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"BAD FOR BUSINESS": CONTEXTUAL ANALYSIS, RACE DISCRIMINATION, AND FAST FOOD*

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INTRODUCTION

If race truly mattered, legal argument, writing, and scholarship would pay much more attention to context than it does today. Not being particularly interested in the material/social interactions and positioning of the parties that lead up to lawsuits or the material/social consequences of decisions after they are rendered, legal analysis as it is reflected in court opinions often leaves out much that lay people would consider crucial to an assessment of whether justice has been done.[1] Courts, in their effort to portray the law as a nearly autonomous field of conflict and a nearly autonomous field of knowledge, frequently ignore or overlook the particular circumstances or the larger setting that frames a dispute; as a result, the parties' actions may be inexplicable or the courts' rulings, unintelligible even to persons trained in the law. Context may be most acutely missed whenever the court makes no mention of the impact on the outcome of what the reader knows or suspects is the parties' race, ethnicity, class, gender, or age. To put it in the language of anti-discrimination law, ignoring context denies adequate relief to people whose lives are a web of market-generated, socially-legitimated disparate impacts that are figuratively the tip of an iceberg whose many layers of naturalized prejudice and restricted opportunities are hidden from view.

There ought to be a theory or a technique for viewing legal disputes in terms of their embeddedness in a concrete reality of material, political, and social conflict. There ought to be a way for

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1. *See* Elizabeth Mertz, *Teaching Lawyers the Language of the Law: Legal and Anthropological Translations,* 34 J. MARSHALL L. REV. 91 (2000).

legal analysis to identify and address what may be a litigant's most heartfelt concerns, concerns that the courts could care less about if they do not figure in a formal, doctrinal framing of the issues. I want to suggest here that contextual analysis which both challenges the relative autonomy of law and grounds legal disputes in their material and social history is a possible answer.

The potency of contextual analysis is readily apparent when already decided cases are placed within a setting or an environment where the complexities of what came before and after the decision are elucidated and their impact on the justness of the decisions are highlighted. As I have suggested elsewhere, contextual analysis might consider the following factors, among others:

> [t]he social, political, and economic status of the parties; the power dynamic that exists among them; the identities of [any] parties whose interests are being adjudicated without their participation or representation; the impact of cultural and material conditions in shaping the dispute; the role of individual agency, including organized political activism, in producing the conflict and possibly resolving it; the sources of knowledge and information underlying the parties' positions; the narrative and rhetorical tools each party possesses; the way in which each party's position is constructed as common sense or otherwise legitimated; and the impact of the outcome on the social, economic, or political subordination or domination of the competing parties.[2]

Contextual analysis along these lines illuminates conflicts that typical legal analysis ignores or obfuscates. Contextual analysis exposes the degree to which the contemporary status quo of hierarchically-arranged or stratified socioeconomic groups are the product of more than the sum of deliberate, overt invidious acts of discrimination perpetrated by lone-acting outlaws. Though the role of individual agency should not be ignored, attention to context highlights the structural predicates that do not necessarily guarantee domination or subordination, but make them considerably more likely. It exposes the discrimination that is embedded in the practices of institutions and markets, and facilitated by "legitimizing myths," i.e., the "attitudes, values, beliefs, or ideologies that provide moral and intellectual support to and justification for the group-based hierarchical social structure

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2. Regina Austin, *Of False Teeth and Biting Critiques: Jones v. Fisher in Context,* 15 TOURO L. REV. 389, 389-90 (1999).

and the unequal distribution of value in social systems."[3] Contextual analysis allows patterns to be discerned in a way that permits diverse cases involving seemingly isolated injuries to be given the label they deserve, i.e., injustice.

Needless to say, scholarly research in the humanities and the social sciences is an essential component of the contextual analysis of cases. Of the various types of research available, I have found ethnographies to be especially useful. Ethnography is "[t]he direct observation of the activity of members of a particular social group and the description and evaluation of such activity."[4] "Usually researchers gather data by living and working in the society and social setting being researched, . . . immers[ing] themselves as fully as possible in the activities under observation, but at the same time keeping careful records of these activities."[5] Ethnographies are basically thick descriptions of human landscapes which draw linkages between culture, material circumstances, individual behavior, and the construction of meaning.[6] They are sources of information about what is going on at the lowest, most local level of a society, in the places where people struggle, compete, collaborate, and adapt to accomplish their cultural goals.[7] Ethnographies question the existence of universal norms and codes of conduct and capture the dynamics of the contentious process by which individuals and groups change and adjust in their efforts to lead a good life. The best ethnographies are surprising; they are revelations of discovery both by the sociologist or anthropologist and the reader.[8] The surprise comes not so much from the unearthing of the exotic and the unusual, but from the exposure of unexpectedly complex layers of juxtapositions and incongruities. When employed as an aid to contextual legal analysis, ethnographies offer explanations of how the law actually impacts on people and how it might be shaped "around the social practices and everyday lives of people most deeply affected by these practices."[9]

Race ethnographies in particular can supply a fresh understanding of the sources of minority peoples' subordination or

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3. James Sidanius, *The Psychology of Group Conflict and the Dynamics of Oppression: A Social Dominance Perspective*, EXPLORATIONS IN POLITICAL PSYCHOLOGY 183, 207 (Shanto Iyengar & William J. McGuire eds., 1993).

4. PENGUIN DICTIONARY OF SOCIOLOGY 151 (3d ed. 1994).

5. HARPER COLLINS DICTIONARY OF SOCIOLOGY 153 (1991).

6. John Brueggeman, *A Century After the Philadelphia Negro: Reflections on Urban Ethnography and Race in America*, 26 J. CONTEMP. ETHNOGRAPHY 364 (1997).

7. Thomas S. Weisner, *The Ecocultural Project of Human Development: Why Ethnography and Its Findings Matter*, 25 ETHOS 177, 177-78 (1997).

8. Richard A. Shweder, *The Surprise of Ethnography*, 25 ETHOS 152 (1997).

9. Carol B. Stack, *Beyond What Are Given as Givens: Ethnography and Critical Policy Analysis*, 25 ETHOS 191, 191 (1997).

confinement in the basement of the status hierarchy, on the one hand, and their struggles and advancement, on the other. Critical race analysis must acknowledge the subtlety of the rationales and modes of contemporary discrimination and the increased salience of disparities in the distribution of social, economic and cultural capital as explanations for the plight of the least well-off. A real world view of race and racism today demands acknowledgment of interracial (between and among minority groups) economic, political, and cultural competition and interracial (within each minority group) economic and cultural diversity. Legal theory must be mindful of the nuances and shadings that challenge the notion that most members of a racial and ethnic minority group, or socioeconomic class are more alike than they are different. Just legal results may depend on our recognizing the multiplicity of marginalized existences as they are lived and captured in ethnographic studies.

Normally I turn to ethnographies to illuminate a case or problem in which I am interested. In this article, I attempt to do the reverse. There are several relatively recent works of ethnographic research set in the contemporary urban race landscape that are relevant to a critical analysis of the law as it relates to low-wage, low-status minority service workers; the three that I will focus on involve the fast food industry.[10] Katherine Newman's book, *No Shame in My Game: The Working Poor in the Inner City*, is about black and Latino fast food workers in Harlem.[11] Carol Stack, a sociologist at the University of California at Berkeley, was involved in the same Ford Foundation research project that produced Newman's book; Stack's fieldwork was done among fast food workers in Oakland, California. Stack's book is forthcoming, but she has written an essay summarizing her most significant findings.[12] Jennifer Anne Parker has written an unpublished Ph.D. dissertation in which she investigates fast food restaurants in three New York City neighborhoods (Chinatown, Washington Heights, and Downtown Brooklyn), all of which employ immigrants.[13]

Because I had previously written a short (unpublished) paper

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10. *See also* ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY (1999) examining the cultures of poor and working-class black urbanites and their competing codes of justice); MITCHELL DUNEIER, SIDEWALK (1999) (recounting the histories and existences of homeless street vendors in Greenwich Village); THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES (Michèle Lamont ed., 1999) (collecting essays dealing with race and work, education and politics).

11. KATHERINE S. NEWMAN, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY (1999).

12. Stack, *supra* note 9.

13. Jennifer Anne Parker, Labor, Culture, and Capital in Corporate Fast Food Restaurant Franchises: Global and Local Interactions Among an Immigrant Workforce in New York City (1996)(unpublished dissertation).

on third-party violence committed at fast food restaurants,[14] I had some slight familiarity with the fast food or quick service industry[15] before I embarked on this project. There is a wealth of literature in the humanities and social sciences on the fast food industry, particularly about McDonald's. Of course, there is more to quick service than McDonald's and hamburgers. Fast food is a substantial sector of the economy; the National Restaurant Association projects that fast food sales for 2000 will exceed $114.7 billion, a 4.4% increase over 1999 sales of $109.9 billion.[16] I read the three ethnographies with a view toward gleaning some understanding of the discrimination that black workers and

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14. *See* Regina Austin, "With Security on the Side": Fast Food Restaurants and the Criminal Acts of Third Parties, written for the Washburn Law School Advanced Torts Continuing Legal Education Program, October 3 & 4, 1997 (on file with the author).

15. Fast food restaurants, as I am using the term, are eating establishments that serve ready-to-eat foods, with little or no waiting time from ordering to serving. This speedy handling of orders is accomplished by (1) using commercial types of convenience foods, and/or (2) by cooking the foods well in advance and keeping them warm (or cold, if necessary to prevent spoilage) until they are sold. "The most common fast foods are: hamburger, french fries, and shakes; pizza and cola; fried chicken and slaw; fish and chips; roast beef sandwiches; tacos; hot dogs; and other mass-produced and mass-served quickie meals. AUDREY H. ENSMINGER ET AL., THE CONCISE ENCYCLOPEDIA OF FOOD & NUTRITION 323 (1995).

Fast food tends to be high in protein, fat, salt, and calories, low in fiber, and reportedly a source of good nutrition if incorporated into a varied diet. *Id.* at 323-24. They also tend to be eaten with the hands. The establishments where fast food is sold are generally part of a chain or string of company and/or franchisee-owned businesses bearing a common name and housed in buildings sharing a common architecture and decor and offering a standardized menu of food cooked according to standardized methods, packaged in standardized materials, and served according to a standardized script or routine. JOHN A. JACKLE & KEITH A. SCULLE, FAST FOOD: ROADSIDE RESTAURANTS IN THE AUTOMOBILE AGE, 329 (1999) (referring to the "coordination of architecture, decor, product, service, and operating routine across multiple locations" that characterizes fast food chains as "place-product-packaging"). The standardization is maintained and enforced by company headquarters. Rick Fantasia, *Fast Food in France,* 24 THEORY AND SOCIETY 201, 207 (1995).

The fast food industry is characterized by many well-recognized national brand chains, including first and foremost McDonald's. The most profitable chains, though they may have a varied menu, are associated with a particular type of food such as hamburgers (Burger King, Wendy's, Hardee's, Sonic Drive-ins, Jack in The Box, Carl's Jr., Whataburger, Krystal, and White Castle); chicken (KFC, Popeyes, Churchs, and Chick-fil-A); pizza (Pizza Hut, Domino's, Little Caesar's, Papa John's, and Chuck E. Cheese); sandwiches (Subway, Arby's, Blimpie, and Schlotzsky's Deli); Mexican food (Taco Bell, Dell Taco, Taco John's, Taco Time, and Taco Bueno); ice cream (Dairy Queen, Baskin-Robbins, TCBY, and Haagen-Dazs); and coffee, sweets, and snacks (Dunkin Donuts, Starbucks, Tim Horton's, and Bruegger's Bagels). JAKLE & SCULLE, *supra,* at 137, 227, 252, 176, 262, 194, 205, 209.

16. 2000 Restaurant Industry Forecast, Quick Service Outlook (visited Dec. 7, 2000)<http:/www.restaurant.org/research/forecast_quickservice.html>.

customers encounter at fast food restaurants. I then looked for actual discrimination cases brought by black prospective workers and black customers. The cases problematized the ethnographies as the ethnographies in turn problematized the cases. The ethnographic studies and the cases together became a catalyst for an assessment of the mechanisms by which black restaurant employees and customers are constructed as being "bad for business." The ethnographies and the cases thus became an entrée for the exploration of an example of the impact of racial stereotypes in economic transactions.

I. BLACKS AND THE QUEST FOR "GOOD JOBS" IN THE FAST FOOD BUSINESS: A CONTEXTUAL ANALYSIS OF *SHIRLEY V. VICNAT*

In 1998, the operator of several McDonald's restaurants located in the business district of San Francisco was sued for allegedly discriminating against black job prospects. Three San Francisco ethnic newspapers—The Sun Reporter, an African-American paper;[17] Asian Week;[18] and Filipanas Magazine[19]— reported the story. The lead plaintiff was Terry Shirley who had applied for work at one of the restaurants, made follow-up calls, and was falsely told that there were no openings.[20] He was joined in the class action by nineteen other blacks, of whom most were testers.[21] The defendant was Vicnat, Inc., which owned five outlets.[22] The owner of record of Vicnat was a Latino.[23] The lawsuit claimed that two of the restaurants had no black employees, a third had only one black female employee, and a fourth had only a black security guard.[24] Whereas African American testers were told that there were no openings, Filipino testers were immediately offered jobs.[25] Asian Week reported that "[a]ccording to eyewitness accounts by plaintiffs and employees, African American applicants routinely have their application forms thrown away or are told by other employees that supervisors do not like to hire blacks and prefer instead to hire Filipino Americans via word-of-mouth."[26] Asian Week continued: "Speaking Tagalog in the workplace also discourages African

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17. *S.F. Blacks Seek $2 Million for McDonald's Racism,* SUN REPORTER (San Francisco), Jul. 30, 1998, at 1 [hereinafter *S.F. Blacks*].

18. Randip K. Panesar, *Good Jobs for Good People? Suit Cites Bias by Fil-Am Managers,* ASIAN WEEK, Aug. 19, 1998, at 14 [hereinafter *Good Jobs*].

19. *Community News–McLawsuit,* FILIPINAS MAGAZINE, Oct. 31, 1998, at 81.

20. *S.F. Blacks, supra* note 17, at 1.

21. *Id.*

22. *Good Jobs, supra* note 18, at 14.

23. *Id.*

24. *S.F. Blacks, supra* note 17, at 1.

25. *Good* Jobs, *supra* note 18, at 1.

26. *Id.*

American and other applicants, the suit alleges."[27]   A
representative from the Asian Law Caucus found the reference to
Tagalog offensive, but concluded that the suit would be successful
if the serious allegations were sustained.[28]

A call to the plaintiffs' attorney revealed that the case was
settled in May of 1999.[29] The relief included advertising and
posting of notices, as well as some financial restitution.[30]
Plaintiffs' attorney described the six non-tester applicants as
recent high school graduates who actually made the long and
rather expensive commute from Oakland to work in San Francisco
business district restaurants (other than McDonald's) that would
hire them.[31] The attorney said that he had seen a few young
blacks leaving the restaurant dressed in McDonald's uniforms.[32]
He doubted, though, that the suit would have long-lasting effect.[33]

Shirley v. Vicnat is not unique, but it does differ from its
reported predecessors in certain salient respects. There have been
a few similar cases involving the competition between indigenous
blacks and immigrant workers over low-wage, low-skilled urban
jobs. Prior decisions indicate that it is not a violation of the
federal employment discrimination law where a workplace
becomes a niche for members of a single ethnic group or
immigrants from a particular country because the employer either
passively relies on employees to tell their friends and relatives
about job openings,[34] or affirmatively uses such word-of-mouth
recruiting as the cheapest method of filling openings.[35] The law
does not impede small immigrant-owned businesses, located in an
immigrant community, whose viability and profitability are
assured through the employment of family, friends, and neighbors
who share a common culture, language, and background.[36] Such
businesses have been allowed to operate with a labor force that
does not reflect the percentage of blacks in the labor pool. With
regard to such establishments, Seventh Circuit Judge Richard
Posner might be correct in suggesting that blacks, who as a group

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27. *Id.*
28. *Id.*
29. Telephone Interview with R. Michael Hoffman, Esq. (Aug. 23, 1999)
[hereinafter Hoffman interview].
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 305 (7th
Cir. 1991) (finding no disparate impact discrimination where only 6% of entry-
level hires were black).
35. See EEOC v. Consolidated Service Systems, 989 F.2d 233 (7th Cir.
1993) (finding that a Korean-owned business that had a workforce recruited
through word of mouth that was 81% Korean was not guilty of disparate
treatment of blacks).
36. *Id.*

are struggling to establish and maintain their own small businesses, should be loathe to press an employment discrimination claim that would heap more contempt on entrepreneurial immigrants who are already "[d]erided as clannish, resented for their ambition and hard work, [and] hated or despised for their otherness."[37] In *Shirley v. Vicnat*, however, blacks applied for positions in a restaurant that was part of a major fast food chain and that was located not in a minority enclave but in the central business district of San Francisco.[38] The alleged discrimination was not just a matter of statistical disparity. It was alleged that the plaintiffs were intentionally rejected on the basis of their race.[39] The challenge to the employment practices of Vicnat did not represent the sort of direct attack on the ethnicity or cultural values of Vicnat's Filipino workers against which Judge Posner warns.

If the context in which *Shirley v. Vicnat* arose and was resolved matters, if the positioning of the parties and the material and social history of the case are pertinent, then, there are a few questions which the litigation immediately brings to mind: Since when have fast food jobs been worth suing over? What has changed? What are the nature, extent, and implications of the competition between indigenous blacks and ethnic minority immigrants for entry-level restaurant jobs? If whites had applied for the jobs at stake in *Shirley v. Vicnat*, one assumes that they would have gotten them. Why do indigenous blacks, who have been here all along so to speak, lack sufficient status to bump new arrivals out of the competition for the jobs blacks want? Is that the correct way to view the matter? Where is the locus of discrimination and domination when minorities battle each other for jobs at the lowest rungs of the labor market? If blacks really want the jobs, what impediments are blocking them from achieving employment at the lowest level of the food service industry?

The three ethnographies provide answers to some of these questions, but their usefulness is limited. The ethnographies tell us something about the contemporary state of the work ethic among low-status service workers, their attitudes toward those who do not work, the contributions (some positive, some not) of their family lives to their material well-being, and the structural context in which they struggle to get ahead through advancement in employment or education. Unfortunately, the ethnographies focus on restaurants in ethnic neighborhoods; none deals with

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37. *Id.* at 238.
38. Hoffman interview, *supra* note 29.
39. *See* S.F. Blacks, *supra* note 17, at 1 (reporting allegations that applications of blacks were tossed in the trash and managers were told to hire only Filipinos).

work sites in the white mainstream where minorities may encounter co-workers, supervisors, or customers who are white. The values of the mainstream, nonetheless, have a powerful, albeit secondhand, effect on the opportunities of black job applicants and customers trying to do business in the enclave environment.

A. *"Good Jobs" in Fast Food*

Not so many years ago the idea that black high school graduates would bring a lawsuit to establish their right to work at McDonald's would have sounded preposterous. Most of us start with the premise that fast food jobs are bad jobs for nearly everyone except the teenage female looking for her first part-time job, at a retail business close to home, so that she can earn a bit of money to spend on the commodities of youth culture. After all, fast food pay is low (roughly minimum wage), while the work is routinized, unskilled, and part-time. Because the managers control the days, the times, and the number of hours crew members work, the size of an employee's paycheck is within the managers' arbitrary control.[40] The jobs are designed to facilitate high turnover. The average tenure in a fast food job is six months.[41] It is little wonder then that nearly one in every eight minority youth in this country is estimated to have worked in the fast food industry at some point in their lives.[42] Advancement or mobility is virtually nonexistent. Manager positions are filled from among the ranks of the workers, but a manager's lot is not very different from that of the crew members, in part because salaried managers may be required to work overtime without receiving overtime pay. The customers are often angry about the food or life in general, and are hard to please.[43] Yet, a norm of deference is enforced. The injunction that fast food workers kowtow to abusive patrons and swallow insults without response carries with it a special stigma in minority communities where reacting to verbal abuse in kind is the norm and being treated with respect is highly valued.[44] Merely holding such a job, then, can be a blow to one's self-esteem and dignity. The notion that fast food jobs are at the bottom of the employment barrel is further reinforced by the low social status of the typical jobs holders—

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40. Stack, *supra* note 9, at 204.

41. NEWMAN, *supra* note 11, at 94.

42. *Id.* at 46.

43. NEWMAN, supra note 11, at 91.

44. Among blacks, new terms for verbal abuse constantly enrich the popular vernacular (take "dis" for example, *see* GENEVA SMITHERMAN, BLACK TALK: WORDS AND PHRASES FROM THE HOOD TO THE AMEN CORNER 108 (rev. ed. 2000)), and verbal jousting or the competitive, creative exchange of barbs and affronts is a performance practice known as "playing the dozens." *Id.* at 115-16.

teenagers, women, minorities, immigrants, and the elderly.[45] For all these reasons, it is difficult to see why anyone would sue to secure a crew-level fast food job.

Under certain circumstances, however, bad jobs become relatively good jobs. From the perspectives of the workers in Katherine Newman's study, for example, fast food jobs were much better than the public perceived them to be. Scarcity played a role in altering the worth of these positions. Because of the shortage of jobs at that time, competition was fierce. For every available job, there were fourteen applicants.[46] Adults were crowding teenagers out of the fast food market in Harlem.[47] The adults were preferred because they were more stable and likely to stick with the job longer.[48] According to Newman, many Harlem adults "remain in jobs designed for teenagers and try to manage adult responsibilities on hopelessly inadequate wages."[49]

Beyond being scarce, the jobs themselves required a level of skill, intelligence, and responsibility that could not be programmed into the computer-run equipment or specified in the prescribed rules or routines mandated by chain headquarters. The workers invented informal "work arounds" that get the job done when customer demand peaks or the equipment fails.[50] "[M]anagement and the workforce develop a craft ethic, a pride in their ability to meet the challenge of a heavy workload without skipping a beat."[51] Though these jobs may be "lowly, repetitive, routinized, and demeaning, . . . doing them right requires their incumbents to process information, coordinate with others, and track inventory."[52] Unfortunately, the skills and experience the workers acquired were largely invisible to outsiders, obscured by the poor reputation of the jobs and the low-status of the workers.[53]

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45. NEWMAN, *supra* note 11, at 95.
46. *Id.* at 62.
47. In the fast food restaurants Newman studied, the workers were "considerably older" than high school age. *Id.* at 49. Over half were more than 25. *Id.* at 163. Moreover, in another departure from the usual pattern, nearly half were male. *Id.* at 51.
48. *Id.* at 232.
49. *Id.* at 151.
50. NEWMAN, *supra* note 11, at 142.
51. *Id.* at 143.
52. *Id.* at 144. The workers in Carol Stack's study also saw themselves as acquiring skills that should have been attractive to employers higher up the labor hierarchy. Among the tasks they mentioned were managing time; handling multiple tasks at one time; negotiating with co-workers from different cultures, recruiting and recommending new employees; developing new systems, shortcuts, and improvements; fixing machines; dealing with rude and bad-tempered customers; and working under the supervision of numerous managers who control their hours and their schedules Stack, *supra* note 9, at 205.
53. NEWMAN, *supra* note 11, at 148-49. "Were [the jobs] nothing more than way stations toward a better career, then there would be little lasting damage

They were therefore not a basis for the workers' advancement in the labor market.

According to Newman, the stigma associated with fast food jobs was overcome by the self-respect the workers felt because they were working. They were accordingly able to associate themselves with the "great mass" of folks who work and with the virtues that come with being "gainfully employed."[54] The cultures of the restaurant workplaces "actively function[ed] to overcome the negatives by reinforcing the value of the work ethic."[55] "[T]he work ethic is more than an attitude toward earning money—it is a disciplined existence, a social life woven around the workplace."[56] The relationships associated with the workplace displaced those that the workers had with friends and relatives who were either unemployed or engaged in illegal behavior. For the younger workers, the jobs covered the costs of going to school which made it possible for them to complete their studies.[57] Moreover, work provided structure and discipline, caring adults who watched over them,[58] fellow workers who were role models with regard to pathways to the world of better jobs,[59] and a measure of success that generated confidence that might be carried into another setting.[60]

Once upon a time, counter and kitchen jobs in fast food restaurants were derisively dismissed as "flipping burgers." The ethnographic studies suggest that there is an alternative assessment. For some workers, the negative aspects of fast food work persisted, but their relative importance was lessened by the pay, pals, pride, and prestige that come with working and holding down a job. It is less surprising therefore that some young blacks would sue for the right to hold such positions. But in seeking such employment they may face stiff competition from other ethnic minorities and immigrants.

B. *Fast Food Restaurants and Ethnic Niches*

The solidarity that played such a significant role in making work life tolerable for the subjects of the three fast food

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to the stigma. But the stigma sticks now because dead-end jobs signify dead-end lives, or so we believe." *Id.* at 297. Newman, however, sees no way to upgrade these jobs. Rather she suggests the creation of structures like consortiums of employers through which workers who have succeeded in the urban inner city fast food context are provided with an entrée to better jobs in the primary labor sector and in the suburbs. *Id.* at 286-89.

54. *Id.* at 98.
55. *Id.* at 102.
56. *Id.* at 119.
57. NEWMAN, *supra* note 11, at 123.
58. *Id.* at 132.
59. *Id.*
60. *Id.* at 123.

ethnographies, and that made seemingly bad jobs appear good enough for applicants to fight for, ironically came at the expense of outsiders, particularly indigenous blacks, who, through the use of stereotypes and ethnic social networks, tended to be excluded from the fairly homogeneous workforces studied.   For example, Newman found that Latino immigrants were favored over blacks,[61] and immigrant blacks were favored over indigenous ones.[62] The Latinos were thought to be harder workers,[63] while immigrants supposedly appreciated the low wages more because they were a vast sum compared to the going rates paid where the workers came from. Class was also a factor in hiring. Though they did not discriminate on the basis of race, the black restaurant owners were biased against lower class minorities with "their poor educational preparation, motivation, dependability, and dress style, [which] made it harder for some people to pass through the employment barrier than others."[64] Those who were not from the immediate neighborhood also had an advantage over those who were because it was feared that neighborhood residents would goof off with their friends who would also ask them for free food.[65] Finally, people who did not have a network of friends and family who worked in the fast food industry and who could, therefore, supply the managers with personal references found it hard to compete with those who did.[66]

The picture that Carol Stack paints in her preliminary findings is pretty much the same. Employers in Oakland, California preferred to hire Latinos and Asians, not blacks.[67] The percentage   of   blacks   hired   at   the   establishments   Stack investigated was half the percentage of blacks who applied.[68] The percentage of foreign-born workers was twice the percentage of native-born workers.[69] The workers were fairly evenly divided among blacks, Latinos, and Asian-Americans although the population of Oakland was 43% black, 14% Latino, and 14% Asian.[70] Despite the assertions of managers and owners, the workforce of the restaurants did not reflect the racial composition of the neighborhood.[71] Commuters were preferred to neighborhood residents.[72] Latinos and Asians tended to work daytime, weekday

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61. *Id.* at 234.
62. NEWMAN, *supra* note 11, at 242.
63. *Id.* at 179.
64. *Id.* at 156-57.
65. *Id.* at 237.
66. *Id.* at 241, 249.
67. Stack, *supra* note 9, at 201.
68. *Id.* at 201.
69. *Id.* at 202.
70. *Id.* at 201.
71. *Id.* at 202.
72. Stack, *supra* note 9, at 203.

shifts, while the black workers, who tended to be younger folks still in school, worked evenings and nights (the more dangerous times of the day).[73] Stack suggests that this arrangement reflected "the organization of shifts, work stations, and job assignments by language groupings."[74] Managers were drawn from among the ranks of the workers; given the preference for non-black workers there were accordingly few blacks on the management track.[75] Since the managers hired the workers and the Latino and Asian managers sometimes had very "limited English skills", they tended to hire from their own group.[76] Because there was a great deal of turnover (as much as 56% of the workforce had been on the job less than a year), the hiring patterns were repeated.[77] Stack concludes, somewhat cryptically, that "[l]anguage-structured shifts are barriers that may account for the race/age structure of these workplaces and for the race and ethnic patterns of promotions to management."[78]

The phenomenon presented by *Shirley v. Vicnat* and addressed by Newman and Stack, i.e., the competition between blacks and immigrant workers in low-wage, low-skilled urban employment settings, extends beyond the fast food context. For example, Roger Waldinger conducted a survey of 170 establishments engaged in the restaurant, hotel, printing, and furniture manufacturing trades in Los Angeles where blacks and Latinos vie for jobs.[79] The interviewees were the highest ranking persons in the subject firms involved with the hiring process.[80] Waldinger found a clear preference for Latino immigrants over native-born blacks.[81] Immigrants were willing to work harder and longer than native-born workers, white or black.[82] Immigrants were also thought to have the right attitude while blacks were not.[83] "In restaurants and in the manufacturing industries . . . studied, the 'skill' that employers rated most important generally involved a proficiency in interacting with people, whether customers or other employees."[84] Interpersonal skills, the ability to get along with customers and co-workers, and a positive, cooperative attitude were more important than literacy or

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73. *Id.* at 202.
74. *Id.*
75. *Id.*
76. *Id.*
77. Stack, *supra* note 9, at 202.
78. *Id.*
79. Roger Waldinger, *Black/Immigrant Competition Re-Assessed: New Evidence from Los Angeles,* 40 SOCIO. PERSPECTIVES 365, 367 (1997).
80. *Id.* at 367.
83. *Id.*
82. *Id.* at 376-77.
83. *Id.* at 377-80.
84. Waldinger, *supra* note 79, at 372.

numeracy in new hires.[85] Blacks allegedly had bad attitudes and a sense of entitlement that put employers off; the employers described blacks as having "a chip on their shoulder," or being distrustful, hostile, less accepting of supervision, and too ready to invoke available remedies if they felt that they had been wronged or treated unfairly.[86]

Nearly all the firms in Waldinger's study hired new workers based on referrals from existing workers.[87] This method promoted good will among the existing staff, was inexpensive yet reliable, and capitalized on personal relationships and ethnic ties to produce a cohesive, mutually supportive and collectively responsible workforce that trained and socialized newcomers.[88] Recruitment via referrals and promotion from inside tended to produce racially/ethically monolithic workforces.[89] Workers often knew about openings before the managers did and had replacement candidates lined up before the managers had a chance to go into the open market.[90] Employers relied heavily on the word of the referring employee, as opposed to an assessment of the person's skills, work history, or outside references.[91] Waldinger speculates that the successful recruitment and promotion of immigrant workers through networks gave "added confidence in the predictive power of ethnic markers" for those managers who followed the odds or technically pursued a pattern of what is known as "statistical discrimination."[92]

Network hiring seems to have a dual function, bringing immigrant communities into the workplace, while at the same time detaching vacancies from the open market, thus diminishing opportunities for blacks. If blacks are less likely than immigrants to have inside information, the evidence further suggests that they are also less likely to meet the criteria employers use when making hiring decisions. To some extent, this second disparity flows from black exclusion from recruitment networks, since insertion into the networks often provides employers with better quality information about applicants.[93]

Getting the job is one thing; holding on to it is quite another. Overt hostility between Latinos and any blacks who make it

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85. *Id.* at 371-74.
86. *Id.* at 378-79.
87. *Id.* at 369.
88. *Id.* at 369-70.
89. Waldinger, *supra* note 79, at 371. Intergroup hostility also worked to produce monolithic workforces. *Id.* at 381-83.
90. *Id.* at 370-71.
91. *Id.* at 373.
92. *Id.* at 380. Waldinger defines "statistical discrimination" as the reliance on "racial or ethnic characteristics, . . . easily observable markers, [as] a proxy for aspects of job-relevant worker behavior which are difficult or impossible to measure." *Id.* at 375.
93. Waldinger, *supra* note 79, at 384.

through the passive barriers of the immigrant hiring network created conflicts that undermined productivity and worked to limit the employers' and the prospective black employees' incentives to integrate the work force.[94] Waldinger speculates that blacks, for their part, may be "opting out of the low-level labor market in response to rising expectations, on the one hand, and the anticipation of employment difficulties, on the other."[95] But there are indications to the contrary, as the discussion above of *Shirley v. Vicnat* suggests.

C. Fast Food, Bad Attitudes, and Customer Preferences

Sociologist Jennifer Anne Parker explores in some depth the subject of blacks' bad attitude and its impact on their employment prospects in the fast food industry. She concludes that blacks' bad attitudes are not simply a matter of individual psychology or a response to conditions external to the workplace. They may be the product of blacks' resistance, not to work in general, but to the conditions of the particular workplace. Writes Parker:

"[T]he lack of motivation," "the lack of enthusiasm" managers speak of and which they claim to be manifestations of "bad attitude" may simply represent disempowerment due to [the workers'] social conditions and the feeling–both physical and psychological–that stems from . . . "the cycle that never ends." Disempowerment is expressed through tiredness, lack of energy . . . and lack of desire to work in a way that expresses enthusiasm. But this manifestation of disempowerment is interpreted by managers as a lack of motivation to work, a lack of a "positive attitude," rather than as rooted in disempowerment itself. It becomes a vicious circle. "Bad attitude" is caused by over work, and unfulfilled expectations regarding work. Bad attitude is reinforced by oppressive conditions including low wages and lack of promotion opportunities.[96]

In Parker's view, indigenous blacks are adversely impacted by the fast food industry's emphasis on employee attitude and appearance.[97] She attributes the impact not to intergroup bigotry, but to the organization of the fast food workplace and to the technological advances that make competence in the tasks associated with actually producing the food less important than those associated with serving it.[98] The service aspects of the business have become more decisive in hiring decisions because competition for market share is occurring at the counter and in the

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94. *Id.* at 382-83.
95. *Id.* at 384.
96. Parker, *supra* note 13, at 275-76.
97. *Id.* at 33, 37.
98. *Id.* 46-48.

dining area and not just in the kitchen.[99] An expert on restaurant management maintains that "[i]ncreasingly, customers have higher expectations, demanding more attention and friendlier service."[100] Meeting consumers' expectations for superior service is likely to become a more significant factor in the competition among fast food chains in the future.[101]

Bigotry and competition based on "good service" are certainly not mutually exclusive. There is some evidence that white customers prefer direct face-to-face contact with white service employees or at least employers believe they do.[102] Of course, a consumer-oriented desire to satisfy the preferences of white customers to be served by whites cannot justify discrimination. The $132.5 million settlement of the employment discrimination case against the family dining chain Shoney's should serve as a warning to any food service employer that it is unlawful to refuse to hire blacks for positions in which they would be seen by or interact with white customers.[103] Nonetheless, the preference may exist, and, law or no law, may be impacting on the employment opportunities of blacks in fast food restaurants. It is worthwhile, therefore, to consider the many factors that might account for it.

Leisure activities in American society are considered personal, private, or intimate even when they occur in public spaces like fast food restaurants that by law are open to all.[104]

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99. *Id.* at 48.
100. ROBERT CHRISTIE MILL, RESTAURANT MANAGEMENT: CUSTOMER, OPERATIONS, AND EMPLOYEES 22 (1998).
101. *Id.* at 46.
102. *Harry J. Holzer & Keith R. Ihlanfeldt, Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q. J. ECON. 835 (1998) (finding that the racial composition of an establishment's customers impacts the racial composition of the workforce, particularly as to jobs involving direct customer contact).
103. *See generally* STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE (1997) (recounting the course of *Haynes v. Shoney's Inc.*). The chief executive of Shoney's believed that black workers were bad for business in white communities, and managers down the line carried out his philosophy. *Id.* at 5, 113, 127-28, 156-57. The number of black workers was accordingly limited, blacks were prompted to quit when their number exceeded what was thought to be an acceptable level, and blacks were excluded from management positions. *Id.* at 15, 77. Applications were color-coded; the "o" in "Shoney's" was blackened so that the manager in charge of hiring would know not to call in a black applicant for further consideration. *Id.* at 5, 77. *See also* EEOC v. Dairy Queen, 989 F.2d 165 (5th Cir. 1993), *rev'ing in part,* 803 F. Supp. 1215 (S.D. Tex. 1991) (dismissing out of hand a claim that customers felt more comfortable being served by persons of their own race and culture and concluding that applications for employment by blacks indicated that the available labor force was not limited to white teenage high school students who lived in the vicinity).
104. Regina Austin, *"Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space,* 71 S. CAL. L. REV. 667, 694-98 (1998).

However, customers ought to have fewer expectations of encountering a select or elite group of like-minded denizens in a fast food restaurant. Social norms of inclusion and exclusion still operate within an outlet's physical domain, and the social status or rank of those who eat, work, or play there, including the restaurant staff, matters to some extent.

Poor service, by an employee of any color, cheapens the experience of eating at a fast food restaurant; it puts customers down class-wise and reminds them that they are not paying for a fine dining experience. Poor service is especially galling when it comes from someone of lower status and rank who could be accused of acting "uppity." Being served by a person from a status group of equal or superior rank, conversely, "enriches" the experience by heightening the consequence or symbolic capital of the person being served.

Domestic employment in America, which has predominately been women's work, has also historically been racially stratified, with whites occupying roles involving more visibility and contact with the employer or superior and fewer arduous duties than minorities.[105] As the locus of reproductive activities like preparing and serving food has moved from the home to business establishments and institutions, the domestic relationship has become somewhat less personal, but it has not necessarily become less racialized or gendered, either in terms of who performs the work or how the work is viewed.[106] The best jobs serving food still go to white men because of a rarely challenged pattern of sex discrimination by elite or upscale dining establishments emulating an Old World or European model.[107] The closer the restaurant environment comes to duplicating a home, the more likely service is viewed as being a feminine role and the more likely white

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105. *See generally* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor,* 18 SIGNS 1, 10, 20, 22 (1992) (elaborating on the racialized division of paid reproductive work both regionally and over time).

106. *See generally* Elaine J. Hall, *Waitering/Waitressing: Engendering the Work of Table Servers,* 7 GENDER & SOCIETY 329 (1993).

107. See David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study,* Q. J. ECON. 915 (1996) (reporting on the results of an audit study conducted by matched sets of men and women testers relying on the same set of resumes that revealed a pattern of sex discrimination in hiring by high-priced restaurants); Glen Collins & Monte Williams, *Few Blacks Where Tips Are High,* N.Y. TIMES, May 30, 2000 (reporting on the underrepresentation of blacks among the waitstaff of elite restaurants in New York City); Charles V. Bagli, *The Ciprianis Are Accused of Sex Bias in Hiring,* N.Y. TIMES, Aug. 25, 1999, at B1 (describing a suit brought by the State Attorney General against the owners of several upscale New York City restaurants that do not hire waitresses). *But see* EEOC v. Joe's Stone Crab, Inc., 969 F. Supp. 727 (1997) (finding a Title VII violation in the hiring practices of a restaurant that pursued the ethos that serious restaurants run in the European manner have male servers).

women are the preferred servers.[108] Minorities are at the end of the line.

There is a widespread belief that contemporary blacks, the descendants of slaves and domestic workers, do not want to do service work because of its association with domesticity and subservience.[109] It is not clear whether indigenous blacks differ from other indigenous Americans in this regard.[110] The civil rights movement created expectations across the society that indigenous blacks, like indigenous whites, would no longer be stuck with doing service work, and that it would be left to the new arrivals, the new immigrants. A distaste for service work could account for the bad attitudes attributed to some blacks and for their resistance to following the norms of deference expected of those staffing a fast food counter. Even if blacks do not abhor service work of a domestic sort or exude bad attitudes more frequently than other similarly situated Americans, the notion that blacks do may create anxieties for white persons confronted by black service workers and produce interactions that make whites' expectations self-fulfilling prophesies. Actual encounters with surly or unfriendly black service workers would reinforce the negative general attitudes. All of this suggests why whites might prefer white servers. Of course, some whites might favor white servers because the legacy of slavery and Jim Crow segregation has made them embarrassed to be served by blacks.

If whites' preferences are viewed from the flip side, whites may be partial to non-black service workers because the latter are thought to be more malleable or accommodating. This assumption may arise from the belief that deference and good service are more likely from the members of racial and ethnic minorities who are economically and socially vulnerable. Recent immigrants are more likely to fit that bill.

Ideally, the interaction at the fast food counter will be characterized by friendliness, easy informality, a desire to please, efficiency, and, depending on the gender and sexual orientation of the parties, a bit of harmless sexual tension or flirting.[111] Parents especially want the experience to be a sociable, fun, and a nonthreatening one for their children whose wishes and preferences often prompt the decision to eat at a fast food restaurant in the first place.[112] Vast numbers of fast food

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108. *Id.* at 303 (associating home-style service with the gendered role of waitress).
109. *See* Waldinger, *supra* note 79, at 379-80.
110. *See* Nancy Loman Scanlon, *The American Attitude Toward Hospitality Service Employment,* 28 MARRIAGE & FAMILY REV. 93 (1998).
111. Elaine J. Hall, *Smiling, Deferring, and Flirting: Doing Gender by Giving "Good Service,"* 20 WORK AND OCCUPATIONS 452, 465 (1993)(asserting that good service is characterized by friendliness, subservience, and flirting).
112. JACKEL & SCULLE, *supra* note 15, at 293 ("asserting that children make

customers have themselves been restaurant employees.[113]   The
service exchange is likely to be smoother if the person in front of
the counter identifies with the person working behind the counter
and sees their roles as being in some sense interchangeable. For
these reasons, intraracial interactions between counterperson and
customer are more likely to be smoother than interracial
interactions.   In addition, white customers who, motivated by
common stereotypes, find blacks to be threatening may shrink
from easy, familiar interactions with black service workers.

Thus,   when   racial   differences   exist   between   the
counterperson and the customer, the dynamic may change and the
white customer's expectations of having the ideal encounter may
decline. Fast food restaurants operating in a highly competitive
market may worry about this. If whites harbor a preference for
white, Latino, or Asian-American service workers over blacks, in
the competition for entry-level jobs where the ability to provide
good service is an important quality, blacks are operating under a
handicap.

There are several fixes that might improve the job prospects
of   black   would-be   fast   food   employees.   White   customer
preferences should be exposed and worked on, as opposed to being
appeased. More litigation like *Shirley v. Vicnat* would be in order.
The working conditions that produce bad attitudes in black service
workers should be improved.   With changes in pay scales,
supervision, and opportunities for advancement, blacks might
alter their perceptions of the value and standing of food service
jobs and come to see them as stepping stones to management
positions in a significant and growing sector of the economy.[114]
Change may be in the offing. A recent Purdue University study
concluded that the constant turnover of workers that characterizes
most fast food establishments is inefficient in light of the costs
associated with continually finding and training replacements and
the lost revenue caused by frustrated customers who search for
better service and consistency.[115]   Finally, blacks' employment
prospects would increase if they had more opportunities to serve
customers who appreciate them.

The cachet of black employees may then partly depend on the

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one-third of family [dining] decisions . . . and . . . one-fifth of all sales").
113. The National restaurant Association maintains that "[o]ne-third of all
adults have worked in the restaurant industry at some time during their
lives."   National restaurant Association, *Industry at a Glance available at*
http//www.restaurant.org/research.org/research/ind_glance.html.
114. *See* Scanlon, *supra* note 110, at 105 (asserting that Americans must
adjust their perception of service-related jobs if labor requirements are to be
met).
115. Milford Prewitt, *Purdue Study: Low Benefits Boost Turnover, Increase
Net Labor Costs,* NATION'S RESTAURANT NEWS, Dec. 6, 1999, at 1 (reporting on
the results of a study conduct by R. Kavanaugh, J. La Lopa & A. Felli).

extent to which the fast food industry appreciates black customers and black franchisees. Unfortunately, pursuing that line of inquiry leads to two more layers of race discrimination and conflict in the fast food industry. The next section considers parallels between the status ascribed to black fast food employees and that accorded black fast food customers.

II. CUSTOMER DISCRIMINATION: GREATER EXPECTATIONS COLLIDE WITH LESSER DESIRABILITY

A. Black Consumer Expectations

Dining at a fast food restaurant has a different significance for African Americans than for other racial/ethnic groups and fulfills a different set of consumer tastes or preferences. A survey conducted by the magazine *Restaurants & Institutions* revealed that blacks in general eat out less frequently than other groups; only 57% of blacks reported eating out once a week compared with 81% of Asians-Americans, 62% of whites, and 62% of Latinos.[116] Blacks, however, especially those with children, ate at quick service establishments as often as others did, although they were less than average frequenters of casual/family-style restaurants.[117] Whereas the average household typically spent $35.50 per week eating out, blacks spent much less.[118] Blacks generally allocate less of their family budgets to consumption of food away from home than whites, Latinos, and Asian Americans.[119]

The *Restaurant & Institutions* survey found that blacks' culinary preferences diverged from those of others as well. "Among ethnic groups, blacks are the least likely to order hamburgers."[120] "Instead they're more apt to have pizza, french fries or fried chicken."[121] "Shrimp and barbecue also rate highly among black customers."[122] Blacks' priorities with regard to take-out food also differed from those of others.[123] Hispanics, for example, were reported to seek "suitable take-out packaging and easy in-and-out access to the store."[124] Blacks, on the other hand, "expect[ed] value, adequate portions and good service."[125] "Blacks

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116. Jacqueline Dulen, *Changing Tastes,* RESTAURANTS & INSTITUTIONS, Feb. 1, 1998, at 58.
117. *Id.* at 66.
118. *Id.* at 62.
119. *See* Jessie X. Fan & Joan Koonce Lewis, *Budget Allocation Patterns of African Americans,* 33 J. CONSUMER AFFAIRS 134 (1999).
120. Dulen, *supra* note 116, at 69.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. Dulen, *supra* note 116, at 69.

place the highest premiums of any group on cleanliness and service."[126]

Black customers' patronage of fast food establishments (as opposed to casual dining or family-style restaurants) seems understandable in light of blacks' material conditions, their social circumstances, and their resulting expectations and preferences, on the one hand, and the characteristics of fast food establishments, on the other. Not only do blacks have less discretionary income than whites; they have also historically suffered discrimination in places of public accommodations like full-service restaurants. Jim Crow segregation has not been dead very long and denials of service and other forms of discrimination by restaurants still occur as the discussion that follows will attest. At the same time, there is much about fast food restaurants that appears to be democratic and egalitarian.[127] It is little wonder then that blacks find them inviting alternatives to family-style and casual dining restaurants like the notorious Denny's and Shoney's[128] or fancier fine dining/white table cloth establishments, precious few of which are owned or managed by blacks.[129]

Fast food restaurants seem to invite all kinds of patrons. The architecture and signage (the crenellated roofs of the White Castles, McDonald's golden arches, the KFC bucket with the Colonel's face) act as an invitation to travelers on the road and pedestrians on the sidewalks. People from various classes, categories, and walks of life rub shoulders at fast food restaurants, though not necessarily for very long. Kids (who bring their parents) are especially courted; play areas, advertising directed at children, toy promotions, and movie tie-ins encourage their patronage. Everyone, not just children, eats with her or his hands in fast food restaurants. The potential for children to damage the interior of such places is minimized through the use of plastic chairs and tables and tile floors. Senior citizens or older adults are more than welcome as well.[130] The distinction between fast food

126. *Id.*

127. *See generally* Allen Shelton, *Writing McDonald's, Eating the Past: McDonald's as a Postmodern Space in* STUDIES IN SYMBOLIC INTERACTION 103,113-16 (Vol. 15, Norman K. Denizin, ed., 1993) (explaining why McDonald's is "democratic theater").

128. *See* text at note 217, *infra* and note 103, *supra.*

129. *See* Marjorie Coeyman, *Color Blind,* RESTAURANT BUSINESS, Jan. 15, 1999, at 32 (describing and explaining the dearth of black chiefs, managers, and owners in fine dining establishments).

130. *See* Kimberley J. Harris & Joseph J. West, *Senior Savvy: Mature Diners' Restaurant Service Expectations,* FIU HOSPITALITY REVIEW, Fall 1995, at 35, 39-41 (surveying methods used by various restaurants including McDonald's and Burger King to attract mature customers). *See also* Johnny Sue Reynolds, Lisa R. Kennon, & Nancy L. Kniatt, *From the Golden Arches to the Golden Pond: Fast Food and Older Adults,* 28 MARRIAGE & FAMILY REV. 213, 221 (1998)(reporting on the results of a survey showing that older adults

customers and employees is blurred. The hired help sit amongst everyone else as they take their breaks, eat the food they and their co-workers have prepared, and converse among themselves or with their friends.

The dining accommodations are designed to keep the customers moving in and out. The seating is not cushy. The surroundings do not invite extended dining. A majority of customers of some restaurants do not even stay to eat their purchases; they order take-out.[131] Fast food restaurants are hardly intended to be so-called "third spaces." The bywords for design seem to be "Get it, eat it, and move along." Some groups do defy the admonition structured into the architecture and layout of the places, among them teenagers who have fewer places of public accommodation that tolerate their presence in large numbers and senior citizens who may linger on during off-peak times like breakfast and late afternoon. Fast food restaurants generally offer customers the comfort of comparatively safe and stable surroundings. Violence does sometime intrude, although security measures (cameras, Plexiglas barriers between counterpersons and customers) and security guards may make them oases in otherwise hostile urban environments.

Customers are waited on according to their place in line. Queuing reduces the opportunity for the server to prefer one category of customer over another. Customers wait on themselves in a fast food restaurant by carrying their own trays to tables, seating themselves where they chose or where space is available, and throwing their trash away before they go out the door. The absence of waiters or waitresses who work for tips minimizes conflicts over the quality of service. The companies emphasize the importance of good customer relations.[132] Employees are taught to be cordial to the rudest customer.[133]

Moreover, fast food restaurants typically have characteristics that seem to insure that blacks will not be cheated with regard to either price or quality of merchandise and that they will therefore get good value for their money. The prices are clearly posted on billboards or marquees and electronically embedded in the computer cash registers. The fare is supposed to be of uniform quality which guarantees that everyone will get pretty much the same product. The kitchen is open and the workers' behavior is

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patronize fast food restaurants primarily because of their convenience, speed of service, inexpensiveness, and reduced prices and promotions).

131. According to the annual report of Tricon Global Restaurants, 71% of KFC customers, 63% of Pizza Hut customers, and 60% of Taco Bell customers consume their purchases off-premises. TRICON GLOBAL RESTAURANTS, INC., 1999 ANNUAL REPORT 22 (1999).

132. ROBIN LEIDNER, FAST FOOD, FAST TALK: SERVICE WORK AND THE ROUTINIZATION OF EVERYDAY LIFE 73-76 (1993).

133. *Id.* at 75-76.

fairly exposed to the public. The cleanliness of the operation which is assumed to be overseen by corporate management is apparent to the customer. The prices are relatively reasonable and affordable by people who do not have a great deal of money. Sales and coupons may reduce the price even further. The food is not generally delivered into the customers' hands before the total bill is paid. No fast food counterperson should be anxious about being stiffed on the check; the fear that black patrons will be unable to pay or will walk out without paying sometimes serves as the excuse for the poor service, poor quality food, or requests for prepayment that blacks sometimes receive in full-service restaurants.[134]

Fast food menus contain items like fried chicken or fish that are staples of the soul food diet many blacks prefer.[135] Fast food is generally of decent quality; some of it is quite tasty; and more of it is becoming healthier.[136]

Finally, the fast food industry courts minority customers in various ways. Advertising campaigns directed at minority customers are common. McDonald's reportedly "reconfigured the seating layout of some of its restaurants in areas heavily populated by Hispanics to provide larger group areas where Hispanic families can sit together, [in recognition of] the importance of extended communities in many Hispanic communities."[137] Corporate giveaways or give-backs, in addition to building goodwill, enrich the communities from which the restaurants draw customers and represent an implicit reduction in the profits business concerns extract from them. Black franchisees and their organizations make a particular point of contributing to and touting their linkages with the communities in which their establishments are located. Whether minorities are getting their fair share of giveaways and give-backs is difficult to determine though.

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134. Race-based requests for prepayment have been held to violate public accommodation law. *Compare* Stevens v. Steak n Shake, Inc. 35 F. Supp. 2d 882 (M.D. Fla. 1998) (ruling that black customers among all patrons asked to prepay bills by waitress burned by walkouts during previous weekend bar rushes were not the victims of race discrimination) *with* Bobbitt v. Rage, 19 F. Supp.2d 512 (W.D. N.C. 1998)(finding discrimination where a Pizza Hut manager, accompanied by two police officers, informed a mixed-race group that it had to prepay for its order because three black teens had run out without paying the day before).
135. *See generally* Tracey N. Poe, *The Origins of Soul Food in Black Urban Identity: Chicago*, 37 AMERICAN STUDIES INTERNATIONAL 4 (1999) (describing the impact of the migration of Southern blacks on the culinary tastes of higher class native black Chicagoans).
136. *See Fast, Yes, but How Good?*, CONSUMER REPORTS, Dec. 1997, at 10 (rating popular fast foods items for taste and nutrition).
137. Maureen Minehan, *Going Public with Diversity*, HR MAGAZINE, Mar. 1999, at 159.

Blacks are indeed loyal customers of the fast food industry. In 1998, blacks accounted for $469 million in sales at McDonald's.[138] Blacks, along with Hispanics whose sales totaled $279 million, accounted for 25 cents of every $1 spent at McDonald's.[139] Sales to blacks and Hispanics represented 30% of Burger King's total.[140]

Fast food restaurants, then, seemingly promise minorities food that is of fairly uniform quality, accommodations that are fairly uniformly open to them, and service that is of fairly uniform hospitality. Despite the fairness and egalitarianism that seem to be structured into fast food restaurants, however, they sometimes frustrate black customers' hopes of receiving democratic treatment and the customers sue.

B. Discrimination and the "Bad Black Customer

There is only a handful of reported court decisions involving racial discrimination by fast food restaurants. In one case, a black plaintiff was allowed to maintain an action when he was ejected from a White Castle for exceeding a time limit which may or may not have been posted.[141] The resolution on the merits was not reported. In most of the remaining cases, the defendant chain managed either to defeat the claim of racism outright or at least make it a debatable issue. A black plaintiff sued when whites behind him in line at a Burger King were waited on out of turn and the counterperson made a smart remark when the black patron complained; the court attributed the incident to poor service and not discrimination.[142] In a third case, a black plaintiff was allowed to proceed with a claim that he had been denied the

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138. Targeted Promotions/Advertising: Fast Food: Minority Consumers Mean Major Revenues, Minority Markets Alert, May 1, 1998 (on file with author).
139. *Id.*
140. *Id.*
141. Hopson v. White Castle Systems, Inc., No. 86C6322, 1987 WL 7834 (N.D. Ill. Mar. 5, 1987).
142. In *Robertson v. Burger King*, 848 F. Supp. 78, 79 (E.D. La. 1994), a counterperson stopped waiting on a black man who was at the front of the line to serve two white men who were behind him. The assistant manager completed the plaintiff's order. When the black man "advised [the counterperson] that he 'would consult higher authorities about the matter,' she responded that she 'wouldn't give a damn what [he] did. . . .'" *Id.* at 79. Everyone involved in the incident but the black customer laughed. The black customer brought a civil suit under state and federal law public accommodation laws against Burger King, but the court dismissed the action. *Id.* at 82. The plaintiff was not denied admittance or service, which the laws guaranteed; he merely received slow service. Slow service may be inconvenient and frustrating, but it is all too common and does not "rise to the level" of a civil rights violation. *Id.* at 81. The court in *Charity v. Denny's Inc*, No. CIVA98-0554,1999 WL 544687 (E.D. La. July 26, 1999), reveals that both the employee and the manager involved in *Robertson* were black.

use of a restroom on account of his race,[143] but it was ultimately found to be frivolous because the restroom was out of order.[144]

McCaleb v. Pizza Hut of America Inc.[145] involved the classic racist service encounter, but the defendant saw the matter differently. Late on a Sunday evening, an extended African-American family group (consisting of seven adults and ten children), gathered together for a family reunion,[146] placed an order for six pizzas over the phone with defendant Pizza Hut's restaurant in Godfrey, Illinois.[147] The family was told that it was not too late for them to eat on the premises.[148] According to plaintiffs' attorney, blacks living in the area tended to patronize the Pizza Hut in the nearby town of Alton.[149] The parties went to the Godfrey restaurant because it was nearer to the home of the mother of several of the adult plaintiffs.[150] Census data from 1990 indicates that Godfrey has a tiny black population among its 5,500 residents, while Alton with a population of almost 33,000 is roughly one-quarter black.[151]

The first member of the group arrived around 10:15 p.m. and heard a Pizza Hut employee say that she was not serving the plaintiffs.[152] She used a racial slur in describing them.[153] The staff on duty that night was entirely white.[154] During the ensuing 45 minutes, the Pizza Hut employees made it quite clear that they did not want plaintiffs to eat on the premises.[155] They boxed the plaintiffs' order, moved tables the plaintiffs were sitting at, vacuumed around them, refused to give them plates and utensils with which to eat their pizzas, turned the lights on and off; turned the jukebox volume up and down, refused to sell them beverages, drove them from the restaurant before they were ready to leave, and used more slurs during a menacing confrontation in the restaurant's parking lot.[156] The court concluded that the defendant "provided [plaintiffs] with less than the full value of their

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143. Perry v. Burger King Corp., 924 F. Supp. 548 (S.D.N.Y. 1996).
144. Perry v. S.Z. Restaurant Corp., 45 F. Supp.2d 272 (S.D.N.Y. 1999).
145. 28 F. Supp.2d 1043 (N.D. Ill. 1998).
146. *Id.* at 1045.
147. *Id.* at 1046.
148. *Id.*
149. Telephone Interview with Edward A. Voci, Esq. (Sept. 10, 1999) [hereinafter Voci interview].
150. *Id.*
151. D-1 General Population and Housing Characteristics: 1980, Geographic Area: Godfrey CDP, Illinois & Geographic Area: Alton, Illinois (visited Mar. 6, 2000) *http://factfinder.census.gov/java_p.../dads.ui.fac.CommunityFac tsViewPage?TABH=3&TABT=.*
152. *McCaleb,* 28 F. Supp.2d 1043, 1046 (N.D. Ill. 1998).
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1046-47.

purchase, that is .the plaintiffs were denied the accouterments that are ordinarily provided with a restaurant meal at the Godfrey Pizza Hut."[157] Furthermore, said the court, "[g]iven the derogatory references to plaintiffs' race both when they arrived and when they left, as well as the more favorable treatment accorded the whites that were dining in the restaurant [when the plaintiffs arrived], it can be inferred that the treatment received by plaintiffs was racially motivated."[158] Defendant's motion for summary judgment was accordingly denied.

The case was settled before a trial was conducted.[159] According to a news report, Pizza Hut denied that racial discrimination was involved in the case; rather, it maintained that the plaintiffs were the "victims of poor service" and the incident was merely "'a bad dining experience and misunderstanding'. "[160]

Some black patrons, who are unwilling or unable to accept being treated with disrespect and discrimination and who perhaps recognize that they have little legal recourse, complain or respond verbally and aggressively to what they consider bad or unequal service. There are several cases in which the vehemence or belligerence of black customers has been used to justify their ejection from the premises and arrest. This response in turn has been labeled discriminatory by the ejected patrons who sued.

Take the case of *Alexis v. McDonald's*. According to the facts as they are reported in published decisions and supplement by comments from plaintiffs' attorney, Yvonne Alexis and her family went to a McDonald's restaurant located off Route 30 on the Mass Pike, in Framingham, Massachusetts, a large town roughly thirty minutes west of Boston.[161] When the Alexis family received its food, it was apparent that the counterperson, Alfredo Pascacio, had mistaken the order.[162] Mr. Pascacio is a native Spanish speaker,[163] while Mrs. Alexis, a manager with a major airline and the mother of three small children, has a Trinidadian accent. They were attempting to overcome the linguistic barriers and to work out the difficulties with the order when Donna Domina, the swing manager, intervened.[164] Here the accounts differed. Mrs. Alexis maintained that Ms. Domina made fun of the worker's accent and the amount of time it was taking for him to complete

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157. *McCaleb*, 28 F.Supp.2d. at 1048.
158. *Id.*
159. April M. Washington, *Arlington Family Settles Lawsuit; Pizza Hut Officials Deny Wrongdoing in Precedent-Setting Case*, DALLAS MORNING NEWS, Dec. 31, 1998, at 1A.
160. *Id.*
161. 67 F.3d 341, 345 (2d Cir. 1995); Telephone Interview with Terrance Perry, Esq. (September 3, 1999; Perry interview, *supra* note 97.
162. *Id.*
163. *Id.*
164. *Id.*

the transaction.[165] Mrs. Alexis came to the worker's defense by telling the manager that she and he were working the matter out and that she should take care of other people.[166] Ms. Domina maintained that she intervened on Pascacio's behalf.[167] Angry words were exchanged and Ms. Domina instructed Pascacio to put the Alexis order in a bag and get them out of the restaurant.[168] She told the Alexis family that if they attempted to eat there, she would call the police.[169] Mrs. Alexis informed her that they intended to eat on the premises and that she should do what she had to do.[170]

A manager summoned Michael Leporati, the off-duty police officer who patrolled the exterior of the restaurant pursuant to an arrangement with the town.[171] The manager told him that Mrs. Alexis had made a disturbance and had been asked to leave.[172] The manager indicted that she wanted Mrs. Alexis to leave.[173] He went into the dining room and told the entire Alexis family that they would have to leave.[174] Mrs. Alexis denied causing a disturbance, urged the officer to make inquiries of other customers, and refused to budge.[175] When Leporati spoke with the manager, she stated that she had had a problem with Mrs. Alexis before and Domina indicated that in that event Mrs. Alexis would definitely have to leave.[176] Mrs. Alexis once again indicated that she "believed she had a right to finish eating."[177] Another officer was called.[178] Mrs. Alexis was placed under arrest, forcibly carried from the premises in handcuffs, and pushed into a police car with the admonition "'Get your ass in there.'"[179] "When Mr. Alexis [in objecting to the treatment his wife received] said 'We have rights,' Leporati responded, 'You people have no rights. You better shut up your [expletive] mouth before I arrest you too.'"[180] Mrs. Alexis was charged with criminal trespass, but was subsequently acquitted.[181]

The Alexis family brought a suit in federal court in which

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165. Perry interview, *supra* note 97.
166. *Id.*
167. *Alexis*, 67 F.3d at 345.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Alexis*, 67 F.3d at 345.
173. *Id.*
174. *Id.*
175. *Id.* at 345-46.
176. *Id.* at 346.
177. *Alexis*, 67 F.3d at 346.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

they alleged civil rights and common law tort claims.[182] The district court granted summary judgment with regard to them all, but the ruling was modified on appeal.[183] Officer Leporati's "You people" statement which "tarr[ed] the entire family with the same brush –absent a scintilla of evidence that any member, with the possible exceptions of [Mrs.] Alexis, had said or done anything remotely wrong or disorderly,"[184] and his unwarranted use of excessive force were sufficient evidence of racial animus to create a triable issue of fact.[185] The affidavits of Mrs. Alexis, her family, and an independent witness expressing their opinions that Domina's angry and rude behavior reflected racial animus were insufficient.[186] In the court's view, the record failed to reveal "probative evidence that Domina's petulance stemmed from something other than a race-neutral reaction to [a] stressful encounter . . . including Alexis's persistence (however justified.)"[187] The case as to the surviving counts was tried and a sharply divided jury was unable to reach a verdict.[188] A retrial was avoided after a confidential settlement was reached.[189]

Wells v. Burger King also involved a verbal altercation that resulted in the ejection of black customers from a fast food restaurant with the assistance of the police.[190] The lead plaintiff Verlinda Wells, a professional woman in her late forties, accompanied her three college-age daughters back to a Burger King they had visited earlier that day.[191] Mrs. Wells wanted both to understand why her children had been unable to place multiple orders at the drive-through window and to order food so that they could eat on the premises.[192] According to Burger King's account of the incident, Ms. Wells responded to an attempt to explain the drive-through's three-order limit with "yelling, screaming, speaking in tongues, waving her arms, and grabbing [the assistant

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182. *Alexis*, 67 F.3d at 346.
183. *Id.* at 354.
184. *Id.* at 348.
185. *Id.*
186. *Id.* at 347.
187. *Alexis*, 67 F.3d at 346.
188. Perry interview, *supra* note 97.
189. *Id.*
190. 40 F. Supp.2d 1366 (N.D. Fla. 1998).
191. *Id.* at 1367; Telephone Interview with Marie A. Mattox, Esq. (Sept. 9, 1999) [hereinafter Mattox interview].
192. The Wells sisters and a friend had been denied the right to place five orders at the drive-through window because company policy limited the maximum number of orders to three. *Wells*, 40 F.Supp.2d at 1367. (Limits on the number of orders that can be placed at a drive-through window at one time are consistent with the desire to keep service at drive-through windows speedy.) *Id.* The Wellses contended that they canceled the two orders they had successfully made and asked for a refund, in part, because the employee was "nasty and abrasive." *Id.* According to Burger King, on the other hand, the young women "argued about the policy, [and] used abusive language." *Id.*

manager's] arm."[193]   The attorney for the Wells family said that
Ms. Wells was merely seeking divine support. At this point, the
Wellses were asked to leave the restaurant.[194]   When they refused,
a silent alarm was pushed, a SWAT team soon surrounded the
building, and an armed officer asked the Wellses to step outside
where he informed them that they had to leave the premises.[195]
The Wells family attorney asserted that the restaurant summoned
the police more often for black customers than for white
customers.[196]

The Wells family brought claims under both § 1981 of the
Civil Rights Act of 1866 and Florida law.[197]   The court rejected the
federal claim and remanded the state law claim to state court.[198]
The court concluded that Ms. Wells went into the restaurant not
"merely to order food," but "for the express purpose of confronting
the manager about the treatment her children received."[199]   "Only
when the conversation became contentious did the manager tell
[Ms. Wells] that the police were being called and that service was
being denied."[200]   Thus, Ms. Wells and her family were denied
service because they created a disturbance, not because of their
race.[201]

One commentator has said that *Alexis* illustrates that ejection
of an unruly patron who belongs to a protected minority does not
violate the civil rights laws if the ejection is based on conduct.[202]
Moreover, "[m]utual misunderstanding, misinterpretation and
overreaction . . .   do   not   give   rise   to   an   inference   of
discrimination."[203]   The same might be said of *Wells*.   But
misinterpretation of the behavior of blacks is quite common.
Whites consistently find black behavior to be more aggressive and
hostile than blacks intend it to be.[204]   Fear of black aggression,
blacks' failure to conform to norms of civility and cordiality in
commercial interactions in which they believe that their rights
have been violated, and some whites' belief that they as whites
possess prerogatives with regard to disciplining blacks all affect
the sorts of interactions that are described in *Alexis* and *Wells*.[205]

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193. *Id.*
194. *Id.* at 1367-68.
195. *Id.* at 1368.
196. Mattox interview, *supra* note 191.
197. *Wells*, 40 S. Supp.2d at 1367.
198. *Id.* at 1369.
199. *Id.* at 1369.
200. *Id.*
201. *Id.*
202. HOTEL, RESTAURANT, AND TRAVEL LAW: A PREVENTIVE APPROACH 59
(Norman G. Cournoyer, Anthony G. Marshall, & Karen L. Morris, eds., 5th ed.
1998).
203. *Id.*
204. THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 44 (1981).
205. *See generally id.* at 43-62 (illustrating how social injustice and

The responses provoked by the confrontations described in *Alexis* and *Wells* share something in common with the refusals of some pizza chain outlets to make deliveries to the residents of certain black minority communities; both involve the construction of the black fast food customers as dangerous and violent. Pursuing a policy reminiscent of the redlining practiced by banks and insurance companies, pizza outlets throughout the nation have denied service to entire neighborhoods on the ground that crime data or employee' knowledge of the dangerousness of the restricted areas leads them to fear that their delivery persons will be ambushed, robbed, and injured or killed in the process.[206] Those who oppose the restrictions contend that they are based on race. Customers in suspect communities have also been ordered to meet delivery persons at the curb[207] or denied the privilege of paying for

repression result when white cultural standards are used to evaluate blacks' emotional expressive behavior).

206. *See, e.g.*, Kathryn Quigley, *Suit Alleges Pizza Places Discriminate*, PALM BEACH POST, Oct. 31, 2000, at 2B (describing a lawsuit filed in Florida state court by minority customers challenging the delivery practices of four pizza chains); Joe Mandak, *Couple Says Pizza Hut Discriminates Against Their Black Neighborhood*, AP, Oct. 6, 2000 (reporting on a complaint to the Pittsburgh Human Relations Commission brought by a black couple denied pizza deliveries; Pizza Hut invokes crime statistics as justification for limitation); *Northeast Wichita Residents Denounce Pizza Delivery Policies*, AP, Apr.4, 2000 (describing the practice of various pizza chains to restrict deliveries in a historically black section of the city to the early evening); Carol Teegardin & Laken Oguntoyinbo, *Some Pizzerias Selective on Where They Deliver in Detroit Area*, DETROIT FREE PRESS, Dec. 11, 1998 (exploring both sides of the debate on restricted pizza deliveries); Daniel Gonzalez et al., *Where Pizza Fears to Deliver City residents Who Can't Get a Pizza from Some Shops Say It's Racism*, POST-STANDARD (SYRACUSE, N.Y.), Mar. 9, 1998, at A1 (describing the competing points of view of customers, drivers, and owners regarding deliveries in the Syracuse area); Stephen E. Winn, *Pizza Problems*, KANSAS CITY STAR, Jan. 25, 1997, at C6 (editorializing on the refusal of a Pizza Hut to deliver pizzas for an honor student's luncheon at a high school in a restricted zone); Clarence Page, *In Bad Taste; Is Pizza Delivery a Right or a Privilege*, CHI. TRIB. , July 25, 1996, at 25 (commenting on the circumstances surrounding a San Francisco ordinance barring refusals to deliver that are not based on a reasonable good-faith belief of danger).

207. *See* Peter Slevin, *Residents Sue Domino's Citing D.C. Delivery Bias; Company Calls Driver Safety the Issue*, WASH. POST, Oct. 5, 1999 at A1 (describing the controversy over delivery restrictions and the debate as to whether they are based on race or subjective assessments of danger); Peter Slevin, *Delivering Discrimination? Two Lawsuits Accuse Domino's of Bias*, WASH. POST. Jan. 9 1999, at B1 (describing lawsuits brought by two disappointed black customers who complained after they were left waiting a the curb). One was allegedly confronted with a knife when the delivery person finally showed up while the other was confronted with racial epithets on the phone. *Id.* The suit brought attacking the practice of curb-side deliveries failed, however. *See also* Robert Woodson, Sr., *The $30 Million Pizza*, WASH. TIMES, Oct. 11, 2000, at A16 (arguing that the suit which was brought against a black franchisee who employed blacks represented a form of civil rights profiteering).

their pizzas by check.[208] In several cases, however, geographically restricted pizza deliveries have been found to violate public accommodations laws.[209] Moreover, in the summer of 2000 Domino's voluntarily entered into an agreement with the Justice Department pursuant to which Domino's implemented procedures to insure that its delivery limitations are based on documented evidence of safety risks to employees and not to race, national origin, religion, age, or other illegal criteria.[210]

Who constitutes a bad customer will vary with the group and the setting. As a general matter, groups of people who are thought not to understand the culture of the particular kind of restaurant or whose presence is deemed incongruous to the culture may be stereotyped as "bad." For example, in upscale full-service restaurants that primarily serve a male business clientele, women are sometimes discriminated against as "bad customers" because they allegedly do not tip well and tie up tables with their talking.[211] In a fast food restaurant, on the other hands, there is no tipping and customer turnover is generally less problematic.

The "bad black customer" is in many ways an analog to the black service employee with the bad attitude. The cases suggest that, in addition to being dangerous and volatile, the bad black customer may also be loud and boisterous, especially when displeased. The bad black customer is unfriendly and suspicious, characteristics not totally unexpected of folks who have long been the targets of discriminatory service. The bad black customer is demanding and difficult to please. Exacting behavior that would

208. *See* James v. Team Washington, Inc., No. CIV .A. 97-00378 TAF, 1997 WL 633323 (D.D.C. 1997) (refusing to dismiss a claim of racial discrimination against a Domino's franchisee based on its refusal to take checks from residents of the community where the black plaintiff's business was located).

209. *See* Robinson v. Power Pizza, Inc., 993 F. Supp. 1462 (M.D. Fla 1998)(granting a preliminary injunction against a Domino's franchise which refused to deliver to the black community of American Beach where the sheriff stated that American Beach posed no greater security risk than any other location in the county); DP, Inc. v. Harris, No 99A-12-003 HDR, 2000 W.L. 1211151 (Del. Super. Ct. 2000) (affirming the decision of the Human Relations Commission awarding damages to a customer who was told that the Domino's franchise did not deliver to her street where the limitation appeared to be based on stereotypes about crime and race, rather than legitimate concerns about the safety risks to drivers).

210. *See* Agreement Between the United States and Domino's Pizza LLC Regarding Domino's Delivery Limitation Policies and Procedures *available at* http//www.usdoj.gov:80/crt/housing/documents/dominossettle.htm; Delivery Area Security Procedure Manual (Appendix B) *available at http://www.usdoj.gov:80/crt/housing/documents/dominos_manual.htm*; Peter Slevin, *Domino's U.S. Reach Accord on Deliveries: Race Can't Be Factor in Limiting Service*, WASH. POST. June 6, 2000, at A3.

211. *See* Elizabeth Church, *Women at Work: Restaurant Service Leaves a Bad Taste,* GLOBE & MAIL (TORONTO), Jan. 6, 1999, at B11 (reporting on the results of a Zagat survey concerning treatment women receive in restaurants); *The Bitter Taste of Inequality,* L.A. TIMES, Jan. 4, 2000, at E4 (ditto).

be acceptable coming from a white patron is probably less acceptable when it comes from a black person on account of the black person's lower social rank or standing. Just as the patron's social standing may depend on the identity of her/his server, so may the status of the server depend on the identity and behavior of the person being served.

Part stereotype, part accurate portrayal, the construct of the bad black customer can produce bad interactions between black patrons and service employees of any color. There is racial bigotry operating here, though the extent of the taint is more a matter of degree than of absolutes. Goodwill on both sides of the counter will cure part of the problem, but there is a modicum of bad service based on the stereotype of the bad black customer that is illegal because it arises from a racist fiction, not fact. Moreover, to the extent that white customers would prefer not to occupy leisure spaces with blacks, restaurants competing to attract or maintain a white clientele might also deem blacks bad for business, label them "bad customers," and strategically resort to various measures such as bad service to limit their patronage.

Distinguishing discriminatory bad service from ordinary, benign bad service is not easy. Bad service is all too common. It may be the facet of restaurant dining customers complain about most.[212] Yet, the subtlety of the inequality and the possibility that the black patron has overreacted do not necessarily negate the conclusion that she or he has been the victim of discrimination. In the absence of an outright refusal to serve, the utterance of slurs or racial insults, or proof that identically-situated whites received better treatment, poor service alone is not generally considered actionable discrimination.[213] The result, though, is that a restaurant that wishes to discourage black patronage may resort to such subtle devices as "slow service, discourteous treatment, [and] harassing comments and gestures [that are not overtly racialized]"[214] with impunity. The behavior is legally written off as the sort of thing that could happen to anybody.

In *Callwood v. Dave & Buster's, Inc.*, the district court acknowledged the inadequacy of the existing standards, and ruled that markedly hostile behavior, directed toward members of a

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212. MILL, *supra* note 100, at 22.

213. *Robertson v. Burger King*, 848 F. Supp. 78 (1994), discussed supra note *87*, is usually cited in support of this proposition. Showing disparities in the treatment of the complainants and white customers would be facilitated by the use of testers, but they are rarely employed and there are no organizations devoted to supplying testers to address claims of discrimination in public accommodations as there are in hiring and housing. *See* Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 U.C.L.A. L. REV. 1207, 1229-32 (1997).

214. Charity v. Denny's Inc., No.CIV.A. 98-0554, 1999 WL 544687, at *5 (E.D.La. July 26, 1999)

protected class, that a reasonable person would consider objectively unreasonable will support an inference of discrimination.[215] "Markedly hostile behavior" might be evidenced by employee behavior that "is (1) so profoundly contrary to the manifest financial interests of the merchant and /or her employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination."[216] While this approach better reflects the realities of modern service discrimination, its reliance on the financial interests of the merchant or the norms of business in general to supply a baseline by which to gauge the propriety of customer service may be misplaced.

Discrimination is not serendipity; in many cases it has structural predicates that leave footprints capable of being tracked. An episode of questionable conduct should be viewed in the context of the competitive or economic position of the particular restaurant, the entire chain, or the industry in general in order to determine if racism of an institutional nature was operating. In some situations, blacks and other minorities are viewed as being bad for business. Contrary to the *Callwood* court's assumption, discrimination against them may be entirely consistent with the financial interests of a proprietor or chain and in accord with unexpressed business norms.

For example, back in the late 1980's and early 1990's, black customers were discriminated against at various Denny's restaurant locations.[217] In a New York Times Magazine article Howard Kohn indicated that Blacks were asked to prepay for their orders; they were seated in the backs of restaurants, out of sight and far from the door; they were locked out of restaurants (so-called "black outs") or otherwise refused service.[218] According to one account in the article, the pattern of behavior resulted partly from a management-imposed policy grounded in the company's material competitive conditions and partly from corporate culture.[219] The article indicated that management was concerned about saving money, particularly through curbing the number of customers who walked out without paying (so-called "walkouts").[220] Computerization enabled management to pinpoint the restaurants where walkouts were a problem and they turned out to be locations frequented by many young blacks.[221] Some of these restaurants were in communities in which the demographics were

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215. Callwood v. Dave & Buster's, inc., 98 F. Supp.2d 694, 707 (D. Md. 2000).
216. *Id.*
217. *See* Howard Kohn, *Service with A Sneer,* N.Y. TIMES, Nov. 6, 1994, §6 (Magazine), at 43.
218. *Id.* at 43-44.
219. *Id.* at 44,45, 47, 58.
220. *Id.* at 46.
221. *Id.*

changing and the clientele was becoming more mixed or black.[222]
Young blacks threatened business because they made the older
white core customers uncomfortable.[223] Because there was a
concern about keeping the customer base as white as possible,
practices that discouraged black patronage were condoned at some
locations.[224]

There are economic factors present in the contemporary fast
food market that might encourage discrimination against black
customers, at some restaurants and within some chains more than
others to be sure. Faced with stiffer competition and declining or
stagnant profit margins in the domestic market and a limited
ability to compete on the basis of menu changes or accelerated
delivery of the food through technological changes in the kitchen,
the fast food industry is paying greater attention to the quality of
the dining experience, particularly to the service and the
restaurants' ambiance. Sit-down family style restaurants like
Denny's, Waffle House, and IHOP (International House of
Pancakes) and casual dining or dinner house establishments like
Applebee's, TGI Friday's, and Chili's are the benchmarks. Hybrid
fast/casual or quick quality restaurants are entering the market.[225]
As a result, fast food restaurants may be more willing to cater to
their white customers' taste for segregated leisure spaces.[226] In
order for the fast food environment to take on the aura of a
family/casual establishment, minorities may become less welcome
patrons.

At the same time, there are limits to the fast food industry's
embrace of minority customers through outlets in their own
communities. Fast food outlets are hard to find in some minority
neighborhoods. Outlets in other minority neighborhoods may
charge more than elsewhere. Economist Kathryn Graddy's work
indicates that fast food restaurants in black neighborhoods charge
more. When income and cost differences are taken into account, it
appears that fast-food prices increase about 5% for a 50% rise in
the proportion of blacks living in a zip code area." [227] This
differential is attributable to franchised outlets, not corporate-
owned outlets.[228] Cost and competition did not explain the

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222. Kohn, *supra* note 100, at 46.
223. *Id.* at 58.
224. *Id.*
225. *See* Cheryl Ursin, *Quick Quality: Serving Food Fast and with Finesse,*
RESTAURANTS USA, Apr. 1998, at 13 (describing restaurants that combine the
"speed and convenience of traditional fast food with the food quality and
appealing decor of casual-dining restaurants").
226. *See* Austin, *supra* note 104, at 694-98 (describing techniques by which
public leisure spaces are privatized and racialized).
227. Kathryn Graddy, *Do Fast-Food Chains Discriminate on the Race and
Income Characteristics of an Area?,* 15 J. BUS. & ECON. STATS. 391, 401
(1997).
228. Kathryn Graddy & Diana C. Robertson, *Fairness of Pricing Decisions,* 9

differential; Graddy speculated that it might reflect the relative disadvantages or advantages of franchise outlets compared to company stores with regard to the cost of insurance and the ability to self-insure, customer price elasticities, or the wage demanded by non-black workers serving black customers.[229] The amenities of restaurants within urban minority communities may differ from those of the suburbs. Some patrons object to the bulletproof plexiglass partitions that separate counterpersons from customers in some inner city fast food restaurants. Mobile blacks and Latinos, searching for access and value, may be increasingly frequenting fast food outlets beyond their communities. Recall that a trip to a fast food restaurant can be a special occasion for blacks who eat out less than others do. This pattern of consumption interferes with any strategies the chains might harbor to segment the consumer base along overlapping racial/ethnic and geographical lines. It also makes it harder to provide the segregated environment white patrons may prefer. Discriminatory service might supply a corrective.

Constrained by a tight labor market from hiring more non-minority workers, the owners and managers may try to control the racial/ethnic identity of the customers. Owners and managers may fear that where the racial/ethnic identity of the customers comes to match that of the workers, losses from pilferage and theft will rise and profits will decline. If a restaurant, because of its work force or its customer base, becomes black or Latino-identified, whites will be hesitant to enter the space and a higher-spending segment of the population will be lost to the enterprise. In order to insure that whites find the setting inviting, methods to reduce the number of minority customers might be deployed.

Finally, enforced deference becomes harder to maintain in a workforce that is ill-trained, unhappy, resentful, and stifled by lack of opportunity for advancement in rank and pay. If, as a general matter, a servant's status is dependent on the class of the persons she or he serves, the level of employee displeasure is heightened where deference must be paid to members of socially devalued groups. Minorities might become the targets of the bitterness the employees feel about their overall working conditions.

This discussion is hypothetical. It is impossible to prove at this juncture if any of these phenomena are occurring and if black customers are experiencing structural race discrimination in their efforts to patronize fast food restaurants. Bad service is very likely not the only manifestation of racism that blacks encounter in patronizing the fast food industry. As the above discussion indicates, black customers may encounter higher prices than white

BUS. ETHICS Q. 225 (1999).
229. Grady, *supra* note 228, at 398-401.

customers when they patronize franchised outlets. The relationship between the customers and the minority franchisees doing business in minority communities is affected by the relationship between those franchisees and their franchisors. Fast food chains have long been accused of racism with regard to their franchising practices.[230] One source of concern today is that franchisors are dooming to failure undercapitalized minority franchisees by overpricing central city stores that will generate only meager returns.[231] Conversely minorities have long complained that they have been foreclosed from operating franchises in locations that are not minority-identified. Both of these complaints, if true, would impact on minority workers and customers.

Given where this article started, it is beyond its scope to explore fully the impact of racism on fast food franchising practices. Suffice it to say though that the impact of racism at one level of the stream of commerce is intrinsically linked to racism at other levels. Just as increased democratization of fast food restaurants should make them more comfortable and accepting workplaces for black employees and black customers, it would also open up opportunities for black entrepreneurship without which black employment and consumption face an uncertain future. As John Gabriel argues in an essay on equality and fast food, the effort to open up employment opportunities for black workers must be:

> linked to a wider struggle for workplace democratisation and more open forms of decision-making about product development, investment and location. There is nothing inherently capitalistic about terms like product development or investment. Their meaning will result from cultural struggles waged on economic sites, amongst others. The aim of these struggles will be to recapture those terms and to inscribe them in new sets of working practices.[232]

CONCLUSION

Context matters! I hope that my discussion of case law involving discrimination in the fast food industry has illustrated that legal analysis would be richer and the results it produces, fairer if the courts took context into account much more often.

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230. *See* Robert W. Emerson, *Franchise Selection and Retention: Discrimination Claims and Affirmative Action Programs,* 40 ARIZ. L. REV. 512 (1998).

231. Milford Prewitt, *Minority Franchisees Make Gains at Chains,* NATION'S RESTAURANT NEWS, Feb. 7, 2000, at 1, 6.

232. JOHN GABRIEL, *Underneath the Arches: Mc Donalds, Markets and Economy,* RACISM, CULTURE, MARKETS 122 (1994).

Where race is concerned, contextual analysis promises to capture better the complexity of racial subordination as it is practiced and lived today. Context reveals the linkage between race and criteria that result in low social standing or distinction, and the myriad ways in which those social distinctions are codified into law. Of particular concern are laws that appropriate and perpetuate the spurious association of blacks with disorder and indolence. Furthermore, context exposes the mechanisms by which supposedly efficiency-driven markets are segregated or segmented, both horizontally and vertically, by race, by gender, and by class. The broadened focus that contextual analysis dictates should reveal greater opportunities for workers and consumers to assert their rights as citizens to explode economic stereotypes, to break down barriers that inhibit free competition for their business and their labor, to democratize economic opportunity and decision making, and to bring equity to markets. Expansion of the black public sphere in all of its dimensions (social, political, and economic), but especially through the creation and development of markets for the talents and energies of black people, will help to create the conditions in which all of us in America will all have the opportunity to live a good life.