Shopping While Black:

Applying the Civil Rights Act of 1866 to Cases of Consumer Racial Profiling

by Anne-Marie Harris, Esq.

The following are notes from a presentation delivered at the North Atlantic Business Law Association Annual Meeting, Boston, MA, April 5, 2003. These notes are excerpted from my article entitled *Shopping While Black: Applying 42 U.S.C. Section 1981 to Cases of Consumer Racial Profiling,* published in the Boston College Third World Law Journal, Volume 23, No. 1, January 2003. They are reprinted in the Salem State College Working Paper Series, 2003.

Please see http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bctwj/23_1/23_1_toc.htm for more information regarding the references contained herein.

Since the 1960s, a great deal of attention has been paid to eradicating discrimination in most sectors of U.S. society including: education, housing, employment, and banking/ mortgage lending. In contrast, discrimination in the marketplace is a topic that has not been studied to date. Besides Ian Ayres' study of new car purchases (published in the Harvard Law Review in 1991) showing that African-American customers pay more for new cars than do white customers, there has been no empirical research to quantify the incidence of consumer discrimination.

During the past decade however, the phenomenon of consumer discrimination or Consumer Racial Profiling (CRP) began to gain national attention. And, since September 11, 2001, consumer racial profiling has been more widely-discussed as Arab and Muslim-Americans report that they are treated with hostility in a variety of venues.

I begin by describing the practice of Consumer Racial Profiling by attempting to quantify it, to identify its causes, and its effects. The class-action lawsuit filed about one year ago against Cracker Barrel Old Country Stores will illustrate the nature of modern-day consumer discrimination. Most people are surprised to learn that consumer discrimination is not illegal per se. Currently, there are no laws that directly address the issue of discrimination against consumers. I discuss the relevant parts of two federal civil rights laws that are being used to hold retailers accountable for discriminating against their customers of color. I summarize the case law that has developed since 1990 and argue that people of color will not be treated equally in the marketplace until the Civil Rights Act of 1964 is amended and the Civil Rights Act of 1866 is interpreted more broadly. I describe those proposals in detail.

Defining Consumer Racial Profiling

Consumer Racial Profiling is the marketplace equivalent to "Driving While Black" (DWB). DWB is defined as the heightened possibility that people of color will be

targeted for traffic stops. Through the use of race-based suspect “profiles,” law enforcement officers can associate people who have certain characteristics (including race and skin color) with the tendency to commit particular offenses. Profiles are intended to assist police in predicting behavior and identifying criminal suspects. Unfortunately, profiling sometimes leads law enforcement officers to use race/ethnicity as proxies for criminal propensity. For example, in January 2003, the Boston Globe reported that a study it conducted revealed a wide racial disparity in the ticketing of motorists and searches of their vehicles by law enforcement. Out of 750,000 traffic tickets issued in Massachusetts, black and Hispanic motorists were ticketed at twice their share of the population. Once ticketed, blacks and Hispanics were fifty percent more likely than whites to have their cars searched. However, a greater percentage of the white motorists whose vehicles were searched were found to have drugs.

In the marketplace, consumer racial profiling (CRP) is a similar phenomenon although it does not necessarily involve action by law enforcement officials. CRP involves explicit or implicit “profiling” (or targeting) of customers that results in differential treatment based on their race/ethnicity and that constitutes a denial OR degradation in the product and/or service they seek to purchase.

Apparently, African-Americans and other shoppers of color are no longer willing to simply patronize different retail establishments when they are not treated as whites are. Some shoppers of color are now filing lawsuits in the federal courts. Approximately eighty-five lawsuits were filed in the federal courts between 1990 and 2002. These lawsuits allege that the defendant companies engaged in one or more of the following behaviors: refusal to serve, removal from the store premises, segregated seating, requiring African-Americans to show additional forms of identification when paying with a check or credit card, rude and/or slow service, following customers while they shop, conducting searches of their belongings.

One example of such company practices involves allegations that Shell Oil stations in Illinois require African-American customers to pre-pay for gas while white customers are allowed to pump their gas before paying for it. Litigation is on-going in that case. Another example arose when an African-American woman was shopping at a Wal-Mart store with her two small sons. They were shopping without incident until they reached the check-out. At the check-out, Ms. Rogers told her sons they could each pick out a treat. They did so and the cashier scanned their candy. Ms. Rogers gave the candy back to her sons to hold while she completed the transaction. Another cashier who was not involved in their transaction, yelled "Hey, get over here, boy, and pay for this candy." Ms. Rogers explained that she had already paid for the candy. After she completed her purchase, the cashier followed Ms. Rogers to the exit and allegedly said: "Hey, Bitch, Have a nice day." Ms. Rogers began looking for a manager to report the cashier's conduct. At this point, the cashier physically attacked Ms. Rogers, punching, scratching, and pulling her hair while calling her a racial epithet. Ms. Rogers lost her lawsuit against Wal-Mart for reasons I will explain later.

Many cases involve retail stores' use of surveillance. One of my students informed me that her manager at a retail store in the local Mall instructed her to follow all Hispanic and African-American customers who entered the store. She understood that this was a common practice in retail establishments. The ABC television news magazine 20/20 conducted an undercover investigation in a suburban shopping mall and found that a sales clerk at a national chain retail store treated two shoppers differently based on their race. ["*Under Suspicion – Security Guards Unfairly Target Black Shoppers"* aired in June 1998] With the help of Loss Prevention specialists, 20/20 coached their "testers" – one white and one black – to behave in the same unsuspicious way. The film footage clearly shows the sales clerk's differential treatment of the two women. For example, while the clerk paid close attention to the number of items the black shopper brought into and out of the fitting-room, she neglected to count the items the white shopper tried on. The clerk surreptitiously "spied" on the black shopper while she was in the fitting-room while she left the white shopper alone.

As previously mentioned, there are no reliable data to confirm the prevalence of consumer discrimination. Some studies reveal that minority customers believe that they are not treated equally in the marketplace. A 1997 Gallup poll revealed that 45% of African-Americans said they had experienced at least one discriminatory encounter within the past 30 days and 30% reported that such discriminatory incidents occurred while shopping. 21% of African-Americans reported discriminatory treatment while "dining out" (including bars, theatres, and other entertainment). In addition, a survey of 1000 households revealed that 86% of blacks and 34% of whites disagreed with the statement that "all customer are treated the same in retail stores regardless of race." [Jerome D. Williams and Marye C. Tharpe, *"African-Americans: Ethnic Roots, Cultural Diversity" in Marketing and Consumer Identity in Multicultural America,* 2001] These studies rely on consumer self-reports which, admittedly, fall short as exact measures. Nevertheless, the surveys have some value in gauging the frequency of discrimination. According to legal scholar, Regina Austin: "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."[*"A Nation of Thieves:" Securing Black People's Right to Shop and to Sell in White America*, Utah Law Review, 1994]

Although this was not the main focus of my research, I found that there are two main causes of Consumer Racial Profiling: overt and sub-conscious or unintentional racism. Some retailers have a stated "animus" against people of color that may range from mere dislike to hatred. Other retailers do not necessarily have any distaste for a particular racial/ethnic group but they believe it is necessary to engage in overtly racist conduct in order to maximize profits and minimize costs.

While overt racism still exists, most modern racism is "sub-conscious." Discrimination in modern society is much more complex than the traditional overt and intentional model because it is frequently covert and unintended. This is an important point that I would like to highlight. According to psychologists, many people repress any racist beliefs that they might have because societal norms tell them that it is wrong to be racist. But, the

repressed racist beliefs unconsciously manifest themselves in people's actions and decision-making processes. I find it fascinating that "individuals respond to conflicts between social norms that condemn racist attitudes and beliefs and their own racist ideas by excluding their own beliefs from conscious recognition." [Philomena Essed's work cited in Barbara Flagg, "*Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent,"* 91 Mich. L. Rev. 953 (1993)] This means that retailers – among others – do not even realize that they are treating people differently simply because of the color of their skin.

Is this a problem? Are people really harmed by consumer racial profiling? Despite the lack of data on this issue, we know that CRP has economic, psychological, and social effects. First of all, shoppers of color pay more for less. Clearly, blacks are being cheated when they pay the same prices as whites and get less in the way of service or merchandise. In addition, opportunity costs are incurred when an African-American takes a bus instead of a taxicab in order to avoid discrimination, for example. Also, African-Americans have decreased access to goods and services as a result of CRP. Secondly, CRP victims suffer psychological harms. In addition to stress-related harms, the repetitive nature of everyday consumer discrimination has a cumulative debilitating effect over the course of a person's lifetime. In addition, I believe that societal harms result when African-Americans and other people of color feel that they have less of a stake in their communities.

If CRP occurs so frequently and if the costs associated with it are so great, why aren't more black consumers seeking redress through the courts? Only eighty-five lawsuits were filed in federal courts during the twelve-year period from 1990 to 2002. Contrast that number with the thousands of lawsuits filed annually alleging employment discrimination. There are actually a number of reasons for the small numbers of lawsuits but the most significant reason relates to the difficulty of determining that retailers are, in fact, engaging in CRP.

Poor Service or Race Discrimination?

Since racism today is very subtle, shoppers of color can never be certain whether the rude treatment or poor service they receive is due to their race. Do you think that a black nightclub patron should believe a doorman who tells her the club is closed for a private party? Do you think that black restaurant patrons should dismiss poor service as nothing more than incompetence?

Consider the following scenario. Mr. and Ms. Pilson and four of their friends, all African-Americans, visited a Cracker Barrel restaurant in July 1999. They were seated and waited for service. While they waited, they noticed that white customers who had arrived after them were already being served their meals. After approximately forty-five minutes, Mr. Pilson complained to the manager. A white server, Sandy, was sent to their table to take the party's food and drink orders. It took an additional 45 minutes for their food to be served. Shortly after they received their food, Mr. Pilson asked Sandy for more napkins.

Without speaking, Sandy threw the napkins on to their table as she walked by. Shortly thereafter, Sandy walked by the Pilsons' table with a tray of water glasses. She dropped a glass, splashing water all over Mrs. Pilson and one of her friends. She said nothing and kept walking. Was this poor treatment aimed at the Pilsons because they are black?

Many reasons that are unrelated to the customer's race can explain poor service in a retail setting such as the sales clerk's mood and/or incompetence. Sociological data indicates that middle-class blacks tend to evaluate a situation carefully before judging it discriminatory. [Joseph R. Feagin] Contrary to the popular belief that people of color see discrimination where there is none, recent psychological studies demonstrate that they attribute behavior like Sandy's to racism only when they are virtually certain that no other reason can explain the poor treatment. [Ruggiero, K. M., & Marx, D. M.]

Applicable Laws

Although there is no federal law that directly addresses the issue of racial discrimination in retail establishments, CRP plaintiffs have relied on a number of state and federal laws to obtain redress. For example, plaintiffs have brought common law claims of defamation, false imprisonment, intentional infliction of emotional distress, and assault and battery against retailers. Plaintiffs have also sought redress under state public accommodations laws or consumer protection laws. Unfortunately, the laws listed here are inadequate for a variety of reasons. Rather than discussing those reasons, I will describe two laws that could be useful to CRP plaintiffs if certain changes were made. They are Title II of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866.

Title II of the Civil Rights Act of 1964 is the federal public accommodations law. It reads as follows:

"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,[1] without discrimination or segregation on the ground of race, color, religion, or national origin."

---

[1] At 42 U.S.C. 2000a(b), 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.

The goal of the Civil Rights Act of 1964 was to: "Eliminate the unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public." [H.R.Rep.No. 88-914 (1964), reprinted in 1964 U.S.Code Cong. & Admin. News 2355]

According to legal scholar, Desiree Kennedy, the 1964 Congress intended to focus only on certain types of business establishments that were seen as the "most flagrant and troublesome areas of discrimination." These were hotels, motels, restaurants, theatres, sports arenas, and so on. Ms. Kennedy explains by focusing on discrimination that existed in those types of businesses, the Congress expected that "the less bothersome would disappear through voluntary action and public effort." As a result, many companies are not covered under the statute's definition of places of public accommodation. Specifically, Title II does not include retail establishments in its list of places of public accommodation. The Act does, however, include retail stores in which a restaurant is located. Because it does not cover many retail establishments, Title II is limited in its ability to protect victims of CRP.

Another concern (among others) with Title II is that it provides only injunctive relief. This means that plaintiffs cannot win monetary damages when they prove that they were discriminated against in places of public accommodation. Instead, the court will issue an order that the establishment refrain from discrimination.

I believe that Congress could amend Title II that the statute might become a more effective tool in combating CRP. First, retail stores could be added to the list of "places of public accommodations." Secondly, the statute could be amended to allow for monetary relief as well as injunctive relief so that plaintiffs have a greater incentive to bring companies that discriminate to justice. The two changes that I propose are quite modest. In fact, the Americans With Disabilities Act – signed into law by President George H.W. Bush in 1990 – includes retail stores in its definition of "places of public accommodations."

Section 1981 of the Civil Rights Act of 1866

Interestingly, the statute that offers the best protection for CRP was enacted one hundred and thirty seven years ago in the wake of the Civil War. According to historian Barry Sullivan: "The 1866 Congress was moved by testimony concerning the ways in which private individuals continued to deprive the newly freed slaves of their freedom." As a result, the first civil rights act in US history was intended to reach private, as well as official governmental, discrimination.

Today, the language of the Civil Rights Act of 1866 provides some protection from discrimination for shoppers of color. Section 1981 states 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."[2] For purposes of this section, the term "make and enforce

[2] Codified as amended at 42 U.S.C. § 1981 (1994).

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 Case Against Cracker Barrel

The claims brought against Cracker Barrel Old Country stores illustrate the way in which courts have been interpreting Section 1981 since 1990. The Pilson's incident, described above, is only one among many allegations lodged against the national restaurant chain. Some particularly egregious claims are that Cracker Barrel employees served African-American customers food from a garbage can and that, for over fifteen minutes, they failed to clean up vomit in a section where African-American patrons were eating.

In general, however, the plaintiffs' claims are that Cracker Barrel violated their rights when it refused to serve them, provided them with inferior service, and seated them in segregated sections, often the smoking section of the restaurant, along with all or most of the restaurant's African-American customers.

The evidence against Cracker Barrel includes: 1) statements from three hundred and ten current and former Cracker Barrel employees who witnessed discrimination at Cracker Barrel restaurants in thirty-one states, 2) direct evidence from more than fifty employees that their managers instructed servers to seat African American patrons apart from white patrons, and 3) direct evidence from ninety-six witnesses who were customers of Cracker Barrel restaurants and who corroborate the plaintiffs' claims.

The plaintiffs seek one hundred million dollars in damages as well as a court order barring Cracker Barrel from engaging in future discriminatory conduct vis-à-vis non-white customers. To determine whether they will win their claim of race discrimination under section 1981, they must first prove their prima facie case by showing that: 1) they are members of a racial minority, 2) the defendant intentionally discriminated against them because of their race, and 3) The discrimination concerned one or more of the activities enumerated in the statute.

The first part of the inquiry is easy to establish be showing that plaintiffs are indeed African-American. The second part will be more or less difficult to prove depending on whether the plaintiffs can establish that the different treatment they received was due to their race and not other factors, as discussed above. Part three requires the Cracker Barrel plaintiffs to prove that the discrimination concerned their right to "make and enforce contracts," one of the enumerated activities under Section 1981.

The Scope of the "Right to Make and Enforce Contracts"

A review of the case law shows that currently, the federal courts do not believe the accounts of African-Americans and other shoppers of color who encounter consumer discrimination. While the courts are willing to allow recovery when the plaintiffs can

prove that a retailer completely prevented them from making a purchase (or, to use the statute's language, making a contract), most plaintiffs lose their lawsuits when they establish that the retailer degraded – but did not completely deny – their service (or their opportunity to make a contract). Generally, customers who are not completely denied the opportunity to contract with a retail store complain that they were harassed while shopping. In many instances, they claim that they were asked to show additional forms of identification when paying or that they were subject to undue surveillance while shopping. These plaintiffs typically receive no redress even though they may be called racial slurs and even removed from the premises. According to the case law, the timing of the discriminatory behavior is critical. In court, customers rarely prove that their section 1981 rights were violated if the store clerk or security guard harassed them either 1) after they enter the store and while they are browsing or 2) after they complete a purchase.

The reasoning used in these cases is that there is no contractual interest at stake when the shopper is just browsing because it is not clear that they intended to make a contract with the store. Similarly, the courts find that there is no contractual interest at stake after the purchase is complete because the contract was already made and the transaction has ended. This rationale was the basis of the court's decision in Ms. Rogers' case against Wal-Mart described above.

Most of the decisions made from 1990 to 2002 indicated that a shopper's "right to make a contract" is not violated when store personnel harass him/her unless the shopper was at the point-of-sale (i.e. involved in a price-check, an exchange of cash, pending credit card authorization, or writing a check) when the harassment occurred. Therefore, as long as the customer was able to complete the transaction, his/her right to make and enforce a contract was not violated.

Hampton v. Dillard Department Stores[3]

While Ms. Hampton's successful claim against Dillard is very unusual, it serves as a good illustration of the way in which the federal courts are interpreting the scope of the right to make and enforce contracts. In that case, Ms. Hampton, an African-American woman, claimed that Dillard security guards targeted her because of her race when they detained her and searched her belongings on suspicion of shoplifting. After she purchased an Easter outfit for her niece's little boy, the Dillard sales associate gave Ms. Hampton a coupon for a fragrance sample. As Ms. Hampton attempted to redeem the coupon at the fragrance counter, the store's security guards accosted her. They dumped the contents of her bag onto the counter and asked for her receipt. They checked every item against the receipt, stuffed it all back into the bag, and informed Ms. Hampton that she was free to go. She was particularly offended because she was a regular customer at Dillard's and she sued the store claiming that her right to make and enforce her contract with Dillard's was violated by the security personnel's actions.

[3] 247 F.3d 1091 (10th Cir. 2001), cert. denied at 122 S.Ct. 1071 (Mem), 151 L.Ed.2d 973, 70 USLW 3396, 70 USLW 3514, 584 U.S.1181 (2002).

The jury awarded her $1.2 million ($56,000 in compensatory damages and $1.1 million in punitive damages) and the Court of Appeals upheld the award. When the U.S. Supreme Court refused to review the decision in 2002, Ms. Hampton's vindication was complete. The decision in this case hinged on the fact that the contractual relationship between Ms. Hampton and Dillard's was not completed when the security guards stopped her and searched her bags. Therefore, the security guard's conduct prevented her from redeeming the coupon and amounted to a violation of her right to make and enforce a contract under Section 1981.

Section 1981 clearly states that the right to make and enforce contracts includes "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." But, contrary to the statute's express language, courts routinely dismiss Section1981 claims when the store's behavior degrades the "benefits, privileges, terms and conditions" of the contract rather than completely denying the goods and/or services that plaintiffs sought to purchase.

The problem – as I see it – is that the courts are interpreting the statute's language very narrowly. Many of the federal courts focus exclusively on the "make and enforce contracts" language of the statute and they disregard the expansive language that describes that right as inclusive of the "enjoyment of all benefits, privileges, terms and conditions of the contract."

In the retail environment making a contract does not simply occur at the point-of-sale. In fact, making a contract involves several steps and activities, including inspecting and comparing the goods and their prices, inquiring about terms and conditions, and even negotiating. When the harassing behavior of a store clerk or a security guard prevents an individual from inspecting and comparing goods while browsing, for example, that frustrates the shopper's opportunity to make a contract (or purchase). In addition, the harassing behavior affects the shopper's ability to enjoy the benefits, privileges, terms and conditions of the contract. When such harassment is based on the shopper's race, I believe it interferes with – and violates – the right of that shopper of color to make a purchase (or contract) on the same terms as white shoppers.

A growing number of courts – although still very few – agree with this analysis. These courts are finding that a retailer's behavior that degrades a black shopper's service may violate Section 1981 even though the behavior does not amount to an outright denial of service. Delays in service and other types of harassment have been found, in a few cases, to violate Section 1981. These decisions favored the plaintiffs because the courts focused on the degradation of service that plaintiffs experienced and the extent to which it differed from the service provided to white customers.

For example, in a recent case, an African-American customer was shopping at a convenience store. She brought her purchases to the counter where the white sales clerk was talking to a white customer. The customer barraged the plaintiff with racial slurs

while the sales clerk laughed. He then threw change at the plaintiff, spat in her face, and ran out of the store as he threatened to kill her. Although the plaintiff was able to complete her purchase with another cashier, the court found that her right to make and enforce her contract with the store was violated.[4]

Returning to the allegations in the Cracker Barrel case, even though the plaintiffs were not explicitly prevented from entering into a contract with Cracker Barrel because they were eventually served in most cases, the harassment they endured prevented them from enjoying the same "benefits, privileges, terms and conditions of the contractual relationship" that white customers enjoy at Cracker Barrel restaurants.

Conclusion

Although individual CRP incidents may appear benign, consumer discrimination affects most – if not all – people of color on a regular basis. If we credit the accounts of shoppers of color that consumer discrimination is pervasive, the fact that retailers conduct business in this manner has serious implications. The consequences are particularly devastating when young victims of CRP are reminded, again and again, that they belong in the margins of American society.

To realize the statute's goal of racial equality in the contracting process, I believe that the courts must interpret Section 1981 more broadly so that it guarantees to all Americans the right to be free from race-based harassment while shopping. In the words of Justice Stewart: "A dollar in the hands of a Negro should purchase the same thing as a dollar in the hands of a white man."

[4] Williams v. Cloverland Farms Dairy, Inc., 78 F.Supp.2d 479 (D.Md. 1999).