Retail Race Discrimination

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*This Article investigates everyday race discrimination while shopping in clothing stores of different price ranges while examining the combined effects of race and gender on consumers’ shopping experiences and outcomes. Nineteen testers—Black and white females and males, were recruited and trained to return pre-purchased, unworn clothing items (without receipts) to approximately sixty retail stores in Chicago. Overall, more than 200 audits were conducted and analyzed in this study. The findings show that, controlling for all other variables, Black customers receive worse treatment in retail stores than do comparable white customers seeking to return identical goods. Implications for law and policy are discussed.*

# Introduction

On September 10, 2020, two Black men—a former police officer and a church pastor—were handcuffed and detained in a Texas Walmart store after trying to return a defective television purchased there earlier that day.[[2]](#footnote-2) The store refused to accept the television and required both men to sign a document vowing not to return to the store.[[3]](#footnote-3)

The two men recently filed a lawsuit against Walmart alleging unlawful race discrimination,[[4]](#footnote-4) but it is unclear whether they can prevail.[[5]](#footnote-5) Title II of the 1964 Civil Rights Act prohibits race discrimination in “places of public accommodation,” but retail stores are not covered by the statute.[[6]](#footnote-6)

In a famous 1968 decision, the Supreme Court explained that “retail stores . . . were excluded from [Title II] for the policy reason [that] there was little, if any, discrimination in the operation of them.”[[7]](#footnote-7) Scholars have similarly argued that “legislatures are not obligated to solve all the problems at once,” and that Congress “was attempting to regulate those types of business establishments that had been engaging in segregationist and discriminatory practices,” while “there was arguably no need for federal legislation regulating other businesses, which did not engage . . . in such practices.”[[8]](#footnote-8)

Indeed, courts have reasoned that Congress did not intend to cover *every* type of business in the Civil Rights Act, but only the “most flagrant and troublesome areas of discrimination,” with the expectation that by doing so, “the less bothersome would disappear through voluntary action and public effort.”[[9]](#footnote-9)

This Article asks whether—almost six decades after the 1964 Civil Rights Act came into effect—the expectation that race discrimination would disappear from retail spaces has been fulfilled.

The startling answer is *no*, not by a long shot. Retail stores today remain strongholds of race discrimination.[[10]](#footnote-10)

Using an original field experiment, this Article reveals that Black consumers are treated considerably less favorably than are similarly situated white consumers, even when trying to return identical, unopened goods to the stores in which these items had been purchased.[[11]](#footnote-11)

These findings hold true regardless of the demographics of the store representative or the price ranges at the store, and racial disparities are only exacerbated once consumers complain and request to speak with the store’s management.[[12]](#footnote-12)

Although the observed racial disparities are large and profoundly disturbing, they would probably not surprise most Blacks.[[13]](#footnote-13) For more than two decades, Gallup has surveyed Blacks about the places where they had experienced discrimination. In [all the polls since 1997](https://news.gallup.com/poll/1687/race-relations.aspx) through today, Blacks have been most likely to report unfair treatment while shopping.[[14]](#footnote-14) In the most recent Gallup poll, conducted in July 2021, as many as 35% of Black respondents reported having recently experienced unfair treatment while shopping in a store—more than in any other situation, including interactions with the police, at the workplace, or in healthcare or entertainment facilities.[[15]](#footnote-15)

Notably, Black consumers report mistreatment during all stages of shopping. Before, during, and after the transaction is made, Blacks frequently report being followed by security, treated rudely by clerks, and flatly denied service.[[16]](#footnote-16)

Although self-reports of mistreatment abound, systematic examinations of everyday retail race discrimination are surprisingly scarce.[[17]](#footnote-17) This Article represents an attempt to begin to fill this gap.

Nineteen testers—Black and white females and males, were recruited and trained for this study, and were sent to return pre-purchased, unworn clothing items to fifty-nine retail stores in Chicago.[[18]](#footnote-18) The testers followed a uniform script and returned the items, unused and in their original packaging, but without a receipt, to each of the audited stores. Overall, more than 200 audits were conducted to examine whether store clerks and managers treat consumers differently based on race or gender.[[19]](#footnote-19)

The findings reveal that white consumers were treated significantly more favorably than were Blacks.[[20]](#footnote-20) Across the sample (and controlling for clerk and store characteristics), white testers were 11% more likely to receive refunds and 22% more likely to have their returns accepted (for exchange, store credit, or refund) after making an initial return request than were Black testers making the same return request while following identical scripts.

Among those who did not receive refunds and consequently requested to speak with the store’s manager, white testers were 32% (!) more likely to see a manager than were Blacks. Black females were significantly less likely to speak with a manager than any other group—Black males, white females, and white males. Even more disturbing, perhaps, is the finding that among those who *actually saw* a manager, white testers were 14% more likely to be granted concessions than were similarly situated Blacks.

Testers’ final outcomes, including the improved outcomes of those whose negotiations with the manager were successful, witnessed a 4% widening of the race gap in the likelihood of receiving refunds, and a 9% widening of the race gap in the likelihood of having one’s return accepted.

Importantly, stores differed in whether they formally allowed for non-receipted returns or required receipts for all returns. Testers were thus sent to the stores *without* *the original receipts* to allow testing for two distinct types of retail discrimination. First, the study tested whether sellers disproportionately granted concessions above and beyond what the formal policy dictated to white customers by allowing them to return non-receipted items (notwithstanding the formal policy) disproportionately more often than they did Black customers. Second, the study tested whether sellers disproportionately deprived Black customers of their contractual rights by denying their return requests more often, even when the formal policies allowed for non-receipted returns.

This Article finds that both types of retail discrimination persist in the clothing market. Controlling for all other variables, Black customers were 24% more likely to be deprived of their contractual rights than were comparable whites.[[21]](#footnote-21) At the same time, Black testers were 27% less likely to receive concessions (beyond what the policy dictated) than were white testers.[[22]](#footnote-22)

What can account for the observed discrimination? While the results do not support a single theory of discrimination, the finding that clerks and managers of both races similarly treated white customers more favorably than they did Blacks may suggest that *in-group* bias is not the sole driver of retail race discrimination.[[23]](#footnote-23) Indeed, evidence from psychological research suggests that the observed disparities in treatment are driven, at least in part, by store agents’ inferences about customers’ criminality, buying power, and proclivity to complain based on their race, gender, and perceived class.[[24]](#footnote-24)

Of course, these explanations are not mutually exclusive and may very well complement one another. Animus and race-based inferences (whether implicit or conscious) may coexist, and further research is needed to assess the importance and explanatory power of each.

Whatever the reasons underlying these discriminatory patterns are, it is crucial to study them further if retail race discrimination is to be curbed. Retail discrimination affects Black consumers’ everyday shopping experiences, [[25]](#footnote-25) and it has been shown that these experiences—collectively termed: “Shopping while Black”[[26]](#footnote-26)—have cumulative debilitating effects on Black consumers’ self-esteem and life satisfaction, even their mental health.[[27]](#footnote-27)

The harmful effects produced by retail discrimination also highlight the need to revisit existing antidiscrimination laws. To this day, federal public accommodation laws do not prohibit race discrimination in retail stores. Courts have thus far been reluctant to interpret these laws broadly to encompass retail discrimination. While some states have included retail stores in their public accommodation statutes, others have not, and even those who do, provide very limited remedies and no effective deterrence.[[28]](#footnote-28)

Until retail stores are adequately covered by antidiscrimination laws (federal and state), this Article proposes that regulators and courts consider using existing consumer protection regulations to combat retail race discrimination. Indeed, some regulatory agencies (including the Consumer Finance Protection Bureau [CFPB]) have already begun taking steps in this direction.[[29]](#footnote-29)

This Article proceeds as follows. Section I briefly reviews the history and contemporary experiences of retail race discrimination in the United States. Section II explains the motivation behind this field experiment by surveying the limited empirical research on retail race discrimination and highlighting the importance of testing discrimination in the actual retail setting. Section III describes the data collection methods used in this study, including measures taken to ensure uniformity across testers. Section IV presents the results, revealing large and significant racial disparities in consumers’ (testers’) return experiences and outcomes. Section V then discusses potential explanations for the observed patterns, and Section VI explores the relevance of the findings for online retail. Part VII then turns to the law and policy questions that this study raises. Revealing the loopholes in existing antidiscrimination laws, it concludes that these laws neither adequately protect consumers nor sufficiently deter retailers from engaging in (what should be unlawful) race discrimination. Part VIII then advances a novel path forward, calling on regulatory agencies (e.g., the FTC and CFPB) and state attorneys general to use their authority to combat “unfair” practices under existing consumer protection statutes to curtail retail race (and gender) discrimination. This last Section explains how this solution could work, at least until an appropriate civil rights framework is adopted.

# I. Retail Race Discrimination: Past and Present

History is rife with stories of Blacks being excluded from retail stores and other places of public accommodation.[[30]](#footnote-30) Retail stores—just like restaurants, lunch counters, and schools—have operated as sites of racial segregation and inequality.[[31]](#footnote-31) Professor Austin explains, “Blacks were condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought. Among the most significant of these activities is buying and selling goods and services.”[[32]](#footnote-32)

Blacks were forced to use back entrances to businesses, denied service in public places, and prevented from trying on merchandise before buying it,[[33]](#footnote-33) up until the 1960s.[[34]](#footnote-34) As historian Grace Hale observed, store clerks “controlled the rituals of deference through which blacks were forced to make their purchases. Black often had to wait until all whites were served to take whatever grade of cornmeal, molasses, or sidemeat clerks would give them.”[[35]](#footnote-35)

Some stores forbade Black customers from entering the store, while others confined Black shoppers to bargain basements.[[36]](#footnote-36) Even when Blacks were allowed to enter stores, they were subjected to humiliation and mistreatment. Stores that “generally received Blacks under the principle of free entry and browsing, then constrained their movement and participation in this space.”[[37]](#footnote-37)

Black customers were welcome to spend their money on goods in many stores but were nonetheless frequently overlooked and underserved. They were denied service at lunch counters and beauty shops, prohibited from trying on and returning clothes, and often denied credit.[[38]](#footnote-38)

Unfortunately, retail race discrimination is not a thing of the past. Despite historic struggles for equal rights to shop in America and the enactment of the civil rights statutes in the 1960s,[[39]](#footnote-39) Blacks continue to face discrimination and mistreatment in retail spaces.

Title II of the Civil Rights Act determines that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.”[[40]](#footnote-40)

However, the Act did not eradicate retail race discrimination. While Blacks can freely enter stores, they are commonly subjected to poor, rude, or slow service.[[41]](#footnote-41) Even more troublingly, perhaps, Black customers are often detained, searched, or handcuffed on suspicion of shoplifting (this despite the fact that most shoplifters in the United States are white).[[42]](#footnote-42) Contemporary experiences of mistreatment are so commonly shared among Blacks that there is even a term for it: “Shopping while Black.”[[43]](#footnote-43)

In the early 1990s, sociologist Joseph Feagin documented some of the experiences of Blacks in retail stores by conducting in-depth interviews with 37 Black middle-class residents living in several American cities on their experiences involving discrimination,[[44]](#footnote-44) which revealed that the Blacks often received poor service in retail establishments and restaurants.[[45]](#footnote-45)

Importantly, social class or status has not immunized Black consumers from experiencing mistreatment at the stores. As Feagin observed, “[n]o matter how affluent and influential, a Black person cannot escape the stigma of being Black, even while relaxing or shopping. There is the recurring strain of having to craft strategies for a broad range of discriminatory situations.”[[46]](#footnote-46)

Even former president Barack Obama noted, in a speech he made following the acquittal of George Zimmerman of the charges of murdering Black high school student Traynor Martin, that “[t]here are very few African-American men in this country who have not had the experience of being followed when they are shopping at a department store. That includes me.”[[47]](#footnote-47)

During the 1990s and 2000s, racial profiling received national attention, when Black celebrities, including television producer Oprah Winfrey, WNBA star Sheryl Swoops, and Congresswoman Maxine Waters, shared their personal stories of mistreatment, bias, and discrimination.[[48]](#footnote-48)

Columbia Law Professor Patricia Williams has also shared similar recollections in her widely read 1991 memoir.[[49]](#footnote-49) While browsing for Christmas presents in New York, Williams was denied entry to a Benneton store by a young white clerk on account that it was “closed,” while white customers were shopping inside. She famously described the “blizzard of rage” she had felt when excluded from the store on account of her race.[[50]](#footnote-50)

These experiences illustrate that even high socioeconomic status cannot completely counteract racial bias or eradicate everyday retail discrimination. As sociologist Joe Feagin observed, “a white person dressed in jeans and a T-shirt can shop comfortably at an expensive store, but a similarly dressed Black person, even if affluent, arouses suspicion.”[[51]](#footnote-51)

In the 1990s, high-profile claims were also brought against Denny’s restaurant for denying Black customers service while seating and serving whites. There were also reports that Denny’s required Black customers to prepay for meals, while prepayment was not required in the case of white customers.[[52]](#footnote-52) This firestorm ended in a $54 million settlement.[[53]](#footnote-53) Similarly, in 1993, Black Municipal Judge Claude Coleman sued a New Jersey Bloomingdale’s store for falsely accusing him of credit card fraud. The charges were ultimately dropped, after one employee involved in the incident was fired and another suspended.[[54]](#footnote-54)

In recent years, widely publicized allegations of racial profiling have been levelled against national retailers, including Barney’s, Walmart, J.C. Penney’s, Sephora, The Children’s Place, and Macy’s.[[55]](#footnote-55)

As further discussed in Section VII, attempts to legally challenge retail race discrimination through litigation, primarily relying on the 1964 Civil Rights Act and Section 1981 of the 1866 Civil Rights Act, has enjoyed only limited success.[[56]](#footnote-56) For example, a content-based analysis of 81 federal cases involving race discrimination claims filed under federal civil rights laws and decided between 1990 and 2002, found that only a ninth of these cases were decided in favor of the plaintiffs.[[57]](#footnote-57) In a subsequent analysis of court decisions involving marketplace discrimination claims in Illinois, the researchers reached similar results.[[58]](#footnote-58)

Notably, while the focus of this Article is on discrimination against Black consumers, other racial and ethnic minorities continue to face similar mistreatment and discrimination.[[59]](#footnote-59) This Article will hopefully facilitate future quantitative studies of discrimination against other minority consumers.

# II. Background and Motivation

As Section I demonstrates, self-reports of mistreatment are ubiquitous, and retail discrimination cases increasingly reach the courts. However, there has been very little systematic inquiry into retail race discrimination to date.

The few studies to address discrimination against consumers by sellers have focused on only a handful of industries and have primarily used differential pricing or refusals to transact to measure discrimination.[[60]](#footnote-60)

In a classic study of car dealerships conducted in the early 1990s in Chicago, Yale Law School Professors Ian Ayres and Peter Siegelman found that salespeople quoted higher prices for identical cars to Black and female customers than they did to white men.[[61]](#footnote-61)

In a more recent demonstration of marketplace discrimination, business professors Benjamin Edelman, Michael Luca and Dan Svirsky found, based on an online field experiment, that—controlling for all other variables—Airbnb hosts were more likely to refuse booking requests made by guests with Black-sounding names than they were guests with white-sounding names.[[62]](#footnote-62)

Yet, other than these studies, almost no field experiments have been administered until now to quantitatively test for marketplace discrimination of minority consumers. Even fewer studies have documented more subtle and covert forms of differential treatment, such as longer waiting times, heightened surveillance, and lower-quality service, and most of this work has relied on interviews or surveys of consumers rather than on audits or experiments.[[63]](#footnote-63)

Notable exceptions include two field experiments on subtle discrimination in retail stores, conducted in the 2000s. In an audit study published in 2000, researchers found that Black and male customers waited significantly longer in line at retail customer service counters than did white and female customers, with Black customers waiting twice as long as whites.[[64]](#footnote-64) Relatedly, in a 2009 audit study, “customers” browsing in high-end stores asked a salesperson if they would remove a security sensor from a pair of sunglasses. The findings revealed that salespeople showed greater levels of suspicion (i.e., staring, following) when interacting with Black customers, especially with Black men.[[65]](#footnote-65)

While these studies are pathbreaking, both in terms of the methods employed and the practical significance of their findings, they undoubtedly revealed only the tip of the iceberg. As commentators have previously noted, “[u]nfortunately, . . . for a variety of reasons scholars have generally neglected profiling that occurs in retail settings.”[[66]](#footnote-66) One potential explanation for this paucity in research is the absence of an “easily accessible database from which to study the problem.”[[67]](#footnote-67) Yet another explanation is that this paucity in the literature reflects a legislative lacuna. As explained in Section VII, while the various civil rights laws of the 1960s explicitly prohibit race and gender discrimination in employment, housing, and places of public accommodation, they largely overlook discrimination in *retail* spaces.[[68]](#footnote-68)

This Article tests whether consumers are treated differently based on race or gender when seeking to return unworn clothing items to stores.

Consumers of both races and genders view their ability to return unused products to stores as very important to their purchasing decisions.[[69]](#footnote-69) U.S. consumers end up returning about twenty percent of all purchases to the stores, adding up to hundreds of billions of dollars each year.[[70]](#footnote-70) The retail clothing industry is particularly ripe for scrutiny because, for most Americans, clothing consumption represents one of their largest annual expenditures.[[71]](#footnote-71)

Black consumers spend almost as much as whites on apparel and services.[[72]](#footnote-72) In fact, according to a nationally representative consumption data, Blacks devote larger shares of their expenditure bundles to visible goods (including clothing) than do whites with comparable incomes.[[73]](#footnote-73) It may therefore be not only harmful from a social perspective, but also inefficient from an economic perspective (and unprofitable to firms), if sales agents treat Black customers as second-class citizens.[[74]](#footnote-74) This study attempts to quantitatively test whether disparities in treatment persist in retail stores, while focusing on the case study of product returns.

# III. Methodology and Design

This study examines whether the process of product returns in the retail clothing market disproportionately disadvantages Black consumers; and whether race and gender intersect, such that Black women are particularly vulnerable to retail discrimination.[[75]](#footnote-75)

The area of product returns is a fruitful ground for studying retail discrimination because store clerks and managers are typically granted a significant degree of discretion about whether to accept or deny consumers’ returns.[[76]](#footnote-76)

Both evidence and theory suggest that broad discretion might lead to or exacerbate discrimination, and that decision-makers often exercise discretion in ways that disproportionately harm minority populations.[[77]](#footnote-77) In the specific context of consumer transactions, law professor Manisha Padi has recently demonstrated, based on a national database, that mortgage service providers exercise their discretionary power to foreclose on defaulting borrowers discriminatorily against borrowers residing in poor neighborhoods.[[78]](#footnote-78)

This Article studies whether retail clerks’ exercise of discretion in the enforcement of their employers’ return policies results in race or gender discrimination.[[79]](#footnote-79) To examine this question, this study used an audit technique.[[80]](#footnote-80) Nineteen testers—five white females, five white males, four Black females,[[81]](#footnote-81) and five Black males—tried to return 203 items to 59 stores.[[82]](#footnote-82)

In each store, testers attempted to return a clothing item[[83]](#footnote-83) that had been purchased in advance,[[84]](#footnote-84) in its original packaging and condition, with tags attached, but *without the receipt*, while following a uniform script that they had memorized and practiced in advance.

Testers were instructed to wait in line until a store clerk became available, tell the store clerk that they wanted to return the clothing item,[[85]](#footnote-85) and await the store clerk’s response. If the store clerk agreed to provide a refund, testers were instructed to accept the refund, thank the clerk, and leave the store.

If, however, testers were denied the return or were offered anything other than a refund (e.g., exchange or store credit), they were instructed to ask to speak to a manager. If the store clerk refused to call a manager, identified as the manager, or called the manager, testers asked once again for a refund. Notwithstanding the store representative’s response, testers would then thank them and leave the store. Upon leaving each store, testers filled out a detailed report, describing the outcomes of each attempted return.

The study deliberately focused on *non-receipted* returns, because, while receipts are commonly required for returns,[[86]](#footnote-86) store clerks are typically granted an especially broad discretion in deciding whether to accept or reject non-receipted returns.[[87]](#footnote-87) Although the stores’ formal policies typically require a receipt—for all returns, or at least for a cash refund—in practice, store agents are often granted discretion to deviate from these policies on a “case-by-case” basis.[[88]](#footnote-88)

To reinforce confidence that any differences in outcomes did not result from unobserved differences between testers, measures were taken to reduce inter-tester variation and ensure uniformity in bargaining. For this purpose, testers were recruited according to uniform criteria (they were all undergraduate students residing in Chicago, between 18–25 years of age, and of average attractiveness, as evaluated by the study’s coordinators).

All testers were instructed to wear similar attire (casual clothing), were told to audit the stores on weekdays in the afternoon, and were trained to behave uniformly at the store. They memorized an identical script that they followed to the letter in their interactions with store clerks and managers.

Testers received a list of contingent responses to the questions they were likely to encounter. If asked, they gave uniform answers about the reason for making the return and about not having the receipt. Before auditing the stores, the testers attended training sessions at the University of Chicago, where they practiced their scripts and participated in numerous mock negotiations meant to help them behave uniformly during the audits.[[89]](#footnote-89)

Since it is still possible that some of the disparities are driven by inter-tester variation other than race or gender, *ex post* leave-one-out cross-validations were conducted to ensure that the observed disparities were not driven by the results of any particular tester. The cross-validations confirmed that the results were indeed not driven by any one tester, as detailed in the Appendix.

To minimize concerns that testers’ behavior would be influenced by any effort on the part of the testers—deliberate or unconscious—to confirm the study’s hypotheses, the testers were told that the study’s goal was to explore stores’ return policies. The testers were not, however, informed that the study actually tested for racial discrimination. Still, some testers reported in their post-audit reports that they had felt discriminated against based on their race and that this should be taken into account when analyzing the results.

# IV. Results

## Stores’ Summary Statistics

The sampled stores’ average annual revenue (for the year of 2018) is $177 million. Their median revenue, however, is only $3.1 million, suggesting that the mean revenue is driven by very large companies. The average company age (defined as 2019 minus the year of establishment) is 63 years, while the median age is 46.5 years. Publicly traded companies constitute 66% of the sample.[[90]](#footnote-90)

[add table]

## The Effect of Race on Return Outcomes

This Section begins by showing testers’ *first-stage* return outcomes, i.e., store clerks’ initial responses to testers’ return requests. Testers’ first-stage outcomes provide relatively well controlled tests for discrimination. Because the store clerks’ initial reactions were made following relatively little intervention on the part of the testers, it is unlikely that the initial differences in treatment were driven by any unobserved differences between testers.[[91]](#footnote-91) On the other hand, testers’ *final-stage* outcomes may better reflect real-world racial and gender disparities to the extent that in real life, consumers often continue to negotiate with sellers.

Regression Table 1 presents the main effect of testers’ race and gender on their first-stage return outcomes. To ensure robustness, two dependent variables were used: (1) whether a cash refund was provided; and (2) whether the return was denied or accepted (for exchange, store credit, or refund).[[92]](#footnote-92)

The results reveal a significant and considerably large race effect across all specifications. Controlling for all other variables, (i.e., controlling for clerk and store characteristics), across the entire sample, white testers were 11% more likely to receive a refund than were Black testers (2% likelihood for Blacks versus 13% likelihood for whites, *p* < 0.05). At the same time, Black testers were 22% more likely to have their returns denied completely (not even accepted for exchange) than were white testers (42% likelihood for Blacks versus 20% likelihood for whites, *p* < 0.01).

Table 1 shows the probability of receiving each response by testers’ race and gender at the first stage, based on a regression analysis of return outcomes on testers’ race and gender, as well as on clerk and store controls. As the table shows, both Black male and female testers did significantly worse than did white testers—male and female. While the interaction between testers’ race and gender was not found to be significant, white female testers did somewhat better than did white male testers (for example, they were 10% less likely to have their returns denied, and 8% more likely to receive a refund than were white males), while Black females and males obtained similar results.

*Table 1 Initial Return Outcomes by Testers’ Race and Gender*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Return Denied | Exchange Only | Store Credit or Exchange | Refund |
| White female | 0.15 | 0.11 | 0.79 | 0.14 |
| White male | 0.25 | 0.16 | 0.74 | 0.06 |
| Black female | 0.42 | 0.07 | 0.58 | 0.00 |
| Black male | 0.42 | 0.08 | 0.58 | 0.02 |

[figure 1 here]

## Effects by Clerk Characteristics

This Section examines whether the findings change based on the race of the store clerk with whom testers interacted. If discrimination is driven primarily by *in-group bias,* then the clerk’s race should matter.[[93]](#footnote-93) That is, store clerks might simply treat testers of the same race more preferentially than “out-group” members due to homophily. If homophily was the main factor driving differential return outcomes, then Black consumers would face higher return acceptance and refund rates when interacting with Black store clerks.

Regression Table 2 presents regressions that include the tester’s race, the host’s race, and an interaction term between the race of the tester and store clerk. Column 1 uses the likelihood of having one’s return accepted (for exchange, credit, or refund) as the dependent variable, while Column 2 uses the likelihood of being offered a refund as the dependent variable.

The interaction was not found to be significant in both cases. However, while the “race gap” in favor of whites was almost identical in magnitude among both Black and white store clerks in the context of propensity to offer refunds, white testers received a significantly higher “race premium” (i.e., more preferential treatment compared to Blacks) in terms of the likelihood of having their returns accepted when interacting with Black, rather than white store clerks.[[94]](#footnote-94)

Table 2 further illustrates the relationship between the race of the testers and the clerks with whom they interacted by presenting the proportions of accepted returns and refunds by the race of the tester and the clerk. The table reveals that white testers were treated more favorably than were Black testers by both white and Black clerks. However, the “race gap” regarding the likelihood of having one’s return accepted was indeed wider among Black clerks than among white clerks (10% among white clerks versus 35% among Black clerks), indicating that it is not merely homophily or in-group bias driving the results.[[95]](#footnote-95) One potential explanation for the observed discrepancy is that Black employees may be more inclined to treat white customers more preferentially than similarly situated Black customers due to fear of losing their jobs if white customers complain about their service.

*Table 2 Proportion of Accepted Returns and Refunds Offered by Race of Clerk and Tester*

|  |  |  |  |
| --- | --- | --- | --- |
|  |  | Return Accepted | Refund Offered |
| White Clerk | White Tester | 0.76 | 0.15 |
| Black Tester | 0.66 | 0.00 |
| Black Clerk | White tester | 0.83 | 0.10 |
| Black tester | 0.48 | 0.04 |

Tables 3 and 4 introduce more nuance by showing the proportions of refunds and accepted returns according to the race and gender of testers and clerks. The tables reveal that white female customers receive the best treatment from white male and Black female clerks, white male customers receive the best treatment from white and Black male clerks, Black female customers receive the best treatment from white and Black male clerks, and Black male customers receive the best treatment from Black female clerks.

*Table 3* Proportion of Refunds Offered by Race/Gender of Clerk and Tester

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | | Clerk race/gender | | | |
| White female | White male | Black female | Black male |
| Tester race/gender | White female | 0.10 | 0.30 | 0.14 | 0.00 |
| White male | 0.00 | 0.25 | 0.07 | 0.14 |
| Black female | 0.00 | 0.00 | 0.00 | 0.00 |
| Black male | 0.00 | 0.00 | 0.11 | 0.00 |

*Table 4* Proportion of Return Acceptance by Race/Gender of Clerk and Tester

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | | Clerk race/gender | | | |
| White female | White male | Black female | Black male |
| Tester race/gender | White female | 0.70 | 0.91 | 0.92 | 1 |
| White male | 0.67 | 0.75 | 0.60 | 1 |
| Black female | 0.44 | 0.89 | 0.33 | 0.67 |
| Black male | 0.71 | 0.50 | 0.67 | 0.20 |

## Concessions and Rights’ Deprivations

Recall that a main goal of this study was to test two distinct forms of marketplace discrimination. The first involves the question of whether sellers provide *concessions*, beyond and above what the formal policy dictates, disproportionately more often to white customers than they do to Black customers. The second was whether sellers deprive Black consumers of their contractual rights as set forth in the retailers’ return policies disproportionately more often than they do white consumers.

For this purpose, testers were sent to return the items without the original receipts. The stores in the sample differ in their formal return policies as follows: 39% of the stores formally require a receipt for *all* returns, while 61% of the stores require receipts for cash refunds but offer exchange or store credit even absent a receipt.

This Section reports the results of two major tests of discrimination. First, among stores that formally require a receipt for all returns, do sellers disproportionately grant concessions to white consumers compared to Black consumers? Second, among stores that formally allow for non-receipted exchanges or store credit, do sellers disproportionately deny Black consumers this right compared to white consumers?

It is noteworthy that while the latter type of discrimination could also result in a breach of contract claim (insofar as customers are denied their contractual right to return the good for store credit as stated in the store’s formal policy), the former type of discrimination is based on preferential treatment of consumers (or “tailored forgiveness”), beyond what the contract or policy dictates. Therefore, anti-discrimination or civil rights laws may provide the only available recourse for the second type of discrimination.

Controlling for all other variables, among stores that formally allowed for non-receipted returns, Black testers were 25% more likely to be deprived of their contractual right to return the item for store credit or exchange than were white testers (38% likelihood of return denial among Blacks versus 13% likelihood of return denial among whites, *p* < 0.01). Importantly, the widest gap (43%!) was observed between white females and Black males. Among Black males, 46% were likely to be denied their contractual rights, while only 3% of white females were likely to experience said denial (*p* < 0.01).[[96]](#footnote-96)

Moving to test only those stores that formally require receipts for *all* returns, controlling for all other variables, white testers were 25% more likely to receive concessions (in the form of having their returns accepted for either store credit or exchange) than were Black testers (45% v. 70% likelihood of experiencing concessions, *p* < 0.1). Importantly, the largest gap was observed between white males and Black females in this situation. Black females were only 27% likely to receive more lenient treatment than the policy dictated, while white males were as much as 75% likely to receive concessions.[[97]](#footnote-97)

*Table 5 Concessions and Rights’ Deprivations by Tester Race and Gender*

|  |  |  |
| --- | --- | --- |
| Tester | Rights’ Deprivation | Concessions |
| White female | 0.03 | 0.66 |
| White male | 0.29 | 0.75 |
| Black female | 0.35 | 0.27 |
| Black male | 0.46 | 0.58 |

## Likelihood of Speaking with Management and Improving Outcomes

As noted, testers were instructed to ask to speak with a manager if denied a refund at the initial stage. Regression Table \_\_\_ presents the regression results. The dependent variable is a dummy variable that takes the value of “1” if the tester saw a manager upon request and “0” otherwise.

Notably, the race and gender of the tester alone accounted for 16% of the observed variance in results. Controlling for all other variables, white testers were 29% more likely to see a manager upon request compared to Black testers (51% v. 80%, *p* < 0.01). Importantly, gender played a highly significant role in determining the likelihood of seeing a manager upon request as well, with female testers 29% less likely to see a manager compared to male testers (50% v. 79%, *p* < 0.01).

As Table 6 demonstrates, the combined effects of race and gender put Black female customers in an especially vulnerable position. They were 64% less likely to speak with a manager upon request than were white men, and 33% less likely to see management than were either white females or Black males.

*Table 6. Likelihood of Seeing a Manager upon Request by Tester’s Race and Gender*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | White Females | White Males | Black Females | Black Males |
| Likelihood of Seeing a Manager | 0.65 | 0.96 | 0.32 | 0.65 |

Importantly, as shown in regression Table \_\_, the interaction between the race of the tester and the store clerk was not found to be significant, indicating that both white and Black clerks were similarly more likely to call a manager when interacting with a white tester compared to a Black tester.[[98]](#footnote-98) Similarly, the interaction between the gender of the tester and the store clerk was not found to be significant, suggesting that clerks of both genders similarly treated male testers more preferentially than they did female testers.[[99]](#footnote-99) Table 6 shows the probability of seeing a manager according to clerks’ and testers’ race and gender characteristics. As the table demonstrates, white males had considerably higher chances of speaking with management upon request than any other tester subgroup, regardless of the race or gender of the store clerk.

*Table 6 Probabilities of Seeing a Manager by Tester’s and Clerk’s Race & Gender*[[100]](#footnote-100)

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | | Clerk race/gender | | | |
| White female | White male | Black female | Black male |
| Tester race/gender | White female | 0.65 | 0.79 | 0.58 | 0.56 |
| White male | 0.96 | 1 | 0.90 | 0.88 |
| Black female | 0.32 | 0.46 | 0.25 | 0.24 |
| Black male | 0.65 | 0.80 | 0.59 | 0.57 |

Next, the study tested the effects of testers’ race and gender on their likelihood of obtaining an improved outcome conditional on speaking with the store’s manager. Regression table \_\_\_ reports the results of a regression of a dummy variable that equals “1” if an improved outcome was obtained and “0” otherwise, for those testers who spoke with a manager, according to the testers’ race and gender. Column 4 adds an interaction term between the race and gender of the tester and columns 5 and 6 add clerk and store controls.

The results show a large and significant race effect. Across the sample, controlling for all other variables, white testers were 14% more likely to receive an improved outcome after speaking with a manager compared to Black testers (*p* < 0.1). While the gender of the tester did not generate significant effects on testers’ likelihood to obtain improved results, male testers were 5% more likely to obtain improved results than were female testers.[[101]](#footnote-101)

*Table 7 Likelihood of Obtaining Improved Outcomes by Tester’s Race and Gender*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | White Females | White Males | Black Females | Black Males |
| Likelihood of Seeing a Manager | 0.31 | 0.34 | 0.13 | 0.22 |

What could explain the “white male” premium, in terms of both the likelihood of speaking with management upon request and the likelihood of obtaining improved outcomes after speaking with a manager?

This study’s findings are consistent with prior research indicating that women and Blacks are often penalized for displaying assertiveness or expressing anger in social and professional settings. Prior research has shown that women of both races, as well as Black men, often suffer a “penalty” for taking actions that appear assertive or angry, as opposed to white men, who are typically rewarded for similar behaviors.[[102]](#footnote-102)

For example, studies have found that both female and Black lawyers are more likely to be judged in a harsher light than white men when displaying assertiveness in the courtroom.[[103]](#footnote-103) In a survey of more than 2,800 lawyers, women of all races reported pressures to behave in “feminine ways,” including backlash for “masculine behaviors.”[[104]](#footnote-104) While only a minority of white male lawyers felt penalized for displaying assertiveness, most women—64% of non-white women and 52% of white women—reportedly felt penalized for such behavior.[[105]](#footnote-105)

Relatedly, a study consisting of a series of controlled experiments explored whether gender bias affects the way people perceive a lawyer’s effectiveness when expressing anger in the courtroom.[[106]](#footnote-106) Participants were randomly assigned to view a male or a female attorney presenting the same closing argument in either a neutral or angry tone, and subsequently reported their impressions of the attorney and how likely they would be to hire the attorney. The findings showed that female attorneys were seen as significantly less effective when expressing anger than when calm relative to male attorneys, who were seen as significantly more effective when they displayed anger.[[107]](#footnote-107)

Seen in this light, the findings of this study could be understood as showing that female customers of both genders, as well as Black males, are penalized when expressing assertiveness at the store by asking to speak with management. The intersection of race and gender again places Black females in an especially disadvantaged position, with the lowest likelihood of being granted their request to speak with management upon request.

The study also tested whether the findings change based on the race or gender of the store manager with whom testers interacted. While the interactions between the race and gender of the store manager and tester were not found to be significant, the race gap widened by 9% among white managers, and the gender gap widened by 22% among male managers.

Delving more deeply, the analysis reveals more nuanced results. As Table 7 shows, white female testers were 27% more likely to receive an improved outcome than were white male testers when interacting with white female managers, but they were treated similarly to white male testers by white male managers, and worse than white male testers by Black female and Black male managers. Black female testers were 13% more likely to receive improved outcomes than were Black males when interacting with Black female managers but were treated worse than any other subgroup of testers when interacting with managers of all other subgroups. In short, female managers—both white and Black—exhibited in-group favoritism, but still favored *male* testers when interacting with *a customer belonging to a different race*.

*Table 7 Probabilities of Obtaining Improved Outcomes by Race and Gender of Tester and Manager*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | | Manager race/gender | | | |
| White female | White male | Black female | Black male |
| Tester race/gender | White female | 0.44 | 0.40 | 0.25 | 0 |
| White male | 0.17 | 0.38 | 0.33 | 0.50 |
| Black female | 0 | 0.17 | 0.33 | 0 |
| Black male | 0.17 | 0.29 | 0.20 | 0.33 |

## Final Return Outcomes

As recalled, testers who did not initially receive a refund requested to speak with the store’s manager, and—whether they saw a manager, had their request denied, or were told that the clerk was in fact the manager—again requested a refund. This Section examines testers’ final return outcomes, while examining the entire population of testers.

Exploring the final return outcomes is important since, in real life, as opposed to a field experiment setting, it can be expected that at least some consumers will complain if their request to return an unopened item that had been purchased at the store is denied. The final-stage outcomes might therefore better reflect actual racial and gender disparities in marketplace outcomes.

Importantly, the findings reveal that the racial gaps in return outcomes widened at the final stage, with white testers 13% more likely to receive refunds, and 33% more likely to have their returns accepted, compared to Black testers. While gender gaps across the entire sample remained insignificant, male testers were almost 7% more likely to receive refunds than were female testers. As with initial-stage outcomes, the interactions between the race and gender of the testers were not found to be significant, indicating that white testers did better than Black testers, regardless of gender.

*Table 8 Final Return Outcomes by Tester Race and Gender*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Return Denied | Exchange Only | Store Credit or Exchange | Refund |
| White female | 0.07 | 0.08 | 0.68 | 0.09 |
| White male | 0.11 | 0.20 | 0.51 | 0.19 |
| Black female | 0.43 | 0.08 | 0.49 | 0.00 |
| Black male | 0.41 | 0.04 | 0.48 | 0.03 |

The figure shows the probability of receiving each response by testers’ race and gender at the final stage, based on a regression of return outcomes (return denied, exchange offered, store credit or exchange offered, refund also offered) on testers’ race and store and clerk controls.

In terms of rights’ deprivation, the race gap widened by 4% (from a 25% to a 29% higher likelihood of Black testers being deprived of a right to return the item compared to white testers). In terms of concessions, the race gap widened by 16% (from 25% to as high as 41%).

|  |  |  |
| --- | --- | --- |
| Tester | Rights’ Deprivation | Concessions |
| White female | 0.00 | 0.85 |
| White male | 0.14 | 0.92 |
| Black female | 0.37 | 0.40 |
| Black male | 0.38 | 0.52 |

## Race Disparities by Store Type

As a measure of store prestige, data on the median prices of all clothing items listed on each store’s website was collected.[[108]](#footnote-108) The average median price at the sampled stores was $60 (SD = $60), with the lowest median price being $5 and the highest being $350. Stores with median prices below the 25th percentile (i.e., stores with median prices lower than $25) were classified as “discount stores.” Stores with median prices between the 25th and 75th percentiles (i.e., between $25 and $70) were classified as “mainstream stores.” Finally, stores with median prices in the upper 25th percentile (i.e., with median prices higher than $70) were classified as “high-end stores.”[[109]](#footnote-109)

Table \_\_\_\_ presents the results of testing whether the type of store (discount, mainstream, or high-end) affected the level of discrimination.

At the first stage of asking to make a return, the race gap was widest among discount stores and smallest among mainstream stores (a 48% gap in the likelihood of having one’s return accepted at the discount stores, compared to a 29% gap in high-end stores and a 10% gap in mainstream stores).[[110]](#footnote-110) This trend reverses, however, when looking at final-stage results. After participants asked to speak with a manager, the race gap (in terms of both the likelihood of having one’s return accepted and the likelihood of receiving refunds) was greater in mainstream and high-end stores than in discount stores. Whites were 25% more likely to have their return accepted than were Blacks among discount stores, 28% more likely to have their return accepted than were Blacks among mainstream stores, and as much as 37% more likely to have their return accepted than were Blacks among high-end stores. Whites were 15% and 17% more likely to receive refunds than were Blacks in high-end and mainstream stores respectively, and only 8% more likely to receive refunds among discount stores.

Notably, racial discrimination was extremely robust, and persisted across stores of all price ranges—from discount to high-end stores.

# V. Why Do Retailers Discriminate?

Economic literature on discrimination typically distinguishes between two main theories of discrimination: taste-based (or animus-based) explanations, and statistical discrimination. Taste-based theories posit that a particular group may be treated significantly worse because it is disfavored or hated.[[111]](#footnote-111) In contrast, statistical theories of discrimination posit that disparate treatment stems not from distaste for certain minority groups, but, rather, from a seller’s desire to maximize profits under a state of imperfect information[[112]](#footnote-112) When information about specific individuals is limited, decision-makers may draw statistical inferences based on an individual’s group affiliation.[[113]](#footnote-113)

Notably, these “statistical” inferences might be biased, driven by stereotypes, and factually false (as the data often suggests).[[114]](#footnote-114) Statistical discrimination, just like animus-based discrimination, can generate or exacerbate social and economic inequalities between groups,[[115]](#footnote-115) and both types of discrimination are illegal under U.S. law (e.g., in the housing and employment markets).[[116]](#footnote-116) Still, “statistical” inferences—factually accurate or not—may offer an explanation, other than pure animus, for the observed disparities in treatment at the stores.

Field experiments of the type used in this study do not allow for direct testing of the mechanisms causing worse outcomes for Black customers. It cannot be ruled out that the racial differences in treatment observed in this study might be driven, at least in part, by animus or bigotry.[[117]](#footnote-117) Yet, Black consumers might also be treated less favorably than are whites due to salespeople’s inferences about their likelihood of shoplifting or abusing the store’s return policy, their buying power or value to the store, or propensity to complain or harm the store’s reputation.

Of course, these explanations are not mutually exclusive and may very well complement one another. Animus and race-based inferences (whether implicit or conscious) may coexist, and further research is needed to assess the importance and explanatory power of each.

## Inferences about the “Typical Shoplifter”

As noted, testers returned the items to the audited stores without showing store clerks the original receipt. Sellers routinely require receipts for returns mainly to protect themselves from shoplifters, consumers trying to return items purchased at a different store, or consumers trying to return items after the return period has passed.[[118]](#footnote-118)

Store clerks (and managers) may draw inferences about the likelihood that consumers would abuse the store’s return policy, steal from the store, or return an item that was not purchased at the store, based on the customer’s race (and gender).[[119]](#footnote-119) Indeed, there is evidence suggesting that store clerks tend to be more suspicious of Blacks, particularly Black men, and unfairly target them with surveillance and calls to the police,[[120]](#footnote-120) even though research consistently shows that shoplifters come equally from all races.[[121]](#footnote-121)

In a 1980 survey of 3,550 U.S. retailers, 46% of the participants believed that racial minorities were more prone to shoplift than were whites.[[122]](#footnote-122) Experimental and survey research also shows that Black consumers are more likely to be suspected of shoplifting.[[123]](#footnote-123)

During the late 1990s, Professor Jennifer Lee of the University of California, Irvine, interviewed Black consumers about their shopping experiences in their neighborhoods in New York and Philadelphia. Black males reported being subject to heightened levels of suspicion at retail stores. Importantly, while Black shoppers with a high socioeconomic status felt they were treated better based on their perceived class, they still felt they were treated less favorably than white shoppers.[[124]](#footnote-124) In a 2000 study, survey participants—all undergraduate marketing students in Minnesota—were asked to imagine that they were the “managers of tomorrow’s retail establishments.”[[125]](#footnote-125) When asked about the “typical shoplifter,” most participants described a young, Black male, even though law enforcement statistics in the area showed that the typical shoplifter was a white female.[[126]](#footnote-126)

As Regina Austin explained, “it is assumed that blacks do not earn their money honestly, work for it diligently, or spend it wisely,” and sales clerks, security guards, and other store representatives will therefore often treat them, knowingly or unconsciously, “as if they were all potential shoplifters, thieves or deadbeats.”[[127]](#footnote-127) Similar suspicion against Black men has been documented in other contexts, including car searches.[[128]](#footnote-128)

## Perceived Buying Power and Value to the Store

The observed racial discrimination might also stem from differences in store clerks’ inferences about consumers’ socioeconomic status, buying power, and value to the store. If clerks typically believe that white customers are likely to be wealthier than are Black customers, and consequently more valuable customers (because they have more buying power), they might treat Black customers less favorably than they do white customers.

As researchers have shown, “historically and contemporarily, Blacks have been viewed as second-class citizens in consumer markets.”[[129]](#footnote-129) In interview-based studies, Black consumers typically report feeling they are “at risk of being evaluated as undesirable or unwanted customers because of racial stereotypes and stigma.”[[130]](#footnote-130) Blacks frequently report being subject to two pervasive stereotypes: (1) the association between race and threat of theft or criminality; and (2) the assumption that Blacks are usually poor.[[131]](#footnote-131)

Indeed, psychological research suggests that people often associate race with class. In a study of how a variety of social groups clustered together, researchers found that “whites” and “middle-class people” were closely clustered, as were “Blacks” and “blue-collar people.”[[132]](#footnote-132) These findings illustrate that class is closely intertwined with what it means to be “Black” or “white.”[[133]](#footnote-133)

In another remarkable illustration of the social constructs of race, researchers found that people who became unemployed, incarcerated, or impoverished in a given wave of a longitudinal survey were more likely to be classified by the interviewer as Black and less likely to be perceived as white regardless of how they had been classified in previous waves of the same survey.[[134]](#footnote-134)

Similarly, one experiment resulted in findings that wearing clothing representative of a lower socioeconomic status increases the likelihood that a person would be classified as Black rather than white.[[135]](#footnote-135)

Statistically, Black consumers spend almost as much as whites on apparel and services.[[136]](#footnote-136) According to a nationally representative consumption data, Blacks devote larger shares of their consumption bundles to visible goods (including clothing) than do whites with comparable incomes.[[137]](#footnote-137) In 2019, Black households’ expenditures totaled approximately $835 billion.[[138]](#footnote-138) Combined spending by all Black households has increased 5 percent annually over the past two decades, outpacing the growth rate of combined spending by white households (3 percent).[[139]](#footnote-139) As Cassi Pittman Claytor notes, “[e]very year Black Americans spend an estimated $1.2 trillion. This combined spending power exceeds several nations’ gross domestic product.”[[140]](#footnote-140) Yet, “for decades and decades, Black consumers have been regularly overlooked by companies that do not see them as a priority demographic.”[[141]](#footnote-141)

Pittman Claytor goes on to explain, “[t]he act of distinguishing which consumers are worthy of service or deserving of goods can function to heighten the status of goods and contribute of their exclusivity. It may reproduce the existing racial order. . . . [A] Black person may see their purchase as a way of rewarding themselves for their hard work. However, a store salesperson may view them as buying something that they cannot afford and consider their purchase inappropriate given their low social rank. If retail settings are places where racial hierarchies are maintained, and even embedded into the branding and the status attached to goods sold, then Black consumers are at risk of being viewed through a racialized lens, which results in their being considered as undesirable by sales staff.”[[142]](#footnote-142)

If this is true, store clerks and managers might perceive Blacks as less valuable consumers and treat them accordingly. Empirical studies of racial profiling in restaurants provides support for this prediction. For example, in two recent cross-sectional studies, significant associations were observed between servers’ beliefs that Blacks are low-value customers (because they were perceived as “bad tippers”) and their self-reported propensity to racially profile Black consumers by providing them lower-quality service.[[143]](#footnote-143)

## Perceived Likelihood of Complaining

The observed differential treatment in retail stores might also be driven by differences in the perceived likelihood—or unlikelihood—that Black consumers will complain and generate reputational harm if dissatisfied. If clerks assume that minority consumers are less likely to complain, and, in any event, less likely to generate reputational harm to the store than are white customers, they might be less willing to treat Blacks as favorably as they do whites.

There is evidence suggesting that store clerks believe that white customers typically feel more entitled, harbor higher expectations of receiving high-quality service from salespeople, and are more likely to display assertiveness when these expectations are not met than are Black customers from similar socioeconomic background.

For example, in a book describing her experiences as a clerk at a large toy store, Professor Christine Williams explains that “[w]hites expect first-rate service; when it is not forthcoming, some feel victimized, even discriminated against.”[[144]](#footnote-144) Williams observed that “[w]hite women developed a sense of entitlement because in most instances they got what they wanted. Members of other groups who wanted to return used merchandise, or who needed special consideration, were rarely granted their requests.”[[145]](#footnote-145)

The difference in expectations among Black and white customers might, in turn, exacerbate racial inequality if store clerks attempt to meet their white customers’ expectations and elevated sense of entitlement by treating them even more favorably than they otherwise would.

Informal interviews conducted in preparation for this research can be illustrative. As one interviewee, a former store clerk at a Chicago rug store explained, “Our policy was to charge a $100 delivery fee, but there might be something in the conversation . . . where I’d say: ‘Ok, I’ll waive it for you’ if they ask. . . . Those who managed to get their fees waived were typically white baby-boomers. . . . There are plenty wealthy people of color who buy rugs, but to my memory, the people who would get their fees waived were mainly white. The Black customers wouldn’t typically ask for their fees to be waived.”[[146]](#footnote-146)

Notably, race, gender, and class, were found to influence what people expect and feel they deserve, with Black, female, and low-income consumers feeling significantly less entitled than do white, male, and more affluent consumers.[[147]](#footnote-147) In particular, evidence suggests that Black and female buyers,[[148]](#footnote-148) as well as low-income buyers,[[149]](#footnote-149) are less likely to challenge a seller’s policy or contract, even if it is one-sided or fraudulent, compared to white and male (and more affluent) buyers.

Relatedly, a survey conducted in thirty-four U.S. cities in 1975 found that, controlling for income and socioeconomic status, Black households had significantly lower problem perception rates than did white households (15.4 percent compared to 21.8 percent).[[150]](#footnote-150) The study further found that “whites complain more than Blacks within each [socioeconomic status] category.”[[151]](#footnote-151)

Consumers, whose perception of a store’s willingness to provide a remedy is one of the most significant correlates of consumer complaining behavior, are more likely to complain when the chances of obtaining redress from sellers are higher.[[152]](#footnote-152) Consequently, consumers appear to complain primarily when they believe that their efforts are likely to be successful.[[153]](#footnote-153)

This generates a vicious cycle. If low-income, Black or female consumers do not feel entitled to complain, or do not anticipate a successful outcome to complaining, they are less likely to register a complaint, thereby becoming even less likely to receive redress. At the same time, higher-income, white and male consumers will complain more often, thereby disproportionately benefitting from preferential treatment from the seller.[[154]](#footnote-154)

# VI. The Future of Retail Discrimination in the Era of E-Commerce

Although e-commerce retail sales currently account for only ~15% of all retail sales worldwide, online shopping is increasingly gaining popularity.[[155]](#footnote-155) According to a 2016 Pew Research Center survey of U.S. consumers, roughly 80% of Americans do at least some of their shopping online.[[156]](#footnote-156)

According to the Bureau of the Census, internet use has historically varied across racial and ethnic lines, and disparities persist. Yet, these disparities continue to decline as internet usage among Black households continues to expand.[[157]](#footnote-157)

Should we expect to see more, less, or similar levels of discrimination with online retailers? Arguably, we may expect to see less discrimination, at least with respect to race and gender (and, arguably, also class), as these characteristics would be less salient, and probably more difficult to observe in online marketplaces. Some commentators have therefore argued that retail discrimination research may be more significant for brick-and-mortar stores than it is for online retail sellers.[[158]](#footnote-158)

While it is plausible that the effects of race and gender will be less pronounced in online settings, several studies have cast doubt on this proposition. In particular, experiments have already shown that race and gender discrimination persist in the online marketplace.[[159]](#footnote-159) For example, an experiment on Airbnb has found that guests with distinctively Black names are significantly less likely to be accepted than similarly situated guests with white-sounding names.[[160]](#footnote-160) Similarly, an experiment on eBay has found that women were disadvantaged as sellers compared to men when selling the exact same product in eBay auctions.[[161]](#footnote-161) These studies suggest that discrimination persists even in online markets.

Indeed, some researchers have even proposed that minority consumers may find it helpful to conceal their racial identities, for example, by using home addresses of family relatives who live in more racially diverse neighborhoods, or by using white-sounding names.[[162]](#footnote-162) In one high-profile case, an online job applicant’s decision to change his name from “Jose” to “Joe” significantly increased the rates of positive responses to his job application.[[163]](#footnote-163)

A related question is whether technological advances, such as the increased use of algorithmic intelligence and big data,[[164]](#footnote-164) will gradually replace salespeople’s discretion and lead to less biased outcomes. In the specific context of product returns, for example, sellers are already increasingly able to track serial returners automatically.[[165]](#footnote-165) Sellers may choose whether or not to behave more leniently toward customers seeking to make returns based on the customers’ purchasing histories.[[166]](#footnote-166) It is possible that market discrimination could be reduced if sellers have more transactional information on consumers, such as their purchasing history and past return behavior.[[167]](#footnote-167) In addition, sellers could be required to formally exclude protected characteristics, such as gender and race, from their algorithms.

However, recent research in the domain of algorithmic credit pricing suggests that discrimination is likely to persist even when sellers scrutinize algorithmic input. The nearly endless range of correlations in big data, combined with the flexibility and complexity of machine learning, threaten to perpetuate existing disparities.[[168]](#footnote-168)

# VII. The Inadequacy of Current Legal Protections

The findings show that Black customers are systematically discriminated against compared to white customers in retail spaces by Black and white store clerks and managers alike. Black customers are significantly more likely than are white customers to be deprived of their contractual rights to return unused products. At the same time, Blacks are significantly less likely than are similarly situated white customers to be granted concessions above and beyond what the return policy dictates. When registering complaints, Black customers are significantly less likely to be allowed to speak with the store management, and—to the extent that they have an opportunity to speak with a manager—Blacks are significantly less likely to be treated more favorably by a manager than they were initially treated by the store clerk than are comparable white customers.

The question that clearly emerges from these findings is whether and how Black customers can fight against, and obtain relief for, racial discrimination in retail stores. A survey of the statutes and case law reveals a gaping hole in legal protections against such discrimination. Antidiscrimination laws and civil rights laws exist at both the state and federal levels. But they provide very limited redress, if any.

## Current Federal Laws Fail to Provide a Remedy

The two main federal statutes that might be applicable are Title II of the Civil Rights Act of 1964, which prohibits race discrimination in places of public accommodation, and Section 1981 of the 1866 Civil Rights Act, which prohibits racial discrimination in contracting. Indeed, these statutes seem at first glance as the ultimate candidates for combatting retail race discrimination.

Title II of the Civil Rights Act of 1964 guarantees that all persons are “entitled to the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations of any place of public accommodation …. on the ground of race, color, religion, or national origin.”[[169]](#footnote-169) It promises to “eliminate the unfairness, humiliation, and insult of racial discrimination in facilities which purport to serve the general public.”[[170]](#footnote-170)

Section 1981 of the Civil Rights Act of 1866 guarantees to “[a]ll persons within the jurisdiction of the United States” the same right as “white citizens” to “make and enforce contracts,”[[171]](#footnote-171) and prohibits discrimination based on race, ethnicity, alienage, religion, or color.[[172]](#footnote-172) The U.S. Supreme Court explained that the purpose of Section 1981 was “to remove the impediment of discrimination from a minority citizen’s ability to participate fully and equally in the marketplace.”[[173]](#footnote-173)

As Supreme Court Justice Potter Stewart famously observed*,* the goal of the 1866 Civil Rights Act was to guarantee that “a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”[[174]](#footnote-174) The law’s language was “designed to ensure that all consumers should receive the same level of transaction experience.”[[175]](#footnote-175)

Yet, at least as currently interpreted by the courts, both of these statutes seem to offer very limited protection.[[176]](#footnote-176)

### Federal Laws Do Not Cover *Retail* Discrimination

First, as puzzling or surprising as it may seem,[[177]](#footnote-177) it is far from clear that Title II of the 1964 Civil Rights Act and Section 1981 of the 1866 Civil Rights Act prohibit race discrimination in *retail settings*.[[178]](#footnote-178)

Title II of the Civil Rights Act of 1964 specifically stipulates that “places of public accommodations” include hotels, motels, restaurants, cafeterias, gas stations, theaters, concert halls, and sports arenas.[[179]](#footnote-179)Unfortunately, however, it does not cover retail stores.[[180]](#footnote-180) Scholars and commentators have suggested that the statute should be interpreted broadly as including retail spaces, and that the statutory list should be seen as illustrative rather than exhaustive, but courts have thus far rejected this interpretation.[[181]](#footnote-181) Plaintiffs have tried to extend the law to retail stores, but, to date, courts have been reluctant to extend the statute’s literal definition of “places of public accommodation.”[[182]](#footnote-182) Indeed, in a famous 1968 decision, the Supreme Court explained that “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.”[[183]](#footnote-183) This decision has not been overturned.

Similarly, it is far from clear that Section 1981 would be interpreted by the courts as applying to all businesses open to the public, including retail stores.[[184]](#footnote-184) As Harvard Law Professor Joseph Singer explains, “the assumption that the Supreme Court would necessarily interpret federal law to prohibit racial discrimination in . . . retail stores constitutes wishful thinking” at best.[[185]](#footnote-185) This is mainly because such an interpretation of the Civil Rights Act of 1866 would arguably render the federal public accommodations law of 1873 and the 1964 Civil Rights Act absolute.[[186]](#footnote-186)

### Section 1981 Imposes Additional Hurdles

Even if Section 1981 were interpreted as prohibiting discrimination in retail stores, plaintiffs would still need to overcome numerous hurdles if they wished to successfully litigate a retail discrimination claim for differential treatment in the performance of retail stores’ return policies.

Specifically, plaintiffs would have to prove that they were discriminated against *based on race*, that the discrimination was *intentional*, and that *discrimination in the performance* of a retailer’s return policy (rather than complete refusal to transact) is prohibited under the statute.[[187]](#footnote-187)

This rigorous framework renders it difficult, if not impossible, for individual plaintiffs to prevail.

First, in many cases, direct evidence of discrimination is unavailable. Frequently, plaintiffs possess evidence only from their few experiences in the store and thus face serious difficulties “proving” that the defendant’s actions were discriminatory. Rarely does a plaintiff uncover a wealth of evidence documenting a company’s discriminatory practices. This is especially true in cases of subtle and covert forms of everyday retail discrimination, such as discriminatory enforcement of return policies and refusals to accept product returns.

Second, it is, of course, no less difficult to prove that the observed discrimination was *purposeful*, and courts dismiss most Section 1981 claims for lack of such proof.[[188]](#footnote-188) Although plaintiffs can establish a prima facie case for discrimination by showing differential treatment,[[189]](#footnote-189) defendants may assert legitimate, nondiscriminatory reasons for their actions,[[190]](#footnote-190) and the burden may then shift back to the plaintiffs to prove that the defendant’s alleged reasons were merely pretexts for intentional discrimination.[[191]](#footnote-191) Absent evidence of a pattern and practice of discrimination against minority consumers, this hurdle is again very difficult to overcome.[[192]](#footnote-192)

Furthermore, in *Mary's Honor Center v. Hicks*, the U.S. Supreme Court held that it is not enough for the plaintiff to prove that the defendant’s reason is incredulous or false,[[193]](#footnote-193) but rather, the plaintiff must show “both that the reason was false, and that discrimination was the real reason.”[[194]](#footnote-194) This decision made it even more difficult for discrimination litigants to prevail in discrimination cases against businesses. Together, these hurdles overly deter most plaintiffs from litigating their claims.[[195]](#footnote-195)

Third, to date, courts have narrowly interpreted the scope of Section 1981 by focusing on conduct that *prevents* the formation of the contract as opposed to degrading the *quality* of the provided product or service.[[196]](#footnote-196)Many federal courts have insisted that Section 1981 plaintiffs show that the salespeople refused to sell to plaintiffs—rather than “merely” degraded the goods or services the plaintiff sought to buy.[[197]](#footnote-197) A typical finding is that “mere delay, even coupled with discourteous treatment, poor service, or racial animus, is insufficient to sustain a Section 1981 claim.”[[198]](#footnote-198)

Hoping that the newly enacted Civil Rights laws would assist them in fighting racial inequality in retail spaces, minority consumers began to bring discrimination claims to court. But the courts dismissed the majority of these claims, refusing to interpret the Civil Rights laws as prohibiting retail discrimination,[[199]](#footnote-199) and racial minorities continued to face discrimination in retail stores despite the civil rights, antidiscrimination rhetoric.[[200]](#footnote-200)

For example, in a highly publicized 1995 incident, three Black men filed a federal civil rights lawsuit against the Eddie Bauer clothing chain, alleging “consumer racism.”[[201]](#footnote-201) A company store’s security guards had detained the three, and had ordered one of them to remove the shirt he was wearing, which he had purchased from the same store the previous day, on suspicion of shoplifting. The jury awarded plaintiffs $1 million in damages, but not on their discrimination or civil rights violation grounds. Rather, the damages were awarded since the plaintiffs had been falsely imprisoned and defamed.[[202]](#footnote-202)

Similarly, in *Lewis v. J.C. Penney*,[[203]](#footnote-203) for example, the Black plaintiff, Roni Lewis, and her white friend, Linda Sebell went shopping at a Newark J.C. Penney store. The two women made a number of purchases, staying until the shop closed. During their visit, the store’s security guards started following them, because, in the guards’ opinion, “they displayed nervous behavior, avoided sales help and were shopping in darkened, deserted areas of the store.”[[204]](#footnote-204) After the women had left the store, the security guards approached them and asked them to return to the store and allow the guards to inspect their bags.[[205]](#footnote-205) The guards searched their bags, and after ensuring that nothing was stolen, let the two women go. Lewis and Sebell both asserted that they had been treated differently by the guards.[[206]](#footnote-206) The guards searched Lewis’ bag, asked her for identification, and questioned her about a discrepancy on her forms of identification. According to Lewis, “[t]he officer simply looked at Ms. Sebell’s bag without asking that the bag be emptied and he glanced at the receipt.”[[207]](#footnote-207) As Sebell testified, “the guards more or less ignored her until Lewis pointed that out, and asked, ‘Are you checking both of us?’”[[208]](#footnote-208) Sebell asserted that “she was searched only because she was with Lewis.”[[209]](#footnote-209) Despite the overwhelming evidence of race discrimination, the court granted summary judgment for the defendant, determining that Lewis had failed to establish discrimination in the making or enforcement of contracts, as enumerated in Section 1981.[[210]](#footnote-210) In its opinion, the court notedthat there was “not a single case . . . in which a customer, falsely accused of shoplifting, was permitted to proceed on a Section 1981 claim.”[[211]](#footnote-211)

Similarly, in *Cedeno v. Wal-Mart*, plaintiffs—Latin-American customers—were accused of shoplifting and asked to leave the store. At some point, the assistant manager at the store observed, “Spanish people come to steal.”[[212]](#footnote-212) A week later, when plaintiffs returned to the store, they were arrested and brought to the police station. While the court noted the assistant manager’s derogatory comment, it described it as a “single regrettable and unacceptable comment,” and dismissed the claim for lack of evidence of purposeful discrimination.[[213]](#footnote-213)

In *Christian v. Wal-Mart Stores*,[[214]](#footnote-214) the plaintiffs—close friends Lois Christian, Black, and Amber Edens, white—went together to a Wal-Mart store to buy Christmas presents. At the store, a Wal-Mart store clerk claimed that Christian was shoplifting and reported the incident to a supervisor who then called the police. Christian and Edens were forced to leave the store without completing their purchases. They filed a lawsuit against Wal-Mart in federal district court, alleging that they were denied their right to make a contract with Wal-Mart due to Christian's race. The trial court granted judgment in favor of Wal-Mart as a matter of law, holding that Christian failed to establish that Wal-Mart’s clerk intended to discriminate when reporting an alleged shoplifting incident to her supervisor or that the supervisor’s request that the plaintiffs leave the store was motivated by racial animus. Plaintiffs challenged the judgment, and the appeal court reversed the judgment and remanded for a new trial.

Under such a narrow view of the scope of Section 1981, retail discrimination claims asserting discriminatory return practices will likely fail primarily on the basis that consumers were not prevented from completing the transaction or making the purchase.[[215]](#footnote-215)

In the famous *Patterson v. McLean Credit Union* case, the petitioner, a Black woman, alleged that her employer violated her civil rights under Section 1981 by engaging in a pattern of racial harassment during her employment, failing to promote her, and then discharging her.[[216]](#footnote-216) The Supreme Courtheld that Section 1981 “does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.”[[217]](#footnote-217)

The Court further explained that “Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.”[[218]](#footnote-218) Under this narrow interpretation of Section 1981, the Court explicitly determined that Section 1981 did not apply to “problems that may arise later from the conditions of continuing employment… including breach of the terms of the contract or imposition of discriminatory working conditions.”[[219]](#footnote-219) In the aftermath of the *Patterson* ruling, courts have routinely dismissed claims of post-transaction mistreatment due to race in a variety of race discrimination cases, including discrimination in insurance, auto repair, and advertising contracts.[[220]](#footnote-220)

Courts have similarly refused to apply Section 1981 to claims of racial profiling in retail stores. In Lewis v. J.C. Penney Co.,[[221]](#footnote-221) for example, the plaintiff had finished shopping and was leaving the store when security guards harassed her. The court determined that Section 1981 provided no relief since her retail purchases had already been completed. Regardless of the humiliation and embarrassment Lewis suffered, Lewis was foreclosed from obtaining relief under Section 1981 because, according to the court, no interference with the formation of a contract took place.[[222]](#footnote-222)

Arguably, this line of post-*Patterson* cases could be distinguished from cases revolving around discrimination in the enforcement of retailers’ return policies. While courts have shied away from applying Section 1981 to post-contract discrimination in cases involving surveillance, racial profiling, and workplace harassment, it is both conceivable and normatively desirable to interpret Section 1981 as prohibiting discrimination in the enforcement of contracts at the post-transaction stage.[[223]](#footnote-223) Indeed, the Civil Rights Act of 1991 explicitly “reaffirms that the right ‘to make and enforce contracts’ includes the ‘making, performance, modification, and termination of contracts,’ and ‘the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.’”[[224]](#footnote-224)

For example, in *Hampton v. Dillard Department Stores, Inc.,* the plaintiffs—a Black customer and her niece—alleged that the niece was searched by the store’s guards and falsely accused of shoplifting on account of race.[[225]](#footnote-225) The plaintiff showed that she was prevented from redeeming coupons for a free fragrance that she had received for making her prior purchases. Based on Hampton’s inability to redeem the coupons, the jury awarded her $56,000 in compensatory damages and $1.1 million in punitive damages.[[226]](#footnote-226) The court determined that Section 1981 (as expanded by the 1991 Civil Rights Act) “provides that once a contractual relationship exists, a benefit or privilege of that relationship may not be withheld based on the race of one party to the contract.”[[227]](#footnote-227)

It seems, based on similar reasoning, that disproportionately denying Black consumers their contractual rights to withdraw from a contract or return a good to the store could arguably fall under the scope of Section 1981 (if retail stores were covered under the statute). However, it is far less likely that courts could interpret Section 1981 as covering concessions (above and beyond what the contract or policy dictates) made disproportionately in favor of white customers compared to Blacks. Put differently, while claims of disproportionate deprivation of contractual rights (although difficult to prove) might fall under the scope of Section 1981, it is far less clear that “tailored forgiveness” in the form of providing disproportionately more concessions to white customers than to Blacks would fall under its scope.

## State Laws Offer Limited Protection

Where state anti-discrimination statutes are available and include retail stores within their ambit, state public accommodations statutes may provide an alternative remedy. There are currently 45 states that have legislation prohibiting racial discrimination in places of public accommodation.[[228]](#footnote-228) Most of these states include retail stores among the businesses that are required to follow these laws. However, seven jurisdictions have not yet prohibited race discrimination in retail stores (Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Texas).[[229]](#footnote-229) In those seven states (which include almost twenty percent of the U.S. population),[[230]](#footnote-230) it may well be that no law prohibits retail stores from discriminating on the basis of race in their treatment of minority consumers.[[231]](#footnote-231)

Moreover, even in the jurisdictions that currently have public accommodation statutes prohibiting discrimination in retail stores, these statutes are rarely invoked because there are limited remedies available to plaintiffs who successfully prove discrimination.[[232]](#footnote-232) In fact, very few public accommodation cases reach the courts, at least in part because of the “common perception that plaintiffs do not fare well in state courts.”[[233]](#footnote-233) Even fewer cases have been filed against retailers for discrimination against Black shoppers.[[234]](#footnote-234)

Some legal scholars have therefore argued that state public accommodations statutes are ineffective in reducing discrimination in places of public accommodation, and especially retail stores.[[235]](#footnote-235)

# VIII. Taking Away the License to Discriminate

As elaborated on in the previous section, to date, retail discrimination, including in the enforcement of return policies, is not explicitly prohibited, either at the state or federal level.[[236]](#footnote-236) More generally, antidiscrimination and public accommodation laws are a patchwork of federal and state statutes in which notable holes remain.[[237]](#footnote-237)

One proposed and straightforward solution is to interpret federal and state civil rights and public accommodation laws more broadly—to include prohibition of post-contract discrimination in retail stores.

Yet, even if a broader interpretation of these statutes is adopted, prohibitions on disproportionate “forgiveness” (or on providing concessions beyond what is required in the contract in ways that disproportionately benefit white customers) will still likely not be covered under the scope of these statutes.

Of course, legislatures could explicitly prohibit post-contract retail discrimination through direct legislation. Until such legislation is advanced, however, this Article proposes another solution. Namely, regulators and courts could recognize that retail discrimination (both at the pre- and post-purchase stages) is an “unfair” act or practice covered by federal and state laws prohibiting unfair, deceptive, or abusive acts or practices (also known as “UDA(A)P” laws).[[238]](#footnote-238)

Both the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) are authorized to take action to prevent retail sellers from engaging in unfair acts or practices when transacting with consumers.[[239]](#footnote-239) An “unfair” act is defined, both under the CFPB Act and under the FTC Act, as an act that is likely to cause substantial injury to consumers, is not reasonably avoidable, and is not outweighed by countervailing benefits to consumers or competition.[[240]](#footnote-240)

Until explicit legislation is passed, courts could interpret current UDAP laws as prohibiting discriminatory performance of consumer contracts, including retailers’ return policies.[[241]](#footnote-241)

FTC Commissioner Rohit Chopra—recently nominated to be the next Director of the CFPB—has also advocated that the term “unfair acts or practices” be interpreted as covering marketplace discrimination, noting that “the FTC should make use of its unfairness authority to tackle discriminatory algorithms and practices in the economy.”[[242]](#footnote-242) Accordingly, in May, 2020, the FTC charged an auto dealer—for the first time—with illegal racial discrimination for ordering employees to charge Black and Hispanic customers higher interest rates than their white counterparts.[[243]](#footnote-243)

In a similar vein, the Washington Attorney General has charged Facebook with unfair acts or practices under the State’s UDAP laws for allowing advertisers to exclude racial and ethnic minorities from receiving advertisements for employment, housing, credit, insurance, and places of public accommodation.[[244]](#footnote-244) In the settlement reached by the parties, Facebook agreed to prevent advertisers from excluding audience for targeted ads based on race and other suspected characteristics.[[245]](#footnote-245)

In contrast to existing antidiscrimination laws and public accommodations statutes which require the showing of *intent* to discriminate, it is proposed that all that would be required in order to prove that a certain discriminatory practice is “unfair” is *disparate impact*, i.e., that an ostensibly neutral policy or practice disproportionately harms racial minority members. As Chopra previously acknowledged, “[g]iven the difficulty of uncovering direct evidence of discriminatory intent, disparate impact analysis is critical for detecting potentially unlawful discrimination.”[[246]](#footnote-246)

Of course, merely prohibiting marketplace discrimination is not enough. Legislative reforms should be complemented by strengthened enforcement efforts, by both state attorneys general and by federal agencies.[[247]](#footnote-247)

To prove discrimination in post-transaction enforcement of consumer contracts, including in the performance of retail return policies, regulators may need to audit sellers, using an approach similar that used and reported on in this study. Such an experimental audit approach has been used as part of longstanding efforts to reduce discrimination in the housing, credit, and labor markets.[[248]](#footnote-248) Indeed, audits have served as critical tools in uncovering relatively subtle, hidden forms of marketplace discrimination.[[249]](#footnote-249) It is now time for regulators to adopt similar approaches for tackling retail discrimination.

When assessing the seller’s violations and deciding on proper sanctions, regulators could consider various factors, including: (1) whether the discriminatory enforcement of the contract or policy is a repeat violation or a one-time occurrence; (2) the size of the consumer group affected; (3) the magnitude of the harm suffered by consumers; and the (4) seller’s history, especially with respect to compliance with UDAP laws.

Sanctions may include requiring sellers to discontinue the discriminatory practice, to provide restitution or compensation to aggrieved consumers, or to pay a fine or a civil money penalty.

Private enforcement should also be facilitated.[[250]](#footnote-250) More specifically, consumers who suffer racial or gender discrimination should be allowed to file class actions against the discriminating seller or service provider.[[251]](#footnote-251) Here, as in the context of public enforcement, it is also imperative to allow for disparate impact claims, as intentional discrimination would often be too difficult to prove.[[252]](#footnote-252)

# Conclusion

This Article provides systematic empirical evidence showing that retail race discrimination is pervasive and incredibly robust. In this experiment, sellers treated Black consumers disproportionately less favorably than similarly situated white consumers seeking to return identical, unopened goods purchased earlier at the stores.

The findings illustrate the importance of addressing a gaping hole in existing anti-discrimination laws. To date, differential treatment of consumers based on their race (or gender) is not explicitly prohibited under the federal civil rights laws. This study’s findings should bring this legislative omission to policymakers’ attention and encourage them to revisit the current state of the law. Until the laws are amended or interpreted more broadly by courts, it is proposed that regulators consider to use their authority to curtail “unfair” practices under existing consumer protection statutes to curb retail race and gender discrimination.

Prohibiting and sanctioning retail discrimination in this manner could provide effective response to the social harms that everyday marketplace discrimination currently continues to generate.

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2. Black men sue Walmart, claim they were handcuffed after trying to return defective TV (nypost.com); Black men say they were handcuffed after returning TV at Walmart (msn.com) [↑](#footnote-ref-2)
3. *Id. See also* Andrea Elliott, *Suit Accuses Macy’s of Bias Against Minority Shoppers*, N.Y. Times, May 21, 2003, https://www.nytimes.com/2003/05/21/nyregion/suit-accuses-macy-s-of-bias-against-minority-shoppers.html (reporting on a class action lawsuit filed against Macy’s for unlawful racial profiling, after class action plaintiff, Ms. Simmons-Thomas, reported being handcuffed and falsely accused of shoplifting at a New York Macy’s store due to her race). [↑](#footnote-ref-3)
4. Steward v. Walmart, Inc, no. cv-02793, 2021 U.S. Dist. 08/26/21. [↑](#footnote-ref-4)
5. *See infra* Section V. *See generally* Allen v. Columbia Mall, Inc., 47 F. Supp. 2d 605 (D. Md. 1999) (holding that the plaintiffs’ claim that security guards’ stop and search of teenagers in store and subsequent stop in the mall did not violate Section 1983 of the Civil Rights Act). [↑](#footnote-ref-5)
6. See 42 U.S.C.A § 2000a. It is relatedly doubtful that retail stores are prohibited from discriminating against Blacks in the “making and enforcing of contracts” under Section 1981 of the 1866 Civil Rights Act. *See infra* Section V. [↑](#footnote-ref-6)
7. Newman v. Piggie Park Enterprises, Inc.390 U.S. 400 (1968). The statute’s usefulness to consumer discrimination plaintiffs is further limited because it prevents plaintiffs from seeking monetary damages, allowing them to obtain only equitable or declaratory relief. *See* Geraldine Rosa Henderson, Anne-Marie Hakstian & Jerome D. Williams, Consumer Equality: Race and the American Marketplace 78 (2016). [↑](#footnote-ref-7)
8. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. UL Rev. 1283, 1417 (1995). [↑](#footnote-ref-8)
9. United States v. Baird, 865 F. Supp. 659, 661–62 (E.D. Cal. 1994), rev’d, 85 F.3d 450 (9th Cir. 1996) (*quoting* Cuevas v. Sdrales, 344 F.2d 1019, 1021 (10th Cir. 1965)) (In a case in which five defendants were charged with injuring a Black man, the court determined that a 7–11 retail convenience store was not a “public accommodation” under the meaning of Title II of the 1964 Civil Rights Act). [↑](#footnote-ref-9)
10. *See infra Section II*. [↑](#footnote-ref-10)
11. *See infra Section II.*  [↑](#footnote-ref-11)
12. *See infra Section II.* [↑](#footnote-ref-12)
13. *See, e.g.,* Jerome D. Williams & Thelma Snuggs, *Survey of Attitudes Toward Customer Ethnocentrism and Shopping in Retail Stores: The Role of Race, in* Society for Consumer Psychology 161–62(1996) (finding, based on a survey of 1,000 American households, that most Blacks, 86%, believed that racial discrimination persists in the marketplace, compared to only 34% of whites). [↑](#footnote-ref-13)
14. Jeffrey M. Jones & Camille Lloyd, *Black Americans’ Reports of Mistreatment Steady or Higher*, GALLUP (July 27, 2021), https://news.gallup.com/poll/352580/black-americans-reports-mistreatment-steady-higher.aspx. [↑](#footnote-ref-14)
15. Jerome D. Williams, Geraldine R. Henderson & Anne-Marie Harris, *Consumer Racial Profiling: Bigotry Goes to Market*, 108 New Crisis (15591603) 22 (2001) (noting that most Blacks report they had been treated differently in retail stores on account of their race). [↑](#footnote-ref-15)
16. *See, e.g.*, Shaun L. Gabbidon & George E. Higgins, Shopping While Black: Consumer Racial Profiling in America (2020) (surveying the evidence that Black customers often feel that sales personnel are disinclined to assist them on account of their race, while giving white clients priority); Christine L. Williams, Inside Toyland: Working, Shopping, and Social Inequality 111 (2006) (observing that white customers receive higher-quality service and more assistance from salespeople while Black customers are frequently ignored, forced to wait, or skipped over); Josephine Louie, *We Don’t Feel Welcome Here: African Americans and Hispanics in Metro Boston*, 33 Civ. Rts. Project (2005) (finding, based on a survey, that over half of Black respondents residing in the Boston Metropolitan Area, report being “treated with less respect, offered worse service, called names or insulted, or confronted with another form of day-to-day discrimination at least a few times a month”); Jennifer Lee, *The Salience of Race in Everyday Life: Black Customers’ Shopping Experiences in Black and White Neighborhoods*, 27 Work Occup. 353 (2000) (reporting, based on 75 in-depth interviews of Black consumers, that Black customers feel that they are treated unfairly in shops located in predominantly white neighborhoods); Aronte M. Bennet et al., *Shopping while Nonwhite: Racial Discrimination Among Minority Consumers*, 49 J. Consumer Aff. 328 (2015) (reporting that non-white customers are significantly more likely to feel discriminated against in stores than are white customers). [↑](#footnote-ref-16)
17. *See, e.g.,* Gabbidon & Higgins, *supra* note 15, at Preface (noting that “[u]nfortunately . . . for a variety of reasons scholars have generally neglected profiling that occurs in retail settings,” and attributing this paucity in research to the fact that “there is no easily accessible database from which to study the problem”); Sophia R. Evett et al., *What’s Race Got to Do with It? Responses to Consumer Discrimination*, 13 Analyses Of Soc. Issues & Pub. Pol’y. 165, 168 (2013) (observing that “reliable data to confirm the regularity of consumer discrimination are limited”); Emily Flitter, *“Banking While Black”: How Cashing a Check Can Be a Minefield*, N.Y.Times, June 18, 2020 (“There is no data on how frequently the police are called on customers who are making legitimate everyday transactions”); Zachary W. Brewster & Gerald Roman Nowak III, *Racialized Workplaces, Contemporary Racial Attitudes, and Stereotype Endorsement: A Recipe for Consumer Racial Profiling*, 64 Sociological Perspectives 343, 343 (2021) (observing that “investigations centered on everyday racial discrimination in frequently utilized consumer markets are surprisingly quite rare”). [↑](#footnote-ref-17)
18. For an elaborate description of the stores’ selection criteria and details on the data collection process, *see infra* Section III. [↑](#footnote-ref-18)
19. An intersectional approach was adopted because it captures, rather than ignores, the interactions between consumers’ race and gender identities in the context of retail discrimination.For prominent recent scholarship discussing the importance of adopting an intersectional approach in race discrimination research, *see, e.g.,* Sumi Cho, Kimberlé W. Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 Signs: J. Women in Culture & Soc’y 785, 787 (2013); Catharine A. MacKinnon, *Intersectionality as Method: A Note*, 38 Signs: J. Women in Culture & Soc’y 1019 (2013) (observing that intersectionality “adds the specificity of sex and gender to race and ethnicity, and racial and ethnic specificity to sex and gender”). [↑](#footnote-ref-19)
20. Black consumers were roughly 22 percentage points less likely to have their non-receipted return accepted (for either refund or store credit) compared to similarly situated white consumers seeking to return an identical product and following an identical script (60% v. 82%, *p* < 0.001). [↑](#footnote-ref-20)
21. Importantly, race intersected with gender, such that Black males were most (46%) likely to be deprived of their contractual rights, and white females were least (3%) likely to experience such deprivation. [↑](#footnote-ref-21)
22. Here, Black females were least likely (34%) to receive a more lenient treatment than the policy dictates, while white males were most likely (80%) to receive such concessions. [↑](#footnote-ref-22)
23. This still does not mean that racial bias does not underly the observed discriminatory patterns. Black clerks and managers could still experience bias or animosity toward in-group members, by internalizing the biases exhibited by the majority group. *See, e.g.,* Theodore R. Johnson, *Black-on-Black Racism: The Hazards of Implicit Bias,* The Atlantic (December 26, 2014), https://www.theatlantic.com/politics/archive/2014/12/black-on-black-racism-the-hazards-of-implicit-bias/384028/. [↑](#footnote-ref-23)
24. *See infra* discussion in Section V. [↑](#footnote-ref-24)
25. *See, e.g.,* Peter Siegelman, *Racial Discrimination in “Everyday” Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out*, A National Report Card on Discrimination in America: The Role of Testing 69 (1998) (assessing the harms and costs generated by marketplace race discrimination); Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B. C. Third World L.J. 1, 1–56 (2003); Claudine Columbres, *Targeting Retail Discrimination with* Parens Patriae, 36 Colum. J. Soc. Probs. 209, 212 (2002) (explaining that “retail discrimination curtails the shopping experience of Black consumers and limits their purchasing ability”). [↑](#footnote-ref-25)
26. Gabbidon & Higgins, *supra* note 15. Consumer racial profiling is most commonly associated with Black consumers, probably because most media coverage and highly publicized litigation cases involve Black consumers. Yet, other racial and ethnic minorities (including Hispanics, Asians, and Native Americans) report similar experiences of discrimination, also known as “shopping while brown or non-white.” [↑](#footnote-ref-26)
27. *See, e.g.,* Joe R. Feagin, *The Continuing Significance of Race: Anti-black Discrimination in Public Places*, 56 Am. Soc. Rev. 101, 109 (1991). For research examining the mental health consequences of racial discrimination*, see, e.g.,* Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, Plos One (2015) (surveying the evidence that discrimination is significantly associated with depression, anxiety, and stress); M.T. Schmitt et al., *The Consequences of Perceived Discrimination for Psychological Well-Being: A Meta-Analytic Review*, 140 Psych. Bull. 921 (2014) (finding significant negative impacts of discrimination on mental health, self-esteem, and life satisfaction, and a somewhat weaker, but still significant, association with physical health). [↑](#footnote-ref-27)
28. *See infra* Section VII. [↑](#footnote-ref-28)
29. *See infra* Section VIII. [↑](#footnote-ref-29)
30. *See generally* Feagin & Sikes, *supra* note 26; Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. Rev. 275, 282 (2001). [↑](#footnote-ref-30)
31. *See, e.g.,* Paul R. Mullins, Race And Affluence 3, 189 (1999). [↑](#footnote-ref-31)
32. Regina Austin, *“A Nation of Thieves”: Securing Black People’s Right to Shop and to Sell in White America*, Utah L. Rev. 147, 147–48 (1994). [↑](#footnote-ref-32)
33. Leon F. Litwack, Trouble in Mind: Black Southerners in the Age of Jim, Crow 330 (1999). [↑](#footnote-ref-33)
34. *See, e.g.,* Feagin & Sikes, *supra* note 26, at 46. [↑](#footnote-ref-34)
35. Grace Elizabeth Hale, Making Whiteness: The Culture of Segregation in the South, 1890–1940, 172–73 (1999). Attempting to avoid mistreatment and humiliation in retail spaces, Black consumers would often opt for mail-order catalogues. *See* Mullins, *supra* note 30, at 47; Kennedy, *supra* note 29, at 284. [↑](#footnote-ref-35)
36. Gabbidon & Higgins, *supra* note 15, at 4. [↑](#footnote-ref-36)
37. T. Parker, *Southern Retail Campaigns and the Struggle for Black Economic Freedom in the 1950s and 1960s, in* Race and Retail: Consumption and Across the Color Line 79 (M. Bay & A. Fabian eds., 2015). [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. Hale, *supra* note 34, at 165–67 (discussing efforts made by Black consumers to gain economic power in the marketplace, including the Black consumer boycotts during the Great Depression and the Civil Rights era). [↑](#footnote-ref-39)
40. *See* 42 U.S.C.A. [↑](#footnote-ref-40)
41. Joe R. Feagin, Living with racism: The black middle-class experience (1994) (documenting the myriad circumstances in which middle-class Blacks report experiences of unfavorable treatment). *See also* David Crockett, Sonya A. Grier & Jacqueline A. Williams, *Coping with Marketplace Discrimination: An Exploration of the Experiences of Black Men*, 4 Acad. Mark. Sci. Rev. 1 (2003) (surveying the research on everyday marketplace discrimination); Zachary W. Brewster & Sarah N. Rusche, *Quantitative Evidence of the Continuing Significance of Race: Tableside Racism in Full-Service Restaurants*, 43 J. Black Stud. 359 (2012) (reporting on a study in which almost 40% of the surveyed restaurant servers reported providing lower-quality service to minority consumers based on race). [↑](#footnote-ref-41)
42. Gabbidon & Higgins, *supra* note 15, at 10–19 (discussing evidence that store clerks tend to be more suspicious of Blacks, particularly Black men, and unfairly target them with surveillance and calls to the police, even though research consistently shows that shoplifters come equally from all races). [↑](#footnote-ref-42)
43. *See, e.g.,* Cassi Pittman, *“Shopping While Black”: Black Consumers’ Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 Journal of Consumer Culture 3 (2020) [↑](#footnote-ref-43)
44. Joseph R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 Am. Soc. Rev. 1, 101–16 (1991). [↑](#footnote-ref-44)
45. *Id.* [↑](#footnote-ref-45)
46. *Id.* at 106–07. [↑](#footnote-ref-46)
47. Tom Cohen, *O*bama:“Trayvon Martin *Could Have Been Me*,” CNN Pol., July 19, 2013, https://edition.cnn.com/2013/07/19/politics/obama-zimmerman/index.html. [↑](#footnote-ref-47)
48. Gabbidon & Higgins, *supra* note 15, at 13. [↑](#footnote-ref-48)
49. Patricia Williams, The Alchemy of Race and Rights (1991). [↑](#footnote-ref-49)
50. *Id. See also* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism Symposium: Excluded Voices: Realities in Law and Law Reform*, 42 U. Miami L. Rev. 127 (1987). [↑](#footnote-ref-50)
51. Feagin, *supra* note 40, at 107. [↑](#footnote-ref-51)
52. Gabbidon & Higgins, *supra* note 15, at 14. [↑](#footnote-ref-52)
53. *Denny’s Restaurant to Pay $54 Million in Race Bias Suits*, N.Y. Times, May 25, 1994, www.nytimes.com/1994/05/25/us/denny-s-restaurants-to-pay-54-million-in-race-bias-suits.html?pagewanted=all&src=pm; *see also* J. Adamson, The Denny’s Story: How a Company in Crisis Resurrected Its Good Name and Reputation [↑](#footnote-ref-53)
54. R. Bleemer, *Newark Judge Sues Over False Arrest*, New Jersey Law Journal, Feb. 7, 1994; D. Margolick, *At the Bar; Falsely Accused: In a Humiliating Arrest, a Black Judge Finds Lesson of Law and Race Relations*, N.Y. Times, ., 1994, www.nytimes.com/1994/01/07/us/bar-falsely-accused-humiliating-arrest-black-judge-finds-lessons-law-race.html. [↑](#footnote-ref-54)
55. *See, e.g.,* Gabbidon & Higgins, *supra* note 15, at 14–15. [↑](#footnote-ref-55)
56. *See infra* Section VII*. See also* A.G. Harris, G.R. Henderson & J.D. Williams, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 Journal of Public Policy & Marketing, 163–71 (2005). *See also* Williams, J.D., [↑](#footnote-ref-56)
57. Harris et al., *supra* note 55. [↑](#footnote-ref-57)
58. A.M. Harris & G.R. Henderson, *Equal Treatment for Equal Dollars in Illinois: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, Law Enforcement Executive Forum, 83–104 (2006). [↑](#footnote-ref-58)
59. *See, e.g.,* Gabbidon & Higgins, *supra* note 15, at xiii. [↑](#footnote-ref-59)
60. *See* *infra* citations in footnotes 61–62. [↑](#footnote-ref-60)
61. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, Harv. L. Rev. 817–72 (1991); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, American Economic Review 304–21 (1995). [↑](#footnote-ref-61)
62. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 Am. Econ. J. 1 (2017). *See also* Andrew Hanson et al., *Discrimination in Mortgage Lending: Evidence from a Correspondence Experiment*, 92 J. Urban Econ. 48 (2016) (finding evidence of discrimination in the credit market). [↑](#footnote-ref-62)
63. *See, e.g.,* Jennifer Lee, *The Salience of Race in Everyday Life: Black Customers’ Shopping Experiences in Black and White Neighborhoods*, 27 Work & Occupations 353 (2000); Edith F. Davidson, Shopping While Black: Perceptions of Discrimination in Retail Settings(2007) (Ph.D. dissertation, University of Tennessee), https://trace.tennessee.edu/utk\_graddiss/147/ (reporting, based on a series of interviews, that Blacks feel that they are constantly subject to racial profiling in retail stores); Aronte M. Bennet et al., *Shopping While Nonwhite: Racial Discrimination Among Minority Consumers*, 49 J. Consumer Aff. 328 (2015) (reporting that non-white customers are significantly more likely to feel discriminated against in stores than are white customers). [↑](#footnote-ref-63)
64. Thomas L. Ainscough & Carol M. Motley, *Will You Help Me Please? The Effects of Race, Gender and Manner of Dress on Retail Service*, 11 Mktg. Letters, 129, 129–36 (2000). [↑](#footnote-ref-64)
65. George E. Schreer, Saundra Smith & Kirsten Thomas, *“Shopping While Black”: Examining Racial Discrimination in a Retail Setting*, 39 J. Applied Soc. Psych. 1432, 1432–44 (2009). [↑](#footnote-ref-65)
66. Gabbidon & Higgins, *supra* note 15, at xi. [↑](#footnote-ref-66)
67. *Id.* [↑](#footnote-ref-67)
68. *See infra* Section VII. [↑](#footnote-ref-68)
69. *See, e.g.,* Rimma Kats, *Many Consumers Avoid Retailers with Strict Return Policies*, eMarketer, Jan. 1, 2018, https://retail.emarketer.com/article/many-consumers-avoid-retailers-with-strict-return-policies/5a4c05a7ebd40008a852a26c (reporting on a recent consumer poll, in which 91% of the surveyed consumers considered their ability to return products to the store as very important to their purchasing decisions); Shmuel Becher & Tal Zarsky, *Open Doors, Trap Doors and the Law*, 74 L. & Contemp. Probs. 63, 72–73 (2011) (discussing how sellers often use generous “open door policies” allowing consumers to return purchases in order to attract consumers to buy at the store); Eyal Zamir & Doron Teichman, Behavioral Law and Economics 290, 290–91 (2018) (arguing for the importance of the right to withdraw in view of evidence that many consumers regret the purchase after the fact). [↑](#footnote-ref-69)
70. *See, e.g.*, Bourree Lam, *The Rise of Return-Anything Culture*, The Atlantic, Dec. 30, 2015, https://www.theatlantic.com/business/archive/2015/12/return-policy-retail/422145/; Aaron Orendoff, *The Plague of Ecommerce Return Rates and How to Maintain Profitability* (Feb. 27, 2019), https://www.shopify.com/enterprise/ecommerce-returns; Andrea Stojanovic, *60 Latest Retail Statistics to Help You Build Your Business* (Aug. 5, 2019), https://www.smallbizgenius.net/by-the-numbers/retail-statistics/#gref. [↑](#footnote-ref-70)
71. Bureau of Labor Statistics (2021), *Consumer Expenditures in 2020*, BLS REP (Dec. 2021), https://www.bls.gov/opub/reports/consumer-expenditures/2020/pdf/home.pdf. In 2019, for example, sales of apparel in the U.S. reached approximately $368 billion, with more than $260 billion spent annually in clothing retail stores. *See also* Lenzing Investor Presentation, *Demand Share of Apparel Market Worldwide from 2005 to 2020, by Region\**, Stat. Rsch. Dep. (Jan. 12, 2022); *Statistics & Facts on the U.S. Apparel Industry*, Statista, Apr 26, 2021. Black consumers spend almost as much as whites on apparel and services, according to the 2020 Bureau of Labor Statistics Consumer Expenditures Survey. *See* Bureau of Labor Statistics, *Average Consumer Expenditure in the United States in 2020, by Race.* Statista Rsch. Dep. Consumer Expenditures Surv., Dec. 10, 2021, https://www.statista.com/statistics/694716/consumer-expenditure-by-race-us/. [↑](#footnote-ref-71)
72. *See* Bureau of Labor Statistics, *supra* note 70. [↑](#footnote-ref-72)
73. Kerwin Kofi Charles, Erik Hurst & Nikolai Roussanov, *Conspicuous Consumptions and Race*, 124(2) Q. J. Econ. 425, 425–67 (2009). [↑](#footnote-ref-73)
74. Michael Chui et al., *The Black Consumer: A $300 Billion Opportunity,* McKinsey Q., Aug. 6, 2021, https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer (suggesting that companies are making a multi-billion mistake by ignoring Black households’ significant spending power). *See also* Kori Hale, *The $300 Billion Black American Consumerism Bag Breeds Big Business Opportunities*, Forbes, Sept. 17, 2021 (echoing the observations made in the McKinsey report). [↑](#footnote-ref-74)
75. Indeed, intersectionality was first introduced into race discrimination research in order to elucidate the particular challenges faced by Black women. *See, e.g.,* Cho et al., *supra* note 18; Mackinnon, *supra* note 18. [↑](#footnote-ref-75)
76. *See, e.g.,* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 828–34 (2006); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 Mich. L. Rev. 857, 873–74 (2006) (noting that “retailers . . . generally granted their on-the-ground employees vast amounts of discretion in liberalizing their official return policies so as to please consumers”); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L. Rev. 679, 704–12 (2004); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 69, 91 (2019). Additionally, in informal interviews I conducted with store clerks working in Chicago, several interviewees mentioned being granted a considerable degree of discretion in deciding whether or not to accept a return. [↑](#footnote-ref-76)
77. *See, e.g.,* Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 Law & Soc’y Rev. 437 (1984); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 Law & Soc’y Rev. 733 (2001); Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 Mich. J. Race & L. 57 (2009). [↑](#footnote-ref-77)
78. Manisha Padi, *Contractual Inequality*, \_\_ Mich. L. Rev. \_\_ (forthcoming 2022); [↑](#footnote-ref-78)
79. Note that scholars have speculated, at least in theory, that retailers would apply their return policies disproportionately to the disadvantage of less valuable or sophisticated consumers but did not specifically discuss race or gender. *See, e.g.,* Becher & Zarsky, *supra* note 75, at 91 (suggesting that “uninformed and weak groups of consumers” will be disadvantaged, as “sophisticated and informed” groups will plausibly be treated more forgivingly or generously); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077, 2100 (2014) (suggesting that reputational forces “are much more likely to work in favor of large, recurring, and sophisticated customers—whose goodwill the supplier values highly—than in favor of the weak, occasional, and unsophisticated customer, whose goodwill is valued less”). [↑](#footnote-ref-79)
80. The methods used in this study have been approved by the University of Chicago Institutional Review Board prior to data collection (IRB Study Number: IRB 18–1529). The study was pre-registered in AsPredicted (see: “Post-Contract Discrimination in the Retail Market,” #16928, created in 11/23/2018). [↑](#footnote-ref-80)
81. I initially hired five Black female testers. However, one tester dropped out during training, after expressing safety concerns and refusing to follow the script when faced with white male clerks and managers at the stores. [↑](#footnote-ref-81)
82. The sample initially consisted of all 192 retail stores with a Chicago location appearing in the ReferenceUSA and Hoover’s Company Directories’ databases. Dollar stores, stores not offering items for $30 or less, or stores that did not have a downtown Chicago location (n = 101) were excluded from the sample to make the study more manageable. One store was excluded from the sample due to deviations from the script. Stores whose return policy did not require a receipt for exchange, store credit, or cash refund (n = 31) were also excluded from the sample. The final sample includes 59 retail stores located in downtown Chicago. Due to discarded tests and scheduling difficulties, the final sample includes 203 audits overall (59 by white female testers, 51 by white male testers, 51 by Black male testers, and 42 by Black female testers). [↑](#footnote-ref-82)
83. To minimize differences acrossstores, purchasers were instructed to buy a clothing accessory (i.e., a hat, gloves, socks, scarves, purses, or bags). If no accessories were available, they were instructed to buy a shirt, pants, or another clothing item. They were specifically instructed to refrain from buying underwear, swimwear, jewelry, electronic devices, clearance or sale items, or any item that was specifically not eligible for returns according to each store’s formal return policy. Products’ prices were kept constant at between $20 to $30. [↑](#footnote-ref-83)
84. Research assistants (purchasers) were sent to purchase the items in advance. They paid in cash so that sellers would not obtain any personal information from the purchase. The items were then returned by different members of the research team—the testers. This design was chosen for several reasons. First, it allowed for the purchase of identical items from each store, so that items would not vary within stores. Second, it mitigated the concern that in some stores, store clerks would identify the person making the return whereas in others, testers would encounter different store clerks. Still, this design raises the concern that in some stores, store clerks were more suspicious of the testers making the returns because they could not identify them. This may mean that in reality, sellers are even more likely to deviate from their formal return policy when they recognize the customer seeking to make the return. Of course, increased suspicion cannot explain the differential treatment based on race and gender. [↑](#footnote-ref-84)
85. If the store clerk asked why they wanted to return the item, testers were instructed to say that they realized they did not need it after purchasing it. It is possible that store clerks’ willingness to depart from the formal policy would vary depending on the reason offered by testers. For example, if testers had said that they had bought the wrong size or received the item as a gift and did not like it, store clerks may have responded differently. The generic excuse used in the study was meant to allow testers to request a refund rather than merely exchange or store credit. Unlike returning a gift or exchanging an item for a different size, explicitly saying that they did not need the product made asking for a cash refund rather than an exchange or store credit more credible and reasonable. In any event, the type of excuse chosen cannot, on its own, explain the observed disparities in treatment based on race and gender. [↑](#footnote-ref-85)
86. For the purposes of preparing for this study, a comprehensive sample of 192 retail stores’ return policies was collected and analyzed. In 84% of the sampled return policies, a receipt was explicitly required for returns or for refunds. [↑](#footnote-ref-86)
87. Johnston, *supra* note 75, at 874 (noting that although most stores require that customers show a receipt, “as actually implemented by on-the-ground employees, many retailers’ official return policies have become ones of ‘liberal and almost unlimited returns,’ with customers often given a full refund even without proof of purchase”). [↑](#footnote-ref-87)
88. *Id.* [↑](#footnote-ref-88)
89. Despite these efforts to enhance uniformity, some differences between testers undoubtedly remained. Yet it is highly unlikely that the observed differences in treatment along gender and racial lines can be explained by these residual differences or by minor divergences from the uniform bargaining script testers were trained to follow. Statistical tests, including leave-one-out cross-validations, were conducted to ensure that the results were not driven any particular tester. See Appendix. [↑](#footnote-ref-89)
90. This data was mainly obtained from Bloomberg and Hoover’s Company Directories. [↑](#footnote-ref-90)
91. *See, e.g.,* Ayres, *supra* note 60, at \_\_\_. [↑](#footnote-ref-91)
92. See robustness checks with different dependent variables in the Appendix. [↑](#footnote-ref-92)
93. *See, e.g.,* Edelman et al., *supra* note 61, at \_\_\_\_. [↑](#footnote-ref-93)
94. While the interaction was found to be significant, and the race gap is larger among Black clerks compared to white clerks, white clerks also significantly favored white testers (chi2(1) = 3.80, *p* < 0.1; F (1, 130) = 3.35, *p* < 0.1). [↑](#footnote-ref-94)
95. This still does not mean that racial bias did not underly the observed discriminatory patterns. Black clerks and managers could still experience bias or animosity toward in-group members, by internalizing the biases exhibited by the majority group. *See, e.g.,* Johnson, *supra* note 22. [↑](#footnote-ref-95)
96. Between these two extremes were white males with a 29% likelihood of experiencing denial and Black females with a 35% likelihood of experiencing denial. [↑](#footnote-ref-96)
97. Between these two extremes were white females with 66% likelihood of obtaining concessions and Black males with a 58% likelihood of obtaining concessions. [↑](#footnote-ref-97)
98. The race gap was 2% smaller when testers interacted with a white clerk, but this difference was not significant. [↑](#footnote-ref-98)
99. The gender gap was 8.6% smaller when testers interacted with a male compared to a female clerk, suggesting that female clerks were more likely to discriminate in favor of male testers than were male clerks, but the difference was not significant. [↑](#footnote-ref-99)
100. Based on a regression of the likelihood of seeing a manager (1 if saw manager, 0 if did not) on the race and gender of both the tester and the clerk, including store controls. Raw outcomes are reported in the Appendix, and are quite similar to the predicted probabilities reported here. [↑](#footnote-ref-100)
101. The interaction between the race and gender of the tester was not found to be significant, but the gender gap was larger among Black testers than among white testers, with Black males about 9% more likely to receive improved outcomes compared to Black females, and white males only 3% more likely to receive improved results compared to white females. [↑](#footnote-ref-101)
102. *See, e.g.,* V. L. Brescoll & E.L. Uhlmann, *Can an Angry Woman Get Ahead? Status Conferral, Gender, and Expression of Emotion in the Workplace*, 19 Psychological Science, 268–75 (2008); V. L. Brescoll, E. Dawson & E.L. Uhlmann, *Hard Won and Easily Lost: The Fragile Status of Leaders in Gender-Stereotype Incongruent Occupations*, 21 Psychological Science, 1640–42 (2010); A.H. Eagly & S. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 Psychological Review, 573–98 (2002); T.G. Okimoto & Brescoll, *The Price of Power: Powerseeking and Backlash Against Female Politicians*, 36 Personality and Social Psychology Bulletin, 923–36 (2010); Robert W. Livingston, Ashleigh Shelby Rosette & Ella F. Washington, *Can an Agentic Black Woman Get Ahead? The Impact of Race and Interpersonal Dominance on Perceptions of Female Leaders*, 23 Psychological science 354–58 (2012); Ashleigh Shelby Rosette et al., *Race Matters for Women Leaders: Intersectional Effects on Agentic Deficiencies and Penalties*, 27 Leadership Quarterly 429–45 (2016); Christopher K. Marshburn et al., *Workplace Anger Costs Women Irrespective of Race*, Frontiers in Psychology 3064 (2020). [↑](#footnote-ref-102)
103. *See* *supra* citations in footnotes 99–100. [↑](#footnote-ref-103)
104. Joan Williams et al., You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession(2018). *See also* A. Stepnick & J.D. Orcutt *Conflicting Testimony: Judges’ and Attorneys’ Perceptions of Gender Bias in Legal Settings*,34(7–8)Sex Roles: A Journal of Research, 567–79 (1996) (finding, based on a large-scale survey, that female judges and attorneys feel that judges and attorneys of both genders engage in different forms of biased behavior against females in legal settings); Janet R. Zuckerman, *Nasty Women: Toward a New Narrative on Female Aggression*, 55(3) Contemporary Psychoanalysis 214–51 (2019), https://www.tandfonline.com/doi/epub/10.1080/00107530.2019.1637392?needAccess=true (last visited Feb. 5, 2022) (observing that “we are far from a place where women can freely compete, own, and exercise aggression, and safely embody a voice of strength and assertion”); J. Bennett, *The “Tight Rope” of Testifying While Female*, N.Y. Times (2018, Sept. 28, 2018, https://www.nytimes.com/2018/09/28/us/politics/christine-blasey-ford-testimony-testifying-while-female.html (observing that “women who express anger will be dismissed as hysterical but men who express anger are perceived as ‘passionate’ about the job”). [↑](#footnote-ref-104)
105. *Id.* [↑](#footnote-ref-105)
106. Jessica M. Salerno et al., *Closing with Emotion: The Differential Impact of Male versus Female Attorneys Expressing Anger in Court*, 42 Law & Hum. Behav. 385 (2018). [↑](#footnote-ref-106)
107. *Id.* [↑](#footnote-ref-107)
108. Python was used to scrape the stores’ websites. Coders and programmers were instructed to derive the median prices of the items based on clothing items only, in order to keep the analysis tractable across stores with different offerings. Median prices were chosen instead of mean prices, as mean prices—unlike median prices—are affected by outliers (i.e., extremely expensive or very cheap products). Some stores blocked access to their websites, and these websites (n = 17) were manually coded. One store’s website was impossible to code manually, so its median price was coded as missing. One store did not have items for sale online, so its median price was also coded as missing. [↑](#footnote-ref-108)
109. This analysis was repeated with classification based on the research assistant’s coding of each store as “discount,” “mainstream,” and “high-end” based on their impressions from being at the store’s physical location. The results were similar and robust. [↑](#footnote-ref-109)
110. The gap in likelihood of receiving refunds was also widest among discount stores (14%, compared to 10% among mainstream stores and high-end stores). [↑](#footnote-ref-110)
111. *See, e.g.,* Bertrand & Duflo, *supra* note\_\_\_, at 311; Gary S. Becker, The Economics of Discrimination (1957). [↑](#footnote-ref-111)
112. *See, e.g.,* E.S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 Am. Econ. Rev. 659 (1972); Kenneth J. Arrow, *The Theory of Discrimination,* *in* Discrimination Labor Markets 3 (1973). [↑](#footnote-ref-112)
113. *See, e.g.,* Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L Rev. 1311, 1319–20 (1989). [↑](#footnote-ref-113)
114. Psychological research demonstrates that the line between taste-based and statistical explanations is often blurry, since bias and stereotypes—whether implicit or conscious—may influence people’s statistical estimations and affect the criteria they use or the inferences they choose to incorporate into their decision-making processes (e.g., Bertrand & Duflo, *supra* note\_\_\_, at 313). [↑](#footnote-ref-114)
115. Bertrand & Duflo, *supra* note\_\_\_, at 314. [↑](#footnote-ref-115)
116. *Id.* at 312. [↑](#footnote-ref-116)
117. *See, e.g.,* Williams et al., *supra* note 14, at 22. [↑](#footnote-ref-117)
118. Another opportunistic behavior that retail sellers often try to protect themselves from is “buy-to-rent” strategies, whereby consumers purchase a product in order to use it for a specific purpose or event, and then return it for a full refund afterward, thereby obtaining free rent. In order to protect themselves from such opportunistic behavior, retailers often formally require consumers to return items “unused” and “with tags attached.” The receipt requirement is less effective in protecting sellers from the “buy-to-rent” problem, since consumers can buy the item, use it, and then return it with a receipt. To minimize concern that sellers’ reluctance to accept the returns would be driven by their suspicions that the items were stolen, testers were instructed to return the items unused, in their original packaging, and with tags attached. [↑](#footnote-ref-118)
119. *See, e.g.,* Shaun L. Gabbidon & George E. Higgins, *Public Opinion on the Use of Consumer Racial Profiling to Identify Shoplifters: An Exploratory Study*, 36 Criminal Justice Review 201–12 (2011) (reporting that consumer racial profiling is pervasive and surveying consumers’ about their opinion on the effectiveness and ethicality of racial profiling in the marketplace). [↑](#footnote-ref-119)
120. John Rappaport, *Criminal Justice, Inc.*,118 Colum. L. Rev. 2251, 2290 (2018) (surveying the evidence suggesting that racial minority group members are apprehended for shoplifting at disproportionate rates, despite evidence that rates of shoplifting are similar across racial groups); Max C. Dertke, Louis A. Penner & Kathleen Ulrich, *Observer’s Reporting of Shoplifting as a Function of Thief’s Race and Sex*, 94 J. Soc. Psychol. 213, 217–18 (1974) (finding no statistically significant difference in white consumers’ propensity to report thefts by Black versus white thieves, but that, when requested to confirm having witnessed a theft, consumers reported thefts by Blacks more often than thefts by whites); Gerald D. Robin, *Patterns of Department Store Shoplifting*, 9 Crime & Delinq. 163, 169 (1963) (finding that Black shoppers were both disproportionally detained and disproportionately referred to the policy); Mary Owen Cameron, The Booster and the Snitch: Department Store Shoplifting 25 (1964) (finding, based on a study of shoplifting in 1940s Chicago department stores, that Black shoppers were “kept under much closer observation than [were] whites”); Lloyd W. Klemke, The Sociology of Shoplifting: Boosters and Snitches Today 50 (1992) (reporting that “males are typically more active in shoplifting than females”). [↑](#footnote-ref-120)
121. *See, e.g.,* Klemke, *supra* note 119, at 64 (observing that “the limited research on race and ethnic variations in shoplifting suggests that only minor differences are evident in the population at large”). [↑](#footnote-ref-121)
122. U.S. Department of Justice, National Coalition to Prevent Shoplifting—Program Guide 5 (1980) [↑](#footnote-ref-122)
123. *See, e.g.,* Schreer et al., *supra* note 64. [↑](#footnote-ref-123)
124. J. Lee, *The Salience of Race in Everyday Life: Black Customers’ Shopping Experiences in Black and White Neighborhoods*, Work and Occupations, 27, 353–76 [↑](#footnote-ref-124)
125. Jo Ann L. Asquith & Dennis N. Bristow, *To Catch a Thief: A Pedagogical Study of Retail Shoplifting*, 75 J. Educ. for Bus. 271 (2000). [↑](#footnote-ref-125)
126. *Id.* [↑](#footnote-ref-126)
127. Austin, *supra* note 31, at 226–28. [↑](#footnote-ref-127)
128. *See, e.g.,* Williams et al., *supra* note 14, at 22–24 (reporting on a poll in which more than half of Black men reported that they had been subjected to racial profiling while driving). [↑](#footnote-ref-128)
129. *See, e.g.,* Cassi Pittman Claytor, *“Shopping while Black”: Black Consumers’ Management of Racial Stigma and Racial Profiling in Retail Settings*, 20 J. Consumer Cult. 3, 4 (2020). [↑](#footnote-ref-129)
130. *Id.* at 16. [↑](#footnote-ref-130)
131. *Id.* at 8–9. [↑](#footnote-ref-131)
132. S.T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82(6) J. Personal. Soc. Psychol. 878–902 (2002). [↑](#footnote-ref-132)
133. *See, e.g.,* Cecilia L. Ridgeway & Tamar Kricheli-Katz, *Intersecting Cultural Beliefs in Social Relations: Gender, Race, and Class Binds and Freedoms*, 27 Gender & Society 294, 304 (2013) (observing that “[c]lass is part of what it means to be ‘white’ or ‘Black’”). [↑](#footnote-ref-133)
134. Andrew M. Penner & Aliya Saperstein, *Engendering Racial Perceptions*, 27(3) Gender & Society (2013). [↑](#footnote-ref-134)
135. Jonathan B. Freeman & Nalini Ambady, *A Dynamic Interactive Theory of Person Construal*, 118 Psychological Review 247–79 (2011). [↑](#footnote-ref-135)
136. *See* Bureau of Labor Statistics, *supra* note 70. [↑](#footnote-ref-136)
137. Charles et al., *supra* note 72, at 425–67. [↑](#footnote-ref-137)
138. Chui et al., *supra* note 73. [↑](#footnote-ref-138)
139. *Id.*  [↑](#footnote-ref-139)
140. Cassi Pittman Claytor, Black Privilege: Modern Middle-Class Blacks with Credentials and Cash to Spend 7 (2020). [↑](#footnote-ref-140)
141. *Id.* [↑](#footnote-ref-141)
142. Claytor, *supra* note 139, at 5–6. [↑](#footnote-ref-142)
143. Zachary W. Brewster, *Racialized Customer Service in Restaurants: A Quantitative Assessment of the Statistical Discrimination Framework*, 82(1) Sociological Inquiry 3–28 (2012); Zachary W. Brewster, Jonathan R. Brauer & Michael Lynn, *Economic Motivations and Moral Controls Regulating Discrimination against Black and Hispanic Diners*, 56(3) Sociological Quarterly 506–38 (2015). *See also* Brewster and Nowak III, *supra* note 16 (finding that waiters exaggerate the difference in Black and white customers’ tipping practices). [↑](#footnote-ref-143)
144. Williams, *supra* note 32, at 111. [↑](#footnote-ref-144)
145. *Id.* [↑](#footnote-ref-145)
146. Interview #13 with a local carpet store clerk (recorded interview on file with the Author). [↑](#footnote-ref-146)
147. *See, e.g.*, Arthur Best & Alan P. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & Soc’y Rev. 701, 707 (1977) (finding, based on a comprehensive survey, that Black consumers had significantly lower problem perception rates than did white consumers). For general observations of these disparities, *see, e.g.,* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.–C.L. L. Rev. 401 (1987) (arguing for racial differences in perceptions of rights-entitlements); Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 Am. Socio. Rev. 747 (2002)(suggesting that upper income white families raise their children with a sense of entitlement and assertiveness, while childrearing strategies among the lower classes and racial minorities tend to result in a lack of assertiveness and a lower sense of entitlement). Females were also found to exhibit lower levels of entitlement. Black and lower-income people were also found to be less likely to seek legal help when encountering civil legal problems. *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016). For gender differences in sense of entitlement, *see, e.g.,* Laurie T. O’Brien, Brenda N. Major, & Patricia N. Gilbert, *Gender Differences in Entitlement: The Role of System-Justifying Beliefs*, 34 Basic & Applied Soc. Psych. 136 (2012) (finding lower levels of perceived pay entitlement among women in comparison to men). [↑](#footnote-ref-147)
148. *See, e.g.*, Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 Stan. L. Rev. 503 (2020) (finding that non-white participants were inclined to see the consumer as more bound by the fine print than were whites). [↑](#footnote-ref-148)
149. *See, e.g.*, Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. Rev. 1405, 1448–51 (1985) (providing anecdotal evidence that the relatively poor buyers are least likely to complain about defective goods); Schmitz, *supra* note 163, at 312 (“Research indicates that complainers have not only greater ‘consumer sophistication’ in terms of knowledge and experience regarding their contract rights, but also higher incomes and educational resources than average consumers”); Jessica M. Choplin, Debra Pogrund Stark & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 L. & Psychol. Rev. 61, 94 (2011) (presenting findings indicating that “those with lower status are more likely to agree and accept senseless explanations . . . Those with higher status seem to be more vigilant, perhaps in an effort to protect their higher status”). [↑](#footnote-ref-149)
150. Best & Andersen, *supra* note 112, at 707. [↑](#footnote-ref-150)
151. Best & Andersen, *supra* note 112, at 723–24. [↑](#footnote-ref-151)
152. *See, e.g.*, Donald Granbois, John O. Summers & Gary L. Frazier, *Correlates of Consumer Expectation and Complaining Behavior,* *in* Consumer satisfaction, dissatisfaction and complaining behavior 18, 18 (Ralph L. Day ed., 1977); Marsha L. Richins, *An Investigation of Consumers’ Attitudes Toward Complaining*, 9 Advances Consumer Rsch. 502 (1982); Marsha L. Richins, *Negative-Word-of-Mouth by Dissatisfied Consumers*, 47 J. Mktg. 68, 76 (1983) (observing that the likelihood of consumers to complain depends to a large extent on the perceived responsiveness of the seller). [↑](#footnote-ref-152)
153. *Id*. [↑](#footnote-ref-153)
154. For a similar observation, *see, e.g.,* Meirav Furth-Matzkin, *The Distributive Impacts of Nudnik-based Activism*, 74 Vand. L. Rev. En Banc 469, 481 (2021). [↑](#footnote-ref-154)
155. *See, e.g.*, Stojanovic, *supra* note 69. [↑](#footnote-ref-155)
156. *See* Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, Pew Research Center: Internet, Science & Tech (2016), https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/ (last visited Oct. 17, 2021). [↑](#footnote-ref-156)
157. Williams et al., *Racial Discrimination in Retail Settings: A Liberation Psychology Perspective*, at 271. [↑](#footnote-ref-157)
158. Williams, Lwin, Harris, and Gooding, “Developing a Power-Responsibility Equilibrium Model to Assess ‘Brick and Mortar’ Retail Discrimination.” *See also* Williams et al., *supra* note 122, at 271. [↑](#footnote-ref-158)
159. *See, e.g.,* Edelman et al., *supra* note 61; Kricheli-Katz & Regev, *supra* note 38; Asaf Zussman, *Ethnic Discrimination: Lessons from the Israeli Online Market for Used Cars*, 123 Econ. J. 433 (2013); Dongyu Chen, Xiaolin Li & Fujun Lai, *Gender Discrimination in Online Peer-to-Peer Credit Lending: Evidence from a Lending Platform in China*, 17 Electronic Com. Res. 553 (2017); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. econ. rev. 991 (2004); Frederik Zuiderveen Borgesius & Joost Poort, *Online Price Discrimination and EU Data Privacy Law*, 40 J. consumer pol’y 347 (2017); Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 Econ. J. 469 (2013); Dominik Hangartner, Daniel Kopp & Michael Siegenthaler, *Monitoring Hiring Discrimination Through Online Recruitment Platforms*, 589 Nature 572 (2021). [↑](#footnote-ref-159)
160. *See* Edelman et al., *supra* note 61. [↑](#footnote-ref-160)
161. *See* Kricheli-Katz & Regev, *supra* note 38. [↑](#footnote-ref-161)
162. May O. Lwin and Jerome D. Williams, *A Model Integrating the Multidimensional Developmental Theory of Privacy and Theory of Planned Behavior to Examine Fabrication of Information Online*, Marketing Letters 14(4) 257–72 (2004). [↑](#footnote-ref-162)
163. Cate Matthews, *He Dropped One Letter in His Name While Applying for Jobs, and the Responses Rolled in*, Huffington Post, Sept., 2, 2014, http://www.huffingtonpost.com/2014/09/02/jose-joe-job-discrimination\_n\_5753880.htm. [↑](#footnote-ref-163)
164. Firms increasingly rely on algorithmic intelligence to predict consumers’ responses to different levels of treatment. *See, e.g.,* Rory Van Loo, *Rise of the Digital Regulator*, 66 Duke L.J. 1267, 1283 (2017) (“[C]ompanies purchase . . . information to estimate a consumer’s overall net worth, which then determines service levels, such as whether to direct a phone call to a VIP customer service line or to an unhelpful call center”); Rory Van Loo, *The Corporation as Courthouse*, 33 Econ. J. Reg. 547, 579–80 (2016); Natasha Singer, *Secret E-Scores Chart Consumers’ Buying Power*, N.Y. Times, Aug. 18, 2012, at BU1; Nate Cullerton, *Behavioral Credit Scoring*, 101 Geo. L.J. 807, 816 (2013) (describing how lenders increasingly adopt ratings technologies currently used to predict consumers’ social influence and online reputation, including metrics such as the number of followers a particular user has on Twitter, the level of “re-tweeting,” and the user’s blog and Facebook links); Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating Consumer “Haves” from “Have-Nots,”* Mich. St. L. Rev. 1411, 1419–33 (2014). [↑](#footnote-ref-164)
165. Johnston, *supra* note 75, at 881. [↑](#footnote-ref-165)
166. *See, e.g.*, Orendoff, *supra* note 69. [↑](#footnote-ref-166)
167. *See, e.g.*, Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 Nw. U. L. Rev. 1667 (2008); Lior Jacob Strahilevitz, *Less Regulation, More Reputation, in* The Reputation Society: How Online Opinions Are Reshaping the Offline World 71 (2012) (suggesting that “an important potential upside of new reputation tracking technologies is their potential to displace statistical discrimination on the basis of race, gender, age, appearance, and other easily observable characteristics”). [↑](#footnote-ref-167)
168. *See, e.g.,* Talia Gillis, *The Input Fallacy*, Minn. L. Rev. (forthcoming 2022); Talia Gillis & Jann L. Spiess, *Big Data and Discrimination*, 86 U. Chi. L. Rev. 459 (2018). [↑](#footnote-ref-168)
169. Cite statute. [↑](#footnote-ref-169)
170. [↑](#footnote-ref-170)
171. See 42 U.S.C. § 1981 (1994). Section 1981 defines the term “make and enforce contracts” as “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” [↑](#footnote-ref-171)
172. *Id.* (“All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”). [↑](#footnote-ref-172)
173. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). [↑](#footnote-ref-173)
174. 392 U.S. 409, 443 (1968). [↑](#footnote-ref-174)
175. Henderson et al., *supra* note \_\_. [↑](#footnote-ref-175)
176. Columbres, *supra* note 24, at 211 (opining that “victims of retail discrimination are unlikely to succeed in suing retail stores” and observing that “even blatant discrimination is often difficult to litigate successfully”). [↑](#footnote-ref-176)
177. Singer, *supra* note 7, at 1291 (“The possibility that no law--state or federal--may prohibit racial and sexual discrimination in retail stores in some states is shocking to most people, including many lawyers and law professors . . . Yet, the formal law does not unequivocally reflect this principle”). [↑](#footnote-ref-177)
178. Singer, *supra* note 7, at 1288–91.Note that sex discrimination is, in any event, not prohibited under these statutes. [↑](#footnote-ref-178)
179. See 42 U.S.C.A § 2000a. [↑](#footnote-ref-179)
180. *Id.*  [↑](#footnote-ref-180)
181. *See, e.g.,* Singer, *supra* note 7, at 1288 fn 8. [↑](#footnote-ref-181)
182. Harris, *supra* note 24; Gabbidon & Higgins, *supra* note 15, at 83. [↑](#footnote-ref-182)
183. Newman v. Piggie Park Enterprises, Inc.390 U.S. 400 (1968). The statute’s usefulness to consumer discrimination plaintiffs is further limited because it prevents plaintiffs from seeking monetary damages, allowing them to obtain only equitable or declaratory relief. *See* Henderson et al., *supra* note 128, at 78. [↑](#footnote-ref-183)
184. *See, e.g.,* Singer, *supra* note 7, at 1288–89 (noting that there is no “iron-clad assurance” that the U.S. Supreme Court would interpret Section 1981 to prohibit racial discrimination in *all* places of public accommodation, including retail stores, and opining that the Supreme Court “might very well *not* interpret . . . Section 1981 as requiring a retail store to admit customers regardless of race”). [↑](#footnote-ref-184)
185. Singer, *supra* note 7, at 1289. [↑](#footnote-ref-185)
186. *Id.*, at 1424–33. [↑](#footnote-ref-186)
187. *See, e.g.,* Ackaa v. Tommy Hilfiger Co., No. CIV .A.96–8262, 1998 WL 136522, at 3 (E.D. Pa. Mar. 24, 1998); Lewis v. J.C. Penney Co., 948 F. Supp. 367, 370 (D. Del. 1996). [↑](#footnote-ref-187)
188. *See, e.g.,* Kennedy, *supra* note 29, 304, 319. [↑](#footnote-ref-188)
189. *See, e.g.,* McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973). [↑](#footnote-ref-189)
190. Id. [↑](#footnote-ref-190)
191. Columbres, *supra* note 24, at 216; Dirden v. Dep’t Hous. & Urban Dev., 86 F.3d 112, 114 (8th Cir. 1996); Lewis, 948 F. Supp. at 371 (quoting Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir. 1993). [↑](#footnote-ref-191)
192. Columbres, *supra* note 24, at 217. *Cf*.Henderson et al., *supra* note 128, at 77 (observing that “some courts have developed a different standard for proving consumer discrimination. For example, in Minnesota, the case law has evolved so that probable cause that discrimination occurred can be established when the evidence shows “treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation,” while referring to *City of Minneapolis v. Richardson*, 239 N. W. 2d 197, 202 (Minn. 1976)). [↑](#footnote-ref-192)
193. 509 U.S. 502, 515 (1993). [↑](#footnote-ref-193)
194. *Id*. at 509–11. [↑](#footnote-ref-194)
195. Columbres, *supra* note 24, at 217. [↑](#footnote-ref-195)
196. *See, e.g.,* Flowers v. TJX Companies, Inc., No. 91-CV-1339, 1994 WL 382515, at \*6 (N.D.N.Y. July 15, 1994) (dismissing claims of discrimination in service because “plaintiffs completed their retail transactions at T.J. Maxx despite the alleged discrimination of defendants”); Kennedy, *supra* note 29, at 307 (“In general, section 1981 retail discrimination claims are unsuccessful unless a consumer was prevented from completing a transaction or making a purchase”); Columbres, *supra* note 24, at 215 (“[c]ourts generally reject the claim that all shoppers must be treated equally while engaged in shopping activities regardless of race. And, because courts narrowly construe § 1981, victims of retail discrimination who are harassed by store employees when they first enter a store or after they complete a purchase are unable to recover”). Harris, *supra* note 24. [↑](#footnote-ref-196)
197. Henderson et al., *supra* note 128, at 76. [↑](#footnote-ref-197)
198. Harris, *supra* note 24, at \_\_\_. [↑](#footnote-ref-198)
199. *See infra* Section V*.*  [↑](#footnote-ref-199)
200. See Kennedy, *supra* note 39, at 281. [↑](#footnote-ref-200)
201. *See, e.g.,* Joann Loviglio, Eddie Bauer Discrimination Case Goes to Jury in Greenbelt Court, DAILY REC. (Baltimore), Oct. 8, 1997, at 19. *See also* Katheryn K. Russell, *Driving While Black: Corollary Phenomena And Collateral Consequences*, 40 BCL Rev. 717, 724 (1998). [↑](#footnote-ref-201)
202. *See, e.g.,* Joann Loviglio, *Civil Rights Not Violated, But Eddie Baier Told to Pay $1 Million in Shoplifting Cast*, Legal Intelligencer, Oct. 10, 1997, at 4. *See also* Gabbidon & Higgins, *supra* note 15, at 14. [↑](#footnote-ref-202)
203. Lewis v. J.C. Penney Co., 948 F. Supp. 367, 368 (D. Del. 1996). [↑](#footnote-ref-203)
204. *Id.*. [↑](#footnote-ref-204)
205. *Id.* [↑](#footnote-ref-205)
206. *Id.* at 369. [↑](#footnote-ref-206)
207. *Id.* [↑](#footnote-ref-207)
208. *Id.* [↑](#footnote-ref-208)
209. *Id.* [↑](#footnote-ref-209)
210. *Id.* at 371. [↑](#footnote-ref-210)
211. *Id.* [↑](#footnote-ref-211)
212. Cedeno v. Wal-Mart Stores, Inc., No. CIV.A.98-CV-479, 1999 WL 1129638, at 1 (E.D. Pa. Mov. 30, 1999). [↑](#footnote-ref-212)
213. *Id.* at 2. [↑](#footnote-ref-213)
214. Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, Court of Appeals, 6th Circuit (2001). [↑](#footnote-ref-214)
215. *See, e.g.,* Lewis, 948 F. Supp. at 371; Flowers v. TJX Companies, No. 91-CV-1339, 1994 W’L 382515, at \*2. (N.D.N.Y. July 15, 1994) (plaintiffs’ Section 1981 claim dismissed on summary judgment because they were able to complete their purchase before being approached by a police officer and asked to leave the T.J. Maxx retail store). [↑](#footnote-ref-215)
216. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). [↑](#footnote-ref-216)
217. *Id.* at 164–65. [↑](#footnote-ref-217)
218. *Patterson*, 491 U.S. at 176. [↑](#footnote-ref-218)
219. *Id*. at 176–77. [↑](#footnote-ref-219)
220. *See, e.g.,* Kennedy, *supra* note 29, 306 (observing that “courts routinely reject . . . claims that Section 1981 applies to post transaction activities”). *See also* H.R.Rep.No.102–30(II), at 37 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 730–31 (according to the House Report on Section 1981, more than 200 Section 1981 race discrimination claims were dismissed in the aftermath of *Paterson*). [↑](#footnote-ref-220)
221. Lewis v. J.C. Penney Co., 948 F. Supp. 367, 368–69 (D. Del. 1996). [↑](#footnote-ref-221)
222. Lewis, 948 F. Supp. at 371–72. [↑](#footnote-ref-222)
223. *See, e.g.,* Kennedy, *supra* note 29, at 321–22 (critiquing the narrow interpretation of Section 1981, which “absolves stores . . . of liability . . . for post transaction conduct,” and calling for a broader interpretation which covers both pre contractual and post contractual discrimination). [↑](#footnote-ref-223)
224. H.R. REP. No. 102–40 (II), *supra* note 2019, at 37–38. Indeed, even following the 1991 amendment, courts continue to construe Section 1981’s language as restricting redress to cases where consumers were denied service or were prevented from completing a retail transaction (*see, e.g.,* Kennedy, *supra* note 29, at 310; Morris v. Office Max, Inc. 89 F.3d 411 (7th Cir. 1996) (determining that while plaintiffs were approached by police officers for shoplifting, they were not prevented from completing a purchase, and that Section 1981 therefore did not apply). Yet, it is linguistically plausible to interpret Section 1981 as prohibiting discriminatory enforcement of sellers’ return policies on the basis of race. [↑](#footnote-ref-224)
225. Hampton v. Dillard Dep’t Stores, Inc., 18 F. Supp. 2d 1256, 1261 (D. Kan. 1998). [↑](#footnote-ref-225)
226. *Id*. at 1261. [↑](#footnote-ref-226)
227. *Id*. at 1262–63. [↑](#footnote-ref-227)
228. J.D. Williams, A.M. Hakstian & G.R. Henderson, *Consumer Racial Profiling*, *in* Encyclopedia of Race and Crime, vol. I, 147–51 (H.T. Greene & S.L. Gabbidon, eds., 2009). [↑](#footnote-ref-228)
229. *See, e.g.,* Singer, *supra* note 7, at 1290. [↑](#footnote-ref-229)
230. U.S. Bureau of the Census data, released July 1, 2021, https://www.census.gov/library/stories/state-by-state.html. Total U.S. Population: 331.4 million. Alabama: 5,024,279, Florida: 21, 538,187; Georgia: 10,711,908; Mississippi: 2,961,279, North Carolina: 10,439,388, South Carolina: 5,118,425, and Texas: 29,145,505. The populations of these states represent 19% of the U.S. population. [↑](#footnote-ref-230)
231. *See, e.g.,* Singer, *supra* note 7, at 1290. Consider, also, that at least 11 jurisdictions do not prohibit *sex* or *gender* discrimination in public accommodations, and no federal statute prohibits sex discrimination in public accommodations unless they receive federal funds. [↑](#footnote-ref-231)
232. Many states set minimum and maximum damage limitations and the amount plaintiffs may recover is often negligible. For example, civil penalties range from $25 to $100 in Connecticut, and from $10,000 to $50,000 in Illinois. Criminal penalties include fines ranging from $10 to $50,000 and imprisonment from 30 days to one year, but state prosecutors rarely bring criminal suits in public accommodation cases. *See* Henderson et al., *supra* note 128, at 79. [↑](#footnote-ref-232)
233. *Id*. [↑](#footnote-ref-233)
234. Harris, 2003; Harris, Henderson, & Williams, 2005; Williams, Harris, & Henderson, 2006. [↑](#footnote-ref-234)
235. *See, e.g.,* Henderson et al., *supra* note 128, at 79 (“In theory, the state public accommodations statutes provide relief for consumers . . . In practice, very few complaints are filed with state agencies” and “even fewer cases are litigated”); Kennedy, *supra* note 29, at 337. [↑](#footnote-ref-235)
236. *See, e.g.,* Stephen Hayes & Kali Schellenberg, *Discrimination Is* “*Unfair”: Interpreting UDA(A)P to Prohibit Discrimination* (2021), https://papers.ssrn.com/abstract=3832022 (last visited Jan. 30, 2022). [↑](#footnote-ref-236)
237. *Id.*  [↑](#footnote-ref-237)
238. It has relatedly been proposed that the Restatement (Second) of Contracts be revised to include a prohibition of discrimination in contracting. *See* Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 Geo. Wash. L. Rev. 183, 207 (1993). Williams suggested that race discrimination “in the formation, performance, enforcement, or termination of a contract” would be prohibited under the common law of contracts. [↑](#footnote-ref-238)
239. 12 U.S.C. § 5531 (2010) (CFPB UDAAP Authority); 15 U.S.C. § 45(n) (2012) (FTC UDAP authority). [↑](#footnote-ref-239)
240. *Id*. [↑](#footnote-ref-240)
241. For an even broader suggestion to interpret current UDAP laws as prohibiting all types of discrimination in consumer markets, see Hayes & Schellenberg, *supra* note 235*.* [↑](#footnote-ref-241)
242. *See* Statement of Commissioner Rohit Chopra, *in the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda Commission File No. 1623238* (May 27, 2020), available at: bronx\_honda\_final\_rchopra\_bronx\_honda\_statement.pdf (ftc.gov) [↑](#footnote-ref-242)
243. *Id.*  [↑](#footnote-ref-243)
244. In re Facebook, Inc., Assurance of Discontinuance(July 24, 2018), 2018\_07\_23 AOD.pdf (agportal-s3bucket.s3.amazonaws.com). [↑](#footnote-ref-244)
245. *Id.* at 3.2; *see also* Emma Woollacott, *Facebook Forced to End “Discriminatory” Ad-Targeting Across U.S.,* Forbes, July 25, 2018. [↑](#footnote-ref-245)
246. *Id.* [↑](#footnote-ref-246)
247. *See, e.g.*, Hayes & Schellenberg, *supra* note 235, at 4. [↑](#footnote-ref-247)
248. *See, e.g.,* Bertrand and Duflo, *supra* note 32; Peter A. Riach & Judith Rich, *Field Experiments of Discrimination in the Marketplace*, 112 economic journal F480–F518 (2002) (surveying the results of controlled field (audit) experiments conducted over 30 years across various countries to test for discrimination in the labor, housing and product markets). [↑](#footnote-ref-248)
249. *Id.* [↑](#footnote-ref-249)
250. *See, e.g.,* Davidson, *supra* note 62, at 4. [↑](#footnote-ref-250)
251. *See, e.g.,* Johnston, *supra* note 75, at 894–95. [↑](#footnote-ref-251)
252. *See, e.g.*, Hayes & Schellenberg, *supra* note 235, at 17. [↑](#footnote-ref-252)