immoral, discriminators have both a legal and social incentive to practice deceptive 'Have a Nice Day Racism' rather than overt discrimination." Siegelman, *supra*, note 5, at 79; see Haydon, *supra* note 18, at 1214 (concluding that racial discrimination is generally covert because it is socially unacceptable or even illegal).

[\[FN59\]](#). Feagin, *supra* note 31, at 103; see Kennedy, *supra* note 2, at 328. 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." Feagin, *supra* note 31, at 109; see Kennedy, *supra* note 2, at 328.

[\[FN60\]](#). Karen M. Ruggiero & Donald M. Taylor, Coping with Discrimination: How Disadvantaged Group Members Perceive the Discrimination That Confronts Them, 68 J. PERSONALITY SOC. PSYCHOL. 826, 837 (1995); see Karen M. Ruggiero, & David M. Marx, Less Pain and More to Gain: Why High Status Group Members Blame Their Failure on Discrimination, 77 J. PERSONALITY SOC. PSYCHOL., 774, 782-83 (1999); Karen M. Ruggiero et al., "Why did I get a 'D'?" The Effects of Social Comparisons on Women's Attributions to Discrimination, 26 PERSONALITY SOC. PSYCHOL. BULL. 1271, 1271-72 (2000); Karen M. Ruggiero & Donald M. Taylor, Why Minority Group Members Perceive or Do Not Perceive the Discrimination that Confronts Them: The Role of Self-esteem and Perceived Control, 72 J. PERSONALITY SOC. PSYCHOL. 373, 385 (1997); see also Cheryl R. Kaiser & Carol T. Miller, Stop Complaining! The Social Costs of Making Attributions to Discrimination, 27 PERSONALITY SOC. PSYCHOL. BULL. 254, 255, 261-62 (2001) (positing that stigmatized people may avoid claims of discrimination because such attributions are costly in terms of perceived control over outcomes and social self-esteem); Janet K. Swim & Laurie L. Hyers, Excuse me--What Did You Say?: Women's Public and Private Responses to Sexist Remarks, 35 J. EXPERIMENTAL SOC. PSYCHOL. 68-85 (1999) (finding that fear of the consequences of confronting discriminators may keep stigmatized people from publicly acting on their dissatisfaction).

[\[FN61\]](#). Kennedy, *supra* note 2, at 325; see Ambinder, *supra* note 32, at 347.

[\[FN62\]](#). See Ambinder, *supra* note 32, at 347; See also *infra* Part III.A (discussing the

difficulty in establishing differential treatment); [Alexis v. McDonald's Rest. of Mass., Inc.](#), 67 F.3d 341, 347 (1st Cir. 1995) (no race-based animus is established absent some evidence that defendant's angry response toward plaintiff stemmed from something other than a race-neutral reaction to a stressful encounter); Singh v. Wal-Mart Stores, Inc., No. CIV.A.98--1613, [1999 WL 374184, at \\*8 \(E.D. Pa. June 10, 1999\)](#) (plaintiff was not similarly-situated in all relevant aspects to customers who were attempting to return or exchange merchandise, because there was no evidence that any other customer attempted to return an out-of-warranty appliance, purchase another appliance, and again attempt to make a return the next day in the presence of an employee who witnessed the events of the prior day); [Jackson v. Tyler's Dad's Place, Inc.](#), 850 F. Supp. 53, 55-56 (D.D.C. 1994), aff'd, [107 F.3d 923 \(D.C. Cir. 1996\)](#) (plaintiffs' assertion that they were denied seating because of their race was insufficient to state a claim when they presented no evidence that white patrons who arrived without reservations were seated in the main dining room); [Robertson v. Burger King, Inc.](#), 848 F. Supp. 78, 81 (E.D. La. 1994) (plaintiff was unable to state a cause of action since the service at the fast-food restaurant was merely slow and he was eventually served).

[FN63]. Haydon, supra note 18, at 1212, 1215, 1228; see Siegelman, supra note 5, at 85, 93 n.37; Ambinder, supra note 32, at 347; Graves, supra note 4, at 186.

[FN64]. Kennedy, supra note 2, at 327.

[FN65]. Id.

[FN66]. See Siegelman, supra note 5, at 70.

[FN67]. Kennedy, supra note 2, at 325-26. Daniel Tardiff contends that the subtle discrimination existing in the United States is often unprovable absent the use of testing programs. Consequently, no definitive data exist to support the belief that racial discrimination persists in America. See Daniel M. Tardiff, Comment, [Knocking on the Courtroom Door: Finally an Answer from Within for Employment Testers](#), 32 LOY. U. CHI. L.J. 909, 924-27 (2001); see also infra note 152 (discussing testing).

[FN68]. Graves, supra note 4, at 185. Graves reports that many federal judges believe that most, if not all, civil rights claims are frivolous. The implication of these findings is that judges do not believe that there is as much racist behavior in the marketplace as there appears to be. Such beliefs can result from "unconscious" racism. Id. at 184. Furthermore, evidence shows that civil rights claims are still underreported. This is partly because pro bono attorneys, who cannot risk sanctions for frivolity and who work for no compensation, frequently represent the plaintiffs in these cases. Id. at 181 n.135; see also Kennedy, supra note 2, at 333 ("[T]here is a fear that all fact-finders, including judges, are susceptible to the effects of cognitive stereotyping.").

[FN69]. Kennedy, supra note 2, at 327. Kennedy suggests that "courts give little weight to ... 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." Id.

[FN70]. Fennessy, supra note 42, at 584; Graves, supra note 4, at 170-71. Graves attributes such heightened pleading requirements to a number of concerns among many federal judges. For example, civil rights claims are complex and take a great deal of time to litigate. Graves, supra note 4, at 172. In addition, Graves cites an explosion of cases that are blamed on "litigants' and lawyers' overuse, misuse, and abuse of the civil justice system." Id. at 171.

[FN71]. See Kennedy, supra note 2, at 281.



[FN72]. See generally Amended Complaint, NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01--CV--325--HLM (N.D. Ga. filed Apr. 11, 2002).

[FN73]. See [LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1375, 1378-79 \(S.D. Fla. 1999\)](#) (African-American customers were repeatedly asked to leave store because, according to Denny's employees, the stove was broken, the restaurant was out of food, or the store was closing); [Charity v. Denny's, Inc., No. CIV.A.98--0554, 1999 WL 544687, at \\*5 \(E.D. La. July 26, 1999\)](#) (listing examples of subtle harassment, including slow service, discourteous treatment, harassing comments and gestures, and racial insults).

[FN74]. Amended Complaint ¶ 1, Cracker Barrel Old Country Store, Inc., (No. 4:01-CV--325--HLM).

[FN75]. Id. § I, ¶ 14. "Cracker Barrel maintains actual or constructive control, oversight, or direction over all restaurant operations, including individual restaurant employment practices. Cracker Barrel operates approximately seventeen stores from leased facilities and also leases land and advertising billboards across the United States." Id.

[FN76]. Id. ¶ 1. Plaintiffs patronized or attempted to patronize 28 Cracker Barrel Restaurants in 16 states. Id. ¶ 2.

[FN77]. Amended Complaint ¶ 3, Cracker Barrel Old Country Store, Inc., (No. 4:01--CV--25--HLM).

[FN78]. A total of 310 current and former Cracker Barrel employee witnesses provided evidence of discrimination in accommodations at Cracker Barrel restaurants in 31 states. More than 50 employee witnesses have direct evidence that Cracker Barrel restaurant managers directed servers to seat African American patrons apart from white patrons. Id. ¶ 4. Plaintiffs' claims were corroborated by 96 witnesses who were customers of Cracker Barrel restaurants. Id. ¶ 5.

[FN79]. Id. ¶ 7.

[FN80]. Id. ¶ 11.

[FN81]. Amended Complaint at Section VIII, Prayer for Relief, ¶¶ 3-4, 5, NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01-CV-325-HLM (N.D. Ga. filed Apr. 11, 2002). The Supreme Court has recognized that a [§ 1981](#) plaintiff is entitled to "compensatory and, under certain circumstances, punitive damages." [Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 \(1975\)](#).

[FN82]. Main, supra note 3, at 290.

[FN83]. Id. at 316; see Kennedy, supra note 2, at 304 (characterizing plaintiffs' options as "a hodgepodge of legal claims"); Haydon, supra note 18, at 1212 (stating that "public accommodations cases have relied upon a patchwork of claims").

[FN84]. Kennedy, supra note 2, at 338.

[FN85]. Id.; see Haydon, supra note 18, at 1228.

[FN86]. Haydon, supra note 18, at 1228. Tort law claims that are typically brought by CRP plaintiffs include the following: (1) False imprisonment, see, e.g., [Shaw v. Dillard's, Inc., 17 Fed. Appx. 908, 910 n.1 \(10th Cir. 2001\)](#); [Hampton v. Dillard Dep't Stores, Inc. 247 F.3d 1091, 1100, 1112 \(10th Cir. 2001\)](#), cert. denied, [534 U.S. 1131 \(2002\)](#); [Rogers v. Elliott, 135 F. Supp. 2d 1312, 1313 \(N.D. Ga. 2001\)](#); (2) assault and battery, see,

e.g., [Rogers v. Elliott](#), 135 F. Supp. 2d 1312, 1313, (N.D. Ga. 2001); [Holmes v. Dillard Dep't Store](#), No. CIV.A.99--3444, 2000 WL 1725082, at \*4-5 (E.D. La. Nov. 17, 2000); [McCaleb v. Pizza Hut of Am., Inc.](#), 28 F. Supp. 2d 1043, 1048 (N.D. Ill. 1998); (3) defamation, see, e.g., [Shawl](#), 17 Fed. Appx. at 910; [Garrett v. Tandy Corp.](#), 142 F. Supp. 2d 117, 118-20 (D. Me. 2001); (4) negligent training and supervision, see, e.g., [Williams v. Cloverland Farms Dairy, Inc.](#), 78 F.Supp. 2d 479, 484-87 (D. Md. 1999); [Perry v. S.Z. Rest. Corp.](#), 924 F.Supp. 548, 550-54 (S.D.N.Y. 1996); (5) intentional infliction of emotional distress, see, e.g., [Brown v. Zaveri](#), 164 F. Supp. 2d 1354, 1363 (S.D. Fla. 2001); [Brown v. Wal-Mart Stores, Inc.](#), No. 96--CV--1500, 1998 WL 178798, at \*3-4 (N.D.N.Y. Apr. 10, 1998); [Perkins v. Marriott Int'l, Inc.](#), 945 F. Supp. 282, 283, 285-87 (D.D.C. 1996).

[FN87]. See, e.g., [Shawl](#), 17 Fed. Appx. at 910 n.1; [Hampton](#), 247 F.3d at 1100, 1112, cert. denied, 534 U.S. 1131 (2002); [Rogers](#), 135 F. Supp. 2d at 1313; (2) assault and battery, see, e.g., [Rogers](#), 135 F. Supp. 2d at 1313; [Holmes](#), No. CIV.A.99--3444, 2000 WL 1725082, at \*4-5 (E.D. La. Nov. 17, 2000); [McCaleb](#), 28 F. Supp. at 1048.

[FN88]. [Austin](#), supra note 4, at 151; see [Thomas Brad Bishop](#), Excerpts from the Law of Shoplifting: A Guide for Lawyers and Merchants, 19 CUMB. L. REV. 43, 55-56, 62-64 (1988).

[FN89]. [Austin](#), supra note 4, at 152. [Austin](#) suggests that [K-Mart Corp. v. West Virginia Human Rights Commission](#) is one case where a store owner used objective evidence of a shoplifter profile. *Id.* at 152, n.21; see [K-Mart Corp. v. W. Va. Human Rights Comm'n](#), 383 S.E.2d 277, 278 (W.V. 1989) (store previously warned to be on the lookout for a shop-lifting band of gypsies).

[FN90]. [Williams](#), supra note 43, at 218; see [Reid v. Key Bank of S. Me., Inc.](#), 821 F.2d 9, 11 (1st Cir. 1987) (affirming jury's conclusion that defendant bank acted in bad faith when, motivated by racial prejudice, it restricted plaintiff's credit and seized his assets without notice); [Ricci v. Key Bancshares of Me., Inc.](#), 662 F. Supp. 1132, 1141 (D. Me. 1987) (jury concluded bank unlawfully discriminated against plaintiff and violated its duty of good faith and fair dealing when it terminated a line of credit it had extended to plaintiff).

[FN91]. [Williams](#), supra note 43, at 225.

[FN92]. *Id.* at 226.

[FN93]. [Nan D. Hunter](#), [Accommodating the Public Sphere: Beyond the Market Model](#), 85 MINN. L. REV. 1591, 1617 (2001); see [Singer](#), supra note 31, at 1345- 48.

[FN94]. [Singer](#), supra note 31, at 1300, 1301. New Jersey, however, has a different approach, as it appears to be the only state that has extended the common law duty to serve to all business and organizations that serve the general public. [Fennessy](#), supra, note 42, at 553.

[FN95]. [Singer](#), supra note 31, at 1475.

[FN96]. *Id.* at 1300.

The antebellum law presented itself in a neutral framework yet obscured the fact that African Americans were not included among the right-holders protected by the right of access to businesses that held themselves out as open to the public. The post-Civil War period brought in an era of confusion and turmoil as social groups attempted to work out the new relations between the races, experimenting with options from full, equal, and integrated access to segregation to outright exclusion. The Jim Crow era constituted

property rights in a manner that both established and perpetuated a racial caste system, while suppressing the contradiction between segregation laws and emerging conceptions of absolute private property rights. The civil rights era again revolutionized social relations in the 1960s.  
Id. at 1475-76.

[FN97]. Hunter, *supra* note 93, at 1614. State laws proscribe primarily three types of discrimination. The most common, sex discrimination, is banned by 43 state statutes, including the District of Columbia. Of those 43 statutes, 11 also prohibit sexual orientation discrimination. Twenty-one state statutes, including the District of Columbia, cover marital status discrimination. Id. at 1615-16.

[FN98]. Kennedy, *supra* note 2, at 337. For example, New Jersey's Law Against Discrimination prohibits discrimination in places of public accommodation, including retail stores, based on race, creed, ethnicity, gender, and sexual orientation. See [N.J. Stat. Ann. § 10:5-4 \(West 1993 & Supp. 2002\)](#).

[FN99]. Singer, *supra* note 31, at 1290; see Hunter, *supra* note 93, at 1628 n.190. States that have no statutes prohibiting race-based discrimination in retail stores include Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas. Singer, *supra* note 31, at 1290.

[FN100]. Fennessy, *supra* note 42, at 607. Fennessy also explains that, under the New Jersey Law Against Discrimination, police officers are not authorized to enforce the anti-discrimination provisions when disputes arise in public accommodations. Id.

[FN101]. Haydon, *supra* note 18, at 1226.

[FN102]. Id.

[FN103]. [15 U.S.C. §§ 41-58 \(2000\)](#).

[FN104]. The legislative history of a Pennsylvania law provides one example: The purpose of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) is to eradicate "unfair or deceptive business practices" and prevent fraud. Among the "unfair or deceptive business practices" barred by the UTPCPL is the "fail[ure] to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made." [Singh v. Wal-Mart Stores, Inc., No. CIV. A. 98-1613, 1999 WL 374184, at \\*10 \(E.D. Pa. June 10, 1999\)](#) (citations omitted); see also [Pa. Stat. Ann. tit. 73, § 201-2](#) (West 1993).

[FN105]. FEDERAL TRADE COMMISSION, POLICY STATEMENT ON UNFAIRNESS, reprinted in H.R. Rep. No. 98-156, 1st Sess. pt. 1, at 36 (1983).

[FN106]. FEDERAL TRADE COMMISSION, POLICY STATEMENT ON DECEPTION, reprinted in *In re Cliffdale Assocs., Inc.*, 103 F.T.C 110, 175 (1984). According to Dr. Ross Petty, Professor of Marketing and Technology Law, Babson College, Wellesley, MA, the FTC has never challenged discriminatory advertising as deceptive. Ross D. Petty & Anne-Marie Harris, *Regulating Racially Discriminatory Advertising: Brown v. Board of Education Meets Modern Marketing* 30 (2002) (unpublished manuscript, on file with author).

[FN107]. [Tenn. Code Ann. § 47-18-101](#) to -125 (2001).

[FN108]. Second Amended Complaint ¶¶ 133-142, *Berry v. South East Waffles, L.L.C.*, No. 4: 01-CV-28 (E.D. Tenn. filed Feb. 15, 2002). This case settled on August 6, 2002.

[FN109]. Id. ¶¶ 133-142.

[FN110]. "The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity." [S. Rep. No. 88-872 \(1964\)](#), reprinted in 1964 U.S.C.C.A.N. 2355, 2369; see also John Hope Franklin, [The Civil Rights Act of 1866 Revisited](#), 41 *Hastings L.J.* 1135, 1137 (1990) ("[The Civil Rights Act of 1964] was direct and specific and addressed acute problems facing African Americans as they sought to make their way through the maze of practices, customs, traditions, and even laws that impeded their everyday functions and activities.").

The only purpose of the 1964 Civil Rights Act was arguably to implement that aspect of the common-law rule [that only innkeepers, common carriers, or places of entertainment (in some states) had a duty to serve the public without unjust discrimination] while overturning the pieces of the common-law rule that held that segregation was a "reasonable regulation" of private property open to the public and that "separate facilities were equal."

Singer, *supra* note 31, at 1337.

[FN111]. Pub.L. No. 88-352, 201, 78 Stat. 241 (1964) (codified as amended at [42 U.S.C. § 2000a](#) to a-6 (1994)).

[FN112]. [H.R. Rep. No. 88-914 \(1963\)](#), reprinted in 1964 U.S.C.C.A.N. 2355, 2393-94.

[FN113]. [U.S. Const. art. I, § 8, cl. 3](#); see [S. Rep. No. 88-872 \(1964\)](#), reprinted in 1964 U.S.C.C.A.N. 2355, 2366-68. The Act was not intended to replace the Act of 1866. Franklin, *supra* note 110, at 1137; see Singer, *supra* note 31, at 1434; see also [Watson v. Fraternal Order of Eagles](#), 915 F.2d 235, 239-40 (6th Cir. 1990).

[FN114]. 42 U.S.C. § 2000(a) (1994). A "public accommodation" is defined as:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
- (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Id. at 2000 (a)(b).

[FN115]. Haydon, *supra* note 18, at 1219; see, e.g., [Chu v. Gordan's Inc., No. 8:01CV182, 2002 WL 802353, at \\*3 \(D. Neb. Apr. 12, 2002\)](#) (holding that a retail store is not a place of public accommodation under the Act); [Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 861-62 \(N.D. Ohio 2000\)](#) (holding that a hair salon is not a place of entertainment, and therefore, not a place of public accommodation under Title II).

[FN116]. [42 U.S.C. § 2000a\(b\)\(2\)](#).

[FN117]. Haydon, *supra* note 18, at 1219; see Kennedy, *supra* note 2, at 335; Singer, *supra* note 31, at 1412. Although retail stores are excluded from coverage, the definition

of public accommodation includes stores that have eating establishments (or other covered entities) located on the premises. [42 U.S.C. § 2000a\(b\)\(4\)\(A\)\(ii\)](#). Consequently, the statute reaches hundreds of stores that have restaurants or lunch counters. Hunter, *supra* note 93, at 1622; see *Thomas v. Tops Friendly Markets, Inc.*, No.96-CV1579, 1997 WL 627553, at \*3 (N.D.N.Y. Oct. 8, 1997) (holding that a retail establishment that contains a food counter covered by [42 U.S.C § 2000a\(b\)\(2\)](#) is a place of public accommodation).

[\[FN118\]](#). 110 CONG. REC. 6533 (1964). To get the bill passed, it was probably necessary to limit the applicability of Title II to certain kinds of businesses. Singer, *supra* note 31, at 1417. According to legal scholar Deseriee Kennedy, the 1964 Congress expected that less bothersome areas of discrimination would disappear through voluntary action and public effort. Kennedy, *supra* note 2, at 335-36.

[\[FN119\]](#). See Singer, *supra* note 31, at 1418.

[\[FN120\]](#). *Id.* at 1412-13; Main, *supra* note 3, at 313. Singer provides compelling arguments on both sides of this debate. Singer, *supra* note 31, at 1413-35. For example, he points to Title II's express exemption for private clubs as evidence that Congress did not intend to exempt retail stores from coverage under the public accommodations statute. "In the absence of an express exemption, we should conclude that Congress did not intend affirmatively to give such stores a right to discriminate ...." *Id.* at 1434. Main urges Congress to amend Title II by updating the list of covered entities to reflect societal changes experienced since 1964, while Hunter maintains that a generic definition of the term "public accommodation" is appropriate. Hunter, *supra* note 93, at 1614, 1615; Main, *supra* note 3, at 313-14. Both Main and Hunter highlight the broad coverage of Title III of the Americans With Disabilities Act of 1990 that also proscribes discrimination in places of public accommodation. Hunter, *supra* note 93, at 1614-15; Main, *supra* note 3, at 314. Hunter also discusses the proper meaning of "public" in the context of civil rights law. See Hunter, *supra* note 93, at 1628-29; see also [United States v. Baird, 85 F.3d 450, 453-54 \(9th Cir. 1996\)](#) (holding that the presence of two video game machines, a form of "entertainment," in a retail convenience store, transformed the retail store into a place of public accommodation under [42 U.S.C. § 2000a\(b\)](#)).

[\[FN121\]](#). See Singer, *supra* note 31, at 1413-15. Perhaps the omission is due, in part, to the fact that "the common law never provided a right of access to retail stores although it did provide a right of access to other public accommodations." *Id.* at 1291.

[\[FN122\]](#). See, e.g., [Chu v. Gordman's Inc., No. 8:01CV182, 2002 WL 802353, at \\*3, 4 \(D. Neb. Apr. 12, 2002\)](#) (rejecting plaintiff's argument that the amusement derived from shopping at the half-price store can transform the retail store into a place of entertainment); [McCrea v. Saks, Inc., No. CIV. A. 00-CV1936, 2000 WL 1912726, at \\*2 \(E.D. Pa. Dec. 22, 2000\)](#) (holding that retail establishments are excluded from Title II coverage based on the ordinary meaning of the statute's words and the exclusionary language in [§ 2000a\(b\)\(2\)](#)); [Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 861-62 \(N.D. Ohio 2000\)](#) (finding that a hair salon is not a place of public accommodation under the act because it is not a place of entertainment, and emphasizing that Congress could have amended Title II to include service establishments if it had wanted); *Haywood v. Sears, Roebuck & Co.*, No. 7:94-CV-106-BR2, 1996 U.S. Dist. LEXIS 11954, at \*7 (E.D.N.C. July 18, 1996) (holding that statute was inapplicable because defendant's retail store was not a "place of public accommodation").

[\[FN123\]](#). See [42 U.S.C. § 2000a-3\(c\)](#). The statute provides, in pertinent part: In the case of an alleged act or practice prohibited by this subchapter which occurs in the State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a state or local authority to grant or seek

relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this Section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.  
Id.

[FN124]. See, e.g., [Stearnes v. Baur's Opera House, Inc.](#), 3 F.3d 1142, 1144-45 (7th Cir. 1993) (holding that plaintiffs must give notice to the Illinois Department of Human Rights before filing a Title II claim); [Watson v. Fraternal Order of Eagles](#), 915 F.2d 235, 242 (6th Cir. 1990) (deeming it unnecessary to reach the merits of plaintiffs' action under Title II because plaintiffs did not exhaust their administrative remedies as required by the statute); [Brown v. Zaveri](#), 164 F. Supp. 2d 1354, 1360 (S.D. Fla. 2001) (Title II claim dismissed for failure to exhaust remedies under the Florida Commission for Human Rights); [Hill v. Shell Oil Co.](#), 78 F. Supp. 2d 764, 772 (N.D. Ill. 1999) (denying defendant's motion to dismiss the Title II claims for lack of subject matter jurisdiction because plaintiffs met the jurisdictional requirements by satisfying the 30-day state notice rule in § 2000a-3(c)); [White v. Denny's Inc.](#), 918 F. Supp. 1418, 1423 (D. Co. 1996) (dismissing plaintiff's Title II claim since plaintiffs conceded they failed to notify the Colorado Civil Rights Commission).

[FN125]. [Robinson v. Power Pizza, Inc.](#), 993 F. Supp. 1458, 1459-60 (M.D. Fla. 1998).

[FN126]. [Id.](#) at 1460-61. The FCHR is empowered to "receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice." [Fla. Stat. Ann. § 760.06\(5\)](#) (West 1997 & Supp. 2001).

[FN127]. See [42 U.S.C. §§ 2000a-3, 2000a-6\(b\)](#); see also [Newman v. Piggie Park Enters.](#), 390 U.S. 400, 402 (1968) (per curiam).

[FN128]. See Haydon, *supra* note 18, at 1251; Main, *supra* note 3, at 314-15.

[FN129]. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870)) (codified as amended at [42 U.S.C. §§ 1981-1982 \(2000\)](#)). Congress enacted the law pursuant to its power, under the Thirteenth Amendment, to eradicate involuntary servitude. See [Runyon v. McCrary](#), 427 U.S. 160, 168-70 (1976).

[FN130]. [Jones v. Alfred H. Mayer Co.](#), 392 U.S. 409, 443 (1968). "The aim of [§ 1981] is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace." [Bobbitt by Bobbitt v. Rage, Inc.](#), 19 F. Supp. 2d 512, 516 (W.D.N.C. 1998); see [Patterson v. McLean Credit Union](#), 491 U.S. 164, 190 (1989).

[FN131]. Barry Sullivan, [Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981](#), 98 YALE L.J. 541, 549, 552, 554, 556 (1989).

[FN132]. Franklin, *supra* note 110, at 1141.

[FN133]. See, e.g., [Chu v. Gordman's, Inc.](#), No.8:01CV182, 2002 WL 802353, at \*6 (D. Neb. Apr. 12, 2002) (the right to contract under § 1981 should be broadly construed); [Charity v. Denny's, Inc.](#), No. CIV.A.98-0054, 1999 WL 544687, at \*5 (E.D. La. July 26, 1999) (finding that courts must afford a liberal construction of the Civil Rights Act in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of racial discrimination); [Haywood v. Sears, Roebuck and Co.](#), No. 7:94-

CV-106- BR2, 1996 U.S. Dist. LEXIS 11954, at \*5 (E.D.N.C. July 18, 1996) ([Sections 1981](#) and [1982](#) must be construed broadly because they are remedial statutes).

[FN134]. Kennedy, supra note 2, at 279.

[FN135]. The statute contains no limitation concerning the types of contracts that it covers. See Singer, supra note 31, at 1434.

[FN136]. [42 U.S.C. § 1981 \(1994\)](#). The U.S. Supreme Court has held that there is a "cause of action for private acts of racial discrimination" under [§ 1981](#) (and [§ 1982](#)). See [Patterson v. McLean Credit Union, 491 U.S. 164, 177 \(1989\)](#); [Runyon v. McCrary, 427 U.S. 160, 173 \(1976\)](#); [Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436-37 \(1968\)](#); see also Sullivan, supra note 131, at 550. In [Patterson v. McLean Credit Union](#), the U.S. Supreme Court had held that [§ 1981](#) did not apply to post-formation conduct in contracting relations. [Patterson, 491 U.S. 164 at 179-80](#). The court concluded that "[racial harassment] is not actionable under [§ 1981](#), which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." Id. The Civil Rights Act of 1991 reversed the [Patterson](#) decision by amending The Civil Rights Act of 1866 "explicitly to prohibit discrimination in entering into, performing, and enforcing all types of contracts." See Williams, supra note 43, at 213; see also [Perry v. Command Performance, No. 89-2284, 1991 WL 464475, at \\*2 \(E.D. Pa. Mar. 27, 1991\)](#), aff'd, 945 F.2d (3d Cir. 1991) (a decision made before the 1991 amendment, where the plaintiff could not establish a [§ 1981](#) claim because the discriminatory conduct occurred after formation of a race-neutral contract for hairstyling services). Kennedy provides an excellent explanation of the Supreme Court's restrictive reading of "making and enforcing contracts" and the ensuing 1991 amendment. See Kennedy, supra note 2, at 308-09; see also Hunter, supra note 93, at 1621.

[FN137]. [42 U.S.C. § 1982](#).

[FN138]. [McCrary v. Runyon, 515 F.2d 1082, 1087 \(4th Cir. 1975\)](#), aff'd, [427 U.S. 160 \(1976\)](#).

[FN139]. Kennedy, supra note 2, at 334.

[FN140]. See [Morris v. Office Max, Inc., 89 F.3d 411, 414-15 \(7th Cir. 1996\)](#) (holding that although plaintiffs were discouraged from patronizing the store because the police were summoned to "check out" African-American customers, they were not excluded from the store, denied service or asked to leave, and consequently, nothing impaired or interfered with the plaintiffs' rights to make a purchase); [Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 870 \(N.D. Ohio 2000\)](#) (holding that defendant's failure to carry products used or preferred by African Americans did not deny plaintiffs the right to purchase property under [§ 1982](#) regardless of whether the failure to carry such products was an unreasonable business decision).

[FN141]. [Jeffrey v. Home Depot U.S.A., Inc., 90 F. Supp. 2d 1066, 1070 \(S.D. Cal. 2000\)](#); see also [Morris, 89 F.3d at 414-15](#) (referring to the same rationale for deciding that defendant violated neither [§ 1981](#) nor [§ 1982](#)); [Haywood v. Sears, Roebuck and Co., No. 7:94-CV-106-BR2, 1996 U.S. Dist. LEXIS 11954, at \\*5, 7 \(E.D.N.C. July 18, 1996\)](#) (plaintiff's claim under [§ 1982](#), like their [§ 1981](#) claim, failed because singling out plaintiffs as potential thieves does not violate their rights under either section of the statute).

[FN142]. See Henderson, Harris, & Williams, supra note 28.

[FN143]. The Supreme Court adopted this standard of proof for [§ 1981](#) claims based on

the framework established in [McDonnell Douglas Corp. v. Green](#), 411 U.S. 792 (1973) and [Texas Dep't of Cmty. Affairs v. Burdine](#), 450 U.S. 248 (1981), two Title VII cases. See [Patterson v. McLean Credit Union](#), 491 U.S. 164, 186 (1989). Courts in four circuits have applied this standard. See [Hampton v. Dillard Dep't Stores, Inc.](#), 247 F.3d 1091, 1101-12 (10th Cir. 2001), cert. denied, 534 U.S. 1131 (2002); [Morris](#), 89 F.3d at 413-14; [Green v. State Bar of Tex.](#), 27 F.3d 1083, 1086 (5th Cir. 1994); [Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.](#), 7 F.3d 1085, 1087 (2d Cir. 1993); [Chu v. Gordman's, Inc.](#), No. 8:01CV182, 2002 WL 802353, at \*4 (D. Neb. Apr. 12, 2002); [Rogers v. Elliott](#), 135 F. Supp. 2d 1312, 1314 (N.D. Ga. 2001); [Buchanan v. Consol. Stores Corp.](#), 125 F. Supp. 2d 730, 734 (D. Md. 2001); [Holmes v. Dillard Dep't Store](#), No. CIV.A.99-3444, 2000 WL 1725082, at \*2 (E.D. La. Nov. 17, 2000); [Jeffrey](#), 90 F. Supp. 2d at 1069; [Bobbitt by Bobbitt v. Rage, Inc.](#), 19 F. Supp. 2d 512, 517 (W.D.N.C. 1998); [Ackaa v. Tommy Hilfiger Co.](#), No. CIV.A.96-8262, 1998 WL 136522, at \*3 (E.D. Pa. Mar. 24, 1998); [Baker v. McDonald's Corp.](#), 686 F. Supp. 1474, 1481 (S.D. Fla. 1987), aff'd, 865 F.2d 1272 (11th Cir. 1988). Courts have adopted the McDonnell Douglas burden-shifting framework for proving Title II cases as well. See [Charity v. Denny's, Inc.](#), No. CIV.A.98-0554, 1999 WL 544687, at \*5 (E.D. La. July 26, 1999) (concluding that the same prima facie test applies in § 1981 cases as claims arising under § 2000(a)); [Arguello v. Conoco](#), No. CIV.A.3:97-CV-0638-H, 1998 WL 713277, at \*4 (N.D. Tex. Oct. 7, 1998), aff'd in part, rev'd in part, 207 F.3d 803 (5th Cir. 2000) (adopting the burden-shifting framework due to the lack of guidance from the Fifth Circuit Court of Appeals about what standard to use and to the Fifth Circuit Court of Appeals' willingness to apply the Title VII burden-shifting framework outside of Title VII); see also Haydon, supra note 18, at 1220.

[FN144]. The Supreme Court first articulated that plaintiffs must establish intentional racial discrimination in [General Building Contractors Ass'n v. Pennsylvania](#), 458 U.S. 375, 388-91 (1982) (emphasis added); see also [Patterson](#), 491 U.S. at 186. Some commentators disagree with the intent requirement. See Graves, supra note 4, at 192 n.212 (arguing that the text of [sections 1981](#) and [1982](#) clearly contains no intent requirements). According to Graves, the intent requirement is not rooted in the reality of racist behavior, which "exists regardless of the discriminator's intent." Id. "The position implied by the discriminatory intent rule, that conscious discrimination is blameworthy but unconscious discrimination is not, is counter-productive of the ultimate goal of racial justice. Invalidating only conscious racism provides an incentive for whites to repress and deny whatever racist attitudes they in fact harbor." Flagg, supra note 41, at 989. By comparison, although most courts do not require Title II plaintiffs to prove that the defendant-merchant intentionally discriminated against them, a few courts have implied that intent is also an element of a Title II claim. See [LaRoche v. Denny's, Inc.](#), 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999); [Harrison v. Denny's Rest., Inc.](#), No. C-96-0343(PJH), 1997 WL 227963, at \*4 (N.D. Cal. Apr. 24, 1997); [Jones v. City of Boston](#), 738 F. Supp. 604, 606 (D. Mass. 1990).

[FN145]. Under the statute, all persons have the same right: 1) to make and enforce contracts, 2) to sue, be parties, and give evidence, 3) to the full and equal benefit of the laws, and 4) to be subjected to like pains and punishments. See [42 U.S.C. § 1981 \(a\)](#). To date, litigation involving [§ 1981](#) most commonly involves the right to make and enforce employment contracts. See [Hawkins v. Pepsico](#), 203 F.3d 274, 278 (4th Cir. 2000); [Buchanan](#), 125 F. Supp. 2d at 734. Claims involving retail transactions have been relatively infrequent. See [Morris](#), 89 F.3d at 413.

[FN146]. [McDonald Douglas Corp.](#), 411 U.S. at 802; see [Burdine](#), 450 U.S. at 253; [Murrell v. Ocean Mecca Motel, Inc.](#), 262 F.3d 253, 257 (4th Cir. 2001); [Christian v. Wal-Mart Stores, Inc.](#), 252 F.3d 862, 879 (6th Cir. 2001). This standard is based on the framework established in employment discrimination cases. See cases cited supra note 143.



[FN147]. See [Reeves v. Sanderson Plumbing Prods., Inc.](#), 530 U.S. 133, 143 (2000); [Burdine](#), 450 U.S. at 253; [Murrell](#), 262 F.3d at 257; [Christian](#), 252 F.3d at 879.

[FN148]. Amended Complaint ¶¶ 2, 4-10, [NAACP v. Cracker Barrel Old Country Store, Inc.](#), No. 4:01-CV-325-HLM, (N.D. Ga. filed Apr. 11, 2002).

[FN149]. [Rosenblatt v. Bivona & Cohen, P.C.](#), 946 F. Supp. 298, 300 (S.D.N.Y. 1996); see [Murrell](#), 262 F.3d at 258 (plaintiffs, who were three African Americans and one Caucasian, proved they were members of a protected class because both blacks and whites can sue for violations of § 1981); [Cedeno v. Wal-Mart Stores, Inc.](#), No. CIV.A.98-CV-479, 1999 WL 1129638, at \* 2 (E.D. Pa. Nov. 30, 1999) (persons of Hispanic origin may use § 1981 to sue for racial discrimination); [Bobbitt by Bobbitt v. Rage, Inc.](#), 19 F. Supp. 2d 512, 520 (W.D.N.C. 1998) (section 1981 prohibits discrimination against non-minority individuals who associate with African Americans); [Shen v. A&P Food Stores](#), No. 93-CV 1184(FB), 1995 WL 728416, at \*3 (E.D.N.Y. Nov. 21, 1995) (section 1981 protects identifiable classes of persons who are subjected to intentional discrimination because of their ancestry or ethnic characteristics).

[FN150]. BLACK'S LAW DICTIONARY 577 (7th ed. 1999); see [Ackerman v. Food- 4-Less](#), No.98-CV-1011, 1998 WL 316084, at \*2 (E.D. Pa. June 10, 1998) (plaintiff stated valid claim of intentional race discrimination where defendant's security guard used numerous racial slurs against her and told her that she could not be married to her husband because he was white and she was a minority); [Shen](#), 1995 WL 728416, at \*3 (plaintiff's allegations of purposeful discrimination are sufficient to state a claim where cashier ordered plaintiffs to shop at a Chinese-run supermarket, used a dirty gesture and said "Get out of here" and an employee shouted to one plaintiff, "Go back to China"); [Jones v. City of Boston](#), 738 F. Supp. 604, 606 (D. Mass. 1990) (finding direct evidence of race-based animus where bartender suggested to a group of white women that they not speak to "niggers" and physically threw plaintiff out of the bar).

[FN151]. [Ambinder](#), supra note 32, at 355. In the housing context, for example, black and white testers have been able to prove intentional discrimination when they attempted to rent the same apartment. See [Haydon](#), supra note 18, at 1216; see generally [Havens Realty Corp. v. Coleman](#), 455 U.S. 363 (1982). Using this method enables researchers to control for other variables, thereby increasing the probative value of the information they obtain. See [Haydon](#), supra note 18, at 1251; [Tardiff](#), supra note 67, at 926-27. While testing can provide invaluable evidence of the defendant's discriminatory intent, [Siegelman](#) suggests that it would be too cumbersome to undertake testing in retail establishments. See [Siegeleman](#), supra note 5, at 81. Currently, there are no significant programs that test for discrimination in public accommodations or retail establishments, although some companies perform internal "audits" to curb poor service. [Haydon](#), supra note 18, at 1212; see [Siegelman](#), supra note 5, at 95 n.50. One explanation for the lack of testing in retail establishments is that the courts have not yet addressed the issue of whether testers would have standing to sue. [Haydon](#), supra note 18, at 1218. Perhaps there is also fear that empirical data would reveal the frequency of discriminatory confrontation and harassment in the marketplace.

[FN152]. See [Hampton v. Dillard Dep't Stores, Inc.](#), 247 F.3d 1091, 1109 (10th Cir. 2001), cert. denied, 534 U.S. 1131 (2002) (stating that evidence of discrimination need not be admitted by defendant); [Joseph v. N.Y. Yankees P'ship](#), No. 00 CIV. 2275(SHS), 2000 WL 1559019, at \*5 (S.D.N.Y. Oct. 19, 2000) (explaining that discriminatory intent can be inferred when plaintiff can show specific instances where individuals situated similarly "in all relevant aspects" were treated differently according to their race); [Washington v. Duty Free Shoppers, Ltd.](#), 710 F. Supp. 1288, 1289 (N.D. Cal. 1988) (explaining that a confession of discrimination is not necessary for finding evidence of discrimination). In cases where there is no direct evidence of intentional discrimination,

some courts require a plaintiff to establish a prima facie case of racial discrimination by showing that: (1) plaintiff is a member of a protected class; (2) he or she attempted to make, enforce or secure the performance of a contract; and (3) was denied the right to do so; and the opportunity to make, enforce, or secure the performance of a contract for like goods or services remained available to similarly situated persons outside of the protected class. See, e.g., [Halton v. Great Clips, Inc.](#), 94 F. Supp. 2d 856, 864-65 (N.D. Ohio 2000); [LaRoche v. Denny's, Inc.](#), 62 F. Supp. 2d 1375, 1382 (S.D. Fla. 1999); [Singh v. Wal-Mart Stores, Inc.](#), No. CIV.A.98-1613, 1999 WL 374184, at \*6 (E.D. Pa. June 10, 1999); [Wells v. Burger King Corp.](#), 40 F. Supp. 2d 1366, 1368 (N.D. Fla. 1998); [White v. Denny's, Inc.](#), 918 F. Supp. 1418, 1424 (D. Colo. 1996).

[FN153]. See [Hampton](#), 247 F.3d at 1107; see also supra Part I.D.

[FN154]. Williams, supra note 43, at 228.

[FN155]. Haydon, supra note 18, at 1213 (explaining that it is convincing evidence of discrimination where black plaintiffs could show that similarly situated white customers obtained the services that had been denied to them. Often, however, no such comparison is possible). When no valid comparison is possible "it may be difficult to distinguish bad service that stems from incompetence, chance, or mistake from bad service that is motivated by illegal discrimination." Id.; see [Christian v. Wal-Mart Stores, Inc.](#), 252 F.3d 862, 871 (6th Cir. 2001); [Cook v. CSX Transp. Corp.](#), 988 F.2d 507, 512 (4th Cir. 1993); [Callwood v. Dave & Buster's, Inc.](#), 98 F. Supp. 2d 694, 707 (D. Md. 2000).

[FN156]. See, e.g., Amended Complaint, ¶¶ 91-102, NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01-CV-325-HLM, (N.D. Ga. filed Apr. 11, 2002). On July 25, 2001, at approximately 9:48 p.m., Chandra Harmon and her friend, Renee Daniel, arrived at Cracker Barrel Country Store #29 in Chattanooga, Tennessee. Ms. Harmon, who is African-American, and Ms. Daniel, who is a multi-racial woman, were accompanied by their children all of whom are either African-American or multi-racial. The restaurant and parking lot were full. As they walked from the parking lot to the restaurant, they passed a white customer who told Harmon's party that the Cracker Barrel was still open and that the restaurant seated customers until 10 p.m. When Harmon's party entered the restaurant, a server stopped them, and informed them that the restaurant was about to close. Harmon and Daniel asked if they could be seated, as they were from out of town and had hungry children with them. The server checked with the manager who approached Ms. Harmon and informed her that the restaurant had stopped seating patrons for the evening and that Cracker Barrel would be unable to serve her party. The manager refused Daniel's request to make an exception because their children were hungry. At approximately 10 p.m., four white men walked into the restaurant behind Harmon and Daniel. To both parties, the manager stated that, "If I let one of you in, I have to serve you all." The Harmon party left the restaurant and got in the car. While still in the parking lot, Harmon and Daniel discussed the incident. Through the window, they could see that the four white customers were seated and drinking beverages. They decided to return to the restaurant. Harmon knocked on the restaurant door, now locked, and demanded to speak to the manager again. When the manager came outside, he initially denied that the four white customers were being served. Harmon and Daniel pointed out that the four customers in question were visible from the front window. The manager went back into the restaurant. At approximately 10:15 p.m., while the manager was inside, Daniel and Harmon watched another white male enter the restaurant. He, too, was seated and served. When the manager returned, he stated, "I just looked at our tapes and I don't have anything rung up after 10:00." The manager also said that the four white customers, who entered the restaurant after Harmon's party, were seated before 10:00 p.m. Id.

[FN157]. See id. ¶¶ 192-201.

193. On February 10, 1999, Ms. Campbell visited the Wilson, North Carolina Cracker Barrel on Highway 264. She was with six family members--three other adults and three minors. The Campbells were the only African Americans in the restaurant. The restaurant was not crowded.

194. When they arrived, Ms. Campbell requested a large table in the non- smoking section. The hostess, a white woman, said, "If you want to be served, you will go to the section where we take you."

195. Though there were three large, non-smoking tables available, and one large smoking table available, the hostess seated the Campbells at a small table in a corner of the smoking section, behind a partition. Ms. Campbell's family were [sic] forced to squeeze together in order to fit at the assigned table.

196. The white server was rude to them. He rushed them and spoke curtly in a demeaning tone while taking their food and drink order.

197. The Campbell party then waited for approximately one half-hour before they were served their drinks. When Ms. Campbell reminded their [sic] of her request for ice, he took all the drinks, not just hers, back to the kitchen. The Campbells did not receive their drinks again.

198. The Campbell party waited for approximately another hour and were not served any food or drinks. The server did not come back to their table during this time, even though he checked the other tables in the section. Meanwhile, in the time during which the Campbells waited, a white party of approximately seven customers arrived, were served dinner and desert [sic], ate their food, and left the restaurant.

199. After approximately one and a half hours, the Campbells had still not been served their drinks or food. They decided to leave. They asked a white female hostess if they could see the manager. She returned with a young black man to speak with them. They asked him when their food would be ready. After checking with the kitchen, he returned to the [sic] Ms. Campbell's table and informed them that the kitchen had not yet started to prepare their order. The Campbells then left the restaurant.

200. The next day, Ms. Campbell telephoned Cracker Barrel's Corporate Headquarters in Lebanon, Tennessee. She spoke with Cracker Barrel counsel, Michael Zylstra. He told Ms. Campbell that Cracker Barrel was a private restaurant, and that it reserved the right to serve whomever it wanted. When Ms. Campbell told Mr. Zylstra that she was going to begin to record the phone conversation, he refused to speak further.

Id. ¶¶ 193-200.

[\[FN158\]](#). [Cook, 988 F.2d at 512](#); see [Christian, 252 F.3d at 871](#); Callwood, 98 F. Supp. at 707.

[\[FN159\]](#). Haydon maintains, "[e]ven if the plaintiff is able to observe white customers receiving better service, there are many respects in which the plaintiff may not have been situated similarly to the observed white customer." Haydon, *supra* note 18, at 1232. Graves argues that courts have redefined the right of people of color not to be intentionally discriminated against in the marketplace so that now people of color have only the right not to be intentionally and overtly discriminated against. Graves, *supra* note 4, at 192 (emphasis added).

[\[FN160\]](#). Haydon, *supra* note 18, at 1232.

[\[FN161\]](#). See, e.g., [Alexis v. McDonald's Rest. of Mass., Inc., 67 F.3d 341, 347 \(1st Cir. 1995\)](#) (no race-based animus is established absent some evidence that defendant's angry response toward plaintiff stemmed from something other than a race-neutral reaction to a stressful encounter); [Wells v. Burger King Corp., 40 F. Supp. 2d 1366, 1368 n.2 \(N.D. Fla. 1998\)](#) (proving that similarly situated individuals outside the protected class were treated differently is problematic where there is no evidence that a group of four non-minority women were refused service when, like plaintiffs, they entered the restaurant late at night, immediately asked to see the manager about an earlier incident at the

drive-through window, handed identification to the manager, and only asked to be served after having a less-than-friendly conversation with the manager); [Perkins v. Marriott Intern., Inc.](#), 945 F. Supp. 282, 286 (D.D.C. 1996) (plaintiffs, whose belongings were scattered about their room and whose call for security assistance was ignored, fail to present evidence of racial animus because they cannot show that a well-behaved non African-American couple, staying at the hotel as cash customers, and who owed \$18 for a breakfast bill, would have drawn the attention of Marriott security personnel).

[FN162]. [Christian](#), 252 F.3d at 872. The standard modifies the 3rd and 4th prongs of the prima facie test set forth above. The new test "allows a plaintiff to state a claim when similarly situated persons are not available for comparison, as will often be the case in the commercial establishment context." *Id.* The court explained that although the McDonnell Douglas test adequately represented the plaintiff's ultimate burden of proof in a [§ 1981](#) action, it was inappropriate to employ it as a prima facie standard in cases involving consumer discrimination. See *id.* at 871-72. The Court echoed Callwood's rationale for replacing the McDonnell Douglas test. Recognizing the differences between employment discrimination and consumer discrimination, the court determined that a distinct standard reflecting such differences is warranted. *Id.* at 872. "Employment decisions ... are regularized and periodic, are made by supervisory personnel, and by their very nature are almost always documented. [They] leave behind a paper trail of evidence which to a greater or lesser extent will be available during discovery or otherwise to a discrimination victim." [Callwood](#), 98 F. Supp. 2d at 706; see [Christian](#), 252 F.2d at 870. Therefore, in the employment context it makes sense to insist upon evidence of similarly situated applicants or employees. In the commercial establishment context, on the other hand, the clientele is "largely itinerant," and the task of protecting similarly situated individuals outside the protected group is much more difficult. [Christian](#), 252 F.2d at 870-71; see [Callwood](#), 98 F. Supp. 2d at 706.

[FN163]. [Callwood](#), 98 F. Supp. 2d at 707; see also [Murrell v. Ocean Mecca Motel, Inc.](#), 262 F.3d 253, 257 (4th Cir. 2001) (stating similar test for establishing a prima facie case of race discrimination in eviction from motel).

[FN164]. See [Christian](#), 252 F.3d at 873. This language, which makes actionable the deprivation of service, as opposed to an outright refusal of service, better comprehends the realities of commercial establishment cases in which an aggrieved plaintiff may have been asked to leave the place of business prior to completing her purchase, refused service within the establishment, or refused outright access to the establishment. It is thus in harmony with the promise of [§ 1981\(b\)](#), which guarantees all persons equal rights in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.*

[FN165]. *Id.* at 872. Graves notes that this test is in harmony with the purpose of [§ 1981](#), which should not be limited to protecting rights only when "violators are foolish enough to tell their victims that they are discriminating against them." Graves, *supra* note 4, at 192.

[FN166]. See [Lizardo v. Denny's, Inc.](#), 270 F.3d 94, 102 (2d Cir. 2001). In [Lizardo](#), plaintiffs alleged that they were treated in a "markedly hostile manner" when the hostess failed to greet them and, in response to one of the plaintiff's inquiry about the wait, said, "don't even go there." *Id.* Moreover, one of the plaintiffs was escorted out of the restaurant and shoved, and defendant's security guards failed to protect plaintiffs in a parking lot brawl. *Id.* Nevertheless, the court ultimately found that, "[i]n this case, the cited instances of hostility, considered in context, did little to support an inference of discriminatory intent." *Id.*

[FN167]. Amended Complaint ¶¶ 125, 126 NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01-CV-325-HLM, (N.D. Ga. filed Apr. 11, 2002). Evidence of a retailer's "markedly hostile" conduct can support a prima facie case of discrimination without any evidence of how similarly situated persons were treated. [Christian, 252 F.3d at 871](#). Factors relevant to the determination of whether conduct is "markedly hostile" ... include whether the conduct is (1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination. [Callwood, 98 F. Supp. 2d at 708](#); see [Christian, 252 F.3d at 871](#).

[FN168]. [Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 \(1981\)](#).

[FN169]. See [42 U.S.C. § 1981\(a\)](#). Most CRP plaintiffs claim that defendants interfered with their right to "make and enforce contracts." See, e.g., [Shawl v. Dillard's Inc., 17 Fed. Appx. 908, 910 \(10th Cir. 2001\)](#); [Chapman v. Higbee Co., 256 F.3d 416, 419 \(6th Cir. 2001\)](#), vacated by [270 F.3d 297 \(6th Cir. 2001\)](#); [Bermudez Zenon v. Rest. Compostela, Inc., 790 F. Supp. 41, 44 \(D.P.R. 1992\)](#). In a small number of cases, however, plaintiffs have alleged violations of [§ 1981\(a\)](#)'s "equal benefits clause." See, e.g., [Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1098 \(10th Cir. 2001\)](#), cert. denied, [534 U.S. 1131 \(2002\)](#); [Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341, 346 \(1st Cir. 1995\)](#); [Lewis v. J.C.Penney Co., 948 F. Supp. 367, 371 \(D. Del. 1996\)](#). In [Haywood v. Sears, Roebuck & Co.](#), plaintiff asserted that defendant violated [§ 1981\(a\)](#)'s "like punishments clause." No. 7:94-CV-106-BR2, 1996 U.S. Dist. LEXIS 11954, at \*5 (E.D.N.C. July 18, 1996).

[FN170]. See [42 U.S.C. § 1981\(a\)](#). The term "make and enforce contracts" is defined as encompassing "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\(b\)](#).

[FN171]. Amended Complaint ¶¶ 10-11, Cracker Barrel Old Country Store, Inc., (No. 4:01-CV-325-HLM).

[FN172]. See, e.g., [Christian, 252 F.3d at 866](#) (African-American shopper was removed from the Wal-Mart store and forced to leave behind her shopping cart of merchandise); [Henderson v. Jewel Food Stores, Inc., No. 96 C 3666, 1996 WL 617165, at \\*4 \(N.D. Ill. Oct. 23, 1996\)](#) (court denied defendant's motion to dismiss plaintiff's [§ 1981](#) claim because plaintiff was ultimately ejected from the store in handcuffs and was unable to complete his purchase, rather than merely being deterred); [Shen v. A&P Food Stores, No. 93 CV 1184\(FB\), 1995 WL 728416, at \\*1 \(E.D.N.Y. Nov. 21, 1995\)](#) (A&P first refused to sell apple juice to individuals of Chinese descent and later limited plaintiffs to purchasing only three bottles per person); [Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288, 1289 \(N.D. Cal. 1988\)](#) (Black shoppers who did not have airline tickets or passports were consistently prevented from entering the duty free shop, while white shoppers were regularly admitted without proof that they were traveling overseas).

[FN173]. See, e.g., [Arguello v. Conoco, Inc., 207 F.3d at 805 \(5th Cir. 2000\)](#) (alleging that cashier at Conoco refused to accept plaintiff's out of state driver's license as identification when she attempted to pay for gas with a credit card, shouted racial epithets at plaintiff while she was completing her transaction, and continued to harangue her over the store's intercom after the plaintiff left the store); [Morris v. Office Max, Inc., 89 F.3d 411, 414 \(7th Cir. 1996\)](#) (alleging that they would have made a purchase had they not been stopped and questioned by police officers while they inspected time stamps).

[FN174]. See [Morris, 89 F.3d at 414](#); see, e.g., [Hampton, 247 F.3d at 1118](#) (plaintiff alleges that when defendant prevented plaintiff from redeeming a coupon, it interfered with a benefit or privilege of her contract with defendant); [Watson v. Fraternal Order of Eagles, 915 F.2d 235, 243 \(6th Cir. 1990\)](#) (denying black patrons the right to buy soft drinks by telling them to leave the premises effectively prevented them from entering into a contract); [Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 869-70 \(N.D. Ohio 2000\)](#) (some of plaintiffs' claims were actionable under [§ 1981](#) insofar as they alleged discriminatory practices by defendants in three areas: application of chemical treatments, available hair styles, and pricing, because plaintiffs sought--but were denied--services at the defendant's salon while caucasians received services and because African Americans incurred or were told of the price increase while caucasians were presumably not charged the same price); [Ackerman v. Food-4-Less, No. 98-CV-1011, 1998 WL 316084, at \\*3 \(E.D. Pa. 1998\)](#) (plaintiff may have been prevented from completing her purchase when, after she picked up a container of Spanish seasoning, defendant's security guard grabbed her and detained her for over two hours in the middle of her grocery shopping); [Henderson, 1996 WL 617165, at \\*4](#) (plaintiff prevented from completing his sales transaction when he was grabbed by a store employee as he substituted and added items to his purchase that the cashier had begun to ring up); [Shen, 1995 WL 728416, at \\*3](#) (plaintiffs' claim is cognizable where they allege that defendant refused to sell them groceries); [Bermudez-Xenon, 790 F. Supp. at 43-44](#) (refusal to seat and serve customers falls under [§ 1981](#)'s protection); [Washington, 710 F. Supp. at 1289-90](#) (claim actionable where African-American plaintiffs--but not white customers--were not admitted into defendant's store and therefore prevented from making purchases, unless they produced a passport or airline ticket to enter defendant's store).

[FN175]. See Kennedy, *supra* note 2, at 315, 330; see, e.g., *infra* notes 176- 181.

[FN176]. See [Morris, 89 F.3d at 414](#). In *Morris*, the assistant manager summoned the police one minute after plaintiffs entered defendant's retail store, reporting "two male blacks acting suspiciously." *Id.* at 412. The Seventh Circuit Court of Appeals found that plaintiffs' allegation that they were considering the purchase of additional items when police arrived to "check [them] out" was insufficient to state a claim under [§ 1981](#) because such loss was speculative. *Id.* at 414. The plaintiffs failed to show that they would have made further purchases if they had not been approached by the police. See *id.*

[FN177]. See [Shawl v. Dillard's, Inc., 17 Fed. Appx. 908, 912 n.3 \(10th Cir. 2001\)](#) (rejecting the "implied contract with the consumer as a member of the shopping public theory"); [Wesley v. Don Stein Buick, Inc., 42 F. Supp. 2d 1192, 1201 \(D. Kan. 1999\)](#) (stating that recognizing a right to browse would almost nullify the contract requirement and, consequently, transform the statute into a general cause of action for all race discrimination); [Lewis v. J.C. Penney Co., Inc., 948 F. Supp. 367, 371-72 \(D. Del. 1996\)](#) (concluding that [§ 1981](#) does not prohibit racial discrimination against every individual who enters the premises of a commercial establishment).

[FN178]. See, e.g., [Hampton, 247 F.3d at 1118](#) (denying plaintiff the benefit or privilege of the merchant's implied contractual offer to let her shop in its store does not give rise to [§ 1981](#) claim); [Morris, 89 F.3d at 414](#) (no [§ 1981](#) violation where police stopped plaintiff while he was browsing in the store, asked him for identification, asked some questions, and apologized); [Arguello, 2001 WL 1442340, at \\*4](#) (denial of a proper shopping atmosphere does not, alone, state a claim under [§ 1981](#)); [Wesley, 42 F. Supp. 2d at 1201](#) (no [§ 1981](#) violation when plaintiff had nothing more than a general interest in the automobiles, was simply browsing for a potential automobile that her parents might purchase at some later date, and could not prove that she would have attempted to make a purchase if defendant had not interfered by treating her rudely and seeking

personal information from her); [Ackaa v. Tommy Hilfiger, Co., No. CIV.A.96-8262, 1998 WL 136522, at \\*5-6 \(E.D. Pa. Mar. 24, 1998\)](#) (no § 1981 violation when plaintiffs were singled out for observation and mildly harassed while browsing). Kennedy argues that "[i]t is artificial to separate out those acts inimical to shopping [such as inspecting the goods displayed for sale and comparing the goods and prices] from the exchange of tender for goods at the cash register." Kennedy, *supra* note 2, at 322. Most courts, however, have not acknowledged the customer's right to "browse." See *id.*

[FN179]. See [Sterling v. Kazmierczak, 983 F.Supp. 1186, 1191-92 \(N.D. Ill. 1997\)](#). In this case, an African-American man, who was wearing a pair of shoes he had recently purchased at Marshall Field's, went to the defendant's store to purchase air rifle cartridges. After being questioned and accused of shoplifting the shoes, a store security guard removed the shoes from plaintiff's feet. Local police were summoned and plaintiff was arrested. At trial, plaintiff produced his receipt from Marshall Field's and was found not guilty. [Id. at 1192](#). Regarding his § 1981 claim, the court found that plaintiff did not present sufficient evidence that defendant's actions interfered with his right to contract because

[t]here are no allegations that [plaintiff] 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 [plaintiff] had the air rifle cartridges in hand when confronted by [the security guard]. The allegations simply establish that [plaintiff] was browsing about the store. The allegations in no way show that [plaintiff] suffered an actual loss of a contract interest; rather, the allegations only establish that [plaintiff] suffered a possible loss of a future contract opportunity.

*Id.*; see also [Evans v. Holiday Inns, Inc., 951 F. Supp. 85, 90 \(D. Md. 1997\)](#) (plaintiffs failed to state a claim where defendant evicted them from the motel after requesting plaintiffs to reduce the noise level in their room). Fennessy explains that it is not yet clear whether the courts of New Jersey will hold that exclusions from retail stores are unlawful under the New Jersey Law Against Discrimination. See Fennessy, *supra* note 42, at 606. Kennedy emphasizes plaintiffs' legal difficulty in proving the absence of probable cause for the stop and search. Kennedy, *supra* note 2, at 334.

[FN180]. [Chu v. Gordman's, Inc., No. 8:01CV182, 2002 WL 802353, at \\*6 \(D. Neb. Apr. 12, 2002\)](#).

[FN181]. See [Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 854 \(8th Cir. 2001\)](#) (no violation of § 1981 occurred because plaintiff was able to purchase the beef jerky before he was detained); [Morris, 89 F.3d at 414](#) (plaintiffs who made a purchase and stayed in the store to examine other merchandise made no showing that defendant's summoning of police to question plaintiffs interfered with their right to make further purchases or enter into retail contracts where they were not denied admittance nor asked to leave the store); [Chu, 2002 WL 802353, at \\*6](#) (Korean plaintiffs' right to contract was not violated when the store's security manager stopped them at the door, after they paid for their purchases, and searched their shopping bags); [Holmes v. Dillard Dep't Store, Inc., No. CIV.A.99-3444, 2000 WL 1725082, at \\*2 \(E.D. La. Nov. 17, 2000\)](#) (plaintiff suffered no contractual loss because she had finished her transaction and was exiting the store when she was asked to leave the store by a deputy); [Hickerson v. Macy's Dep't Store, No. CIV.A.98-3170, 1999 WL 144461, at \\*1-2 \(E.D. La. Mar. 16, 1999\)](#) (plaintiff's right to contract was not violated because plaintiff had completed his transaction when the security guard stopped him, asked him to produce a receipt, searched his bag, and required him to return to the store because they had him "on tape" stealing a pair of jeans); [Ackaa, 1998 WL 136522, at \\*6](#) (right to contract was not violated when security guards at defendant's store followed plaintiffs around the store, accosted them, falsely accused them of shoplifting, and requested that they leave the store and not return under threat of arrest for trespassing, because plaintiffs were not prevented from entering the store, their transactions in the store were completed, and they did not

express any intention to shop in the store again that day); [Lewis, 948 F. Supp. at 372](#) (right to contract was not violated when store security guards approached plaintiff near her car in the store parking lot and asked her to return to the store so they could inspect her shopping bags); [Flowers v. TJX Cos., No. 91- CV-1339, 1994 WL 382515, at \\*6 \(N.D.N.Y. July 15, 1994\)](#) (defendant did not interfere with the formation of an implicit retail contract where plaintiffs who were accused of shoplifting and asked to leave the store had completed their retail transactions at T.J.Maxx).

[FN182]. Main, supra note 3, at 307; see [Ackerman v. Food-4-Less, No. 98- CV-1011, 1998 WL 316084, at \\*3 \(E.D. Pa. June 10, 1998\)](#).

[FN183]. [Hampton, 247 F.3d at 1114-16](#). The Supreme Court declined to review the case.

[FN184]. [Id. at 1100](#).

[FN185]. [Id. at 1106](#).

[FN186]. [Id. at 1103-05](#). Referring to the comment to [Restatement \(Second\) of Contracts § 45 \(1981\)](#), in which an option or unilateral contract is defined as "an offer that does not invite a promissory acceptance," the Tenth Circuit Court of Appeals explained that Dillard's offered a variance of an option or unilateral contract to Ms. Hampton, and she completed the invited performance in accordance with the terms of the offer." [Id. at 1104](#). [Restatement \(Second\) of Contracts § 45](#) provides: 1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it. 2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer. [Restatement \(Second\) of Contracts § 45 \(1981\)](#).

[FN187]. [Hampton, 247 F.Sd at 1106](#).

[FN188]. See [Bagley v. Ameritech Corp., 220 F.3d 518, 521-22 \(7th Cir. 2000\)](#) (plaintiff was not prevented from making a purchase when the assistant manager loudly stated that she would not help him and made an obscene gesture towards him, and plaintiff left the store without saying anything or seeking further assistance); [Garrett v. Tandy Corp., 142 F. Supp. 2d 117, 119 \(D. Me. 2001\)](#) (no interference with plaintiff's [§ 1981](#) right to contract because the transaction was already complete when the Radio Shack manager accused him of stealing a computer); [Thomas v. National Amusements, Inc., No. 98-71215, 1999 U.S. Dist. LEXIS 5188, at \\*8-9 \(E.D. Mich. Feb. 24, 1999\)](#) (no contract loss where plaintiffs were not wholly denied the right to see a movie at defendant's theater although the movie usher required minority--but not caucasian--theatergoers who possessed the wrong tickets to return to the ticket booth to exchange their tickets); [Bobbitt by Bobbitt v. Rage, Inc., 19 F. Supp. 2d 512, 518 \(W.D.N.C. 1998\)](#) (one group of plaintiffs failed to state a claim where they alleged that they received discourteous treatment and poor service but were not asked to leave or denied service).

[FN189]. See [Bentley v. United Refining Co. of Pennsylvania, 206 F. Supp. 2d 402, 405-06 \(W.D.N.Y. 2002\)](#) (summary judgment granted for defendant where service was delayed and plaintiff was treated rudely but was able to complete his transaction); [Rogers v. Elliott, 135 F. Supp. 2d 1312, 1313, 1315 \(N.D. Ga. 2001\)](#) (sales clerk's use of racial epithets and physical assault of plaintiff was insufficient to violate plaintiff's right to contract where plaintiff had already completed the transaction); [Arguello v. Conoco, Inc., No. CIV.A.397C70638.H, 2001 WL 144230, at \\*4 \(N.D. Tex. Nov 9, 2001\)](#) (no valid [§ 1981](#) claim exists where sales clerk harassed, insulted, and disparaged plaintiff due to



her ethnic background but did not prevent plaintiff from completing the sales transaction and purchasing the goods she desired).

[FN190]. [Hampton, 247 F.3d at 1118.](#)

[FN191]. See supra note 169 and accompanying text.

[FN192]. See [42 U.S.C. § 1981\(b\) \(2001\)](#).

[FN193]. See [Jeffrey v. Home Depot U.S.A., Inc., 90 F. Supp. 2d 1066, 1069 \(S.D. Cal. 2000\)](#) (plaintiff who purchased a deadbolt suffered no actual loss of a contract interest because he was not denied service or detained but merely delayed by the cashier's request to search the red canvas bag that plaintiff was carrying); [Bobbitt, 19 F. Supp. 2d at 514-15, 517-18](#) (plaintiffs' rights were not violated when they were not denied admittance, nor refused service, nor asked to leave at any time, although they waited 10-12 minutes to be seated, and another 15 minutes for a menu--notably longer than white patrons--but were finally waited upon); [Ackerman v. Food-4- Less, No. 98-CV-1011, 1998 WL 316084, at \\*3 \(E.D. Pa. June 10, 1998\)](#) (finding plaintiff's ability to contract would be unabridged if she could have purchased an item after her two and one half hour detention for alleged shoplifting); [Harrison v. Denny's Rest., Inc., No. C-96-0343 \(PJH\), 1997 WL 227963, at \\*4 \(N.D. Cal. Apr. 24, 1997\)](#) (plaintiff did not show that Denny's denied him service where his order was taken, he received his meal, and he was satisfied with his meal, even though service was slow); [Robertson v. Burger King, Inc., 848 F. Supp. 78, 81 \(E.D. La. 1994\)](#); (plaintiff who ultimately received service failed to state a claim under [§ 1981](#) because he was not denied admittance or service when Burger King employee temporarily stopped serving him to wait on white customers behind him).

[FN194]. [Bentley, 206 F. Supp. 2d at 406.](#)

[FN195]. See [Hill v. Shell Oil, Co., 78 F. Supp. 2d 764, 777 \(N.D. Ill. 1999\)](#) (holding that black plaintiffs who purchased gasoline stated a cause of action where defendant forced them, but not whites, to pre-pay); [Bobbitt, 19 F. Supp. 2d 518-19](#) (requirement that plaintiffs pre-pay for food altered a fundamental characteristic of service and was sufficient to state a cause of action under [§ 1981](#)).

[FN196]. See [Hill, 78 F. Supp. 2d at 777.](#)

[FN197]. [Id. at 777 n.11](#); see [McCaleb v. Pizza Hut of Am., Inc., 28 F. Supp. 2d 1043, 1048 \(N.D. Ill. 1998\)](#); see also [42 U.S.C. § 1981\(b\)](#).

[FN198]. No. 00 CIV. 2275 (SHS), [2000 WL 1559019, at \\*5 \(S.D.N.Y. Oct. 19, 2000\)](#).

[FN199]. See [id. at \\*4](#); see also [Buchanan v. Consolidated Stores Corp., 125 F. Supp. 2d 730, 735-36 \(D. Md. 2001\)](#) (summary judgment in favor of defendant was denied where defendant instituted a no-check policy at its stores more likely to be patronized by African-American customers whereby plaintiffs were allowed to purchase the item(s) they wanted only if they complied with defendant's special condition on plaintiffs' right to contract); [Ghaznavi v. Days Inns of Am., Inc., No. 91 CIV. 4520\(MBM\), 1993 WL 330477, at \\*4 \(S.D.N.Y. Aug. 20, 1993\)](#) (plaintiff stated a valid claim in situation where hotel manager had discretion to accept alternative forms of identification but refused to do so when plaintiff attempted to check in); [Harvey v. NYRAC, Inc., 813 F. Supp. 206, 208-11 \(E.D.N.Y. 1993\)](#) (defendant may have arbitrarily employed a "race neutral" policy prohibiting the rental of "luxury" automobiles to Brooklyn residents for the purpose of discriminating against prospective African-American car renters); [Washington v. Duty Free Shoppers, Ltd., 710 F. Supp. 1288, 1289 \(N.D. Cal. 1988\)](#) (summary judgment in

favor of defendant was denied where store customers who were African-Americans alleged that they were required to produce a passport or airline ticket to shop at the defendant's store, while this requirement was not imposed on non-minority customers).

[FN200]. See Amended Complaint ¶¶ 91-102, *NAACP v. Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM, (N.D. Ga. filed Apr. 11, 2002).

[FN201]. See, e.g., [Joseph, 2001 WL 1559019, at \\*5](#) (an African-American woman made out her prima facie claim by stating that defendant denied her entry for failing to conform with the dress code at the "Stadium Club" while her caucasian friend, who was wearing a similar tank top, was admitted); [LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1375, 1379, 1383-84 \(S.D. Fla. 1999\)](#) (plaintiffs who were members of a multi-racial party established a prima facie case of discrimination by alleging that the manager asked them to leave moments after they arrived at the restaurant saying: "You don't look right together" and that they needed to leave); [Franceschi v. Hyatt Corp., 747 F. Supp. 138, 140, 145 \(D.P.R. 1990\)](#) (plaintiff alleging that defendant refused access to the hotel to Spanish-speaking visitors while permitting entrance to English-speaking visitors stated a valid claim under [§ 1981](#)). In *Berry v. South East Waffles, LLC*, plaintiffs' allegations against defendant are similar to those filed against Cracker Barrel. Second Amended Complaint ¶¶ 14-65, No. 4:01-CV-28, (E.D. Tenn. filed Feb. 15, 2002). The parties settled this lawsuit on August 6, 2002. In *Berry*, as African-American patrons approached the door, they noticed employees of the Waffle House closing the blinds and placing a hand-written sign on the entrance door which read "Closed due to maintenance" although there was no indication that any maintenance was being performed. The employees locked the doors before any of the African Americans could reach the front door. Plaintiffs observed that the restaurant was busy cooking for and serving a large number of caucasian customers. Waffle House employees periodically unlocked the restaurant's doors to let caucasian patrons out. When they asked if they could enter the restaurant and be served, plaintiffs were turned away. When they asked if they could place orders and have them filled on a "to go" basis, Waffle House employees answered plaintiffs with a resounding "No§" One of the plaintiffs video-taped the events described above. Plaintiffs contacted the Police Department to dispatch an officer to the scene and to assist them with entry to the Waffle House restaurant. Police did not detain or arrest anyone during the pertinent time period, and they did nothing to enforce plaintiffs' right of access to the premises. *Id.* ¶¶ 23-47.

[FN202]. Singer, *supra* note 31, at 1434.

[FN203]. As illustrated by Campbell incident described in Amended Complaint ¶¶ 91-102, *Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV- 325-HLM.

[FN204]. See *id.* at ¶¶ 121-128, 137-174, 209-214.

[FN205]. See, e.g., [Shawl v. Dillard's, Inc., 17 Fed. Appx. 908, 911-12 \(10th Cir. 2001\)](#) (plaintiff did not show an actual contract loss when she decided to return the next day to purchase a pair of sandals rather than completing the purchase on that day, to prevent an unpleasant salesperson from earning a commission on the sale); [Bagley v. Ameritech, Corp., 220 F.3d 518, 521 \(7th Cir. 2000\)](#) (holding that plaintiff did not establish a [§ 1981](#) claim for refusal of service because he decided to leave the store rather than attempting to receive service from other salespeople after the assistant manager said, "I will not serve [you]" while giving plaintiff "the finger"); [Arguello v. Conoco, Inc., No. CIV.A.397CV0638-H, 2001 WL 1442340, at \\*3, 5 \(N.D. Tex. Nov. 9, 2001\)](#) (plaintiff, who waited in line to purchase beer, observed the sales clerk harassing his daughter, then put the beer down and left the store, failed to state a claim because he did not attempt to purchase anything nor was he prevented from purchasing anything); [Callwood v. Dave & Buster's, Inc. 98 F. Supp. 2d 694, 718 \(D. Md. 2000\)](#) (finding plaintiffs' "constructive

eviction" argument failed to state a claim under [§ 1981](#) because they offered no evidence that they were deprived of defendant's services while similarly situated patrons outside the protected class were not).

[FN206]. See Amended Complaint ¶¶ 185-191, *Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM.

[FN207]. See [Singh v. Wal-Mart Stores, Inc., No. CIV.A.98-1613, 1999 WL 374184, at \\*6](#) (recognizing a valid claim of contractual interference under [§ 1981](#) where store refused to accept an item for return or exchange); [Perry v. Burger King Corp., 924 F. Supp. 548, 552 \(S.D.N.Y. 1996\)](#) (denying motion to dismiss where customer finished meal and sought to use restaurant's restroom facilities; noting that plaintiff may be "considered to have contracted for food and use of the bathroom" as benefit of contractual relationship).

[FN208]. [Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1104 \(10th Cir. 2001\)](#), cert. denied, [534 U.S. 1131 \(2002\)](#).

[FN209]. Amended Complaint ¶¶ 184, 201, *Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM.

[FN210]. See id. ¶¶ 192-201.

[FN211]. See [Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777 \(N.D. Ill. 1999\)](#).

[FN212]. [Williams v. Cloverland Farms Dairy, Inc., 78 F. Supp. 2d 479, 482-83 \(D. Md. 1999\)](#).

[FN213]. Id.

[FN214]. Id. at 485.

[FN215]. Id. at 485-86.

[FN216]. See, e.g., [Lizardo v. Denny's, Inc., 270 F.3d 94, 104-05 \(2d Cir. 2001\)](#) (recognizing claims of delayed service as actionable but granting summary judgment for defendant on the facts because smaller non-minority parties who were seated before African-American plaintiffs were not similarly situated); [White v. Denny's, Inc., 918 F. Supp. 1418, 1425 \(D.D.C. 1996\)](#) (plaintiffs' failure to "literally attempt to order food and drinks at Denny's is not enough, in and of itself, to conclude that they failed to meet their prima facie burden"); [Bermudez-Xenon v. Rest. Compostela, Inc., 790 F. Supp. 41, 43-44 \(D.P.R. 1992\)](#) (no dismissal of plaintiffs' claim under [§ 1981](#) where they waited three hours to be seated and served at defendant's restaurant whereas white patrons who arrived after them were promptly provided with seats and service).

[FN217]. [Callwood v. Dave and Busters, Inc., 98 F. Supp. 2d 694, 705, 709-10, 716 \(D. Md. 2000\)](#) (denying defendant's motion for summary judgment where plaintiffs experienced extraordinarily discourteous and hostile treatment from the staff and management of the restaurant when the server ignored their party, repeatedly issued warnings about the restaurant's seating policy to members of the party in a disrespectful tone, even though plaintiffs were in compliance with the policy, and later refused to serve them). Applying its new standard of proof, the court denied defendant's motion for summary judgment because it found that plaintiffs presented sufficient evidence that "they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable." [Id. at 709](#).

[FN218]. [McCaleb v. Pizza Hut of Am., Inc., 28 F. Supp. 2d 1043, 1048 \(N.D. Ill. 1998\)](#)

(plaintiffs' claim was not precluded since, in contrast to white customers, they were not seated, provided with utensils, or asked if they wanted to order drinks even though defendant allowed them to purchase pizza).

[FN219]. [Charity v. Denny's, Inc., No. CIV.A.98-0554, 1999 WL 544687, at \\*3 \(E.D. La. July 26, 1999\)](#) (even though restaurant manager offered to personally serve them complimentary meals, plaintiffs' [§ 1981](#) claim was cognizable where waiter refused to serve them due to their race and engaged in harassing and taunting conduct).

[FN220]. [McCaleb, 28 F. Supp. 2d at 1048](#).

[FN221]. *Id.* In this case, plaintiffs inquired about drinks and were informed that the drink machine had been turned off. Although they ordered their pizzas for dine-in service, the pizzas were prepared in take-out boxes. The pizzas were not delivered to the table; instead a member of plaintiffs' party had to retrieve them. Pizza Hut employees played loud music, turned lights on and off, and generally disrupted plaintiffs' dining experience to such an extent that they left, unable to complete their meal. *Id.* at 1046- 47.

[FN222]. Kennedy, *supra* note 2, at 338-39. This amendment was "intend [ed] ... to bar all race discrimination in contractual relations." [H.R. Rep. No. 102-40, pt. 1, at 92 \(1991\)](#), reprinted in 1991 U.S.C.C.A.N. 549, 630; [H.R. Rep. No. 102-40, pt. 2, at 37 \(1991\)](#), reprinted in 1991 U.S.C.C.A.N. 694, 730; (emphasis added). See [Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 \(1986\)](#) (finding that Title VII's use of the phrase "'terms, conditions or privileges of [men and women in] employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment ....'").

[FN223]. Brief of Amicus Curiae [Lawyers' Committee For Civil Rights Under Law at 6, Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 \(10th Cir. 2001\)](#) (Nos. 98-3011, 98-3261) cert. denied, [534 U.S. 1131 \(2002\)](#).

[FN224]. See *id.*

[FN225]. *Id.* at 5.

[FN226]. See *id.*

[FN227]. See, e.g., [Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1050 \(8th Cir. 2002\)](#); [Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 \(11th Cir. 2002\)](#); [Swinton v. Potomac Corp., 270 F.3d 794, 806-07 \(9th Cir. 2001\)](#); [Spriggs v. Diamond Auto Glass, 242 F.3d 179, 191 \(4th Cir. 2001\)](#).

[FN228]. Moreover, some courts specifically reject "an expansive interpretation that [§ 1981](#) broadens the scope of civil rights and protects consumers from harassment upon entering a retail establishment." [Hampton, 247 F.3d at 1118](#).

[FN229]. See Singer, *supra* note 31, at 1434 (noting that there is no textual basis for applying the statute to some contracts but refusing to apply it to others).

[FN230]. [42 U.S.C. § 1981\(a\)-\(b\) \(2000\)](#) (emphasis added); see [Hampton, 247 F.3d at 1104](#) (explaining that the list "in subsection (b) which gives examples of what might constitute the 'making' or 'enforcing' of a [sic] is intended to be illustrative rather than exhaustive").

[FN231]. [Fox v. General Motors Corp., 247 F.3d 169, 175-76 \(4th Cir. 2001\)](#); see [Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 \(1993\)](#); [Patterson v. McLean Credit Union, 491 U.S. 164, 180 \(1989\)](#); [Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57, 64-66 \(1986\)](#).

Furthermore, in cases involving the Americans with Disabilities Act and Americans with Disabilities Employment Act (ADEA), courts have easily applied the Title VII standards for hostile work environment harassment. See [Fox, 247 F.3d at 176](#); see also [Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 \(6th Cir. 1996\)](#) (concluding that a hostile work environment claim is actionable under the ADEA because of the use of the "terms, conditions, or privileges of employment" language and "the general similarity of purpose shared by Title VII and the ADEA").

[FN232]. [491 U.S. at 180](#); see [Fox, 247 F.3d at 175](#). The Patterson Court specifically held that [§ 1981](#)'s application was restricted to racial discrimination in the making and enforcement of contracts, such that plaintiff's claim of racial harassment was not actionable under [§ 1981, 491 U.S. at 178-80](#). Congress reacted by amending the statute's language--in particular, the phrase "benefits, privileges, terms and conditions"--to be an "illustrative rather than exhaustive" list of the protected facets of the contractual relationship. [H.R. Rep. No. 102-40, pt. 1, at 92 \(1991\)](#), reprinted in 1991 U.S.C.C.A.N. 549, 630; [H.R. Rep. No. 102-40, pt. 2, at 37 \(1991\)](#), reprinted in 1991 U.S.C.C.A.N. 694, 730-31.

[FN233]. Following 1991 amendments to the Civil Rights Act, legal theories of recovery for intentional discrimination under [§ 1981](#) and [Title VII](#) are "substantially identical." [Kim v. Nash Finch Co., 123 F.3d 1046, 1063 \(8th Cir. 1997\)](#); see [Patterson, 491 U.S. at 186](#) (holding [Title VII](#) burden-shifting rules apply in [§ 1981](#) cases). Under either [§ 1981](#) or [Title VII](#), a plaintiff can show a racially hostile work environment by demonstrating that the harassment was "(1) unwelcome; (2) based on race; and (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere," and that (4) there was some basis for imposing liability on employer. [Spriggs v. Diamond Auto Glass, 242 F.3d 179, 183-84 \(4th Cir. 2001\)](#).

[FN234]. See Amended Complaint ¶¶ 103-120, 121-128, 137-55, 165-171, 209-214, NAACP v. Cracker Barrel Old Country Store, Inc., No. 4:01-CV-325-HLM, (N.D. Ga. filed Apr. 11, 2002).

[FN235]. See id. ¶¶ 177-184, 192-201.

[FN236]. The standard of proof for analyzing such a claim could mirror the one articulated by the court in [Callwood v. Dave & Busters, Inc., See 98 F. Supp. 2d 694, 704-05 \(D. Md. 2000\)](#). Making a slight alteration to extend the test beyond the employment situation, hostile environment harassment would be established when defendant's conduct is sufficiently severe or pervasive to alter the terms or conditions of the contract and creates an abusive atmosphere. See supra note 150 and accompanying text.

[FN237]. Both Haydon and Kennedy remark that judges routinely dismiss consumer discrimination claims on summary judgment under [Fed. R. C. P. 56](#). See Kennedy, supra note 2, at 330; Haydon, supra note 18, at 1231. A plaintiff's inability to point to similarly situated whites who received better treatment frequently results in a finding that there exists no genuine issue as to any material fact. See Kennedy, supra note 2, at 330; Haydon, supra note 18, at 1231

[FN238]. See Henderson, Harris, & Williams, supra note 28.

[FN239]. See supra note 146. The purpose of the McDonnell Douglas framework requiring "the defendant to articulate a legitimate non-discriminatory reason for its action [is] to progressively narrow the inquiry in order to 'frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.'" Fennessy, supra note 42, at 585; see [St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 529](#)

[\(1993\)](#) (Souter, J., dissenting).

[FN240]. See [Murrell v. Ocean Mecca Motel, Inc.](#), 262 F.3d 253, 257, 258 (4th Cir. 2001); [Christian v. Wal-Mart Stores, Inc.](#), 252 F.3d 862, 879 (6th Cir. 2001); [Wells v. Burger King Corp.](#), 40 F. Supp. 2d 1366, 1368 (N.D. Fla. 1998).

[FN241]. In [Halton v. Great Clips, Inc.](#), defendants attempted to explain the dramatic increase in price for services primarily used by African-American customers as a valid business decision. [94 F. Supp. 2d 856, 869 \(N.D. Ohio 2000\)](#). They contended that initially, the price for the service, which included a shampoo, blow dry, and thermal curl, was artificially low to attract customers and was intended to reflect the time necessary to perform the service. *Id.* After the initial price for this service was set at nine dollars, however, defendants discovered that the service took between an hour and an hour and a half. *Id.* Given that most stylists could perform three haircuts in an hour, defendants multiplied the price of a haircut by three and charged the African-American plaintiffs twenty-seven dollars for the shampoo, blow dry, and thermal curl. *Id.*; see e.g., [Lizardo v. Denny's, Inc.](#), 270 F.3d 94, 102 (2d Cir. 2001) (defendant cites plaintiffs' confrontation with the restaurant manager as the non-discriminatory reason for ejecting the African-American plaintiffs); [Hampton v. Dillard Dep't Stores, Inc.](#), 247 F.3d 1091, 1108 (10th Cir. 2001) cert. denied, 534 U.S. 1131 (2002). (Dillard's contends that Officer Wilson, based on the facts and circumstances, had probable cause to stop Ms. Hampton); [Singh v. Wal-Mart Stores, Inc.](#), No. CIV.A.98-1613, 1999 WL 374184, at \*8 (E.D. Pa. June 10, 1999) (defendant suspected that plaintiff was engaging in a "swap" of merchandise or "fraud"); [Wells v. Burger King Corp.](#), 40 F. Supp. 2d 1366, 1368 (N.D. Fla. 1998) (defendant refused to serve plaintiffs and asked them to leave because plaintiffs were causing a disturbance in the restaurant); [White v. Denny's, Inc.](#), 918 F. Supp. 1418, 1425-26 (D. Colo. 1996) (defendants discontinued plaintiffs' service when one member of plaintiffs' party loudly used profanity, yelling "bitch" across the restaurant, in response to white patron's offensive racial comments directed to plaintiffs); [Jones v. City of Boston](#), 738 F. Supp. 604, 605 (D. Mass. 1990) (defendant's reason for asking plaintiff to leave the hotel based on plaintiff's harassment of women in the bar, unruly behavior, knocking over a table, and shouting obscenities at defendants).

[FN242]. See [Christian](#), 252 F.3d at 878 (manager testified that he wanted plaintiff removed from the store because he suspected her of shoplifting); [Hampton](#), 247 F.3d at 1099-1100. But see Fennessy, *supra* note 42, at 579, (suggesting that a mere suspicion of shoplifting may not be a sufficient legitimate, non-discriminatory reason for the retailer's action under the New Jersey Law Against Discrimination).

[FN243]. Kennedy, *supra* note 2, at 331; see Fennessy, *supra* note 42, at 602. Retail discrimination is often disguised ... and it is usually more difficult to determine whether or not the exclusion [from the retail establishment] occurred on the basis of race. For example, consider a situation where the merchant suspects and excludes minority customers who, while browsing through the store, surreptitiously watched and discussed the location of the store's security personnel. From the merchant's perspective, these customers were excluded based upon their suspicious actions and not their race. If the minority customers were not shoplifters, however, but were simply noting to each other the common minority experience of being watched and followed by store security, then the exclusion may have been based upon race. Fennessy, *supra* note 42, at 602.

[FN244]. Haydon, *supra* note 18, at 1232.

[FN245]. [62 F. Supp. 2d 1375, 1383 \(S.D. Fla. 1999\)](#). Although the court found that Denny's satisfied its burden of production when it "proffered a variety of reasons for the conduct by its manager on January 2, 1998," the court ultimately awarded each plaintiff

\$300 in compensatory damages. See [id. at 1383, 1385](#).

[FN246]. [McDonnell Douglas Corp. v. Green](#), 411 U.S. 793, 804 (1973).

[FN247]. *Id.*; see [Christian](#), 252 F.3d at 879; [Johnson v. Univ. of Cincinnati](#), 215 F.3d 561, 572 (6th Cir. 2000).

[FN248]. [St. Mary's Honor Ctr. v. Hicks](#), 509 U.S. 502, 511 (1993); see [Reeves v. Sanderson Plumbing Prods., Inc.](#), 530 U.S. 133, 137 (2000).

[FN249]. [Combs v. Plantation Patterns](#), 106 F.3d 1519, 1538 (11th Cir. 1997); [Sheridan v. E.I. Dupont de Nemours & Co.](#), 100 F.3d 1061, 1072 (3d Cir. 1996).

[FN250]. See [Hampton v. Dillard Dep't Stores, Inc.](#), 247 F.3d 1091, 1117 (10th Cir. 2001), cert. denied, 534 U.S. 1171 (2002) (upholding an award for in the amount of \$1.2 million, a most unusual result). In [Clark v. Maryland Hospitality, Inc.](#), Thomas and Nancy Clark, two black individuals, live within five or six miles of the Maryland Inn. On July 5, 1988, a desk clerk denied them a room, telling them that the motel did not rent to local residents. The Clarks filed a complaint with the Prince George's County Human Relations Commission alleging racial discrimination. The commission sent two testers to the motel, one black and the other white. The desk clerk asked the black tester for identification, then told him he could not stay in the motel because he was a local resident. Although the white tester used a local address when registering, the clerk on duty rented him a room without asking for identification or questioning his reasons for staying at the motel.

No. 91-2091, [1992 WL 187297, at \\*1 \(4th Cir. Aug. 6, 1992\)](#). The Fourth Circuit Court of Appeals affirmed the district court's denial of defendant's motion for judgment notwithstanding the verdict. *Id.* In [Bentley v. United Refining Co. of Pennsylvania](#), the jury awarded plaintiff \$5,000 in compensatory damages and \$100,000 in punitive damages. [206 F. Supp. 2d 402, 403 \(W.D.N.Y. 2002\)](#). Following the jury verdict for the plaintiff, however, the district court granted defendant's motion for judgment as a matter of law finding that plaintiff was not denied service and that the six to seven minute delay he experienced did not alter a fundamental characteristic of the service to which he was entitled. [Id. at 405, 406](#). The court found that, "[d]espite the delay, plaintiff maintained his position in line and completed his intended purchases." [Id. at 406](#).

[FN251]. After a three-day trial, the jury in [Perry v. S.Z. Restaurant Group](#) concluded that defendant did not discriminate against plaintiff when restaurant's employees told him the restroom was out of order and when he was subjected to racial epithets. [45 F. Supp. 2d 272, 273 \(S.D.N.Y. 1999\)](#). In [Middlebrooks v. Hillcrest Foods, Inc.](#), the jury found that African-American plaintiffs were not subjected to intentional race discrimination under [§ 1981](#) despite their presentation of direct evidence at trial of such racial discrimination. See Order, [Middlebrooks v. Hillcrest Foods, Inc.](#), at 7, No. 1:97-2411-TWT (N.D. Ga. Nov. 19, 1998); see generally Verdict, [Middlebrooks v. Hillcrest Foods, Inc.](#), No. 1:97-2411-TWT, (N.D. Ga. filed Jan 19, 1999).

[FN252]. [Hampton](#), 247 F.3d at 1109.

[FN253]. *Id.*

[FN254]. See [Kennedy](#), *supra* note 2, at 317.

[FN255]. See [Murrel v. Ocean Mecca Hotel Inc.](#), 262 F.3d 253, 255, 260 (4th Cir. 2001); [Christian v. Wal-Mart Stores Inc.](#), 252 F.3d 862, 864 (6th Cir. 2001); [Arguello v. Conoco, Inc.](#), 207 F.3d 803, 813 (5th Cir. 2000) [Watson v. Fraternal Order of Eagles](#), 915 F.2d 235, 237 (6th Cir. 1990). In [Chapman v. Higbee Co.](#), the Sixth Circuit Court of Appeals

initially affirmed summary judgment for the defendant, but later vacated its decision. [256 F.3d 416, 418 \(6th Cir. 2001\)](#), vacated by [270 F.3d 297 \(6th Cir. 2001\)](#).

[FN256]. See [Lizardo v. Denny's, Inc.](#), 270 F.2d 94, 99 (2d Cir. 2001); [Shawl v. Dillard's, Inc.](#), 17 Fed. Appx. 908, 909 (10th Cir. 2001); [Bagley v. Ameritech Corp.](#), 220 F.3d 518, 522 (7th Cir. 2000); [Jackson v. Tyler's Dad's Place](#), 107 F.3d 923, 923 (D.C. Cir. 1996); [Morris v. Office Max, Inc.](#), 89 F.3d 411, 412, 415 (7th Cir. 1996); [Alexis v. McDonald's Rests. of Mass., Inc.](#), 67 F.3d 341, 354 (1st Cir. 1995); [Bray v. Hebble](#), 976 F.2d 45, 45 (D.C. Cir. 1992); [Perry v. Command Performance](#), 945 F.2d 395, 395 (3d Cir. 1991).

[FN257]. [Charity v. Denny's, Inc., No. CIV.A.98-0554, 1999 WL 544687, at \\*5 \(E.D. La. 1999\)](#). Racial justice cannot be attained absent recognition of the social significance of race. Whites' increased color-conscious attention to black perspectives and experience is a crucial ingredient in the effort to eradicate the difference race has made in this society. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1113-25 (1991). Any attempt to eliminate the unfair treatment that shoppers of color encounter in the marketplace requires a thorough and objective examination of the phenomenon of CRP. See Austin, *supra* note 4, at 173; Siegelman, *supra* note 5, at 86-88.

[FN258]. PAUL R. MULLINS, *RACE AND AFFLUENCE* 47 (1999); see Kennedy, *supra* note 2, at 284.

[FN259]. Testing by the Equal Rights Center in Washington, D.C. revealed that consumer racism exists in cyberspace too. See generally Complaint, *Lake v. Kozmo.com, Inc.*, No. 1:00CV00815 (D.D.C. filed Apr. 13, 2000). In that case, the (now defunct) online company was accused of racial redlining of predominantly African-American neighborhoods. See *id.* ¶ 1. That case closed on August 30, 2000.

[FN260]. As an 18 year old female resident of a Harlem housing project indicated: "Some white people are very rude .... All black females and boys are treated the same--bad--when they go into a white store." Don Terry, *Holding on to Dreams Amid Harlem's Reality*, NY TIMES, Feb. 5, 1991, at A1, B4; see Austin, *supra* note 4, at 149. "Even the youngest black consumers are in for a good bit of distrust." Austin, *supra* note 4, at 149.

[FN261]. The courts' attitude is reminiscent of their treatment of sexual harassment in employment 30 years ago. See J. RALPH LINDGREN & NADINE TAUB, *THE LAW OF SEX DISCRIMINATION* 169-70 (1989).  
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