Styling Civil Rights: The Effect of § 1981 and the Public Accommodations Act on Black Women's Access to White Stylists and Salons

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"We must challenge the rigid ways of the past, recognizing–as Judge Benjamin Cardozo declared in 1932–that 'the agitations and the promptings of a changing civilization' demand more flexible legal forms and demand equally 'jurisprudence and philosophy adequate to justify the change.'"[1]

I. INTRODUCTION

White stylists and salons have denied service to Black[2] women for at least the past seventeen years.[3] This exclusion is reminiscent of the Reconstruction and Civil Rights eras, when states, individuals, and businesses discriminated against Blacks and ultimately labeled Blacks with the "badges and incidents of slavery and involuntary servitude."[4] The segregation perpetrated by salons not only affects the psyche of Black women

1. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 104 (BasicBooks 1992).
2. I recognize that there are numerous terms to describe an individual's race such as "African-American" or "Caucasian," but I chose to use the terms "Black" and "White" to maintain simplicity.
3. *See, e.g.*, Clark v. Creative Hairdressers, Inc., No. Civ.A.DKC 2005-0103, 2005 WL 3008511, at *1-3 (D. Md. Nov. 9, 2005) (alleging that defendants denied service to Blacks); Perry v. Command Performance, No. 89-2284, 1989 WL 143281, at *1 (E. Dist. Pa. Nov. 22, 1989) (alleging that Mrs. Perry, a black woman, was not serviced due to race).
4. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1335 (1952). I am aware that racial discrimination is not as horrific as slavery, but discrimination in the United States is a direct consequence of slavery. Therefore, I will suggest that when salons discriminate against Black women, it is directly related to the slavery and discrimination history of this country—and thus discrimination in salons or anywhere else is a badge and incident of slavery. It is ultimately a reminder of slavery and labels Black women with the "badges and incidents of slavery and involuntary servitude." *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1322 (2007) (asserting that the "badges and incidents of slavery interpretation of the [Thirteenth] Amendment requires an examination of whether a modern condition or form of discrimination is a lingering effect of the system of African slavery."). Professor Carter's article provides a very good and thorough discussion regarding courts' difficulty in defining a "badge and incident of slavery" and determining the power under the Thirteenth Amendment to eradicate the "badges and incidents of slavery."

but may also cause Black women to feel inferior.[5] Ultimately, the denial of service to Black women by White stylists and salons diminishes the effects of the laws enacted by the congressional legislature to promote equality and individual civil rights.

Ironically, the United States of America prides itself as a country promoting "liberty and justice for all."[6] Indeed, the American flag, which represents the "proud traditions of freedom, of equal opportunity,"[7] combined with the Pledge of Allegiance, "foster [this] national unity and pride."[8] Inherent in these principles is the belief that everyone is entitled to equal treatment. Therefore, Black women naturally should expect to walk into any salon and receive service from any hair stylist, even a White stylist, without incident.

Yet salons have failed to meet these simple and legitimate expectations. For example, Debbie Deavers Sturvisant is a Black woman in Springville, Alabama. She recently filed a complaint against Dillard's Department Store ("Dillard's") alleging racial discrimination by its hair salon.[9] The salon offered a "wash and set"[10] for twenty dollars;[11] however, Dillard's charged Ms. Sturvisant thirty-five dollars.[12] The complaint stated: "Dillard's charges significantly more for the same salon service, using the same products, for [Black] customers than that charged for [White] customers."[13] Ms. Sturvisant alleged that Dillard's determined its price scale for a "wash and set" based solely upon whether the customer was White or Black.[14] Accordingly, Ms. Sturvisant filed suit asking for relief pursuant to 42 U.S.C. § 1981,[15] a statute that prohibits discrimination in contractual relationships and provides for the full and equal benefit of all laws.[16]

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5. *See* B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 508-09 (2005) (stating that legalized segregation offended the notion of equality because it connoted the inferiority of Blacks).
6. 4 U.S.C. § 4 (2000) (stating the Pledge of Allegiance to the Flag: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.").
7. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 6 (2004) (quotations omitted).
8. *Id.*
9. Complaint at 7, Sturvisant v. Dillard's, Inc., No. 7:05-CV-00305 (N.D. Ala. filed Feb. 9, 2005). *See* Tom McArthur, *Hair Salon Charges Blacks More, Suit Says; Price Shouldn't Be Based on Stereotypes, Lawyer Says*, CHI. SUN TIMES, May 31, 2005, at 28 (explaining sections of the *Sturvisant v. Dillard's* complaint).
10. A "wash and set" consists of a customer having her hair washed, curled with rollers, and dried under a hooded hair dryer.
11. Complaint, *supra* note 9, at ¶ 16.
12. *Id.* at ¶ 15.
13. *Id.* at ¶ 10.
14. *Id.*
15. *Id.* at ¶ 25.
16. *See* 42 U.S.C. § 1981 (2000) ("(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges,

Ms. Sturvisant's experience is not an isolated incident.[17] Traditionally, Black women have had difficulty fitting into the "acceptable" standards of society.[18] White stylists' refusal to style Black women's hair is yet another hurdle that Black women have had to face in this multi-cultural society. Unfortunately, the legal system has not provided an effective remedy for Black women denied service by White stylists and salons.[19] These Black women typically petition for relief pursuant to § 1981 as amended by the Civil Rights Act of 1991[20] and the Public Accommodations Act of 1964.[21] Congress enacted § 1981 to provide protection to

terms, and conditions of the contractual relationship. (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.).

17. *See, e.g.*, Hewlett v. Premier Salons International, Inc., 185 F.R.D. 211, 214 (D. Md. 1997) (alleging that plaintiffs were told by defendants that "[w]e do not deal with [their] type or texture of hair").
18. *See, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 557 (stating that the club probably fired Chambers because she resisted to conform to white and middle-class morality); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383 (asserting that Black women are "conditioned by the extent to which their physical characteristics . . . approximate those of the dominant racial group").
19. *See, e.g.*, Harris v. Creative Hairdressers, Inc., No. Civ. JFM-04-199, 2005 WL 2138128, *1 (D. Md. Sept. 2, 2005) (granting summary judgment to the defendants whom plaintiff alleged discriminated against her); Perry v. Command Performance, No. 89-2284, 1989 WL 143281, at *3 (E. Dist. Pa. Nov. 22, 1989) (granting summary judgment to the defendants whom plaintiff alleged denied her service).
20. 42 U.S.C. § 1981 (2000).
21. 42 U.S.C. § 2000a (2000) (All relevant parts state: "(a) Equal access: All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin. (b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments: Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment at his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment. (c) Operations affecting commerce; criteria; 'commerce' defined: The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in this case of an establishment

Blacks against infringement of their civil rights from discrimination by public and private sources after the abolishment of slavery.[22] Congress enacted the Public Accommodations Act of 1964, 42 U.S.C. § 2000a, to prohibit discrimination or segregation in places of public accommodation.[23] Black women have relied on these statutes to provide an avenue to combat discrimination, but the courts' narrow construction and application of these statutes have only reinforced discrimination. Until the judicial or legislative branches provide adequate remedies,[24] these Black women likely will continue to endure this discriminatory and racist treatment.

Not receiving hair styling services may seem like a problem of marginal importance. However, this sort of discrimination is exactly the sort of discrimination that the critical race theorists seek to bring to the forefront. This paper will show that the experiences of these Black women present legitimate cognizable claims and provide an appropriate and effective basis for analyzing two anti-discrimination laws, § 1981 and § 2000a.[25] Part II explains the cultural significance of hair to Black women. Part III addresses the social stigmas and theories that may cause White stylists and salons to deny service to Black Women. Part IV discusses the legislative history of § 1981, while Part V reviews the United States Supreme Court's early judicial interpretation and application of § 1981. Part VI presents the re-birth of the "make and enforce" clause of § 1981 after amendments in the Civil Rights Act of 1991. This section criticizes the narrow reading of § 1981 that ignores subsection (b) which requires the "enjoyment of all benefits, privileges, terms and conditions of the contractual relation-

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described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State and the District of Columbia or a foreign country.").

22. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82 (2000)). *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991) (stating that one purpose of 42 U.S.C. § 1981 is to expand scope of relevant civil rights statutes); CONG. GLOBE, 39th Cong., 1st Sess. 1809, 1861 (1866).
23. 42 U.S.C. § 2000a (2000).
24. *See, e.g.*, U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XIV, § 1 (stating no state shall make a law or enforce a law that abridges the privileges and immunities of citizens of the United States); U.S. CONST. amend. XV, § 1 (stating the right to vote shall not be denied on account of race); U.S. CONST. amend. XIX (stating the right to vote shall not be denied on account of sex); Brown v. Bd. of Educ. of Topeka, 394 U.S. 294, 301 (1954) (allowing entry to public schools that is based on nondiscriminatory reasons).
25. *See* John O. Calmore, *Critical Race Theory, Archie Shep, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2161 (1992) (stating that critical race scholars seek to show that experiences of people of color are "legitimate, appropriate, and effective bases for analyzing the legal system and racial subordination.").

ship."[26] Moreover, this section encourages a broader interpretation of § 1981 which would include the recognition of discriminatory treatment of Black women in White hair salons during the contractual relationship. Specifically, this paper advocates that courts provide industry-specific standards to combat discrimination and provide the full protection embedded in § 1981. Part VII proposes a second alternative form of relief, through the application of the "full and equal benefit" clause of § 1981 to private parties, available to Black women who have been discriminated against by White hair salons. Part VIII proposes that Courts should expand the term "public accommodation" in 42 U.S.C. § 2000a to include hair salons.

II. INTERLOCKING OF HAIR AND HISTORY FOR BLACK WOMEN: AN EXPRESSION OF SELF

"Hair is central to every woman's identity, regardless of class, ethnicity or race, sexual orientation, or age."[27] Most women enjoy having their hair styled,[28] and most women spend an ample amount of time styling their hair or letting someone else style it.[29] In salons, women's hair not only receives adequate care, but also a woman's psyche is nurtured.[30] Accordingly, a woman's stylist provides more than just hair care; usually the stylist becomes a friend and confidant.[31]

For Black women, hair and history intertwine more deeply than for any other culture.[32] The history and importance of hair stretches from African societies of the past to present day culture.[33] "Early European[s] . . . reported the pride that many African societies placed on well-groomed hair."[34] In West African societies, the hairdresser held a distinct place in the community because West Africans believed that the hair contained a person's spirit.[35] The importance of hair continued throughout the slavery era. During slavery, one method used to dehumanize captives was to shave their heads.[36] Moreover, slave owners attempted to break the spirit

26. 42 U.S.C. § 1981(b) (2000).
27. Kathy Davis, *Good Hair Days*, 21 WOMEN'S REV. BOOKS 14, June 1, 2004 (book review).
28. *See* Sheba R. Wheeler, *Where Couture Meets Culture Black Women Look High and Low for a Salon that Can Treat Their Hair Right*, DENV. POST, May 2, 2004, at L03.
29. *See* Avis Thomas-Lester, *The Care & Nurturing of Black Women's Hair*, WASH. POST, Sept. 17, 2001, at C08 (discussing the frequency with which Black women go to the salon and the amount Black women spend on hair care products).
30. *See* Wheeler, *supra* note 28.
31. Mary Bishop, *Today, Black Hair Care is Limited Only by Imagination*, ROANOKE TIMES & WORLD NEWS, Apr. 30, 1998, at 1.
32. *See* Robyn-Denise Yourse, *Tressed with Pride Expert in Black Hair Shares Lifelong Fascination*, WASH. TIMES, Apr. 23, 2005, at B01 (noting the same is true not only for Black women but for Black men as well).
33. AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA *passim* (St. Martin's Griffin 2001).
34. Tianna Sanders, Lori Tharps, Elise Smith, Kendall Chapman & Ayana Byrd, *Happy to be Nappy*, CHI. SUN-TIMES, Mar. 14, 2001, at 56.
35. BYRD, *supra* note 33, at 5.
36. Sanders et al., *supra* note 34, at 56. *See* BYRD, *supra* note 33, at 10.

of slaves by referring to slaves' hair as animal fur.[37] Nevertheless, when slaves escaped or were released they often returned to their flamboyant and well-groomed hairstyles,[38] or they flaunted their unkempt hair to assert their "individuality and humanity in the repressive slave culture."[39] Hair was a symbol of pride, strength, and invincibility.

After slavery, the hair products market did not produce the combs, oils, and other products necessary for Black women to care for their hair.[40] Furthermore, the White beauty ideal of straight and long hair influenced Black women who ultimately took steps to straighten their hair.[41] Some commentators suggested this shift was most likely in response to popular White culture and the lack of a forum to celebrate Black hair and style.[42] Advertisers and retailers, Black and White, sold straightening products to Blacks.[43] The straightening products, most of which were damaging to the hair,[44] promised societal upward mobility to Black women. These products helped Whites become more comfortable with the presence of Blacks because use of the products changed Blacks' hair to be more similar to the White beauty ideal.[45] Some Black women pressed[46] their hair instead of using chemicals, internalizing White standards as less threatening and more acceptable.[47] Yet other Black women did not conform to the White standards. They styled their hair in natural hairstyles[48] and were often criticized for their non-conformity.[49] For example, braided hairstyles have

37. BYRD, *supra* note 33, at 14.
38. *Id.* at 14-15. *See* BILL GASKINS, GOOD AND BAD HAIR *passim* (Rutgers University Press 1997) (showing beautiful photographs of Black male and female hair styles).
39. BYRD, *supra* note 33, at 15. *See* ROSE WEITZ, RAPUNZEL'S DAUGHTERS: WHAT WOMEN'S HAIR TELLS US ABOUT WOMEN'S LIVES 9 (Farrar, Straus & Giroux 2004) (stating that styling one's hair is one of few ways to express identity and pride).
40. BYRD, *supra* note 33, at 17.
41. *Id.* at 16-17.
42. *Id.* at 16; WEITZ, *supra* note 39, at 16.
43. BYRD, *supra* note 33, at 23. A particularly important Black figure selling hair products to Black women was Sarah McWilliams, later known as Madam C.J. Walker; she produced products that provided a safer alternative to achieve the white ideal goal. *Id.* at 33-35.
44. *Id.* at 23; *See Black Women Awarded $4.5 Million in Hair Care Suit*, JET, Jan. 20, 1997, at 12 (discussing a settlement between World Rio Corporation and nearly 53,000 Black women who used the relaxer made by World Rio that caused their hair to turn green and fall out).
45. *See* BYRD, *supra* note 33, at 27-28 (stating the assimilation to the White aesthetic was the next best option besides being White or "passing" as White).
46. *See* JULIA KIRK BLACKWELDER, STYLING JIM CROW: AFRICAN AMERICAN BEAUTY TRAINING DURING SEGREGATION 19 (Texas A&M University Press 2003) (describing the process to press hair: "Beautician slid the hair through the [sic] her oiled fingers and then painstakingly combed the hair with a long-toothed, heated metal comb. The hairdresser employed the 'pressing' comb to separate the hair strands and to push them flat by pressing the teeth nearly parallel to the hair while pulling the hair against the base of the comb and through its teeth.").
47. Sanders et al., *supra* note 34, at 56.
48. Natural hairstyles are styles such as afros, dreadlocks, and braids.
49. *See* Caldwell, *supra* note 18, at 384-85 (stating that the Afro hairstyles were viewed as too unusual, too "Black"); Vivian Chen, *Cleary Gottlieb has a Bad Hair Day: Talk about a Glamour Don't*, NAT'L L.J., Aug. 27, 2007 (quoting an editor from Glamour magazine as saying "Dreadlocks, how truly dreadful" and "No offense, but those 'political' hairstyles really have to go.").

been regarded as an "extreme and unusual hairstyle," and courts have upheld the exclusion of the braided hairstyle from the workplace.[50] Natural hairstyles are viewed as a political statement,[51] a statement of self-assurance, or confidence,[52] but ultimately a symbol of rebellion.

The significance of Black hair is not only relevant for historical or political purposes, but is also an issue in popular culture as well. For example, Grammy award winning artist India.Arie released a song in 2006 entitled "I Am Not My Hair."[53] This song urged and encouraged individuals to look beyond hair style choices to see the person inside.[54] Oscar winning actress Halle Berry caused quite a stir in the spring of 2007, when she announced that she would shave her head for a film appropriately titled *Nappily Ever After*.[55] In fact, according to the press release, Halle Berry's character will have to deal with people's perception and how her hair defined her.[56] Strangely enough, neither White artists nor White actresses have to defend their character, views, or self-worth due to hair style change; they only have to defend against the occasional, "does it look good" inquiry.[57] Popular culture only reinforces the stereotypes and stigmas that are intertwined with a Black woman's hair choices.

Therefore, Black women's hair is not only important for appearance, but their hair may determine how they will gain acceptance into the dom-

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50. Caldwell, *supra* note 18, at 367.
51. *Id.* at 384-85.
52. *See* Sanders et al., *supra* note 34, at 56.
53. INDIA.ARIE, *I Am Not My Hair*, *on* TESTIMONY: VOL. 1, LIFE & RELATIONSHIP (Motown Records 2006).
54. *Id*. (Verse 1 - "Little girl with the press and curls, age 8 I got a jerry curl, 13 and I got a relaxer, I was the source of so much laughter, 15 when it all broke off, 18 when I went all natural, February 2002 I went on and did what I had to do, cuz it was time to change my life to become the woman that I am inside, 97 dread locks all grown, I looked in the mirror for the first time and saw that (hey)"; Chorus – "I am not my hair, I am not this skin, I am not your expectations (no), I am not my hair, I am not this skin, I am the soul that lives within"; Verse 2 – "Good hair means curls and waves, bad hair means you look like a slave, at the turn of the century, its time for use to redefine who we be, you can shave it off like an African beauty, got in on lock like Bob Marley, you can rock it straight like Oprah Winfrey, it's not what's on your head, it's what's underneath (say hey)"; Chorus; Hook – "Does the way I wear my hair make me a better person, does the way I wear my hair make me a better friend, does the way I wear my hair determine my integrity, expressing my creativity"; Verse 3 – "Breast cancer and chemotherapy took away her crown and glory, she promised God if she was to survive, she would enjoy everyday of her life, on national television her diamond eyes are sparkling, bald-headed like a full moon shining, singing out to the whole wide world like hey"; Chorus (repeat)).
55. Reuters, *Halle Berry Set to go Bald for a New Movie*, CNN.Com, Apr. 6, 2007.
56. *Id*. *See* Robin Givhan, *Why A Hairstyle Made Headlines*, WASH. POST, Apr. 7, 2006, at C01 (discussing the incident involving Cynthia McKinney and her different hairstyles).
57. Note that in 2007 when Katie Holmes cut her hair into a bob, CNN did not find it necessary to report the story, nor has Katie Holmes had to defend herself, beyond the occasional interview in *People* or *In Style* magazines regarding the new bob becoming a great fashion statement. I am aware of the media's obsession with Britney Spears' shaved head; however, I believe reasonable minds would agree that the media's obsession with Britney Spears' shaved head is related to her sporadic and awkward public appearances and the media's obsession with her, not her choice of hair style.

inant White society.[58] Hairstyles have become symbolic of either freedom from or oppression by White American culture.[59] Accordingly, the visual standards of White society "establish a boundary between black and white, good and bad, pure and evil, true and false, justifying not only the aesthetic or ideal or racial superiority, but also the social, economic, and political structures of domination that result from this ideal."[60] This dichotomy between acceptable and non-acceptable hairstyles has contributed to the "good hair" and "bad hair" complex.[61] "Good hair"[62] is commonly defined as long, straight, or slightly curly hair, while "bad hair"[63] is thick, nappy, tightly curled, kinky hair. Arguably the "bad hair – good hair" complex within the Black community is an extension of the favoritism that White society has given to White-like features. Undoubtedly this multitude of concepts, stereotypes, and images contribute to White stylists' and salons' hesitation to serve Black women.[64]

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58. *See* Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and a Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 139 (2001) (stating that "Whiteness is the standard by which all should be measured"); Wheeler, *supra* note 28, at L03.
59. WEITZ, *supra* note 39, at 9.
60. Caldwell, *supra* note 18, at 392.
61. *See* Turner, *supra* note 58, at 116 (stating that "One's perception of having either 'good' or 'bad' hair has an impact on an individual's emotional well-being."). Furthermore, the Yale University study's Dr. Marianne LaFrance noted that: "[Having] . . . 'bad hair' negatively influences self-esteem, brings out social insecurities and causes people to concentrate on negative aspects of themselves; the effects of thinking about bad hair go beyond being concerned with how one looks or feeling a little displeased. Thoughts about bad hair have the effect of making positive beliefs about oneself recede into the background and causing negative traits to move to the forefront; Bad hair leads people to think less positively about themselves about who and what they are. It also causes them to see more character flaws that have little to do with how one looks; Thinking about bad hair . . . spills[s] over into pessimistic thinking about being able to accomplish what one wants to do; Bad hair increases various indicators of social insecurity such as self consciousness and a greater inclination to be unsociable; Women, in particular . . . [showed] signs of greater embarrassment when they had bad hair. Specifically, women report being more self-conscious, more embarrassed, more ashamed, and more bothered when they were primed to think about having bad hair." *Id.*
62. Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACKLETTER L.J. 57, 83 n.7 (2001); Thomas E. Hanson, Jr., Note, *Rising Above the Past: Affirmative Action as a Necessary Means of Raising the Black Standard of Living as Well as Self-Esteem*, 16 B.C. THIRD WORLD L.J. 107, 124 (1996).
63. Kimberly Jade Norwood, *The Virulence of BlackThink and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143, 169 n.74 (2004-05); Joan R. Tarpley, *Blackwomen, Sexual Myth, and Jurisprudence*, 69 TEMP. L. REV. 1343, 1378-79 (1996); Vednita Nelson, *Prostitution: Where Racism & Sexism Intersect*, 1 MICH. J. GENDER & L. 81, 86 (1993).
64. I am in no way asserting that Black stylists are not qualified to style Black women's hair. Nonetheless, a Black woman should have the option of patronizing any salon or having any stylist style her hair. *See* GASKINS, *supra* note 38 (stating that "attending of Black hair on a Black head by Black hands is one of our cultural provisions").

III. DENIAL OF SERVICE TO BLACK FEMALE PATRONS

Blacks and Whites have traditionally been segregated in various aspects of their lives, for example, in their places of worship.[65] Historically, hair salons have also been racially segregated.[66] Nonetheless, as with churches, some Blacks and Whites choose to break the mold. They choose to integrate and trust a stylist of a different race to handle their hair.[67] More often than not, Black stylists serve White women without any complaints.[68] The same does not apply to White stylists servicing Black women. The classic response given to Black patrons by White stylists is, "We do not do Black hair."[69]

A. Hairy Social Connotations

Black hair is commonly thought of as kinky hair or "bad hair."[70] Stylists and salons commonly assume that all Black women's hair is the same because the women are Black.[71] Actually, "black hair" can be curly, wavy, long, short, straight, textured, fine, thick, medium, coarse, oily, dry or a combination of characteristics.[72] Generally, there are fifteen to twenty different types of hair on Black women, with a number of different types on one head.[73] There is no standard type of "black hair."

Nevertheless, many White stylists and salons assume all Black women have the same type of hair. The same generalization is not given to White women whose hair may come in five to six different types.[74] Hair type is not a definite characteristic of race; there are no genetic characteristics common to all Black people or all White people.[75] Anyone can have the stereotypical curly pattern of "black hair" and not be Black.[76] Substantially curly hair is present in all races to varying degrees.[77] Nevertheless,

65. Anna Borgman, *When It Comes to Their Hair, Blacks, Whites Often Part Ways*, WASH. POST, Aug. 25, 1996, at B01.
66. *Id.* The same applies to Black males, but this article focuses on the issues of Black women. *See* Grier v. Specialized Skills, 326 F. Supp. 856, 857 (W.D.N.C. 1971) (showing Black males wanting to have their hair cut at a White barber school).
67. Meredith Clark, *We Relax, We Braid, We Lock, We go Natural. And We Search for the Hairdresser who Really Gets Us and Our Black Hair; Quest for Great Tresses*, AUSTIN AMER. STATESMAN, Aug. 18, 2005, at E1.
68. *See* Ayana Byrd, *Are We Losing Ground in the Black Hair Care Industry*, HYDE PARK CITIZEN, Apr. 25, 2002, at 8 (stating that Black stylists were in demand to style White people's hair).
69. James Ragland, *Hair Salons are Not Models of Integration, Either*, KNIGHT RIDDER TRIBUNE NEWS SERV., Jan. 10, 2005, at 1. *See Simpson Jurors Ask For and Get New Beautician*, JET, May 15, 1995, at 12 (discussing that several of the Black female jurors felt that the beautician was not familiar with Black hair care).
70. Tarpley, *supra* note 63, at 1379; Turner, *supra* note 58, at 116.
71. Ragland, *supra* note 69, at 1.
72. *See* Borgman, *supra* note 65, at B01.
73. David Mitchell, *Fragile Black Hair Needs Special Handling*, TORONTO STAR, Sept. 13, 1988, at J2.
74. *Id.*
75. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994).
76. Tom Long, *Feisty Hairdresser: Known as the Vidal Sassoon of Boston's African-American Community*, MONTREAL GAZETTE, June 30, 2005, at C7.
77. Grier v. Specialized Skills, 326 F. Supp. 856, 859 (W.D.N.C. 1971).

many White stylists will automatically assume that they cannot style "black hair."[78] Professionally trained hair stylists should not be allowed to use that as an excuse: "Hair is hair."[79] In fact, there is no proof that a well-trained stylist is unable to style a Black person's hair or anyone's hair.[80] Different textures and types of hair require different techniques, which is different from the assertion that "black hair" requires different techniques than "white hair."

B. Lack of Legitimate Connection Between Race and Hair

The historical and societal excuses for the discriminatory treatment of Black women in salons are an extension of the outdated biological race theory. This theory defines a race as a "distinct group of people[ ] who share certain hereditary physical characteristics such as skin color, hair texture and facial features."[81] This view asserts that physical characteristics vary little within a race but greatly between different races.[82] Realistically, people do not fit neatly into existing racial categories.[83] More often than not, people will have characteristics typical of a number of different racial classifications.[84] In fact, intra-race differences are often more extreme than the differences between races.[85] Efforts to define race by physical characteristics like skin color, hair texture, or jaw size have been futile.[86] In actuality "race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions."[87] Therefore, race is a social construction.[88] As such, the basis for racial categorization should be human interaction rather than physical differentiation.[89]

Nevertheless, judgments about an individual's physical characteristics are made from their racial category.[90] These categories come "to power our belief system, our value judgments, our thought processes, and our informal classifications regarding the nature of individuals in a particular racial category."[91] By adhering to these views the "socially dominant race prescribes a racial category to others and relegates members of that cate-

78. Ragland, *supra* note 69, at 1; Wheeler, *supra* note 28.
79. Clark, *supra* note 67, at E1.
80. *See Grier*, 326 F. Supp. at 859 (stating that "[t]here is no indication apparent in this text book that barbers trained in the Charlotte Barber School would not be qualified to cut the varying types of Negroid hair.").
81. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW § 1.3, at 3 (Aspen Law & Business 2000) (internal citations omitted).
82. *Id.*
83. *Id.* at 5.
84. *Id.*
85. Ken Nakasu Davison, Note & Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 174 (2005).
86. Lopez, *supra* note 75, at 14-15.
87. *Id*. at 7.
88. *Id.* at 27.
89. *Id.*
90. Bell, *supra* note 81, at 5.
91. *Id*. (internal citations omitted).

gory to an inferior social position."[92] Unfortunately, the negative labeling given to "black hair" does more than provide an unfavorable label; it affects a Black woman's emotional well-being.[93] Once this negative view is abolished and rejected, White stylists can begin to treat Black women as individuals. By viewing their customers as individuals, White stylists can determine how to style a Black woman's hair by evaluating her individual hair texture instead of her race.[94] The law is a creation of human beings and, therefore, reflects society. Society has promulgated and embraced the stereotypical notions of "black hair" long enough. The legislature has provided the necessary tools to remedy discrimination, but now the judiciary must interpret and enforce the law as the legislature intended.[95]

IV. LEGISLATIVE HISTORY OF § 1981

The legislative history of § 1981 demonstrates that § 1981 was a direct response by Congress to the effects of slavery. Congress was aware that to ensure the civil rights of all individuals, it would need to regulate private as well as state action. Congress officially eradicated slavery by adopting the Thirteenth Amendment.[96] After declaring the end of slavery, most of the southern legislatures enacted Black Codes.[97] The Black Codes severely restricted the freedoms of Blacks and caused Blacks to be a "legally [ ] separate and oppressed class."[98] The aftermath of the Civil War encouraged politicians to adopt a series of constitutional amendments and federal statutes[99] that were "necessary and proper for abolishing all

92. *Id.* § 1.6, at 13 (quoting John A. Powell, *The Racing of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 104-05 (1997)). Those consequences would be especially difficult to tolerate for individuals who may have physical characteristic of one race, but identify and claim a different race. Bell, *supra* note 81, § 1.7, at 20.

93. Turner, *supra* note 58, at 116.

94. *See* Lopez, *supra* note 75, at 16 (quoting Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 96 (1990)) (stating that the belief that race is determinative of the physical attributes of individuals is synonymous with believing that "Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves").

95. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 120-21 (Yale University Press 1957) (1921) (stating the "general line of direction for the judge: . . . he ought to shape his judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question . . . disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him.").

96. U.S. CONST. amend. XIII (Section 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; Section 2: "Congress shall have power to enforce this article by appropriate legislation").

97. Gressman, *supra* note 4, at 1325. This article provides one of the most comprehensive analyses of the legislative history surrounding the Civil Rights Act of 1886 and early judicial interpretation of the Act. I relied heavily upon this article for this section of the paper.

98. *Id.*

99. *Id.* at 1323.

badges and incidents of slavery in the United States."[100] Congress sought to protect "the civil rights and immunities of all people directly through the federal government."[101] To do so, Congress specifically drafted and passed the Civil Rights Act of 1866.[102] To strengthen the Civil Rights Act of 1866, Congress passed other civil rights statutes in 1870, 1871, and 1875,[103] and also passed the Fourteenth and Fifteenth Amendments.[104] These amendments and statutes forced the federal government to regulate the civil rights of individuals, and the amendments and statutes were intended to attack private action and state action.[105]

Accordingly, Congress intended neither the Fourteenth Amendment nor the Civil Rights Act of 1866 to be limited to state action; Congress intended the legislation to cover private action as well.[106] The federal government, through the Civil Rights Act of 1866, guaranteed all individuals the right to: (1) make and enforce contracts; (2) buy, sell, and own realty and personalty; (3) sue, be parties and give evidence; and (4) receive the full and equal benefit of all laws and proceedings for the security of persons and property.[107] Congress wanted those rights to be permanent and

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100. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). Arguably the Thirteenth Amendment gave Congress virtually unlimited power to enact laws for the protection of Blacks in every state. *See* Runyon v. McCrary, 427 U.S. 160, 179 (1976); *Jones*, 392 U.S. at 440.

101. Gressman, *supra* note 4, at 1326.

102. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82 (2000)) (Civil Rights Act of 1866, Relevant Parts of Section 1: "That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Relevant Parts of Section 2: "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, expect as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.").

103. Gressman, *supra* note 4, at 1328, 1333-34.

104. *Id.* at 1324, 1333.

105. *Id.* at 1323; Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 984 (2002).

106. *See* Gressman, *supra* note 4, at 1330 (stating that the "demonstrated fact that violations of civil rights were primarily the product of individual rather than state action made it unreasonable for the committee to limit the scope of the amendment to state action . . . . The subsequent debates in Congress implicitly assumed that individual action, not just state action, was covered by the amendment.").

107. *Id*. at 1326.

not subject to repeal by subsequent legislative bodies.[108] With the advent of the Fourteenth Amendment, Congress attempted to solidify the Civil Rights Act of 1866 into the United States Constitution.[109] Indeed, Congress intended to incorporate the provisions and implications of the Civil Rights Act of 1866 into the Fourteenth Amendment.[110] The subsequent Civil Rights Act of 1875 embodied and articulated the intent of Congress when they created the Reconstruction amendments and statutes.[111] The Civil Rights Act of 1875 would "protect all citizens in their civil and legal rights."[112] This was the most penetrating federal enactment.[113] In this Act it was clear that Congress intended to protect everyone, especially newly freed Black people, from unwarranted intrusion into their civil rights from all parties or entities. Although Congress passed multiple statutes, such as the Civil Rights Act of 1866, and the Fourteenth Amendment with the intention of "combat[ing] the Black Codes and other laws and practices limiting the freedom guaranteed by the Thirteenth Amendment"[114] and "remov[ing] the badges and incidents of slavery and involuntary servitude,"[115] the judicial branch's construction of these statutes and amendments were arguably both narrow and contrary to the intent of Congress.[116]

V. IMPLICATIONS OF THE JUDICIAL INTERPRETATION OF § 1981

A. Judicial Erosion of the Intent of Congress

In a series of cases during the late 1800s, the United States Supreme Court effectively unraveled ten years of congressional legislation. The judicial branch initially eroded the broad purposes of the Fourteenth Amendment. Congress intended the Fourteenth Amendment to reach private action and to encompass individual rights including the ones explicitly listed in the Civil Rights Act of 1866.[117] In the *Slaughterhouse Cases*,[118] the United States Supreme Court decided "only national citizenship received any protection from the privileges and immunities clause and that such national citizenship did not comprehend any of the fundamental rights of the individual."[119] The privileges and immunities clause would

108. *Id.* at 1329.
109. *See id.* (stating that the motivating factor of the Fourteenth Amendment was the doubtfulness of the permanent status of the Civil Rights Act of 1866 and the inadequacies of the Thirteenth Amendment).
110. *Id.*
111. *See id.* at 1334 (stating that the Civil Rights Act of 1875 was the capstone of the congressional civil rights program).
112. *Id.*
113. *Id.* at 1335.
114. Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 123 (2005).
115. Gressman, *supra* note 4, at 1335.
116. *See id.* at 1337 (stating that "soon the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial rewriting of their efforts.").
117. *Id.* at 1333.
118. Slaughterhouse Cases, 83 U.S. 36 (1872).
119. Gressman, *supra* note 4, at 1337.

only protect the limited rights that arose between a citizen and the federal government.[120] Those limited rights had "no practical relationship to the cruel violence which marked the infringements of civil rights in the South and which gave rise to the amendment."[121] The *Slaughterhouse Cases* effectively limited the breadth of the civil rights statutes by limiting the breadth of the Fourteenth Amendment.

An example of the limitation on civil rights imposed by the *Slaughter-House Cases* is in *United States v. Cruikshank*.[122] In *Cruikshank*, a posse of White individuals threatened, injured, oppressed, and intimidated several Black people to "hinder and prevent them in their free exercise and enjoyment of rights and privileges 'granted and secured' to them 'in common with all other good citizens of the United States by the constitution and laws of the United States.'"[123] The Court in a later case stated that "the provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals."[124] Accordingly, the elimination of private action from the reach of the Fourteenth Amendment severely limited Congress's ability to determine the badges and incidents of slavery and enact appropriate legislation pursuant to section five of the Fourteenth Amendment.[125]

Therefore, the prior legislation by Congress, including the Civil Rights Act of 1866, was only allowed to regulate the relationship between the individual and the federal government.[126] The Fourteenth Amendment no longer "add[ed] anything to the rights which one citizen ha[d] under the Constitution against another."[127] Hence, the Thirteenth Amendment, "while applicable to private action, 'simply abolished slavery and involuntary servitude.'"[128] The limiting of the Fourteenth Amendment effectively limited the Thirteenth Amendment, as the Fourteenth Amendment was not used to help secure civil rights and remove the badges and incidents of slavery and involuntary servitude between private individuals. So, although the fifth section of the Fourteenth Amendment was designed to allow legislative protection of basic civil rights, the Court's decisions limited its use only to the adoption of legislation that corrected the effects

120. *Id.* at 1338 (stating that those rights included the right to sue in federal courts and the right to protection abroad and on the high seas).

121. *Id.*

122. United States v. Cruikshank, 92 U.S. 542 (1875).

123. *Id.* at 548.

124. Gressman, *supra* note 4, at 1339 (quoting Virginia v. Rives, 100 U.S. 313, 318 (1879)).

125. *See* Runyon v. McCrary, 427 U.S. 160, 170 (1976); Gressman, *supra* note 4, at 1340. *See generally* U.S. CONST. amend. XIV (Relevant parts state: "Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

126. *See* Gressman, *supra* note 4, at 1339.

127. *Id.* (quoting *Cruikshank*).

128. *Id.* at 1340 (quoting United States v. Harris, 106 U.S. 629 (1883)).

of state laws on actions prohibited in the first section of the amendment with no extension to private acts.[129]

After substantially limiting the scope of the Fourteenth Amendment—and, hence, the effectiveness of other civil rights statutes—the Court explicitly invalidated the Civil Rights Act of 1875 in *The Civil Rights Cases*.[130] The Civil Rights Act of 1875[131] sought to "protect all citizens in their civil and legal rights"[132] by attempting to regulate "'social rights' and private interactions between individual citizens," such as discrimination in places of public accommodation.[133] Although the Court agreed that the Thirteenth Amendment was applicable to private individuals and that Congress had the power to outlaw badges and incidents of slavery, the Court did not find that the denial of admission to an inn or theater due to race was a result of the slavery era.[134] The Court further determined that even the Civil Rights Act of 1866 did not "attempt to cover" the "social rights of man and races in the community."[135]

These cases effectively ignored the intent behind the adoption of the amendments and statutes. The protection of basic civil rights was transferred back to the realm of the states, exactly what the legislators had sought to prevent.[136] This decision put the liberty and equality of Blacks at risk; consequently, individuals, Congress, and the judicial branch have been struggling to apply the original intent of Congress ever since.

B. Limited Realization of Congress's Intent of § 1981

The 39th Congress from 1865-1867, especially Senator Trumbull, wanted the Civil Rights Act of 1866 to be construed broadly to "secure for all men, whatever their race or color, what the Senator called the 'great fundamental rights.'"[137] Consequently, Congress passed the bill with the intention of "approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act."[138] This included not only discrimination by law but also discrimination by local custom or prejudice,[139] and any other interference from any

129. *See id.* at 1341.
130. The Civil Rights Cases, 109 U.S. 3 (1883).
131. The Civil Rights Act of 1875, 18 Stat. 335 (1875) (Section 1 provides "That all person within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.").
132. This phrase is taken from the title of the act. *Id.* at 335.
133. Richardson, *supra* note 114, at 124.
134. *See* Gressman, *supra* note 4, at 1341 (quoting *The Civil Rights Cases*).
135. *Id.* (quoting *The Civil Rights Cases*).
136. *See id.* at 1340-41. *See also* Richardson, *supra* note 114, at 125 (stating that the decision in *The Civil Rights Cases* "ushered in an era of restrictive reading of all civil rights laws . . . [and] Congress's ability under the Thirteenth and Fourteenth Amendments to pass legislation aimed at eradicating 'the badges and incidents' of slavery").
137. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968).
138. *Id.* at 435.
139. *See* Beermann, *supra* note 105, at 993.

source, private or government.[140] Eventually, the application of 42 U.S.C. § 1982[141] to private parties in *Jones v. Alfred H. Mayer Co.*[142] opened the door for the application of § 1981 to private parties in *Runyon v. McCrary*.[143]

The issue in *Runyon* was whether two private schools could exclude qualified students solely because the children were Black.[144] In *Runyon*, the Court stated that the Civil Rights Act of 1866 was designed to "prohibit all racial discrimination whether or not under color of law, with respect to the rights enumerated therein."[145] Furthermore, *Runyon* held that the Civil Rights Act of 1866 prohibits racial discrimination in the making and enforcement of private contracts,[146] and therefore the "statute [§ 1981] is a valid exercise of Congress's power to enforce the Thirteenth Amendment."[147] The schools' racial exclusion and refusal to offer educational services on an equal basis to White and Black students "amount[ed] to a classic violation of § 1981."[148] Nearly one hundred years after the *Slaughterhouse Cases*, the Court finally acknowledged the applicability of § 1981 to private parties as the legislature had intended.

However, the excitement of having both statutes derived from the Civil Rights Act of 1886—§ 1981 and § 1982—reach the intended potential of applying to private parties was short-lived. In 1989, the Supreme Court decided *Patterson v. McLean Credit Union*.[149] The Petitioner, a Black woman

140. *See Jones*, 392 U.S. at 423-24.
141. 42 U.S.C. § 1982 (2005) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").
142. *Jones*, 392 U.S. at 439. The Respondents refused to sell the Petitioner, a Black man, a home because of the Petitioner's race. *Id.* at 412. The Court held that 42 U.S.C. § 1982 is applicable to private parties. *Id.* at 439. Congress enacted section 1 of the Civil Rights Act of 1866 so Blacks could equally enjoy theses rights as Whites through the United States and to stop interference from any source whatsoever, whether government or private. *See id.* at 423. Furthermore, the continuation of the Act in Section 2 shows that Section 1 was intended to prevent any interference by private and government parties because Section 2 explicitly grants protection from interference under "color of any law." *See id.* at 424-26 (quoting § 2). Furthermore, Section 2 specifically imposes criminal sanctions on those actions under "color of any law" and the legislature specifically wanted to exempt private citizens from the criminal sanction clause. *See id.* at 425; *see also id* at 426 n.33. Therefore, it is obvious that Congress intended Section 1 to prevent all racially motivated denial of the rights listed in the statute and only those rights deprived in Section 2 are criminally punishable. *See id.* at 426; *see also* Tillman v. Wheaton-Recreation Ass'n, 410 U.S. 431, 439-40 (1973) (stating that the language of 42 U.S.C. § 1981 and § 1982 is traceable to the Civil Rights Act of 1866, so there is no reason to construe 42 U.S.C. § 1981 and § 1982 differently).
143. Runyon v. McCrary, 427 U.S. 160, 168 (1976).
144. *Id.* at 163. The Court noted that in the contractual relationship between the petitioners and the respondents, "the schools would have received payments for services rendered and the prospective students would have received instruction in return for the payments." *Id.* at 172. It should be noted the Petitioners mailed advertisements to Respondents' home and advertised in the *Yellow Pages*. *See id.* at 165.
145. *Id.* at 170 (quoting *Jones*, 392 U.S. at 436).
146. *Runyon*, 427 U.S. at 168.
147. Beermann, *supra* note 105, at 996.
148. *Runyon*, 427 U.S. at 172.
149. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

named Brenda Gail Patterson ("Patterson"), alleged that her employer, McLean Credit Union, the Respondent, violated § 1981.[150] Specifically, Patterson alleged that the employer harassed her, failed to promote her, and discharged her because of her race.[151] In *Patterson*, the Court considered overruling *Runyon*, but ultimately decided that prohibiting racial discrimination in the making and enforcement of private contracts is consistent "with the prevailing sense of justice . . . [and] with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin."[152] The Court held in *Patterson* that § 1981 covers only conduct at the initial formation of the contract and conduct that impairs the right to enforce contractual obligations through legal process.[153] The statute does not apply to post-formation conduct.[154] Hence, Patterson's claims based on racial harassment and racially motivated discharge were not actionable under § 1981 because they did not "implicate the 'making or enforcement' of the private contract."[155] The Court effectively limited the scope of § 1981, and the original intent of Congress was once again ignored.

C. Negative Effects of Judicial Interpretation on Black Women Patronizing White Salons

In *Perry v. Command Performance*[156] in 1990, the *Patterson* analysis negatively affected a Black hair patron in her quest to seek hair services at a White salon—and thus perpetuated conduct that Congress sought to eradicate when enacting 42 U.S.C. § 1981.[157] In 1987, Mrs. Edith Perry, a Black woman, entered Command Performance, a salon located in the King of Prussia Mall in Pennsylvania, for a "wash and set."[158] Mrs. Perry's husband had previously called Command Performance and made her an appointment.[159] Mrs. Perry's appointment was with Ms. Helene Kugler, a White stylist.[160] Ms. Kugler was not feeling well and asked Mrs. Perry if another White stylist, Ms. Beth Abbott,[161] would style Mrs. Perry's

150. *Id.* at 164.
151. *Id.*
152. *Id.* at 171, 174.
153. *See id.* at 179.
154. *See id.* at 177.
155. Beermann, *supra* note 105, at 1000 (quoting *Patterson*, 491 U.S. at 176-77).
156. Perry v. Command Performance, No. 89-2284, 1989 WL 143281 (E.D. Pa. 1989), *vacated,* 913 F.2d 99 (3d Cir. 1990), *aff'd,* No. 89-2284, 1991 WL 46475 (E.D. Pa. Mar 27, 1991), *aff'd without reported opinion*, 945 F.2d 395 (3d Cir. 1991). For further discussion of the case, see generally David Culp, *Corporate Irresponsibility: A Return to the Back of the Bus*, 30 CAL. W. L. REV. 93 (1993). The hair salon cases require a thorough recitation of the facts to understand the breadth of the problem. The same treatment will be given to all the hair salon cases referred to in this Article.
157. *See Jones*, 392 U.S. at 440 (showing from the legislative history that Senator Trumbull intended the Civil Rights Act to "destroy all these discriminations in civil rights against the [B]lack man").
158. Perry v. Command Performance, 913 F.2d 99, 100 (3d Cir. 1990).
159. *Id.*
160. *Id.*
161. Culp, *supra* note 156, at 93-94. Ms. Abbott had more than nine years of experience as a hair stylist. She never intended on providing services to a Black person and with

hair.[162] Mrs. Perry agreed. When Ms. Kugler asked Ms. Abbott to service Mrs. Perry, Ms. Abbott refused.[163] Ms. Abbott exclaimed, among other comments, "I don't do black hair!"[164] Mrs. Perry became distraught and began to cry.[165] Later, her husband escorted Mrs. Perry from the salon.[166] Afterwards, Command Performance sent Mrs. Perry a gift certificate,[167] but the damage to Mrs. Perry's psyche was irreparable, as this incident labeled Mrs. Perry with a badge of slavery.[168]

Command Performance actively solicited Black patrons through its advertisements.[169] Nonetheless, the salon did not take steps to ensure that their stylists could style Black people's hair even though Pennsylvania law requires a hair stylist to style all types of hair regardless of a person's race or color.[170] Instead, Command Performance employed a Black stylist who primarily served the Black clientele.[171] This incident screamed of discrimination, but, according to the law articulated in *Patterson*, the courts were not able to award Mrs. Perry a victory.[172]

Mrs. Perry brought a claim in federal court alleging a "federal claim arising under 42 U.S.C. § 1981 and a pendent state law claim of intentional infliction of emotional distress."[173] When the district court ruled against Mrs. Perry's claim, it found that Command Performance made a contract on "racially neutral terms" with the Perry's.[174] Furthermore, the

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over 22,000 patrons, she had never provided services to a Black person. But Ms. Abbott had never denied service to a white person. *Id.*

162. *Perry*, 913 F.2d at 100.
163. *Id.*
164. *Id.* Ms. Abbott's exact words were: "No, no, no, no! I don't do black hair. No, no, no, no! Not today! I just don't do black people's hair! Oh, no, I'm not going to do your hair, I'm from New Hampshire and I don't deal with blacks!"
165. *Id.*
166. *Id.*
167. Culp, *supra* note 156, at 96.
168. *See id.* at 94-96 (During the incident Mrs. Perry stated, "How can you say that to me? All I wanted was a wash and set." After the incident Mrs. Perry sought medical treatment for both physical and mental problems, as Mrs. Perry suffered from hives, insomnia, and poor performance at work.); *id.* at 95-96 (stating that the degrading incident at Command Performance reminded Mrs. Perry of an incident when she was five years old and had to move to the back of the bus because of her race); *see generally* Carter, Jr., *supra* note 4 (discussing badges and incidents of slavery).
169. *See* Culp, *supra* note 156, at 95.
170. *Id.*
171. *Id.*
172. Perry v. Command Performance, 945 F.2d 395 (3d Cir. 1991) (affirming judgment in favor of Defendant, Command Performance).
173. Perry v. Command Performance, No. 89-2284, 1989 WL 143281 *1 (E.D. Pa. 1989). The federal claims having been ruled on, the district court declined to exercise its pendent jurisdiction over the state law claims. *See id.* at *2. It is likely, however, that Mrs. Perry's state law claim for intentional infliction of emotional distress would have been successful, since she suffered from physical injuries due to the emotional distress caused by Command Performance. In Pennsylvania, if a plaintiff wants to recover for intentional infliction of emotional distress, there must be physical injuries or impact resulting from the fright, nervous shock, or mental or emotional disturbances or distress. *See, e.g.,* Rambo v. Greene, No. 03894, 2005 WL 579943, *3 (Pa. Com. Pl. Feb. 28, 2005); Friend v. Saldana, No. 448-1993, 1995 WL 610269 (Pa. Com. Pl. Feb. 13, 1995).
174. *Perry*, 913 F.2d at 101.

district court agreed with the Supreme Court in *Patterson* stating "section 1981 would appear as legal grounds for a claim only if the defendant refused to enter into a contract with the plaintiff altogether or on terms different than those afforded white [patrons]."[175] The district court afforded no remedy for Mrs. Perry but did conclude that Command Performance's actions "could be properly labeled racial harassment."[176]

Subsequently, the Third Circuit Court of Appeals remanded the case to the district court to investigate whether "the refusal to serve [the] plaintiff occurred after the contract was made or was concurrent with the making of the contract."[177] In addition, according to the appellate court, even if the district court concluded that a contract was formed when the appointment was scheduled, the court must allow evidence to prove that the contract was grounded on intentionally discriminatory terms.[178] If the contract was formed on intentionally discriminatory terms, then the claim could proceed under § 1981.[179]

On remand, the district court stated that § 1981 only prohibits "the refusal to enter into a contract with someone [when based on race], as well as the offer to make a contract only on discriminatory terms."[180] The district court defined an enforceable contract as one "where parties intend to conclude a binding agreement, and the essential terms are certain enough to provide a basis for an appropriate remedy."[181] The court found an enforceable contract when Mrs. Perry agreed to have the services performed by Ms. Kugler.[182] At that point, "the services to be rendered were clearly defined and Plaintiff had impliedly agreed to pay the standard fee for that basic service."[183] Subsequently, the district court entered judgment in favor of Command Performance.[184] Since the court determined that Mrs. Perry and the salon formed a contract, Mrs. Perry did not have an actionable claim pursuant to § 1981.

VI. RE-BIRTH OF THE "MAKE & ENFORCE" CLAUSE OF § 1981 AND ITS EFFECT ON SALON SERVICE

The *Patterson* case and its unjust consequences contributed to the need for congressional amendment to § 1981 by the Civil Rights Act of 1991.[185]

175. *Id.*
176. *Id.*
177. *Id.* In other words: is the contract formed at the time the appointment is scheduled or does the acceptance of the offer occur simultaneously with the performance of the contract? *Id.* at 102. The court encourages one to look at industry practice and the expectations of the parties to the instant case to determine whether a contract was in existence. *Id.*
178. *Id.*
179. *Id.* The discriminatory terms would entail that the salon would "provide services only if a hairdresser were available who would be willing to wash and set a Black person's hair." *Id.*
180. *Perry*, 1991 WL 46475 at *2 (quoting *Patterson*, 491 U.S. at 176-77).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at *4.
185. *See* Steven J. Burton, *Racial Discrimination in Contract Performance:* Patterson *and A State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 431-32 (1990) (stating some

This Act effectively overruled *Patterson*.[186] Congress sought to enact Section 101 of the Civil Rights Act of 1991 to respond to recent Supreme Court decisions by expanding the scope of the relevant civil rights statutes, provide adequate protection to victims of discrimination,[187] and restore vitality to well-settled legal doctrines.[188] Subsection (b) of § 1981 clearly applies the "make and enforce contracts" clause to the "performance . . . and enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[189] Furthermore, subsection (c) codifies the scope of the Civil Rights Act of 1866 by explicitly stating that Congress will not allow public or private impairment of any of the rights protected by § 1981.[190] The new language coupled with the legislative history and intent of the statute, old and new, seems clearly to state the breadth of legal issues and rights protected under § 1981. However, courts still battle with the correct application of the "make and enforce" clause and the "full and equal benefit" clause.[191]

A. Narrow View: Completion of Contract and Blatant Inequalities

Unfortunately, courts are having difficulty applying the "make and enforce" language of § 1981 to post-formation conduct.[192] Specifically, courts struggle to determine whether a claim is actionable under the "make and enforce" clause in § 1981 when the contract is completed, meaning there was an offer and an acceptance.[193] Some courts have held that there is no § 1981 claim when the contract is completed,[194] because the plaintiff has received the "enjoyment of all benefit, privileges, terms and conditions of the contractual relationship."[195] Other courts have held that the completion of the contract is not dispositive of whether a plaintiff

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interesting consequences of the *Patterson* interpretation including: (1) "a private school must admit persons of all races without racial discrimination, but may require persons of one race to sit in the back of the classroom without any federal remedy for that racial discrimination . . . and (2) section 1981 requires the terms of a contract to be racially nondiscriminatory, but no section 1981 action lies for their race based breach because that is post-formation conduct within the performance stage of a contract").

186. 42 U.S.C. § 1981 (2000), as amended by the Civil Rights Act of 1991, Pub. L. 102-166, Nov. 21, 1991, 105 Stat. 1071, § 101. *See* Jeremy Deese, *Civil Rights – 42 U.S.C. § 1981 – Scope of the Equal Benefit Clause:* Chapman v. Higbee Co., 319 F.3d 825 (6th Cir), 71 TENN L. REV. 199, 204 (2003); Richardson, *supra* note 114, at 129.
187. The Civil Rights Act of 1991, Pub. L. 102-166, § 3, 105 Stat. 1071, 1071 (1991).
188. Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924 (1993).
189. *See* 42 U.S.C. § 1981 (2000).
190. Deese, *supra* note 186, at 204.
191. *See* Belton, *supra* note 188, at 925 (stating that the 1991 Civil Rights Act contains "numerous ambiguities and unresolved issues that have important consequences for determining the future contours of the unfinished civil rights agenda"). This paper will discuss the full and equal benefit clause in Part VII.
192. *See* Richardson, *supra* note 114, at 130.
193. *See id.* at 119-47 (discussing the different views some courts have articulated regarding consumer discrimination when the contract is completed).
194. *E.g.*, Harris v. Creative Hairdressers, Inc., No. Civ. JFM-04-199, 2005 WL 2138128, * 3 (D. Md. Sept. 2, 2005); Morris v. Office Max, Inc., 89 F.3d 411, 414 (7th Cir. 1996).
195. 42 U.S.C. § 1981(b) (2000).

may assert a claim under § 1981.[196] Accordingly, courts have grappled with finding a cognizable claim under § 1981 for Black women discriminated against by White salons.

If a Black woman is allowed to make a contract but her enjoyment of the service is tarnished because of her race, courts should find a cognizable claim pursuant to § 1981. Section 1981 explicitly dictates that the term "make and enforce contracts" includes the "enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[197] If a plaintiff can prove that a salon treated a person of another race differently, the plaintiff has a cognizable claim. However, if it is proven that White women were required to wait three hours while being passed over, subjected to leaving the salon with soaking wet hair, or if hair stylists yanked and pulled their hair unnecessarily during the styling process, then Black women subjected to the same treatment would not have a cognizable claim under § 1981. A Black woman who has not received the same treatment as a White woman has *not* enjoyed all the "benefits, privileges, terms, and conditions of the contractual relationship." That is evident by the plain meaning of the statute. Instead, courts have ignored subsection (b) of § 1981 and have rested on the result that Black women have enjoyed the benefits, privileges, terms and conditions as long as she received the services at the salon, ignoring the fact that those services were not performed under the same terms or conditions given to White women.

Black women usually raise the following claims under § 1981: (1) denial of service because of race,[198] (2) higher prices because of race,[199] or (3) inadequate or substandard service because of race.[200] All of these situations fit well within the breadth of § 1981, and thus should constitute a cognizable claim under § 1981.

1. Limited Breadth of the Narrow View

Courts that have narrowly construed the "make and enforce" clause have found a cause of action only when the "purchase was actually thwarted"[201] or where blatant inequalities existed, such as price differences based on race. These courts are not able to protect numerous Black women from discrimination in White salons. By adhering to the narrow interpretation and essentially allowing White salons to treat Black women negatively so long as the contract is completed, the courts have effectively negated the 1991 amendments to § 1981, which state that an individual has a right to enjoy all the benefits, privileges, terms, and conditions of the contractual relationship.[202] This narrow view equates the completion

196. *See*, *e.g.*, Kelly v. Bank Midwest, N.A., 161 F. Supp. 2d 1248, 1256-57 (D. Kan. 2001); Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777 (N.D. Ill. 1999).
197. 42 U.S.C. § 1981(b) (2000).
198. Hewlett v. Premier Salons International, Inc., 185 F.R.D. 211, 214 (D. Md. 1997).
199. Sturvisant Complaint, *supra* note 9, at ¶ 10.
200. *See* Clark v. Creative Hairdressers, Inc., No. DKC 2005-0103 (D. Md. filed Jan. 13, 2005), Complaint at ¶ 30.
201. Richardson, *supra* note 114, at 131.
202. *See id.* at 134 (stating that this interpretation seemingly ignores 42 U.S.C. § 1981(b)).

of services with enjoying the full benefits, privileges, terms, and conditions of the contractual relationship, no matter how unpleasant the service or the magnitude of disparate treatment. To state a *prima facie* case under the narrow standard a plaintiff must show: "(1) membership to a protected class; (2) an attempt to contract for certain services; (3) denial of the right to contract for certain services; and (4) that such services remained available to others outside the protected class."[203]

The factual analysis found in *Halton v. Great Clips, Inc.* provides an example of a typical cognizable claim for a Black woman attempting to meet this narrow standard.[204] Great Clips, Inc. ("Great Clips") is located within a shopping plaza.[205] Ms. Halton, a former employee, and other plaintiffs alleged that Great Clips violated § 1981 by refusing services based on race, instructing stylists to refuse customers certain services based on race, and maintaining business policies and practices of race discrimination that prohibit Black customers from exercising their right to contract, obtain equal treatment, opportunity and service under the law.[206] Great Clips moved for summary judgment.[207]

The court addressed at least two categories of plaintiffs: (1) potential customers and (2) customers.[208] Ms. Mia Allmond, a potential customer, was a Black woman who allegedly requested a perm[209] from a stylist at Great Clips.[210] The stylist responded to Ms. Allmond's request by asserting, "We don't do perms for Black hair."[211] Without inquiring further, the stylist assumed that by "perm" Ms. Allmond meant "relaxer."[212] The stylist made an assumption about the service that Ms. Allmond wanted because of Ms. Allmond's race.[213] In fact, Ms. Allmond has had both treatments performed on her hair in the past.[214] Therefore, Ms. Allmond satis-

203. Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 865 (D. Md. 2000). The full analysis is a burden shifting analysis where: (1) the plaintiff must establish a *prima facie* case of racial discrimination; (2) the employer must articulate some legitimate, nondiscriminatory reasons for its actions; and (3) the plaintiff must prove that the stated reason was in fact pretextual. *Id. See* Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 870 (6th Cir. 2001) (stating that direct evidence of intent is not needed in the *prima facie* case).
204. *Halton*, 94 F. Supp. 2d at 856.
205. *Id.* at 861.
206. *Id.* at 858. The plaintiffs also sought relief under 42 U.S.C. § 1982 and § 2000a. *Id.*
207. *Id.*
208. *Id.* at 864.
209. *Id.* at 866 n.11 (stating that a perm is a chemical treatment with a lower pH factor used to curl hair).
210. *Id.* at 868.
211. *Id.* In one instance Ms. Allmond was told by a Great Clips' employee that "[they] don't take appointments and [they] don't do perms." *Id.* Another time Ms. Allmond was told by a Great Clips' employee that "[they] don't do perms for black hair." *Id.*
212. *Halton*, 94 F. Supp. 2d at 866 n.11 (stating that a relaxer is a chemical treatment used to straighten hair).
213. There was also evidence that Great Clips would screen phone calls to attempt to determine the race of the potential patron and the employees did not ask if the Black women wanted the chemical process that would straighten hair or the chemical process that would curl hair, especially since there could be confusion with the terminology of relaxers and perms. *Id*. at 868.
214. *Id.*

fied the *prima facie* case regarding Great Clips' refusal to give Ms. Allmond a perm and Great Clips did not offer a non-discriminatory reason for its actions.[215] Another potential customer, Ms. Brenda Lightning, was refused a fade or bald fade haircut, but stylists have provided those haircuts to White people.[216] Thus, Ms. Lightening also satisfied the *prima facie* case.[217] Therefore, Great Clips was not entitled to summary judgment on these claims.[218]

The Black customers who alleged that Great Clips maintained a policy of charging Black customers inflated prices satisfied the *prima facie* case.[219] Great Clips claimed that the increase in price was relative to the amount of time necessary to perform the service.[220] Next, the plaintiffs had to show that Great Clips' non-discriminatory reason was simply a pretext for discrimination.[221] In this case, there was testimony to suggest that the price was increased "[b]ecause too may [sic] [Black] women were coming in requesting that service."[222] Since there was evidence that defendant's proffered reason was not the true motivating reason, Great Clips was not entitled to summary judgment on the issue.[223] As shown by *Halton v. Great Clips, Inc.*, a narrow construction of the "make and enforce" clause only provides remedies in situations where the contract was not completed or formed on obviously discriminating terms, e.g., inflated prices.

2. Unjust Results: Inadequacies of Narrow Interpretation

Blatant discrimination and non-completion of a contract are not the only methods of discrimination which should be actionable under § 1981. More subtle forms of discrimination in a salon are no less injurious to a Black female plaintiff than blatant discrimination, and both types of discrimination label Black women with the badge of slavery that Congress designed the statute to eradicate. If the courts do not expand the types of actionable discrimination under § 1981 to include actions by White stylists and salons that significantly decrease the enjoyment of service by Black women, many Black women will never be able protect their contractual rights in White salons pursuant to the statute.

In *Harris v. Creative Hairdressers, Inc.*, Ms. Paulette Harris sued Creative Hairdressers, Inc., d/b/a Hair Cuttery alleging racial discrimination under § 1981.[224] Ms. Harris entered Hair Cuttery for a "shampoo and

215. *Id.*
216. *Id.* at 869.
217. *Id.*
218. *Id.* at 870.
219. *Id.* at 869.
220. *Id.*
221. *Id.* To establish a pretext: the plaintiffs must show by a preponderance of the evidence either: (1) the proffered reasons had no basis in fact, (2) the proffered reasons did not actually motivate [the action]; or (3) that [the reasons] were insufficient to motivate [the action]. *Id.*
222. *Id.*
223. *Id.* at 870.
224. Harris v. Creative Hairdressers, Inc., No. JFM-04-1991, 2005 WL 2138128, *1 (D. Md. 2005). Ms. Harris also asserted a claim for negligent hiring and retention under state law. *Id.*

blow dry."[225] The stylist attempted to charge Ms. Harris twenty-one dollars for the service even though the listed price was thirteen dollars.[226] Apparently, twenty-one dollars was the price for a "shampoo, blow dry, and straightening," because straightening hair is more labor intensive.[227] Ms. Harris alleges that she did not need the straightening service on this particular visit.[228] Allegedly, another stylist stated that the increase in price was because Ms. Harris was "[Black]."[229] While at Hair Cuttery Ms. Harris called and complained to the home office of Hair Cuttery, which instructed the store to charge Ms. Harris thirteen dollars.[230] Hair Cuttery then suggested that Ms. Harris pre-pay for the service as one stylist asserted to Ms. Harris that "you people got a bad habit of getting services done and not paying them before you leave."[231] A stylist performed the service and Ms. Harris paid thirteen dollars plus a five-dollar tip after the service was completed.[232]

Ms. Harris did not satisfy a *prima facie* case.[233] In this case, Ms. Harris's right to contract was not "impeded, thwarted, or deterred," and mere decrease in enjoyment was not sufficient.[234] Although the expression of a primitive racial slur and pre-payment of services by one race and not the other may violate § 1981, the court held that the stylists' remarks were overstated and Ms. Harris was not forced to pre-pay for her services.[235] In conclusion, the court held that Hair Cuttery did not violate § 1981 and granted Hair Cuttery's motion for summary judgment.[236]

Another similar non-cognizable claim arose in *Clark v. Creative Hairdressers*.[237] Ms. Monica Clark, Ms. Leslie Mercer, and unidentified plaintiffs[238] sued Creative Hairdressers, Inc., which owns and operates a number of Hair Cuttery Salons.[239] Ms. Monica Clark visited a Hair Cuttery salon and the stylist asked Ms. Clark to pay ten dollars more than the published price for a "wash and set."[240] Ms. Clark was told that the price increase was because her hair was past her shoulders, even though Ms. Clark alleges that her hair was not past her shoulders.[241] Furthermore, the pricing schedule states that the length increase was valid for chemical

225. *Id.*
226. *Id.*
227. *Id.* at *1 n.3.
228. *Id.*
229. *Id.* at *1.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* A *prima facie* case would have Ms. Harris show: (1) she is a member of a racial minority, (2) the defendant intended to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities protected by the statutes.
234. *Id.*
235. *Id.*
236. *Id.* at *4.
237. Clark v. Creative Hairdressers, Inc., No. DKC 2005-0103, 2005 WL 3008511 (D. Md. 2005).
238. I will refer to Ms. Clark, Ms. Mercer, and unidentified plaintiffs as such individually and as "the plaintiffs" when I am referring to the named and unidentified plaintiffs.
239. *Clark*, 2005 WL 3005811 at *1.
240. Complaint, *supra* note 200, at ¶¶ 16-17.
241. *Id.* at ¶¶ 18-19.

services, which does not include "wash and sets."[242] Ms. Clark paid the extra ten dollars and complained to the salon the following day.[243]

Later that year, Ms. Clark visited another Hair Cuttery salon to receive a "wash and trim."[244] The stylists at this salon did not service Ms. Clark within a reasonable time-frame.[245] In fact, the stylists, all White women, took cigarette breaks and helped a White man before servicing Ms. Clark.[246] When a stylist did service Ms. Clark, the stylist left Ms. Clark's hair dripping wet.[247] Later Ms. Clark complained to the home office, which suggested that Ms. Clark go to another Hair Cuttery location, and Hair Cuttery offered Ms. Clark free coupons.[248]

For a third time Ms. Clark visited yet another Hair Cuttery Salon.[249] Ms. Clark was told a price for her wash, dry and cut that exceeded the published price.[250] In fact, the stylist, who happened to be Asian, quoted the price listed for washing, drying and straightening hair, which was not what Ms. Clark needed as her hair was already straight.[251] The stylist also asserted that he would need a special tool to style Ms. Clark's hair, which caused Ms. Clark embarrassment since the stylist did not need to use any special tools.[252] This stylist challenged Ms. Clark to find someone who would perform the service at the listed price and refused to serve Ms. Clark.[253] When Ms. Clark complained to the manager, the manager did not discipline the stylist, but told Ms. Clark that the stylist thought it would be difficult to blow dry "her kind of hair."[254] The manager further stated that the stylist must have thought that Ms. Clark's hair " 'is like that' pointing to a poster of [a Black] woman with tight ringlets in her hair."[255] The Asian stylist who finally serviced Ms. Clark was not happy about servicing Ms. Clark and yanked Ms. Clark's hair as she styled it.[256] Ms. Clark complained and was given two more coupons.[257]

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242. *Id.*
243. *Id.* at ¶¶ 20-21.
244. *Id.* at ¶ 22.
245. *Id.* at ¶ 23.
246. *Id.* at ¶¶ 24-25.
247. *Id.* at ¶ 30.
248. *Id.* at ¶¶ 31-32.
249. *Id.* at ¶ 33.
250. *Id.* at ¶¶ 34-35.
251. *Id.* at ¶ 36. The fact that the stylist was Asian is an interesting point. The Asian stylist possessed the same stereotypical views as did the White stylists at that salon and the other salons. *See* Viet D. Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289, 1292 (1998) (stating that non-black minorities "often distinguished themselves from and at times expressly denigrated Blacks"); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, 777 (2003) (stating that integration and assimilation of certain groups into U.S. society sometimes includes adopting racist attitudes towards Blacks).
252. Complaint, *supra* note 200, at ¶ 37.
253. *Id.* at ¶¶ 38-39.
254. *Id.* at ¶ 39.
255. *Id.*
256. *Id.* at ¶ 40.
257. *Id.* at ¶ 41.

Another plaintiff, Ms. Leslie Mercer, visited a Hair Cuttery salon to receive a "roller set" with her daughter.[258] After waiting approximately ten minutes, two stylists discussed not performing the "roller set" since Ms. Mercer was Black.[259] One of the stylists then yelled over the counter and into the waiting area that Ms. Mercer's hair type was too difficult and that no one could perform the service.[260] Ms. Mercer and her daughter left the salon feeling embarrassed, and Ms. Mercer complained to the Hair Cuttery Hotline.[261]

An unidentified Black woman also had similar experiences at Hair Cuttery salons.[262] In one instance, the Black woman was refused service for a "shampoo and set" and was forced to wait additional time to have her hair styled.[263] Another time at the same salon, the stylists told this woman that they did not want to style her hair and instead would take the next person on the list.[264] She was never serviced.[265] Yet another time, this woman was forced to wait an additional ten to fifteen minutes to receive a shampoo and set until finally a Black stylist serviced her while the other White stylists continued to serve the White clients.[266] On all occasions, this woman was either not serviced or forced to wait hours while White customers were serviced; apparently the manager was aware of the on-going discrimination and unequal treatment towards this woman.[267] Unfortunately, two other unidentified Black women had similar experiences as these women were either not serviced for various reasons or were required to wait for an extended time-period.[268]

The plaintiffs brought suit against Hair Cuttery for allegedly violating § 1981 by showing a pattern and practice of discriminating against Blacks because of their race, denying and delaying service to Blacks, charging Blacks a higher price, or otherwise treating Blacks unfairly when they visited the salons.[269] The court granted Hair Cuttery's motion for summary judgment and dismissed the plaintiffs' § 1981 claim.[270] Since the plaintiffs did not show direct evidence of intentional discrimination, the court allowed the Plaintiffs to proceed under the three-step burden-shifting analysis.[271]

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258. Complaint, *supra* note 200, at ¶ 42, ¶ 45.
259. *Id.* at ¶¶ 50-51.
260. *Id.* at ¶¶ 52-53.
261. *Id.* at ¶¶ 57-58.
262. *Id.* at ¶¶ 59-73.
263. *Id.* at ¶¶ 59-60.
264. Complaint, *supra* note 200, at ¶ 61.
265. *Id.*
266. *Id.* at ¶ 62.
267. *Id.* at ¶¶ 63-67.
268. *Id.* ¶¶ 68-71. One woman was told that she would have to come back when the Black stylist was there. *Id.* at ¶ 69.
269. *Clark*, 2005 WL 3008511 at *1.
270. *Id.* at *16.
271. *Id.* at *8-*9. The burden shifting analysis proceeds as follows: (1) plaintiff must establish a *prima facie* case of discrimination; (2) defendant must present a legitimate non-discriminatory reason for the action; (3) plaintiff must prove by a preponderance of evidence that the legitimate reasons offered by the defendant were not the true reasons, but were instead pretext for discrimination. *Id.*

Ms. Clark did not fulfill the fourth prong of the *prima facie* case, meaning that the court did not find that Ms. Clark was denied the opportunity to contract for goods or services that were otherwise afforded to White customers.[272] Ms. Clark needed to prove that her "right to contract had been impeded, thwarted, or deterred in some way," but Ms. Clark only asserted that her "enjoyment of the contract experience was impacted."[273] On another occasion when Ms. Clark visited a Hair Cuttery salon she was overcharged.[274] In this instance, the court held that Ms. Clark fulfilled the elements of the *prima facie* case, but she did not prove that Hair Cuttery's putative reason (Ms. Clark's hair length) was pretext for discrimination.[275] In determining whether a reason is pretextual, the court stated that the "ultimate question is whether the [defendant] intentionally discriminated, and proof that 'the [defendants]' proffered reason is unpersuasive, or even obviously contrived does not necessarily establish that the plaintiff's proffered reason . . . is correct.'"[276] In this case, Ms. Clark did not present any evidence to show that Hair Cuttery's reason was more than a mistake of fact or that the overcharge was because of race.[277]

Ms. Mercer fulfilled the elements of a *prima facie* case because of Hair Cuttery's assertion that no one could perform a roller set on her because her hair was "too difficult to do."[278] In this instance, Hair Cuttery asserted a number of non-discriminatory reasons for the stylist's denial of service.[279] There was evidence suggesting that Hair Cuttery's non-discriminatory reasons were true.[280] When Ms. Mercer ultimately asserted that Hair Cuttery's reasons must be pretext in light of the numerous other Black customers who have complained of similar mistreatments, the court held that Ms. Mercer had not submitted evidence sufficient to establish a pattern and practice of discrimination.[281] "In order to establish a pattern or practice, a party must "prove more than the mere occurrence of iso-

272. *Id.* at *10. The general *prima facie* case under 42 U.S.C. § 1981 required each plaintiff to establish: "(1) [s]he is a member of a protected class; (2) [s]he sought to enter into a contractual relationship with defendant; (3) [s]he met the defendant's ordinary requirements to pay for and to receive goods or services ordinarily provided by the defendant to other similarly situated customers; and (4) [s]he was denied the opportunity to contract for goods or services that was otherwise afforded to white customers." *Id.* at *9.

273. *Id.* at *9.

274. *Id.* at *10.

275. *Clark*, 2005 WL 3008511 at *10-*11.

276. *Id.* at *11.

277. *Id.* The court suggests that if Ms. Clark renewed her argument regarding the long hair fee only being added for chemical services, that might constitute more evidence to dispute defendants' legitimate non-discriminatory reason. *Id.* at *11 n.18.

278. *Id.* at *11.

279. *Id.* The reasons included: "(1) Mr. Bach believed that it was another stylist's turn to provide service and that stylist had left the store; (2) Mr. Bach perceived Ms. Mercer's hair as being difficult to do and felt that he could not competently perform the requested service; (3) Mr. Bach was uncomfortable performing the service Ms. Mercer requested; and (4) Mr. Bach had poor customer service skills and was generally rude to customers." *Id.*

280. *Id.* at *12.

281. *Clark*, 2005 WL 3008511 at *10.

lated or 'accidental' or sporadic discriminatory acts."[282] Instead, "[the plaintiff] [has] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice."[283] In conclusion, the court approved Hair Cuttery's motion for summary judgment.[284]

Although the plaintiffs in *Harris v. Creative Hairdressers* and *Clark v. Creative Hairdressers* were ultimately able to receive services from the White salons and stylists, their experiences were unpleasant. A broader expansion of the *prima facie* case would have undoubtedly, at least, provided these Black women with a cognizable claim under § 1981.

B. Broader View: Looking Deeper into the Contractual Relationship

Courts have options beyond using the narrow "formation" construction of the "make and enforce" clause, and the next part of this paper discusses these options. Courts may either: (1) examine the facts and determine whether the terms of the contractual relationship change with the race of the customer,[285] (2) determine whether the discriminatory treatment denied the plaintiff "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" using the markedly hostile test,[286] or (3) use an industry-specific analysis. All views respect and import "the community standards of decency and fairness into contractual obligations."[287]

1. Terms and Conditions Test

Some courts that have construed the make and enforce clause broadly usually "do not require a denial of the right to contract . . . [but] instead [the courts] examine the facts to determine whether the terms of the contractual relationship change with the customer."[288] The courts are effectively "stepping beyond the moment when consideration is exchanged in an attempt to explore and define the parameters of the [service] contract, and, in doing so, are paying special attention to the additional language of the 1991 amendment, which requires freedom from discrimination in contracting to include the 'enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'"[289] One of the most obvious violations of § 1981 is the requirement of having one race pre-pay for services, while the other race does not have to pre-pay for services.[290] This

282. *Id.* at *13.
283. *Id.*
284. *Id.* at *16.
285. Richardson, *supra* note 114, at 136.
286. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 871 (6th Cir. 2001) (endorsing the "markedly hostile" test). *See* Richardson, *supra* note 114, at 119 (advocating adoption of the "markedly hostile" test).
287. Richardson, *supra* note 114, at 143. Richardson further states that the doctrines of promissory estoppel, the duty of good faith and fair dealing, and the duty to serve "illustrate the common law's recognition of the totality of the contractual relationship." *Id.* at 146.
288. *Id.* at 136.
289. *Id.* at 136-37.
290. *E.g.* Kelly v. Bank Midwest, N.A., 161 F. Supp. 2d 1248, 1256-57 (D. Kan. 2001).

directly implicates the terms and conditions language applied to the "make and enforce" clause.[291] Effectively, this test provides the courts with a mechanism to compare the treatment of one race during the contractual process with the treatment of another race within the contractual process.

2. Markedly Hostile Test

Other courts have established a "markedly hostile" test.[292] To assert the test, the plaintiff must prove: (1) plaintiff is member of a protected class; (2) plaintiff sought to make or enforce a contract for services ordinarily provided by the defendant; and (3) plaintiff was denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that (a) the plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.[293] The most important benefit of the test is that the test encompasses situations where the plaintiff "may have been asked to leave the place of business prior to completing [her] purchase, refused service within the establishment, or refused access to the establishment."[294] To meet the markedly hostile standard, a plaintiff must show racial animus, possibly usage of a racial epithet or proof that the conduct was due to the plaintiff's race, by the defendant,[295] which is a safeguard to block frivolous claims.

Racial animus can offend a customer equally whether she "gets no service at all or is served in a manner that marks her with the badge of slavery that the Civil Rights Acts were enacted to remove."[296] However, a service-ordered industry has many instances that may show markedly hostile treatment but the element of racial animus is not present, such as a failure to greet customers in an extremely busy environment and an unfriendly or testy response.[297] Hence, not all sub-par service is discrimination. For racial animus, courts look for a racial epithet or proof showing that the treatment was because of the plaintiff's race.[298]

Both options are more consistent with the original intent of Congress, when enacting the Civil Rights Act of 1866, to provide protection for the individual's civil rights and to protect Blacks from wearing the badges of slavery. For example, in *Harris*, the alleged racial slur and request to prepay for services did not allow her to receive the same treatment as that enjoyed by white citizens.[299] According to the markedly hostile test, Ms. Harris is a member of a protected class, sought to have her hair styled,

291. *See* 42 U.S.C. § 1981(b) (2000).
292. *Christian*, 252 F.3d at 871.
293. *Id.* (stating the "markedly hostile" test).
294. *Id.* at 873. The markedly hostile test also allows a claim to be stated when similarly situated persons are not available for comparison. *Id.*
295. Leach v. Heyman, 233 F. Supp. 2d 906, 909-10 (N.D. Ohio 2002).
296. *Id.* at 909.
297. *Id.* at 910.
298. *E.g., id.*
299. Harris v. Creative Hairdressers, Inc., No. JFM-04-1991, 2005 WL 2138128, *1 (D. Md. 2005).

and received the services in a markedly hostile manner. The assertion of a racial epithet and the request to pre-pay are both actions that an ordinary person would find objectively discriminatory.[300]

3. Proposed Test: Industry-Specific Test

In *Clark*, the factual situations probably would not fall so easily into either of the broad aforementioned options. The racial animus requirement in the markedly hostile test restricts some substandard service claims because of the possibility that the substandard service was due to a regular customer service mishap, like a busy restaurant or customer greetings accompanied with a bad attitude, both of which may be due to factors besides race. Also, no view accounts for substandard service performance due to incorrect racial stereotypes. Unfortunately, in a hair salon and other personal service industries, a person's personal views and historical connotations may restrict individuals' ability to provide equal services to all. Therefore, the courts should use an industry-specific test. This idea is an extension of the markedly hostile test, which was derived in part to provide a test more sensitive to consumer discrimination than employment discrimination.[301] This test extends further to encompass and account for standard practices. By looking at the industry techniques, training, and standard operating procedures of the business, the courts will better be able to determine when an individual is discriminated against because of their race instead of attempting to fit subtle discrimination tactics into the realm of a strict or narrow formulaic standard.

The industry-specific test would require the plaintiff to establish that: (1) the plaintiff is a member of a protected class; (2) the plaintiff sought to make or enforce a contract for services ordinarily provided by the defendant; and (3) (a) the plaintiff's reasonable enjoyment of services was below the standard given to non-protected class members, (b) the service was contrary to industry expectations, and (c) the plaintiff was subjected to other conditions or obligations surrounding the contractual relationship. For example, if the courts applied the proposed industry standard test in *Clark v. Creative Hairdressers*, Ms. Clark would be able to assert a cognizable claim. Ms. Clark is a member of a protected class and she engaged in a contractual relationship with the salon for services ordinarily provided by the salon. A number of Ms. Clark's experiences fulfill prong three of the test. For instance, Ms Clark experienced an extended and nonstandard wait time, the stylist did not properly perform the service and Ms. Clark paid more for the service than the standard charge. Further, Ms. Clark had to justify wanting a particular service and then listen to the stylist's antics and challenges regarding Ms. Clark's hair texture and type.

Although the test may be burdensome, arguably such fact-specific analysis was anticipated when the legislatures decided to enact the Civil Rights Act of 1866 and intrude into the relationships between individuals. The legislation of the Civil Rights Act of 1866 intended to interfere in the

300. *See Leach*, 233 F. Supp. 2d at 910; Hill v. Shell Oil Co., 78 F. Supp. 2d 764, 777 (N.D. Ill. 1999).
301. *Christian*, 252 F.3d at 872.

lives of individuals to secure civil rights. Furthermore, such a test is necessary especially in the hair industry and many other retail industries. Years of stereotypes and inequalities make it necessary for the courts to utilize the breadth of the statute and equalize the intended status quo of Whites and Blacks. Hopefully, the legislature will make standards particular for the making and enforcement of contracts in different industries to secure civil rights for the individuals throughout the country as originally intended by Congress. The courts would have the task of ensuring that those standards are upheld by applying the industry-specific test. Even without help from the legislative branch in making standards, the court may look to expert testimony to help determine an appropriate standard. In conclusion, between the proposed industry test and the authority found in the legislative history of § 1981 the courts have all the authority necessary to determine whether individuals are violating the civil rights of others.

VII. STYLING A DIFFERENT CAUSE OF ACTION: FULL AND EQUAL BENEFIT CLAUSE OF 1981

Much confusion surrounds the correct application of the "full and equal benefit" clause. In fact, there is a circuit split as to whether the "full and equal benefit" clause should apply to private parties or only to public parties.[302] If applied correctly to private parties, the "full and equal benefit" clause is another possible form of relief for Black women discriminated against in White salons.[303]

A. Private v. Public Party Application

Circuits which do not allow the "full and equal benefit of all laws" to apply to private parties argue that since a state is the sole source of law, it is only the state that can deny the full and equal benefit of the law.[304] These circuits allege that the plaintiff must "allege some sort of state action contributed to the [plaintiff's] being discriminated against."[305] The Court of Appeals for the Third Circuit in *Mahone v. Waddle* agreed with legislative intent that the Civil Rights Act of 1866 is supposed to eradicate all discrimination against Blacks and offer Blacks the full freedom and equality in civil rights.[306] Amazingly, after stating that the Civil Rights Act of 1866 is supposed to eliminate all discrimination, the court ignored the legislative history and decided that individuals cannot deny the full and

302. *E.g.,* Chapman v. Higbee Co., 319 F.3d 825, 833 n.5 (6th Cir. 2003) (stating full and equal benefit clause applies to private parties). *Contra e.g.,* Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 855 (8th Cir. 2001) (stating full and equal benefit clause only applies when there is state action).

303. A hair salon case regarding discrimination against Black women has not been brought under the full and equal benefit clause, but this paper asserts that a Black woman may assert a cognizable claim against a hair salon under the full and equal benefit clause of 42 U.S.C. § 1981.

304. Bilello v. Kum & Go, LLC, 374 F.3d 656, 661 (8th Cir. 2004).

305. *Id.* (internal citations omitted).

306. Mahone v. Waddle, 564 F.2d 1018, 1028 (3d Cir. 1977).

equal benefit of the law.[307] Hence, the court held that the "full and equal benefit" clause concerned relations between an individual and a state, not two individuals.[308] The court reasoned that since the state is the sole source of law, only it, not individuals, is capable of denying Blacks the full and equal benefit of the law.[309] Yet the court held that private discrimination may be remedied by the "make and enforce" contract clause—just not the "full and equal benefit" clause.[310]

The circuits that allow the "full and equal benefit" clause to apply to private parties rely on the plain language of the statute,[311] legislative history,[312] and similar and surrounding statutes.[313] The Court of Appeals for the Sixth Circuit in *Chapman v. Higbee Company* held that the "full and equal benefit" clause applies to private parties.[314] Subsection (c) of the statute emphasizes that "[§ 1981] is protected against impairment by nongovernmental discrimination and impairment under color of State law."[315] Congress did not limit the applicability of subsection (c), and application of subsection (c) to all the rights in (a) is consistent with the legislative history.[316]

One primary argument of critics disputing applying the "full and equal benefit" clause to private parties is that the interpretation would cause subsection (c) to apply to the penalty clause in subsection (a).[317] The critics assert that "since only the state imposes or requires 'taxes, licenses,

307. *See* Hawk v. Perillo, 642 F. Supp. 380, 390 (N.D. Ill. 1985) (stating that the *Mahone* court found the meaning of section 1981 not in the plain language of the statute, but in what it views as the obvious implications of the language used).
308. *Mahone*, 564 F.2d at 1029.
309. *Id.*
310. *Id.*
311. *See* 42 U.S.C. § 1981(c) (2000).
312. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) (showing that Senator Trumbull intended the Civil Rights Act to destroy all these discriminations in civil rights against the [B]lack man (citing CONG. GLOBE, 39th Cong., 1st Sess., 322.)).
313. *See* 42 U.S.C. § 1985(3) (2000) (Revelant parts state: "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all person within such State or Territory the equal protection of the laws. . . ."); Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (stating that Section 1985(3) does not require state action and that the "Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private person[;] yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State."); Chapman v. Higbee Co., 319 F.3d 825, 831 (6th Cir. 2003) (stating that the interpretation in *Griffin* of 42 U.S.C. § 1985(3)'s equal protection provision suggests that 42 U.S.C. § 1981's analogous clause would protect against private impairment); Deese, *supra* note 86, at 206 (analysis of the Supreme Court's switch from requiring action under color of state law in Collins v. Hardyman, 341 U.S. 651 (1951) for a claim under Section 1985(3) and then subsequently holding that private action is actionable as well in *Griffin*).
314. *Chapman*, 319 F.3d at 833.
315. 42 U.S.C. § 1981(c) (2000).
316. *Chapman*, 319 F.3d at 831-32.
317. *Id.* at 838 (Suhrheinrich, J., dissenting).

and exactions,'" the "punishment, pains, and penalties" to which the clause refers are those imposed by the state.[318] Those parties completely misinterpret the statute. The statute states "all persons . . . shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."[319] That phrase in subsection (a) subjects all members of society to not only the benefits of society but also the punishments of society.[320] This is further supported by the legislature's original intent and drafting.[321]

Those against private party application also argue that allowing the full and equal benefit clause to be applied to private parties will "federaliz[e] state tort law."[322] However, these courts have not shown, through the legislative history or the language of the statute, that the federal government wants to preclude its involvement in protecting civil rights.[323] In fact, the legislative history suggests that the goal of the statute is to eliminate all discrimination between Blacks and Whites affecting basic civil rights.[324] There is no reason why racially motivated torts that deprive a person of the full and equal benefit of laws or proceedings should be outside the scope of the statute when racially motivated contracts are within the reach of federal regulation.[325]

B. Better View: Private Party Application – Black Women's Relief in Salons

The better view is that the "full and equal benefit" clause should apply to private action. Under § 1981's equal benefit provision, the plaintiff must demonstrate the denial of a benefit of a law or proceeding protecting his or her personal security or a cognizable property right.[326] Specifically, the plaintiff must: (1) prove a racial animus,[327] (2) identify a relevant law or proceeding for the "security of persons and property," and (3) persuade a fact-finder or the court that the defendants have deprived them of "the full and equal benefit" of this law or proceeding.[328]

Applying this standard to a typical hair salon case, a Black woman needs to show racial animus. The law is developing in this area, but

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318. *Chapman*, 319 F.3d at 838 (Suhrheinrich, J., dissenting) (citing Mahone v. Waddle, 564 F.2d 1018, 1029-30 (3d Cir. 1977)).
319. 42 U.S.C. § 1981(a) (2000).
320. *See* Hawk v. Perillo, 642 F. Supp. 380, 391 (N.D. Ill. 1985).
321. *See* The Civil Rights Act of 1866, 14 Stat. 27 (codified as 42 U.S.C. §§ 1981-82). In the Civil Rights Act of 1866, the statute provided criminal sanctions in Section 2 of the Act, which applied to public entities. That section has been deleted but Section 1 remains primarily untouched. Section 1 did not impose penalties and so it does not do so here either.
322. *Chapman*, 319 F.3d at 842 (Suhrheinrich, J., dissenting).
323. Phillip v. Univ. of Rochester, 316 F.3d 291, 297 (2d. Cir. 2003).
324. *Id. See Jones*, 392 U.S. at 440 (showing that Senator Trumbull intended the Civil Rights Act to destroy all these discriminations in civil rights against the [B]lack man (citing CONG. GLOBE, 39th Cong., 1st Sess., 322)).
325. *Phillip*, 316 F.3d at 298.
326. *Chapman*, 319 F.3d at 832.
327. *Leach*, 233 F. Supp. 2d at 909 (stating that "racial animus can offend a customer equally whether he gets no service at all or is served in a manner that marks him with the badge of slavery that the Civil Rights Acts were enacted to remove").
328. *Phillip*, 316 F.3d at 298.

courts look for facts such as a racial epithet or proof that the conduct was due to the plaintiff's race.[329] Arguably, a Black woman could show evidence of a pattern of treatment regarding stylists' reactions and discriminatory treatment toward Black women. This would include extended waiting periods, stereotypical and racially motivated assertions, and substandard service and results compared to industry standards and practices. Next, Black women would have to show a policy protecting Black women's right to receive service. In most cases, the salon has a policy asserting that it will serve everyone and its stylists will be proficient in all types of services.[330] Alternatively, courts should recognize that hair stylists are licensed by the state. The state requires that licensed stylists be capable of styling *all* hair.[331] So, the salon must abide by the state's policies. Lastly, a Black woman would have to prove that the salon deprived her of the full and equal benefit of service, which would be the inability to receive adequate and reasonable styling service.

In conclusion, the broad interpretation of § 1981 should be adopted. The purpose of the Civil Rights Act of 1866 was to end all discrimination, which cannot be effectively accomplished if the laws are construed narrowly, which allows discriminatory acts to persist. More importantly, it leaves Black women without a remedy for the degrading and unequal treatment that they often receive while visiting predominately White salons.

VIII. APPLICABILITY OF 42 U.S.C. § 2000A

Courts should extend the Public Accommodations Act to cover hair salons. Title II of the Civil Rights Act contains a provision prohibiting discrimination or segregation in a place of public accommodation.[332] Congress did not intend for the Act to cover all establishments,[333] but covered establishments have been construed broadly.[334] Nonetheless, there has been considerable controversy regarding § 2000a(b)(3), which includes: any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment.[335] The controversy is over the meaning of entertainment. The United States Supreme Court has defined entertainment as an "act of diverting, amusing, or causing someone's time to pass agreeably."[336] Entertainment includes a passive audience, e.g., amusement park, as well as activities where the patron is actively

329. *Leach*, 233 F. Supp. 2d at 910.
330. *See Clark*, 2005 WL 3008511, at *5 (stating that the training material emphasizes that "a stylist's goal should be to become proficient in all types of services[. . .]to avoid unintentionally discriminating against a client"). *See also Chapman*, 319 F.3d at 828 (showing that Dillard's had rules and instructions for security personnel stating that strip searches are prohibited).
331. NIC homepage, *National Inter-State Council of State Boards of Cosmetology*, http://www.nictesting.org/index-main.html.
332. 42 U.S.C. § 2000a (2000).
333. Rousseve v. Shape Spa for Health and Beauty, 516 F.2d 64, 66 (5th Cir. 1975).
334. Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 861-62 (D. Md. 2000).
335. 42 U.S.C. § 2000a (2000).
336. *Rousseve*, 516 F.2d at 67 (citing Daniel v. Paul, 395 U.S. 298, 306 n.7 (1969)).

engaging in the activity.[337] Courts have held that the section "must be read with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public."[338]

A. Halton v. Great Clips, Inc.*: A Hair Salon is Not a Place of Public Accommodation*

Black women have applied for relief under 42 U.S.C. § 2000a, asserting that the hair salon is a place of public accommodation, yet courts have not agreed that a hair salon is within the meaning of public accommodation—as exemplified in *Halton v. Great Clips, Inc*.[339] Although courts have found health spas, golf clubs, and beach clubs to be within the meaning of covered establishments, a court has not found a hair salon as such.[340] Even though in *Halton* the hair salon was located on the same premises as other covered establishments and served the same customers,[341] the salon was still on the premise of a retail store plaza—and Title II does not include retail stores "because there has been little if any discrimination in the operation of these establishments."[342]

Furthermore, the court in *Halton* stated that the health spas, golf clubs, and beach clubs were also places of recreation, which brought them under the broad definition of entertainment.[343] The court held that a place of entertainment[344] does not include a hair salon, and there is no evidence that spa-like activities, e.g., baths and sauna treatments, take place at Great Clips.[345] Furthermore, there was not a covered establishment on the premises.[346] The court defined premises as the rented space by the hair salon, not the entire shopping plaza.[347] Accordingly, Great Clips had no control over the other tenants nor did Great Clips own the shopping center, and there was no evidence that most of Great Clips' business came

337. *Id.* at 66.

338. *Id.* (internal citations omitted).

339. *Halton*, 94 F. Supp. 2d at 864.

340. *Id.* at 862.

341. *Id.*

342. *Id. Contra* 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 (2003); Matt Graves, Note, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001).

343. *Halton*, 94 F. Supp. 2d at 862.

344. Entertainment: "the act of entertaining; agreeable occupation for the mind; diversion; amusement, . . . something affording pleasure, diversion, or amusement esp. a performance of some kind." *Id.* at 862.

345. *Id.*

346. *Id.* at 863.

347. *Id.*

from the shopping center's other business.[348] Consequently, the court held that Great Clips was not a place of public accommodation.[349]

B. Changing Times: A Hair Salon is a Place of Public Accommodation

With the purpose of the Act in mind, the courts have erred by not including a hair salon as a place of entertainment. Similar to the health and beauty spa referred to in *Rousseve*, a salon provides rehabilitative treatment. Women at salons are pampered as a stylist reforms and styles their hair. In fact, many stylists become their patrons' confidant, and the salon is used by many women as a place to relax, gossip, and read magazines. Furthermore, many hair salons extend their services to pedicures, manicures, and massages. Quite frankly, most salons are more similar to the Shape Spa for Health and Beauty in *Rousseve* than the courts may want to acknowledge. Many salons solicit new patrons through newspapers and other forms of advertisements,[350] which effectively invite individuals into its place of business. This is important to combat assertions that the salon does not control who visits the premises, as the court asserted in *Great Clips*. Moreover as times change, activities that may have been entertainment in the past—such as lynching[351]—are not now; activities that were not entertaining in the past have now moved into the realm of entertainment.[352] So, the notion of entertainment has not only changed but also expanded.

Alternatively, many salons also provide snacks and drinks, both in a machine and made at the salon. 42 U.S.C. § 2000a(b)(2) clearly states that a "soda fountain or other facility principally engaged in selling food for

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348. *Id.* The court is distinguishing these facts from those in the United States v. Beach Associates, Inc., 286 F. Supp. 801 (D.C. Ma. 1968). In *Beach Associates*, after the passage of the Civil Rights Act of 1964, the Bay Carry-Out replaced a restaurant and was used primarily to serve the Beach Club's customers. 286 F. Supp. 803-04. Even though the Bay Carry-Out Shop was not located in the Beach Club, the court still found it to be "physically located within the premises of the Beach Club pursuant to § 2000a(b)." *Id.* at 807. In this instance both establishments were controlled by one family, the carry-out was designed to attract customers to the beach, and most of the carry-out customers were from the Beach Club. *Id.*

349. *Halton*, 94 F. Supp. 2d at 864.

350. In fact, a couple of salons in Nashville, near where I attended law school, had commercials and billboards to advertise for their services. I have also seen coupons for hair salon services in the Clipper Magazine, which is a savings magazine that is mass mailed. *See* www.clippermagazine.com. The magazine is in hard copy; however you can find similar coupons on the magazine's website, www.myclipper.com. The website, like the mailing, does not ask for any information such as age, gender, or race, but the companies invite your business by choosing to advertise with a mass mailing coupon company.

351. *See* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 818 (2005) (describing lynching as entertainment); Cecil J. Hunt, II, *The Color Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 481 n.16 (citing GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940, at 238 (1998), which describes lynching as a form of public family entertainment).

352. *See* BEAUTY SHOP (MGM 2004) (showing the entertainment that happens in a beauty shop).

consumption on the premises" is a covered establishment.[353] In *Lansdowne*, the court stated that a snack bar is "sufficient to render the entire facility a covered establishment which serves the public."[354] *Lansdowne* also looked at where the materials in the swim facility were designed and produced to show how it affected commerce.[355]

Even without the pampering service that many salons provide or without the distribution of food, a regular salon should fit within the ordinary meaning of the statute. The "overriding purpose of Title II is to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."[356] Furthermore, excluding some places from the statute overwhelmingly authorizes racial discrimination, and consumers should not have to face discrimination when entering the marketplace.[357] The courts should realize that discrimination is alive and well. Construing this statute narrowly only perpetuates racism. Furthermore, the statute must evolve and change with time. The judge has a duty to "innovate . . . to some extent . . . for with new conditions there must be new rules."[358] It is definitely appropriate for the judiciary to broaden the scope of 42 U.S.C. § 2000a.

IX. CONCLUSION

As shown through this paper, Debbie Deavers Sturvisant's case against Dillard's is not a unique occurrence. No one can predict the outcome of Ms. Sturvisant's case, but the case raises interesting questions regarding Black women's ability to receive hair service. Black women charged different prices, forced to wait unbearable lengths of time, and completely turned away from hair salons are definitely reminiscent of eras heavily burdened with discriminatory conduct. Unfortunately, the very statutes Congress enacted to help prohibit discrimination now give more protection to the perpetrator than to the victim. It seems that society, courts and individuals alike have become complacent with the progress of society and ignore the more subtle and unconventional forms of discrimination.

Moreover, the refusal to style Black women's hair only lowers Black women on the social and political ladder. By viewing hair as "black hair" and unworkable, the salons "reinforce[ ] the view of a homogenous, unicultural society,"[359] which is only reinforced by the "legal" approval of the court system. "Anti-discrimination law should be . . . directed toward behavioral manifestations of such negative associations, not to line drawing based on fixed, immutable, and outmoded conceptions of race or

353. 42 U.S.C. § 2000a (2000).
354. United States v. Lansdowne Swim Club, 894 F.2d 83, 86 (3d Cir. 1990).
355. *Id.*
356. Welsh v. Boy Scouts of America, 993 F.2d 1267, 1270 (7th Cir. 1993) (internal citations omitted).
357. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1448 (1996).
358. CARDOZO, *supra* note 95, at 137.
359. Caldwell, *supra* note 18, at 380.

gender."[360] Furthermore, anti-discrimination law should eliminate the "behavioral consequences of certain stereotypes."[361]

The courts' unwillingness to interpret the statutes to provide the maximum amount of protection only legitimizes the discrimination that the statutes were enacted to eliminate. This is the bottom line: Regardless of whether a Black woman wants a White stylist to style her hair, Black women should have the right to choose. Courts owe Black women an interpretation of civil rights statutes that will recognize a cognizable claim for denial of service or receipt of substandard service that ultimately labels Black women with the badge of slavery.

360. *Id.* at 387.
361. *Id.* at 395.