

Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination

Anne-Marie G. Harris, Geraldine R. Henderson, and Jerome D. Williams

Through an examination of 81 federal court decisions made between 1990 and 2002 involving customers' allegations of race and/or ethnic discrimination, the authors uncover three emergent dimensions of discrimination: (1) the type of alleged discrimination (subtle or overt), (2) the level of service (degradation or denial), and (3) the existence of criminal suspicion in the alleged discriminatory conduct (present or absent). Using a framework that enables the categorization and aggregation of cases with common themes, the authors demonstrate that real and perceived consumer discrimination remains a problem in the U.S. marketplace, and they conclude that further research is necessary for marketers to address the issue effectively.

Many people have reflected on the strides that the United States has made in education, housing, employment, and other aspects of daily life following the passage of the Civil Rights Act of 1964. Given the roots of the civil rights movement in marketplace interactions—for example, the consumer bus boycotts and consumer lunch-counter sit-ins of the 1950s and 1960s—it seems appropriate to assess the progress that has been made in the eradication of consumer discrimination in the marketplace 40 years later. To accomplish this goal, we examined more than 80 federal court decisions spanning more than a decade that address racial/ethnic marketplace discrimination. We begin with a discussion that explains the terminology that is frequently used in the literature and popular press—for example, “shopping while black” (SWB) (Gabidon 2003), consumer racial profiling (CRP) (Williams, Henderson, and Harris 2001), consumer discrimination (Harris 2003), and statistical discrimination (Lee 2000). Next, we describe the extent of marketplace discrimination and why we believe that this topic is important for marketers, and we discuss the legal issues and relevant legislation. In the remainder of the article, we focus on an analysis of the federal cases.

Anne-Marie G. Harris is an assistant professor, Management Department, Salem State College School of Business in Massachusetts (e-mail: aharris@salemstate.edu). *Geraldine R. Henderson* is an associate professor, College of Communication, Department of Advertising, University of Texas at Austin (e-mail: gerri@mail.utexas.edu). *Jerome D. Williams* is F.J. Heyne Centennial Professor of Communication, Department of Advertising, with a joint appointment in the Center for African and African American Studies, University of Texas at Austin (e-mail: jerome.williams@mail.utexas.edu). The second author thanks the Institute for Innovation and Creativity at the University of Texas at Austin for its research support.

Defining CRP

According to some definitions, CRP, or SWB, is analogous to law enforcement racial profiling, which typically occurs when law enforcement officers stop, question, investigate, detain, and/or arrest people on the basis of their race/ethnicity rather than on probable cause or even a reasonable suspicion that these people have engaged in criminal activity. This phenomenon is commonly referred to as “driving while black or brown” (DWB).

However, many incidents of marketplace discrimination do not involve suspecting customers of engaging in criminal activity. In this article, we define CRP as a type of differential treatment of consumers in the marketplace based on race/ethnicity that constitutes denial of or degradation in the products and/or services that are offered to the consumer. Our definition of CRP covers consumption experiences beyond shopping in retail stores. For example, our analysis of federal cases demonstrates that CRP frequently occurs in places of public accommodation, such as hotels, restaurants, gas stations, and service providers, as well as retail establishments, including grocery/food stores, clothing stores, department stores, home improvement stores, and office equipment stores. Furthermore, CRP affects members of minority groups beyond those classified as black/African American, such as Hispanics, Asians, Native Americans, and Arab Americans. Indeed, since September 11, 2001, there has been heightened interest and concern about CRP as it applies to anyone perceived as Middle Eastern, including South Asians, Latinos, and even Jews (Nakao 2001).

Extent of CRP and Impact on Marketers

Compared with DWB, in which one survey reports that 37% of African Americans believe that they have been victims of racial profiling (Morin and Cottman 2001; Valia 2001), the evidence suggests that SWB is a far more common experience among African Americans (Ainscough and Motley 2000; Henderson 2001). Williams and Snuggs (1997) conducted a mail survey of 1000 households and found that

86% of African Americans believed that they were treated differently in retail stores on the basis of their race. A 1999 Gallup poll reported that 75% of black men had been subjected to CRP (Knickerbocker 2000). Since 1990, the popular press has reported hundreds of accounts of CRP and marketplace discrimination against consumers of color.

Sociologist Feagin (1991) suggests that African Americans use several diverse strategies to cope with perceived injustices, including withdrawal, resigned acceptance, verbal or physical confrontation, and the filing of lawsuits. In *Exit, Voice, and Loyalty*, Hirschman (1970), a noted economist, describes a similar set of strategies: (1) exit (leave the store), (2) voice (complain, file a lawsuit, and so forth), and (3) loyalty (accept and continue to purchase from the retailer). Our analysis focuses exclusively on the “voice” strategy through lawsuits. For the sake of space and generalizability, we limit the current analysis to those cases filed in federal courts in which judges issued published decisions between 1990 and 2002, a time frame that coincides with a large number of news accounts about CRP.

Given that consumers of color constitute approximately one-third of the U.S. population and wield more than a trillion dollars of purchasing power (Humphreys 2004), it is important to note that “exit” strategies due to SWB and other forms of marketplace discrimination can have a direct, negative impact on marketers. For example, sales at one Treasure Cache store fell by more than 50% following an SWB-related incident (Bean 2001). Dillard’s department store stock has significantly dropped in the past few years, which some link to the more than 100 CRP lawsuits filed against the retail chain (Kong 2003). A Denny’s poll found that approximately 50% of African Americans said they would never eat at Denny’s again following negative publicity surrounding a CRP lawsuit, though in a subsequent poll, the number fell to 13% because of aggressive efforts by Denny’s to address CRP issues (Hood 2004).

Legal Review of CRP Issues and Legislation

Claims of marketplace discrimination are typically filed under federal civil rights laws that stem from the Civil Rights Acts of 1866 and 1964. We describe these two laws and their application to cases of CRP and marketplace discrimination.

Civil Rights Act of 1866

Congress enacted the Civil Rights Act of 1866 pursuant to its Thirteenth Amendment authority to eradicate involuntary servitude (*Runyon v. McCrary* 1976). Among the goals of the Civil Rights Act of 1866 was 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 man” (*Jones v. Alfred H. Mayer Co.* 1968, p. 443). Plaintiffs who successfully prove intentional discrimination under this act are entitled to both equitable (injunctive) and legal (monetary) relief, including compensatory and punitive damages (*Johnson v. Railway Express Agency* 1975).

Victims of consumer discrimination have advanced valid claims under two sections of the 1866 act, codified at 42

U.S.C. § 1981 and 42 U.S.C. § 1982. Section 1981 provides that “[a]ll persons ... shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens.” The term “make and enforce contracts” includes “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” The U.S. Supreme Court has stated that the purpose of Section 1981 is “to remove the impediment of discrimination from a minority citizen’s ability to participate fully and equally in the marketplace” (*Patterson v. McLean Credit Union* 1989).

Only a small number of plaintiffs have alleged that their right to contract was violated during retail or other commercial transactions. Courts have narrowly interpreted the scope of Section 1981 by focusing on conduct that prevents the formation of the contract rather than on conduct that affects the nature or quality of the contractual relationship. Many federal courts insist that to state a valid claim, Section 1981 plaintiffs must produce evidence that they were denied an opportunity to complete a retail transaction. This restricted interpretation of the statute has resulted in the dismissal of many plaintiffs’ claims at the summary judgment stage and before the presentation of evidence to a fact finder (Kennedy 2001).

Section 1982 provides that “[a]ll citizens of the United States shall have the same right as is enjoyed by white citizens ... to purchase personal property.” Personal property is any tangible or intangible property that is not real estate. Given that most courts interpret it similarly, this section does not provide more effective relief than Section 1981 (Kennedy 2001). In general, the courts do not believe that defendants have interfered with a plaintiff’s right to purchase personal property when that plaintiff is ultimately able to purchase the goods or services he or she sought.

Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 prohibits discrimination and segregation in places of public accommodation. This law aims to “eliminate the unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public” (House of Representatives 1964). It provides a guarantee that “[a]ll 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.”

Although Title II does not require proof of intentional discrimination, it disallows plaintiffs from seeking monetary damages. The statute permits a court to issue only equitable or declaratory relief (*Newman v. Piggie Park Enters., Inc.* 1968). Equitable relief, such as the issuance of a court order that prohibits a defendant from engaging in discriminatory conduct, is nonmonetary. Declaratory relief is a binding adjudication of the rights and status of the litigants even though no relief is awarded.

Title II also requires a plaintiff to notify the state civil rights agency of the complaint before filing suit and within a certain time frame from the alleged discrimination. This notification requirement results in the dismissal of some claims because many plaintiffs are not aware of it and fail to meet the statutory deadline.

Under Title II filings, courts must make a threshold determination as to whether the place in question is a “place of public accommodation,” which Title II(b) defines as follows:

1. Any inn, hotel, motel, or other establishment that provides lodging to transient guests;
2. Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises;
3. Any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and
4. Any establishment that is physically located within the premises of any establishment otherwise covered by this subsection, or within the premises of which is physically located any such covered establishment, and which holds itself out as serving patrons of such covered establishment.

Most consumers and their counsel are surprised to discover that retail stores are not considered places of public accommodation under Title II. There are some exceptions to this rule because the act does cover retail stores that contain eating establishments (and eating establishments that are “located on the premises of any retail establishment”). According to the Supreme Court, “Retail stores, food markets, and the like were excluded from [Title II] for the policy reason [that] there was little, if any, discrimination in the operation of them” (Kennedy 2001, pp. 335–36). Legal commentators argue that Title II should be amended to include all retail establishments among the list of covered entities—given their coverage in the Americans with Disabilities Act as well as many state public accommodations laws—and to provide for monetary damages before it can truly become an effective tool in addressing the discriminatory conduct that occurs in the marketplace (Harris 2003; Kennedy 2001).

State Laws Prohibiting Discrimination

State laws also provide relief for some victims of marketplace discrimination. Several states have enacted civil rights or human rights statutes similar to the federal Civil Rights Acts. However, most consumer discrimination claims tend to be mediated and resolved out of court, leading some commentators to characterize state statutes as ineffective in terms of addressing systemic problems (Haydon 1997). Although settlements may efficiently resolve individual claims to the parties’ satisfaction, they may also enable defendants to shield themselves from greater scrutiny and bad publicity. In addition, potentially valid claims are not adjudicated, and thus the courts are prevented from establishing precedent with the force of law. State courts have decided only 89 cases of consumer discrimination that involve state public accommodations laws, whereas federal courts that interpret state public accommodations statutes decided an additional 36 cases (Harris 2004). We have not included lawsuits filed solely under state laws because of limitations of space and overall generalizability.

Thus, judicial opinions contribute to an understanding of CRP and marketplace discrimination, yet it is important to note that complaints filed in court represent a “tiny and non-random fraction” of actual incidents of discrimination (Siegelman 1999, p. 82). Our subsequent analysis focuses

exclusively on cases in which federal courts interpreted the previously described federal laws.

Analysis of Cases

The cases that we review include plaintiffs of all racial groups who claimed that they were treated poorly compared with white customers in commercial establishments. More specifically, we analyzed cases in which people of color alleged that defendants violated their rights under federal statutes covering “the making and enforcing of contracts” (§ 1981), “the purchase of personal property” (§ 1982), and “the full and equal enjoyment . . . of places of public accommodation” (Title II). We report a total of 81 court cases that were filed against 57 different defendants, indicating that some defendants were pursued on multiple occasions. The resulting database includes major retailers, such as Office-Max, Wal-Mart, Sears, Dillard’s, Macy’s, and Home Depot. Note that the inclusion of a company in our database of cases is not an indication of guilt. This only means that a suit was filed against the company (for a complete list of all 57 defendants along with the number of times each defendant was implicated, see Table 1).

Methodology

Our primary impetus in developing the framework for analyzing the cases was to categorize and aggregate cases with common themes under a common heading. To achieve this goal, we examined the case summaries to ascertain where commonalities existed. Although it was not our intent to engage in a sophisticated manifest or latent content analysis study of the case summaries, we found it useful to use standard principles typically used in content analysis research to place each case systematically in a meaningful category.

For example, training was conducted to ensure congruity among the researchers across three themes (or dimensions). With the researchers serving as coders, each author independently read the text of the 81 cases, using the case summary as the unit of analysis, and made a case-by-case assessment of each of three dimensions using dichotomous measures—for example, the type of discrimination (subtle or overt), level of service (degradation or denial), and criminal suspicion (present or absent). Given that the coding tasks the researchers performed were more typical of a manifest content analysis and required less interpretation of the content by the coders in the unit of analysis (Kolbe and Burnett 1991), there was little disagreement in applying the three dimensions to the cases. Most sophisticated content analysis studies usually require some type of intercoder reliability measure that corrects for chance agreement, such as Scott’s (1955) pi index. However, for this type of content analysis, which was undertaken merely to categorize cases, it was appropriate to use a simple percentage-of-agreement method (Kassarjian 1977). The intercoder reliability scores across all three dimensions exceeded 95%, which was well above the .85 standard that is recommended when not correcting for chance agreement (Kassarjian 1977). Thus, we are confident that the categorization framework using the three dimensions successfully captures the commonalities of all cases.

Table 1. Number of Cases Filed Per Defendant

| Company | Number of Claims | Type |
|--|------------------|---|
| Denny's | 7 | Bar/restaurant |
| Waffle House | 5 | Bar/restaurant |
| Wal-Mart | 5 | Large retail establishment |
| Dillard's | 4 | Large retail establishment |
| Burger King | 3 | Fast food/carryout/delivery |
| Dave & Buster's | 2 | Restaurant |
| Hyatt | 2 | Lodging |
| McDonald's | 2 | Fast food/carryout/delivery |
| Pizza Hut | 2 | Fast food/carryout/delivery |
| A&P Food Stores | 1 | Food/grocery store |
| ABC Liquors | 1 | Small retail establishment |
| Adams Mark | 1 | Lodging |
| Ameritech | 1 | Telecommunications |
| Avis Rent-a-Car | 1 | Car rental/car dealers |
| Baur's Opera House | 1 | Entertainment/amusement/ social club |
| Budget Rent-a-Car | 1 | Car rental/car dealers |
| Cloverleaf Farms Dairy | 1 | Food/grocery store |
| Command Performance | 1 | Hair salon |
| Conoco | 1 | Gas station |
| Cracker Barrel | 1 | Bar/restaurant |
| Days Inn of America | 1 | Lodging |
| Domino's Pizza | 1 | Fast food/carryout/delivery |
| Don Stein Buick | 1 | Car rental/car dealers |
| Donovan | 1 | Bar/restaurant |
| Duty Free Shoppers | 1 | Small retail establishment |
| Food-4-Less | 1 | Food/grocery store |
| Fraternal Order of Eagles | 1 | Entertainment/social club |
| Gordmans, Inc. | 1 | Large retail establishment |
| Great Clips | 1 | Hair salon |
| Holiday Inn | 1 | Lodging |
| Home Depot | 1 | Large retail establishment |
| Hy-Vee Food Stores, Inc. | 1 | Food/grocery store |
| JCPenney | 1 | Large retail establishment |
| Jewel Food Stores | 1 | Food/grocery store |
| Kaybee Toys | 1 | Large retail establishment |
| Kookies | 1 | Bar/restaurant |
| Macy's Department Store | 1 | Large retail establishment |
| Marriott International | 1 | Lodging |
| Maryland Hospitality, Inc. | 1 | Lodging |
| MetLife | 1 | Services |
| National Amusements | 1 | Entertainment/amusement/ social club |
| New York Yankees | 1 | Entertainment/amusement/ social club |
| Ocean Mecca Motel, Inc. | 1 | Lodging |
| OfficeMax | 1 | Large retail establishment |
| Philip Morris | 1 | Tobacco producer |
| Radio Shack | 1 | Small retail establishment |
| Restaurant Compostela | 1 | Bar/restaurant |
| Romeo Carryouts | 1 | Fast food/carryout/delivery |
| Rumors Restaurant | 1 | Bar/restaurant |
| Sam & Harry's | 1 | Bar/restaurant |
| Sears Roebuck | 1 | Large retail establishment |
| Shell Oil | 1 | Gas station |
| Sportmart/Kazmierczak | 1 | Large retail establishment |
| Steak 'n Shake | 1 | Fast food/carryout/delivery |
| T.J. Maxx | 1 | Large retail establishment |
| Tommy Hilfiger | 1 | Small retail establishment |
| Tops Friendly Markets | 1 | Food/grocery store |
| United Refining Co. of Pennsylvania | 1 | Gas station |
| Total | 81 | |

Establishing a Framework for Analysis

We uncovered the following three emergent dimensions that served to summarize accounts of marketplace discrimination against people of color: (1) the level of service that results from the alleged discriminatory behavior (degradation or denial), (2) the type of discrimination (subtle or overt), and (3) the existence of criminal suspicion in the discriminatory behavior (present or absent).

With respect to the first dimension, discrimination can result in a level of service that is either an outright denial or a degradation of the products and services. In a retail environment, the denial of goods or services occurs when customers are prevented from participating in consumption experiences. Examples include refusing to wait on certain customers or to provide them information about goods or services that is available to other customers, denying customers access to the establishment, and removing customers from the store. In contrast, a degradation of goods and services occurs when customers of color are allowed the opportunity to transact but are provided something less—in a variety of possible ways—that what white customers receive. Degradation can take many forms, such as extended waiting periods, prepay requirements, being charged higher prices, and being subjected to increased surveillance and to verbal and/or physical attacks, including the use of racial epithets.

In making such a distinction, we found support in the Civil Rights Act of 1866. As we mentioned previously, Section 1981 prohibits race discrimination in “making and enforcing contracts,” including commercial transactions. This section prohibits a merchant or a service provider from denying a customer the opportunity to engage in a transaction on the basis of the customer’s race. That statute further defines “the right to make and enforce contracts” by stating that it includes “the right to the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” This language should ensure that all consumers receive the same level of transaction experience when spending the same dollars. Therefore, the law guarantees a consumer both the right to buy a ticket to ride the bus and the right to sit in any seat he or she chooses. Thus, we believe that it is important to make the distinction between “denial” and “degradation.”

The second dimension, overt versus subtle discrimination type, is derived directly from extant research (Harris 2003; Williams, Lee, and Haugtvedt 2004). Overt discrimination is obvious and direct, whereas subtle discrimination is more ambiguous and indirect (Harris 2003). The National Research Council’s (Blank, Dabady, and Citro 2004) landmark study on the measurement of racial discrimination identified two components in its definition of racial discrimination: (1) differential treatment (i.e., overt) and differential effect, which the report actually refers to as being “subtle.” Furthermore, recent research on the measurement of discrimination and prejudice has focused on constructs and techniques designed to tease out the differences between overt expressions of prejudice and more subtle forms—for example, the symbolic racism scale, modern racism scale, implicit association test, stereotypic explanatory bias, linguistic intergroup bias, and so forth (for a discussion of these constructs and techniques, see Williams, Lee, and Haugtvedt 2004).

The two dimensions of level of service and type of discrimination combine to form four different CRP categories: (1) subtle degradation, (2) overt degradation, (3) subtle denial, and (4) overt denial. Subtle degradation of goods and services involves cases in which plaintiffs complain that they did not receive what they expected in a particular consumption setting but do not have direct evidence that this treatment was based on their race or ethnicity. In contrast, overt degradation occurs when it is clear that nonwhite patrons received less by way of goods and services than white customers. Subtle denial refers to situations in which plaintiffs allege that they were outright denied access to goods or services; however, they are unable to identify white patrons who received better treatment. Conversely, overt denial occurs when there is clear evidence of preferential treatment of white patrons compared with nonwhite counterparts. Table 2 summarizes these prototypes in matrix form.

The third dimension of criminal suspicion alludes to the common misperception that minority consumers engage in more criminal activity than majority consumers. The literature suggests that there is a predilection for singling out people of color for increased scrutiny by criminal justice officials (Gabbidon 2003). For example, because of the increased concern over DWB, many states now engage in ongoing data collection to assess the validity of traffic racial profiling. Notably, some early results suggest that majority drivers have a greater propensity to engage in criminal activity. For example, Northeastern University Institute on Race and Justice's recent study of Rhode Island traffic stops shows that nonwhite motorists were 2.5 times more likely to be searched than white motorists (Farrell et al. 2003). Furthermore, when the traffic stop resulted in a search, whites were more likely to be found with contraband; 23.5% of white drivers who were searched were found with contraband compared with 17.8% of nonwhite drivers. Somewhat related to this result, Federal Bureau of Investigation Uniform Crime Reporting data indicate that the greatest percentage of arrestees is white; for example, in 2002, more than 70% of arrestees were white (Federal Bureau of Investigation 2004). However, recent signal detection studies in psychology with blacks and whites in the roles of police

officers and criminals suggest a perceptual sensitivity effect; that is, blacks were incorrectly shot at more than whites, and guns held by blacks were less distinguishable from harmless objects than were guns held by whites (Greenwald, Oakes, and Hoffman 2003). Given the inconsistency of data on presumption and perception of involvement in criminal activity versus actual involvement, we believe that "presence" versus "absence" of criminal suspicion is an important categorization theme.

Thematic Interpretation

Subsequently, we discuss the 81 cases on the basis of the first two dimensions of level of service and type of discrimination (represented in the Table 2 matrix), along with the third dimension of criminal suspicion. Table 3 summarizes the status of each of the 81 cases.

Subtle Degradation

This category contains 28 cases, more than any other category, and it represents 35% of all the cases. Defendants include bar/restaurants (2), car rental/car dealers (1), entertainment/amusement/social clubs (1), fast-food/carryout/delivery establishments (2), food/grocery stores (3), hair salons (1), large retail establishments (12), lodging (3), small retail establishments (2), and tobacco producers (1). More than two-thirds (19) of these cases were adjudicated in favor of defendants, suggesting that courts did not believe that any degradation of goods or services occurred as the result of race or ethnicity. In one-fourth (7) of these cases, defendants settled, and only two cases were decided in favor of plaintiffs.

One of the most notorious subtle degradation cases involved a black woman who was shopping at Dillard's department store. She selected her items and paid for them at the checkout counter, where the sales associate gave her a coupon for free cologne. She proceeded to the fragrance counter and, while attempting to redeem the coupon, was stopped by a security officer who searched her belongings. Although there was no direct evidence that the security officer intentionally discriminated against her because of race, he filed a two-page "Security Report" that referred to her status as an African American 12 times (*Hampton v. Dillard Department Store* 2002).

A Kansas City jury found that the store's security officers violated the plaintiff's right to make and enforce contracts when they harassed her at the fragrance counter. The jury awarded her \$1.1 million in punitive damages in addition to compensatory damages. The Tenth Circuit Court of Appeals upheld the jury award even though the harassment occurred after Ms. Hampton paid for her merchandise, finding that

Table 2. The CRP Grid

| Level of Service | Extent of Discrimination | | |
|------------------|--------------------------|----------|-----------|
| | Subtle | Overt | Total |
| Degradation | 28 (35%) | 26 (32%) | 54 (67%) |
| Denial | 6 (7%) | 21 (26%) | 27 (33%) |
| Total | 34 (42%) | 47 (58%) | 81 (100%) |

Table 3. Status of CRP Cases

| Description of Category | Subtle Degradation of Goods and/or Services | Overt Degradation of Goods and/or Services | Subtle Denial of Goods and/or Services | Overt Denial of Goods and/or Services | Total |
|-----------------------------------|---|--|--|---------------------------------------|-------|
| Settled cases | 7 | 11 | 1 | 13 | 29 |
| Cases with finding for plaintiff | 2 | 2 | 3 | 3 | 9 |
| Cases with finding for defendant | 19 | 13 | 2 | 5 | 38 |
| Total number of cases in category | 28 | 26 | 6 | 21 | 81 |

the contractual relationship between her and Dillard's had not yet ceased when the security officer detained her. Nevertheless, the Tenth Circuit Court specifically rejected the notion that consumers of all races have the right to a harassment-free shopping experience, explaining that there "must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping" (*Hampton v. Dillard Department Store* 2002, p. 1118). The United States Supreme Court denied Dillard's petition to review this decision.

Overt Degradation

This category contains the second-highest number of cases (26, or 32%) and includes defendants such as bar/restaurants (5), car rental/car dealer (1), entertainment/amusement/social clubs (3), fast-food/carryout/delivery establishments (5), food/grocery stores (2), gas stations (3), large retail establishments (3), lodging (2), services (1), and small retail establishments (1). Despite the overt nature of the discriminatory conduct in these cases, half of the cases (13) were found in favor of the defendant. Regarding the other cases, 42% (11) were settled out of court, and only 2 were decided in favor of the plaintiff. Many federal courts are narrowly interpreting the statutory language of Section 1981, which evinces their failure to understand the experiences of consumers of color, who are regarded as lacking a valid claim of discrimination unless they suffer a complete denial of service.

An example of especially egregious discrimination occurred at a Conoco store in Fort Worth, Tex. The plaintiffs, who are Hispanic, stopped to purchase gas and other items on their way to a family picnic. When they presented a credit card for payment, the Conoco employee immediately stated, "I will need to see [identification]." The plaintiff presented her valid Oklahoma driver's license, but the employee responded, "I'm not going to take that." During the dispute, one of the plaintiffs began to feel ill and decided to leave the store to avoid complications to a chronic health problem (*Arguello and Govea v. Conoco, Inc.* 2003). The employee then begrudgingly agreed to the transaction but, after additional discourse, told the plaintiff, "f— you, you f—ing Iranian Mexican bitch, whatever you are."

This verbal assault was followed by the employee shoving their purchases off the counter, gesturing obscenely at the plaintiffs, and announcing over the store's intercom that they should "go back where you came from, you poor Mexicans, ... you goat-smelling Iranians." When one of the plaintiffs tried to reenter the store to determine the employee's name, he was barred from doing so. The employee readily agreed that she discriminated against them. When the plaintiffs lodged their complaints with Conoco management, their efforts were rebuffed, and the company neither apologized nor responded.

According to the Fifth Circuit Court of Appeals, none of the conduct alleged in the complaint or proved at trial infringed on the plaintiffs' rights as protected by Section 1981 and Title II. The court found that though the store clerk may have deterred them, she did not prevent their ability to contract with the firm under the same terms and conditions as white customers. Therefore, neither plaintiff was entitled to injunctive relief. The United States Supreme Court refused to review the Court of Appeals' decision.

Subtle Denial

Subtle denial, the smallest category of the four, contains cases in which there was denial of service along with ambiguity as to whether this discrimination was based on race. Establishments include a bar/restaurant (1), fast-food/carryout/delivery (1), hair salon (1), large retail establishment (1), lodging (1), and small retail establishment (1). Half of these cases (3) were found in favor of the plaintiff, 2 were decided in favor of the defendant, and 1 was settled.

An example of subtle denial of service occurred when a white woman took her two African American grandsons and their mother on a weekend trip to the beach. The white plaintiff entered a motel's office to inquire about room availability, while the remainder of her family stayed in the car. She checked into the motel for two nights and paid the bill in advance with cash. They then deposited their bags in the room and headed for the outdoor pool. Within a few minutes, the desk clerk appeared and demanded that they leave immediately. When the plaintiffs asked, "Why? What did we do?" the desk clerk said, "I want you off my premises now." He did not respond to their repeated requests for an explanation (*Murrell v. Ocean Mecca Motel, Inc.* 2001).

The desk clerk claimed that he was enforcing the four-person room occupancy limit, though the plaintiff's party consisted of four people and the motel's brochure and Web site stated that all rooms had between five- and seven-person limits. The clerk attempted to withhold \$50 for a room-cleaning charge, but the plaintiff protested that they had occupied the room for less than ten minutes and eventually received a full refund. The 4th Circuit Court of Appeals reversed the trial court's decision that the plaintiffs had failed to present sufficient evidence of race discrimination, finding the proffered circumstantial evidence compelling.

Overt Denial

This final category contains the greatest number of cases involving outright denial of service and represents more than one-fourth (21) of all CRP and discrimination incidents. Establishments include bar/restaurants (10), a car rental/car dealership (1), entertainment/amusement/social clubs (2), fast-food/carryout/delivery establishments (2), a food/grocery store (1), a large retail establishment (1), lodging (2), services (1), and a small retail establishment (1). More than half of the cases (13) were settled, which is the highest among the categories. In contrast, fewer than 20% (5) were found in favor of the defendant, which is the lowest percentage among the categories. The remaining cases were decided in favor of the plaintiff (3).

This prejudicial conduct is exemplified by several lawsuits filed against Denny's restaurants. One particular case involved a server who forced African American customers to wait an extraordinarily long time to be seated. He then proceeded to make harassing gestures and directed racially charged, derogatory comments toward them. The waiter eventually refused to serve the table, informing managers that they could not make him serve "n—." In a similar case, two African American customers at a different Denny's restaurant alleged that they were subjected to racially derogatory comments, refused service, and directed to leave

the premises without receiving their meals. Not surprisingly, both cases resulted in confidential, out-of-court settlements (*Charity v. Denny's* 1999; *McCoo v. Denny's* 2000). Because these lawsuits were filed, Denny's has paid \$54 million in damages to settle two class-action suits and has undergone a major restructuring to address these issues. Today, Denny's is consistently listed near the top in rankings of the best companies in the United States for African Americans (Bean 2003; Hood 2004; for a detailed account, see Adamson 2000).

Criminal Treatment

Our analysis reveals that 40% of all CRP cases involved allegations that customers of color were treated with suspicion or as if they were criminals (see Table 4). Of these cases, 16 involved subtle and 10 involved overt degradation of service. Only 3 cases involved subtle denial, whereas 3 others involved overt denial of service. More than half of the cases of subtle degradation involved some form of criminal treatment. We describe two examples next.

The first example is a Massachusetts case in which a white female reported that she was instructed by her employer to engage in discriminatory treatment of minority customers. "For example, ... her supervisors ... asked her to shadow minority customers who were shopping in the store because of their belief that such customers were more likely to steal" (*Commonwealth of Massachusetts v. The Children's Place Stores, Inc.* 2000, p. 3). She also alleged that her white supervisors directed her to refuse minority customers large shopping bags because they would use the bags to steal. In addition, she claimed that she and other sales associates were told to withhold credit card applications from minority customers. Supervisors also informed sales associates "not to bother to attempt add-on sales with minority customers nor to inform minority customers of sales or promotions" (*Commonwealth of Massachusetts v. The Children's Place Stores, Inc.* 2000, p. 3).

After the complaint was filed, the Massachusetts Attorney General's Office sent matched-pair testers to shop at several Children's Place stores throughout Massachusetts to observe and record customer treatment. The testing showed that black testers were more likely to be followed by store personnel, whereas white testers were not subjected to such surveillance. When testers made a major credit card purchase, Children's Place employees were more likely to compare the black tester's receipt signature to his or her credit card signature and to scrutinize the black tester's signature more closely than the white tester's signature. The Attorney General's Office subsequently filed suit against the Children's Place, and both parties eventually arrived at a negotiated agreement under which the retailer agreed to require

training of all employees and to submit to additional testing audits.

The second example is a class-action suit that was filed in New York City against Macy's and its parent company, Federated Department Stores, which the parties settled in July 2004. In the complaint, African American customers alleged that Macy's and Federated Department Stores systematically discriminated against people of color by targeting them as suspected shoplifters. The defendants' common discriminatory practices as described in the complaint include the following:

Targeting people of color to be personally followed by plain-clothes security detectives and watched by video surveillance by the use of, among other things, "race codes" to identify African-Americans when they enter Macy's stores; tolerating the use of racially derogatory comments by Macy's security managers, including referring to African-American shoppers as "Monkeys;" subjecting people of color to false accusations of shoplifting in disproportionately high percentages whereby, in certain Macy's stores, people of color make up more than 90% of the people grabbed for alleged shoplifting; imposing actual "quotas" for the number of shoplifting cases that security personnel are required to make; demanding in-store monetary payments from people of color falsely accused of shoplifting to increase Macy's profits; threatening people of color with criminal prosecution or extended confinement in handcuffs or holding cells away from their family and friends to coerce false confessions and cash payments to security personnel in order to be released; and subjecting people of color suspected of shoplifting to ridicule, insults, verbal and physical abuse and harassment. (*Simmons-Thomas v. Macy's East, Inc., Federated Department Stores, Inc., et al.* 2003, p. 2)

Conclusion

Through this research, we demonstrate that both race and ethnic discrimination remain vexing problems in places of public accommodation and retail establishments; the results suggest the need for further research. We observed that the number of lawsuits filed in federal court alleging marketplace discrimination has increased since we began our study. Perhaps members of racial groups (especially blacks) have transitioned from being vulnerable (Hill 1995) to being vocal (Hirschman 1970). Because defendants face the perception among African Americans and other people of color that business from minority customers is not valued as highly as that of white customers, defendants faced with charges of discrimination have financial and other incentives to settle such cases rather than subject themselves to the publicity a lawsuit could engender.

In terms of further research, we recommend a more rigorous content analysis than that of our preliminary analysis, which we undertook mainly for purposes of categorization. In addition to placing each case in a cell with descriptive

Table 4. Criminal Treatment of Customers in CRP Cases

| Description of Category | Subtle Degradation of Goods and/or Services | Overt Degradation of Goods and/or Services | Subtle Denial of Goods and/or Services | Overt Denial of Goods and/or Services | Total |
|-----------------------------------|---|--|--|---------------------------------------|-------|
| Criminal treatment | 16 | 10 | 3 | 3 | 32 |
| Total number of cases in category | 28 | 26 | 6 | 21 | 81 |

meaning, which was our main objective, it would be useful to derive some prescriptive meaning from each cell. For example, a deeper analysis might address such questions as why there are so few cases in the subtle denial category (6%), why there are so few cases with a finding for the plaintiff (9) compared with out-of-court settlement (29) or a finding for the defendant (38), how these results relate to the case categories, and why the percentage of criminal treatment cases is so low for overt denial (14%, or 3 of 21 cases) compared with subtle degradation (57%, or 16 of 28 cases). Ultimately, additional research is necessary to determine what prescriptive measures can address the problem or perception of CRP.

Lawful conduct and ethical treatment may require strategic policy changes to ensure a more diversity-friendly environment for customers of all races. One avenue is diversity training designed to sensitize employees to explicit or implicit prejudices that inhibit them from treating all customers with dignity and respect. Following such consciousness raising, firms should actively monitor interactions with customers to ensure that both positive outcomes and negative incidents are consistent across diverse subgroups. For example, some retailers recently have begun employing “the demographic test” to detect and prevent discriminatory behavior among their employees by using U.S. Census data to determine the racial/ethnic makeup of their store trade areas and by comparing those data with their store arrest and detention records (Fifield and O’Shaughnessy 2001). Regardless, people of color must be vigilant to the remaining vestiges of segregation and discrimination, understand their legal rights, and make their voices heard by holding offenders accountable. In this way, all consumers can ensure that they receive equitable treatment for equal dollars.

References

- Adamson, Jim (2000), *The Denny’s Story: How a Company in Crisis Resurrected Its Good Name and Reputation*. New York: John Wiley & Sons.
- Ainscough, Thomas and Carol M. Motley (2000), “Will You Help Me, Please? The Effects of Race, Gender and Manner of Dress on Retail Service,” *Marketing Letters*, 11 (May), 129–35.
- Arguello and Govea, *Petitioners, v. Conoco, Inc., Respondent* (2003), Amicus Curiae Brief in support of the Petitioners of the Lawyers’ Committee for Civil Rights Under Law, the Mexican American Legal Defense and Education Fund, and the National Association for the Advancement of Colored People, on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, U.S., No. 03-324, (October 6).
- Bean, Linda (2000), “Retail Racial-Profiles Charges Settled by Children’s Place Chain,” (December 22), [available at <http://diversityinc.com/>].
- (2001), “Retail Racial Profiling: Retrain Staff to Focus on Customer Service,” (April 18), [available at <http://diversityinc.com/>].
- (2003), “Legal: What Happened to Diversity’s Bad Boys: Texaco, Denny’s, Coca-Cola,” *DiversityInc*, (October–November), 111, 112, 114, 116.
- Blank, Rebecca M., Marilyn Dabady, and Constance F. Citro, eds. (2004), *Measuring Racial Discrimination: Panel on Methods for Assessing Discrimination*. Washington, DC: The National Academies Press.
- Charity v. Denny’s* (1999), WL 544687, U.S. District Court for the Eastern District of Louisiana.
- Civil Rights Act* (1866), Ch. 31, 14 Stat. 27, reenacted by *Enforcement Act of 1870*, Ch. 114, 18, 16 Stat. 140, 144 (1870), codified as amended at 42 U.S.C. §§ 1981 and 1982, (April 9).
- (1964), Public Law 88-352, 78 Stat. 241, codified as amended at 42 U.S.C. § 2000(a) to (a)(6).
- Commonwealth of Massachusetts v. The Children’s Place Stores, Inc.* (2000), Complaint and Consent Decree, MCAD Docket No. 00133755, (December 21).
- Farrell, Amy, Dean Jack McDevitt, Shea Cronin, and Erica Pierce (2003), *Rhode Island Traffic Stop Statistics Act Final Report*. Boston: Northeastern Institute on Race and Justice.
- Feagin, Joe R. (1991), “The Continuing Significance of Race: Antiblack Discrimination in Public Places,” *American Sociological Review*, 56 (February), 101–116.
- Federal Bureau of Investigation (2004) *FBI Crime Statistics*, (Table 43), [available at http://www.fbi.gov/ucr/cius_02/pdf/02crime4.pdf].
- Fifield, Adam and Elise O’Shaughnessy (2001), “Shopping While Black,” *Good Housekeeping*, 233 (November), 129–36.
- Gabbidon, S.L. (2003), “Racial Profiling by Store Clerks and Security Personnel in Retail Establishments,” *Journal of Contemporary Criminal Justice*, 19 (August), 345–64.
- Greenwald, Anthony G., Mark A. Oakes, and Hunter G. Hoffman (2003), “Targets of Discrimination: Effects of Race on Responses to Weapons Holders,” *Journal of Experimental Social Psychology*, 39 (4), 399–405.
- Hampton v. Dillard Department Store* (2002), 985 F.Supp.1055 (D.Kan. November 25, 1998); 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, 534 U.S. 1131 (2002).
- Harris, Anne-Marie G. (2003), “Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling,” *Boston College Third World Law Journal*, 23 (1), 1–57.
- (2004), “State Public Accommodations Statutes and Cases,” unpublished manuscript, School of Business, Salem State College.
- Haydon, Stephen E. (1997), “A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations,” *UCLA Law Review*, 44 (April), 1207–1251.
- Henderson, Timothy P. (2001), “Perception that Some Merchants Practice Racial Profiling Generates Debate,” *Stores*, (June), [available at <http://www.stores.org/archives/jun01edit.asp>].
- Hill, Ronald Paul (1995), “Researching Sensitive Topics in Marketing: The Special Case of Vulnerable Populations,” *Journal of Public Policy & Marketing*, 14 (Spring), 143–48.
- Hirschman, Albert O. (1970), *Exit, Voice, and Loyalty*. Cambridge, MA: Harvard University Press.
- Hood, Rachele (2004), “Consumer Racial Profiling: Perspectives from the Boardroom,” paper presented at the University of Texas Ethics and Branding Speaker Series, McCombs School of Business, College of Communications, Austin, Tex. (March 30), [available online at <http://research.communication.utexas.edu/crp/>].

- House of Representatives (1964), Report No. 914, 88th Congress, 1st Session, *18 U.S. Code Congressional & Administrative News*.
- Humphreys, Jeffrey M. (2004), "The Multicultural Economy 2004: America's Minority Buying Power," *Georgia Business and Economic Conditions*, 64 (3), [available at <http://www.selig.uga.edu/forecast/GBEC/GBEC043Q.pdf>].
- Johnson v. Railway Express Agency* (1975), 421 U.S. 454 (United States Supreme Court).
- Jones v. Alfred H. Mayer Co.* (1968), 392 U.S. 409.
- Kassarjian, Harold H. (1977), "Content Analysis in Consumer Research," *Journal of Consumer Research*, 4 (June), 8–18.
- Kennedy, Deseriee A. (2001), "Consumer Discrimination: The Limitations of Federal Civil Rights Protection," *Missouri Law Review*, 66 (2), 275–39.
- Kolbe, Richard H. and Melissa Burnett (1991), "Content-Analysis Research: An Examination of Applications with Directives for Improving Research Reliability and Objectivity," *Journal of Consumer Research*, 18 (September), 243–50.
- Kong, Deborah (2003), "Lawsuits Filed by Minorities Draw More Attention to Racial Profiling of Consumers," *Associated Press*, (June 8).
- Knickerbocker, Brad (2000), "New Face of Racism in America: Retailers Denying Checks and Cab Drivers Refusing Rides in Minority," *The Christian Science Monitor*, (January 14), 1.
- Lee, Jennifer (2000), "The Salience of Race in Everyday Life: Black Customers' Shopping Experiences in Black and White Neighborhoods," *Work and Occupations*, 27 (3), 353–76.
- McCoo v. Denny's* (2000), 2000 WL 156824 (U.S. District Court for the District of Kansas).
- Morin, Richard and Michael H. Cottman (2001), "Discrimination's Lingering Sting; Minorities Tell of Profiling, Other Bias," *The Washington Post*, (June 22), A1.
- Murrell v. Ocean Mecca Motel, Inc.* (2001), 262 F.3d 253 (4th Circuit Court of Appeals).
- Nakao, Annie (2001), "Arab Americans Caught in Profile Snare: Detained, Denied Boarding or Kicked Off Planes for Looking Middle Eastern," *The San Francisco Chronicle*, (September 28), A1.
- Newman v. Piggie Park Enters., Inc.* (1968), 377 F.2d 433 (4th Cir. 1967), 390 U.S. 400.
- Patterson v. McLean Credit Union* (1989), 491 U.S. 164.
- Runyon v. McCrary* (1976), 427 U.S. 160.
- Scott, W. (1955), "Reliability of Content Analysis: The Case of Nominal Scale Coding," *Public Opinion Quarterly*, 19 (3), 321–25.
- Siegelman, Peter (1999), "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*, Michael Fix and Margery Austin Turner, eds. Washington, DC: The Urban Institute.
- Simmons-Thomas v. Macy's East, Inc., Federated Department Stores, Inc., et al.* (2003), No. 03-CV-3625, Amended complaint filed with the United States District Court for the Southern District of New York (June 2).
- Valia, Matthew (2001), "Racial Profiling, Discrimination Still Prevalent, Survey Finds," (June 25), [available at <http://diversityinc.com/>].
- Williams, Jerome D., Geraldine R. Henderson, and Anne-Marie Harris (2001), "Consumer Racial Profiling in Retailing: Bigotry Goes to Market," *The New Crisis*, 108 (November–December), 22–24.
- , Wei-Na Lee, and Curtis P. Haugtvedt, eds. (2004), *Diversity in Advertising: Broadening the Scope of Research Directions*. Hillsdale, NJ: Lawrence Erlbaum Associates.
- and Thelma Snuggs (1997), "Survey of Attitudes Toward Customer Ethnocentrism and Shopping in Retail Store: The Role of Race," in *Society for Consumer Psychology 1997 Winter Conference Proceedings*, Cornelia Pechmann and S. Ratneshwar, eds. Postdam, NY: Society for Consumer Psychology, 161–62.