NEW JERSEY LAW AND POLICE RESPONSE TO THE EXCLUSION OF MINORITY PATRONS FROM RETAIL STORES BASED ON THE MERE SUSPICION OF SHOPLIFTING

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I. INTRODUCTION

Imagine yourself shopping in a retail store. You are approached by a store clerk and told that you are no longer allowed in the store because you are suspected of shoplifting. The store employee maintains that the store is private property and that proof of criminal activity is not required in order to exclude you from the premises. The employee adds that the police have been called, and you will be arrested for criminal trespass if you do not leave.[1]

Further imagine that you were targeted for suspicion of shoplifting because of your race. Retail shoplifting countermeasures are often affected by intentional or subconscious racism.[2] As ABC News recently reported, "In stores across this country, [minority shoppers] are under suspicion simply because of the color of their skin."[3] In an out-of-state case with particularly blatant facts, a 7-Eleven convenience store employee refused to serve black customers, and then informed the responding police sergeant that no more than two black shoppers would be allowed in the store at any time "because the store had recently experienced a problem with blacks shoplifting."[4]

In that case, it was the black customers who called the police to secure enforcement of state civil rights laws guaranteeing nondiscriminatory access to

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[1] This hypothetical reflects a situation encountered by the author in his capacity as a career police officer in New Jersey. This fact pattern and the police response to this scenario were also at issue in *Robinson v. Town of Colonie*, 878 F. Supp. 387, 392 (N.D.N.Y. 1995). *See* discussion *infra* note 6.

[2] *See* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and Sell in White America*, 1994 UTAH L. REV. 147 (1994).

[3] *ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998), *available in* 1998 WL 5433617.

[4] Lewis v. Doll, 765 P.2d 1341, 1342 (Wash. Ct. App. 1989).

places of public accommodation.[5] Oftentimes, it is the merchant who calls the police seeking to have the patron removed and arrested for criminal trespass.[6] Moreover, the evidence of shoplifting and racism is usually more ambiguous. The responding officer may be unable to definitively ascertain how much of a part, if any, that racism played in any particular retail exclusion. This Comment will address these difficult scenarios in the context of New Jersey public accommodations law and the professional police response to these disputes.

Part II of this Comment analyzes New Jersey public accommodations laws relating to our hypothetical minority customer's right to access a retail store. The New Jersey Constitution, public accommodations statutes and common law each purport to guarantee the minority customer's right to demand reasonable and nondiscriminatory access to the retail store,[7] yet the scope of these access rights remains unclear. The New Jersey Supreme Court has expressly declined to answer the question of whether businesses can exclude individual visitors based on the mere suspicion of criminal activity.[8] Thus, a responding officer cannot determine whether or not the exclusion is lawful. Consequently, police action to enforce either the merchant's right to exclude trespassers or the patron's right to access public accommodations could theoretically escalate a private wrong into an unconstitutional state action.[9]

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[5] *See id.* at 1342-43.

[6] *See, e.g., Robinson*, 878 F. Supp. at 392. In *Robinson*, employees of a T.J. Maxx clothing store called the police to remove a "suspicious" black couple from the store. *See id.* at 391-92. The extent of the Robinsons' "suspicious" conduct was limited to trying on and removing one sweater. *See id.* at 391. Although the store had no evidence that Mr. and Mrs. Robinson were shoplifters, the police ordered them to leave the store. *See id.* at 392. When Mrs. Robinson asked the officer why she was being ordered to leave, the police officer responded, "They don't need a reason. If you don't want to leave you will be arrested for trespass." *Id.* Another officer testified that he told the Robinsons that there had been an earlier shoplifting incident involving black persons and the store employees felt that the Robinsons might have been associated with that earlier group. *See id.* The officer told the Robinsons that "[t]here was an earlier incident involving some minorities, and everyone is still very nervous and very upset." *Id.*

[7] "Retail stores" are defined as "places of public accommodation" by the New Jersey Law Against Discrimination. N.J. STAT. ANN. § 10:5-5(l) (West Supp. 1998).

[8] *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 174 n.5, 445 A.2d 370, 375 n.5 (1982) ("We need not decide whether the common law allows exclusion of those merely suspected of criminal activity . . .").

[9] *See* Bray v. Alexandria Woman's Health Clinic, 506 U.S 263, 304 n.10 (1993) (Souter, J., concurring). Justice Souter, referring to the segregated lunchroom sit-in cases of 1963, stated, "[G]overnment enforcement of private segregation by use of state trespass law, rather than 'securing to all persons . . . equal protection of the laws,' itself amounted to

Part III will discuss the lack of a uniform or predictable police response to retail public accommodations access/trespass disputes. The New Jersey Attorney General's office has promulgated extensive reporting requirements for all retail exclusions that are at least partially based on race.[10] Nevertheless, police officers are provided with little guidance on resolving the immediate face-to-face disputes between merchants and customers. A police officer faced with a dispute over unresolved legal issues will usually seek to restore order, maintain the status quo, and advise the aggrieved parties to seek redress in the courts. The officer's problem in these retail access disputes is that there is no guidance for determining the status quo or neutral point of equilibrium to maintain. From a property rights perspective, maintaining the status quo involves separating the combatants by ordering the customer to leave the merchant's property. In contrast, the civil rights perspective begins at an entirely different baseline; the store is open to the public, so the merchant should be required to obtain a court order before changing the status quo by excluding specific individuals.[11] Police officers, however, have no legal authority to enforce civil rights laws which purport to guarantee nondiscriminatory access to places of public accommodation.[12] Police officers have the power to employ criminal trespass laws to protect merchants' property rights, but no legal authority to compel a bigoted merchant to serve a customer.

In conclusion, Part IV will offer suggestions on improving both the under-

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an unconstitutional act in violation of the Equal Protection Clause . . . ." *Id.* Justice Scalia's majority opinion in *Bray* replied by suggesting that pre-1964 police actions to assist the sit-in demonstrators, in the absence of valid legislation authorizing the action, would have constituted an unconstitutional taking of the merchant's property. *See id.* at 282 n.14 ("Surely property owners have a constitutional right not to have government physically occupy their property without due process and without just compensation.").

[10] *See* NEW JERSEY DEP'T OF LAW AND PUBLIC SAFETY, BIAS INCIDENT INVESTIGATION STANDARDS—POLICY AND PROCEDURES FOR NEW JERSEY LAW ENFORCEMENT (1991) (on file with the *Seton Hall Constitutional Law Journal*); *see also* discussion *infra* Part III.B.

[11] *See* Joseph William Singer, *No Right To Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1495 n.33 (1996). As Professor Singer noted, property rules phrased in racially neutral language can be discriminatory when the rules "affect people differently based on race." *Id.* Professor Singer further argued that the replacement of the common law "right of access with a right to exclude was, at least partially, intended to allow exclusion of African-Americans from public accommodations, even though it was phrased in race-neutral terms." *Id.*

[12] *See* N.J. STAT. ANN. § 10:5-26 (West 1993). This is the criminal provision of the LAD, which provides penalties for willful interference with the duties of any representatives of the Division on Civil Rights. *See id.* Unfortunately, there is no similar provision to provide police officers with authority to enforce the LAD.

lying public accommodations law and the police response to these disputes. Ambiguities in the present law create opportunities for discrimination and provide little guidance to the police officers, merchants, and store customers who would otherwise attempt to conform their actions to the rule of law. As the United States Supreme Court has stressed, "[L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[13] The conclusion of Part IV will suggest changes designed to restore clarity, coherence, and predictability to public accommodations law.

II. THE RIGHT TO ACCESS RETAIL STORES AND OTHER PLACES OF PUBLIC ACCOMMODATION

The prosecution of public accommodation trespass disputes often brings a shop-keeper's possessory interests into conflict with an alleged trespasser's right to access the property. Based on its state constitution and common law, New Jersey has expanded the patron's right to access public accommodations.[14] New Jersey has also enacted civil rights statutes outlawing discrimination in retail stores and other places of public accommodation based on race, creed, ethnicity, gender, and sexual orientation.[15] Therefore, this Comment will primarily focus on a patron's expanded access rights to public accommodations under New Jersey law, rather than the more limited protections afforded under federal law.

A. THE COMMON LAW RIGHT TO ACCESS PRIVATE PROPERTY

The New Jersey Supreme Court has held that businesses which are open to the general public cannot arbitrarily or unreasonably abridge any individual's common law right to access the property.[16] Historically, innkeepers, smiths and

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[13] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[14] *See* Kreimer v. Bureau of Police, 958 F.2d 1242, 1265-70 (3rd Cir. 1992) (holding that a library could lawfully exclude a homeless patron who harassed other patrons and disrupted the functioning of the library, reasoning that Kreimer's right to access the library should not be enlarged to such a disproportionate extent that it denied others the right to reasonable and safe use of the facility).

[15] *See* N.J. STAT. ANN. §§ 10:5-4 to -12 (West 1993). In fact, section 10:5-5 (West Supp. 1998) of the New Jersey Law Against Discrimination specifically defines public accommodations to include all retail stores. In contrast, Congress exempted retail stores from Title II of the Civil Rights Act of 1964, which bans discrimination in places of public accommodation.

[16] *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 173, 445 A.2d 370, 375 (1982)

common carriers were prohibited from arbitrarily refusing to serve specific customers.[17] New Jersey appears to be the only jurisdiction which has extended this common law duty to all businesses and organizations which serve the general public.[18] For example, the New Jersey Supreme Court held that in the absence of

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(holding that the state's common law barred casinos from excluding card-counters, even though these gamblers could successfully distort the gaming odds); Doe v. Bridgeton Hospital, 71 N.J. 478, 489-91, 366 A.2d 641, 647-48 (1976) (holding that three private, nonsectarian hospitals had a common law obligation to make their facilities available to doctor's and patients who wished to conduct elective abortions at these hospitals). The New Jersey Supreme Court noted that some private businesses are "subject to judicial regulation for the common good." *Id.* at 485, 366 A.2d at 645.

[17] *See Doe*, 71 N.J. at 486, 366 A.2d at 645. The *Doe* court specifically stated:

> If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier.

Id. at 486, 366 A.2d at 645 (quoting Lane v. Cotton, 12 Mod. 472, 484 (K.B. 1701)). The United States Supreme Court has also approvingly cited this passage from *Lane v. Cotton*. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 571 (1995); Bray v. Alexandria Woman's Health Clinic, 506 U.S 263, 305 n.10 (1993) (Souter, J., concurring); Reitman v. Mulkey, 387 U.S. 369, 385-86 (1967) (noting that restaurants, inns, drugstores and hospitals have been found to be "affected with a public interest in the historic and classical sense"); Lombard v. Louisiana, 373 U.S. 267, 276-77 (1963) (Douglas, J., concurring) (noting that common law judges have historically regulated businesses which serve a public interest and, referring to the segregated lunchroom sit-in cases that predated the Civil Rights Act of 1964, arguing that the Court "should not await legislative action before declaring that state courts cannot enforce this type of discrimination").

[18] *See* Singer, *supra* note 11, at 1290. Professor Singer noted that in New York, like most jurisdictions, the common law prohibition against discriminatory treatment of customers applies only to innkeepers and common carriers. *See id.* All other privately owned businesses are presumptively allowed to arbitrarily exclude individual customers unless that right is specifically limited by statute. *See id.* Thus, New Jersey appears to be the only jurisdiction that recognizes a common law action against retail stores for arbitrary exclusions. *See id.* This observation is significant in the context of this Comment which focuses on the rights of customers who are excluded from retail stores based on the bare unsubstantiated suspicion of shoplifting. In New Jersey, these customers may be able to recover on a common law action, without proving any class-based animus, by merely showing that the merchant's actions were arbitrary and unreasonable. *See Uston*, 89 N.J. at 173-75, 445 A.2d at 375-76 (finding that Kenneth Uston was unlawfully excluded from the casino based solely on his card-counting abilities, which distorted the casino's blackjack odds); *see also* Brooks v.

a statute or administrative regulation authorizing casinos to exclude blackjack players who count cards, these card-counting patrons have a common law right to access casinos.[19] These places of public accommodation have "a common law duty to treat patrons fairly."[20] The court, however, has expressly declined to answer the larger question addressed by this Comment, which is whether the common law allows the exclusion of visitors from public places based on the mere suspicion of criminal activity.[21]

In *Uston v. Resorts International Hotel*,[22] the New Jersey Supreme Court balanced a property owner's common law right to exclude individual customers against the rights asserted by a patron seeking entry to the property.[23] Uston sued Resorts claiming that the casino had no common law right to exclude him from the property.[24] Resorts argued that it possessed the right to exclude Uston and others who count cards because the blackjack strategy employed by card-counters distorts the odds of the game.[25]

The court in *Uston* held "that the common law right to exclude is substantially limited by a competing common law right of reasonable access to public places."[26] The casino could exclude disorderly patrons who disrupted or threatened its operations; however, because the property was open to the general pub-

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Chicago Downs, 791 F.2d 512, 517 (7th Cir. 1986) (calling New Jersey's *Uston* decision an "abandonment of the common law rule" and holding that "[a]s long as the proprietor is not excluding the mobster look-a-like because of his national origin (or because of race, color, creed, or sex), then the common law, and the law of Illinois, allows him to do just that").

[19] *See* Campione v. Adamar of New Jersey, Inc., 155 N.J. 245, 258, 714 A.2d 299, 305 (1998). The *Campione* court cited *Uston* for the proposition that the common law prohibits businesses which are open to the public from acting in an arbitrary and discriminatory manner towards individual patrons. *See id.* at 258, 714 A.2d at 305 (citations omitted).

[20] *See id.* at 266, 714 A.2d at 309 (holding that a patron can pursue a common law action for discriminatory treatment against a casino).

[21] *See Uston*, 89 N.J. at 174 n.5, 445 A.2d at 375 n.5 ("We need not decide whether the common law allows exclusion of those merely suspected of criminal activity . . . .").

[22] 89 N.J. 163, 445 A.2d 370 (1982).

[23] *See id.* at 167-74, 445 A.2d at 372-76.

[24] *See id.* at 166, 445 A.2d at 371.

[25] *See id.*

[26] *Id.* at 168, 445 A.2d at 372.

lic, the casino could not unreasonably exclude selected individuals.[27] In so reasoning, the court in *Uston* concluded that since card-counting did not disrupt or threaten the operations of the casino, the casino could not lawfully exclude Mr. Uston.[28]

While the *Uston* court held that Resorts Casino could not exclude card-counters, the court expressly declined to decide whether the state's Casino Control Commission is vested with the statutory authority to pass regulations which override the common law by excluding card-counters.[29] This holding distinguished exclusions based on generally applicable administrative rules from other exclusions based on the arbitrary whims of individual property owners, and thus implied that statutory-based administrative rules may receive significant deference and override common law access rights.[30] The *Uston* court referred to its 1959 decision in *Garafine v. Monmouth Park Jockey Club*,[31] in which the court upheld the administrative rules of the New Jersey Racing Commission that provided for the mandatory exclusion of suspected bookmakers from horse racing facilities.[32] The *Uston* court, however, expressly stated that it was not deciding

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[27] *See id.* at 173, 445 A.2d at 375.

[28] *See id.* at 174, 445 A.2d at 375.

[29] *See id.*

[30] *See* State Dep't of Law & Public Safety v. Merlino, 216 N.J. Super. 579, 582-88, 524 A.2d 821, 823-26 (App. Div. 1987), *aff'd mem.*, 109 N.J. 134, 535 A.2d 968 (1988) (upholding New Jersey statutory and administrative provisions which require licensed gambling casinos to exclude both "career criminal offenders" and "associates of career offenders" whose "associations and dealings with organized crime figures" renders their "presence in a licensed casino inimical to the interests of the State of New Jersey and to licensed gambling"). It should be noted, however, that the public policy behind these statutory and administrative provisions would not be applicable to the retail exclusions addressed in this Comment because: (1) these provisions are limited to the gambling industry where the state has an overriding public interest in excluding organized crime; and (2) the statute and casino control regulation offer procedural protections for the excluded casino customers that would be unavailable to retail customers, such as a guaranteed right to hearing within thirty days to contest the exclusions. *See id.* at 584, 524 A.2d at 824 ("N.J.S.A. 5:12-71(g) and N.J.A.C. 19:42-4.4(c) require the commencement of an exclusion hearing before the Casino Control Commission within 30 days of a receipt of a demand for such hearing."). For a detailed discussion of *Merlino*, see Judy Verrone, *Administrative Law—Hearsay Need Not Be Supported By Competent Evidence in Exclusionary Proceedings Pursuant to the Casino Control Act*, 18 SETON HALL L. REV. 214, 214-16 (1998).

[31] 29 N.J. 47, 148 A.2d 1 (1959).

[32] *See id.* at 57, 148 A.2d at 6.

whether the common law allows the exclusion of visitors from public places because of the mere suspicion of criminal activity.[33] Furthermore, even if the common law once allowed such suspicion-based exclusions, the New Jersey Supreme Court has noted that the balance of property rights is not static, but is constantly evolving away from the absoluteness of the property owner's rights and toward the promotion of social interests.[34]

Despite its precedential value, *Uston* nonetheless fails to answer the question of whether retail merchants can exclude individual customers based on the mere suspicion of shoplifting.[35] Nevertheless, *Uston* does suggest that merchants should not count on *Garafine* to justify the exclusions. These retail exclusions lack statutory or regulatory support and generally appear more arbitrary than the administrative rules upheld in *Garafine*. Accordingly, a merchant's arbitrary exclusion policy may receive less deference than would a generally applicable administrative regulation.

B. THE CONSTITUTIONAL RIGHT TO ACCESS PUBLIC ACCOMMODATIONS

The New Jersey State Constitution expansively protects each person's "right

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[33] *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 174 n.5, 445 A.2d 370, 375 n.5 (1982).

[34] *See* State v. Shack, 58 N.J. 297, 305, 277 A.2d 369, 373 (1971). The New Jersey Supreme Court's landmark decision in *State v. Shack* illustrates that adjudicating these trespass cases involves making policy choices that balance conflicting rights. *See id.* In *Shack*, a farm owner asserted his traditional right to exclude others from his property. *See id.* at 308, 277 A.2d at 374. Shack, an attorney employed by a federally funded nonprofit farm-worker organization, claimed a constitutional right to enter the property to aid the farm's migrant workers. *See id.* at 301, 277 A.2d at 371. The court considered, but did not decide, the defendant's claims that the First Amendment, Sixth Amendment, and Supremacy Clause of the United States Constitution barred this trespass prosecution. *See id.* at 301-02, 277 A.2d at 371. Instead, the court held that the farmer did not have a common law right to exclude the defendant, and therefore, no trespass occurred. *See id.* at 307-08, 277 A.2d at 374. There is language in *Shack* supporting a broad view of its holding. *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 365, 650 A.2d 757, 777 (1994) (citing *Shack* as the foundation for the common law right to distribute political literature at regional shopping malls). The *Shack* court stated that property rights are not absolute. *See Shack*, 58 N.J. at 305, 277 A.2d at 373. Necessity or public policy may justify entry over the landowner's objection; there must be an accommodation between property rights and social interests. *See id.* at 305-06, 277 A.2d at 373.

[35] *See Uston*, 89 N.J. at 174 n.5, 445 A.2d at 375 n.5 (stating that the court "need not decide whether the common law allows exclusion of those merely suspected of criminal activity").

to entry of private property that has been opened to the public."[36] Unlike the United States Constitution, the New Jersey Constitution confers affirmative rights that are "secure not only from State interference but—under certain conditions—from the interference of an owner of private property even when exercised on that private property."[37]

Article I, paragraph 1 of the New Jersey Constitution specifically protects the natural and unalienable rights of acquiring "property, and of pursuing and obtaining safety and happiness."[38] In *Peper v. Princeton University Board of Trustees*,[39] the New Jersey Supreme Court held that this constitutional provision prohibited a private university's practice of employment discrimination.[40] The court concluded that employment discrimination by Princeton University unconstitutionally interfered with the employee's ability to acquire property, and reasoned that "[i]f Peper was not promoted because she was a woman, she was denied the same right to acquire property that is guaranteed males under Art. I, para. 1."[41] Further, the court stated that "[t]he right to acquire property would be a hollow one indeed if it did not protect individuals from being invidiously denied the opportunity to obtain the means necessary to acquire that property . . . ."[42] The court concluded that "[s]ince Art. I, para. 1 specifically protects the rights of all persons to acquire property, the necessity of permitting Peper to vindicate this basic right is self evident."[43]

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[36] Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 (3rd Cir. 1992).

[37] *New Jersey Coalition*, 138 N.J. at 352, 650 A.2d at 770 (1994) (establishing the constitutional right, under Article I, paragraph 6 of the state constitution, to distribute political literature in regional shopping malls).

[38] N.J. CONST. art. I, ¶ 1.

[39] 77 N.J. 55, 389 A.2d 465 (1978).

[40] *See id.* at 79, 389 A.2d at 477. The *Peper* court relied upon the employee's state constitutional protections rather then the New Jersey Law Against Discrimination [hereinafter "LAD"] because, at the time the discrimination occurred, the LAD specifically exempted private universities from the statute's employment discrimination provisions. *See id.* at 72-73, 389 A.2d at 474. While this litigation was pending, the New Jersey legislature amended the LAD to make it applicable to the employment actions of private universities. *See id.* at 73, 389 A.2d at 474.

[41] *Id.* at 79, 389 A.2d at 477.

[42] *Id.* at 79-80, 389 A.2d at 477.

[43] *Id.* at 80, 389 A.2d at 477-78.

Similarly, a private retail store's arbitrary and discriminatory exclusion of minority customers interferes with a person's ability to acquire essential property, such as food and clothing. Thus, a merchant's discriminatory exclusion of a minority customer may violate Article I, paragraph 1 of the New Jersey Constitution.

Moreover, to advance and enforce the state constitutional right to access public accommodations, the New Jersey legislature enacted the Law Against Discrimination[44] [hereinafter "LAD"], which provides that the right to nondiscriminatory access to retail stores and other places of public accommodation "is recognized as and declared to be a civil right."[45] Article I, paragraph 5 of the New Jersey Constitution affirmatively declares that that no one will be denied the enjoyment of any civil right because of race, color, or national origin.[46] Thus, any race-based exclusion from a retail store violates the LAD, Article I, paragraph 1, and Article I, paragraph 5 of the New Jersey Constitution.

In other contexts, the New Jersey Supreme Court has repeatedly recognized that the New Jersey Constitution prohibits the private owners of places of public accommodation from using their property in a manner that tramples the state constitutional rights of other citizens.[47] Regarding each person's constitutional right to access private property and the constitutional obligations imposed upon the owners of quasi-public property, a unanimous New Jersey Supreme Court stated that when expounding the state constitution, the court will "look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property."[48] While there are no published opinions by any New Jersey

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[44] *See* N.J. STAT. ANN. §§ 10:5-4 to -12 (West 1993).

[45] N.J. STAT. ANN. § 10:5-4 (West Supp. 1998); *see also* Goodman v. London Metals Exch., Inc., 86 N.J. 19, 30-31, 429 A.2d 341, 347 (1981) ("The legislature has given the Law Against Discrimination a special niche in the legislative scheme . . . . This law is aimed at fulfilling provisions of the state constitution guaranteeing civil rights."). For a comprehensive discussion of the relationship between the 1947 New Jersey Constitution and the contemporaneously drafted LAD, see *infra* Part II.B.3.

[46] *See* N.J. CONST. art. I, ¶ 5.

[47] *See* New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 650 A.2d 757 (1994); State v. Schmid, 84 N.J. 535, 562, 423 A.2d 615, 630 (1980) (establishing the state constitutional right to access and distribute political literature on private property that has been opened to the public); *see also Peper*, 77 N.J. at 73, 389 A.2d at 477 (holding that a private university's gender discrimination violated Ms. Peper's constitutional right to acquire property).

[48] *Schmid*, 84 N.J. at 562, 423 A.2d at 630. For an extensive discussion of the *Schmid*

court which specifically address the state constitutional right to access a single retail store, the New Jersey Supreme Court's analysis of the constitutional right to acquire property from a private employer and the state constitutional right to access shopping malls is illustrative of how a New Jersey court may address the constitutional right to buy consumer goods from a retail store.

1. NEW JERSEY SUPREME COURT DECISIONS ON THE CONSTITUTIONAL RIGHT TO ACCESS SHOPPING MALLS AND OTHER PLACES OF PUBLIC ACCOMMODATION

a. State v. Schmid[49]

Chris Schmid, a political activist, was convicted of criminal trespass upon the private property of Princeton University.[50] Schmid entered the campus for the sole purpose of distributing political literature.[51] He admitted that he had been warned on prior occasions that he would be arrested for trespassing if he returned to the campus.[52] The New Jersey Supreme Court reversed Schmid's trespass conviction, holding that the state constitution guaranteed Schmid's right to distribute political literature on the Princeton campus.[53]

After finding that federal First Amendment jurisprudence was not dispositive on the issue of Schmid's non-consensual use of private property, the court focused on state constitutional protection of expressive rights.[54] The court found that the state constitution, which applies directly to private action that hinders expressive rights, served to provide Schmid with more protection than was afforded by the First Amendment of the United States Constitution.[55] The *Schmid*

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court's holding that the New Jersey Constitution prohibited a private university from interfering with Chris Schmid's constitutional rights to access the property, see *infra* Part II.B.1.

[49] 84 N.J. 535, 423 A.2d 615 (1980).

[50] *See id.* at 538, 423 A.2d at 616.

[51] *See id.* at 538-39, 423 A.2d at 616-17.

[52] *See id.* at 541, 423 A.2d at 618.

[53] *See id.* at 569, 423 A.2d at 633.

[54] *See id.* at 552, 423 A.2d at 624.

[55] *See id.* at 559, 423 A.2d at 628 ("It has been noted that in our interpretation of fundamental state constitutional rights, there are no constraints arising out of principles of fed-

court noted that under the New Jersey Constitution, private property is subject to reasonable restrictions to further public welfare.[56]

The New Jersey Supreme Court then attempted to reconcile and balance the conflicting interests of the private property owner with the rights of others who demand use of the property to exercise constitutional rights.[57] Generally, as the *Schmid* court concluded, the more that private property is opened to the public, the greater the rights of individual members of the public to demand reasonable access to that property.[58] The court in *Schmid* established a three-prong test to balance various conflicting rights in any such future controversy.[59] The *Schmid* test balances: (1) the purpose and normal use of the private property; (2) "the extent and nature of the public's invitation to use that property; and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property."[60] Applying this test, the *Schmid* court concluded that Schmid possessed the constitutional right to access Princeton University's property, and therefore, Schmid's actions did not constitute

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eralism."). The *Schmid* Court further explained in a footnote, "This point was expressed in dissent by Justice Pashman who stated that 'one of the most important functions performed by state constitutional bills of rights which is not performed by the federal constitution is the protection of citizens against private oppression as well as oppression by the state.'" *Id.* at 559 n.9, 423 A.2d at 628 n.9 (quoting King v. South Jersey Nat'l Bank, 66 N.J. 161, 193 (1974) (Pashman, J., dissenting)).

[56] *See id.* at 561, 423 A.2d at 629.

[57] *See id.* at 562, 423 A.2d at 629.

[58] *See id.*; *see also* State v. Guice, 262 N.J. Super. 607, 621 A.2d 553 (Law. Div. 1993) (discussing the relationship between the scope of the public invitation to the property and the extent of each citizen's right to demand reasonable access). Mr. Guice was a member of Chris Schmid's political organization and conducted similar political activities on the campus of Stevens Institute. *See id.* at 617, 621 A.2d at 558. The *Guice* court noted that the only distinguishing fact between *Guice* and *Schmid* was that Stevens Institute was not as open a campus as Princeton. *See id.* at 611-12, 621 A.2d at 555-56. The Stevens Institute closed its gates to the public one day per year and did not actively encourage the public to use its facilities. *See id.* at 612, 621 A.2d at 555-56. The court concluded that the public invitation and use of "Stevens Institute does not rise to the level of significant public use as established in *Schmid.*" *Id.* at 618, 621 A.2d at 558. Because of the limited public invitation to access Steven's Institute, the *Guice* court distinguished the *Schmid* precedent, and held that Mr. Guice did not have the right to access the property of Stevens Institute. *See id.* at 613, 621 A.2d at 555-56.

[59] *See id.* at 563, 423 A.2d at 630.

[60] *Id.*

criminal trespass.[61]

b. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation*[62]

The New Jersey Supreme Court refined the *Schmid* three-prong balancing test in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corporation*.[63] The plaintiffs in *New Jersey Coalition* sued several regional shopping malls and sought an injunction compelling the mall owners to allow political leafleting on mall property.[64] The court held that the plaintiffs had a constitutional right to distribute political leaflets in regional shopping centers.[65] In so holding, the *New Jersey Coalition* court acknowledged that the United States Constitution and most other states grant no general right to conduct expressive activities in shopping centers.[66] The court, however, based its decision on the New Jersey Constitution, the *Schmid* three-part test, and a "general balancing of expressional rights and private property rights."[67]

The court in *New Jersey Coalition* concluded that the first two prongs of the *Schmid* test, the normal use of the property and the extent and nature of the public invitation, were interrelated and should be considered together.[68] Applying those two elements, the court found that the combination of the malls' normal use and the public invitation extended by these regional shopping malls constituted "an implied invitation to leaflet."[69] Moreover, the *New Jersey Coalition* court also found that the plaintiffs satisfied the third prong of the *Schmid* test, which is the "compatibility" of the property's normal use with the activities of

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[61] *See id.* at 568, 423 A.2d at 632 (concluding that Chris Schmid's distribution and sale of political materials was consistent with the mixed uses of Princeton University).

[62] 138 N.J. 326, 650 A.2d 757 (1994).

[63] *Id.*

[64] *See id.* at 332, 650 A.2d at 760-61.

[65] *See id.* at 362, 650 A.2d at 775.

[66] *See id.* at 349, 650 A.2d at 769.

[67] *Id.* at 362, 650 A.2d at 775.

[68] *See id.* at 357, 650 A.2d at 772.

[69] *Id.*

the party demanding access to the premises.[70] The court noted that the malls were unable to meet their burden of proving that the plaintiffs' leafleting interfered with the malls' normal business operations.[71] Under this modified *Schmid* test, the *New Jersey Coalition* court held that the plaintiffs had a constitutional right to distribute political leaflets in regional shopping centers.[72]

2. THE STATE CONSTITUTIONAL RIGHT TO BE FREE FROM INVIDIOUS DISCRIMINATION IN THE PURCHASE OF CONSUMER GOODS FROM RETAIL STORES

The New Jersey Supreme Court's expansive interpretation of the state constitutional "right to entry of private property that has been opened to the pub-

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[70] *See id.* at 361, 650 A.2d at 775.

[71] *See id.* at 361-62, 650 A.2d at 775. This "business interruption" test flows from, and is at the heart of, both the New Jersey Supreme Court's constitutional and common law property access analysis. *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 174, 445 A.2d 370, 375 (1982); *see also supra* text accompanying notes 27-28 (discussing the business interruption test). In *Uston*, the court held that while the common law barred a casino from excluding card-counters who did not disrupt or threaten the operations of the casino, "the right of property owners to exclude from their premises those whose actions 'disrupt the regular and essential operations of the' premises" was unquestioned. *Uston*, 89 N.J. at 174, 445 A.2d at 375 (quoting State v. Schmid, 84 N.J. 535, 566, 423 A.2d 615, 631 (1980)). Thus, the common law and constitutional business interruption tests are inextricably tied together. While the court in *New Jersey Coalition* decided this case on constitutional grounds, the court drew upon the New Jersey common law. *See New Jersey Coalition*, 138 N.J. at 365, 650 A.2d at 777. The court noted that the common law "lays a foundation that would vindicate the exercise of speech and assembly rights in this [shopping mall] setting." *Id.*

The dissent in *New Jersey coalition* criticized the majority for its reliance on *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971), noting that *Shack* was inapposite in that it was premised on the common law and public policy of protecting disadvantaged migrant workers. *See id.* at 400-01, 650 A.2d at 794-95 (Garibaldi, J., dissenting). There were sound reasons, however, for adopting common law standards into the court's constitutional analysis. In basing the constitutional right to access shopping centers on *Shack* and common law standards, the court explicitly recognized the interaction between the state's common and constitutional law, and implicitly recognized that the people who ratified the 1947 New Jersey Constitution understood its meaning within the context of the state's common law. In this regard, it should be noted that *Shack* cited a 1939 authority for the proposition that the common law bars property owners from using their property to injure the rights of others. *See* State v. Shack, 58 N.J. 297, 305, 277 A.2d 369, 373 (1971).

[72] *See New Jersey Coalition*, 138 N.J. at 362, 650 A.2d at 775.

lic"[73] should theoretically apply to state equal protection rights as well as expressional rights. Article I, paragraph 5 of the New Jersey Constitution affirmatively declares that that no one shall be discriminated against in the exercise of any civil right, nor be denied the enjoyment of any civil right because of race, color, or national origin.[74] In order to fulfill this nondiscrimination provision of the New Jersey Constitution, the state legislature enacted the LAD which provides that the right to be free from invidious discrimination in retail and other public accommodations "is recognized as and declared to be a civil right."[75] Moreover, Article I, paragraph 1 of the New Jersey Constitution specifically protects the natural and unalienable rights "of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[76] While there is no published authority addressing these specific constitutional rights in the context of nondiscriminatory access to retail goods, these rights should receive the same protection afforded the expressive rights found in Article I, paragraph 6 of the New Jersey Constitution.

Analogizing these equal access rights to the court's expressive access jurisprudence, this author believes that the exclusion of minority patrons from retails stores, based upon nothing more than a merchant's bare unsupported shoplifting suspicion, constitutes a violation of the New Jersey Constitution. Exercise of the civil and constitutional right to be free from invidious discrimination in the purchase of consumer goods from a retail store is thoroughly consistent with both the public invitation and the normal use of retail property.[77] It cannot be said

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[73] Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 (3rd Cir. 1992).

[74] *See* N.J. CONST. art. I, ¶ 5.

[75] N.J. STAT. ANN. § 10:5-4 (West Supp. 1998).

[76] N.J. CONST. art. I, ¶ 1.

[77] The court in *New Jersey Coalition* reasoned that since expressive activity was permitted in these regional malls, there was a presumption that the plaintiff's expressive activity was compatible with the malls' business operations. *See* 138 N.J. at 361, 650 A.2d at 775. Based on this reasoning, the court concluded that the malls had the burden of proving that the plaintiff's activities interfered with the malls' business operations. *See id.* Similarly, since retail stores are in the business of selling products to the public, each individual customer's endeavor to buy these products from a retail store should have this same presumption of compatibility with the store's business operations. While there are no published New Jersey opinions on the right to buy products sold at a retail store, a customer's efforts to buy products, which are held out for public sale at a retail store, must be more consistent with the store's normal business operations than the anti-war leafleting was to the business operations of the malls in *New Jersey Coalition*.

that *New Jersey Coalition*'s constitutionally protected anti-war leafleting[78] was more consistent with a retail store's normal use or public invitation. Thus, the *Schmid* factors should balance more favorably for the shopper who merely seeks to buy groceries from a retail store.[79] The Supreme Court of New Jersey has refused to allow mall owners to use their property in a way that negatively impacts expressive rights;[80] there is no reason to believe that the court would allow merchants to use retail property in a manner that negatively impacts upon civil rights. This impact standard[81] could be critical in the retail discrimination context, where it may be easier to prove a disparate impact upon the minority customer than it is to prove that the merchant was motivated by racial animus.

There is language in *New Jersey Coalition* that would justify this broad view of the supreme court's holding. The court noted that even if the mall owners were to lose some business due to the political leafleting, this would merely be an unavoidable aspect of mall ownership since the state constitution guarantees the exercise of rights "at their premises with all of its inevitable consequences."[82] The court rejected the mall owners' property rights argument concluding "[i]nsofar as invasion of private property rights is concerned, our deci-

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[78] *See id.* at 396, 650 A.2d at 792.

[79] *See supra* notes 71 & 77 and accompanying text (discussing *Uston* and *New Jersey Coalition*).

[80] *See New Jersey Coalition*, 138 N.J. at 362, 650 A.2d at 775.

[81] *See id.* The mall owners banned not only anti-war leafleting, but all controversial leafleting because the business owners felt that it might interfere with the shopping centers' commercial business. *See id.* at 371-72, 650 A.2d at 780. The *New Jersey Coalition* court hypothesized that even if the mall owners were to lose some business due to controversial leafleting, that would not justify the malls' leafleting prohibition because of its negative impact on the plaintiffs' expressional rights. *See id.* at 372, 650 A.2d at 780. Regarding this balance between the merchants commercial interests and the plaintiff's access rights, the court reasoned:

> [T]he assertion of a negative effect on defendants' enterprises is not persuasively supported by the record. Even if the issue were in doubt on this record, it is an unavoidable consequence of their own activities. Our Constitution guarantees the right of free speech at their premises with all of its inevitable consequences.

Id.

[82] *Id.* at 371, 650 A.2d at 780 (reasoning that the mall owners' loss of autonomous control over the use of their property was a cost of doing business).

sion in *State v. Shack* is similarly dispositive."[83] The court cited *Shack* in reasoning that "in necessitous circumstances, private property rights must yield to societal interests and needs."[84] The *New Jersey Coalition* court also cited *Shack* for the proposition that the balance between individual property ownership rights and societal property access rights "depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion."[85] Moreover, the *Shack* court reasoned that the law will not allow private property rights to trump human values, to deny the poor the essentials that are necessary for their health, welfare or dignity.[86]

The *New Jersey Coalition* court limited the applicability of its decision to large regional malls by expressly holding that no single store, highway strip mall, or medium-sized shopping center would be required to submit to political leafleting on its premises.[87] Notwithstanding this holding, the balancing should be different when weighing a customer's state constitutional right to be free from invidious discrimination in the purchase of retail goods for two reasons. First, the purchase of retail goods is more consistent with retail property's normal use and public invitation, and second, while the inability to leaflet at a single grocery store cannot silence a political message, the exclusion from a single grocery or department store can impair a low income family's ability to obtain adequate food and clothing.[88] While every race-based exclusion clearly constitutes a civil

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[83] *Id.* at 372, 650 A.2d at 779-80 (citation omitted); *see also supra* note 34 for a more detailed discussion of *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971).

[84] *New Jersey Coalition*, 138 N.J. at 365, 650 A.2d at 777.

[85] *Id.* at 366, 650 A.2d at 777 (quoting State v. Shack, 58 N.J. 297, 305, 277 A.2d 369, 373 (1971)).

[86] *See Shack*, 58 N.J. at 303, 277 A.2d at 372. The *Shack* court's common law reasoning also echoed equal protection themes:

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well being must remain the paramount concern of a system of law. Indeed, the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare or dignity. Here we are concerned with a highly disadvantaged segment of our society.

Id.

[87] *See New Jersey Coalition*, 138 N.J. at 373, 650 A.2d at 781.

[88] *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79, 389 A.2d 465, 477

rights violation, the hardships are particularly severe for low income families who cannot afford the additional costs that result from such discrimination.[89] Such hardships may be particularly devastating where there are no other grocery or clothing stores within walking distance of the shopper's home.

3. EQUAL PROTECTION AND PUBLIC ACCOMMODATIONS: ARGUMENTS FOR GROUNDING ACCESS RIGHTS ON THE STATE CONSTITUTION RATHER THAN RELYING SOLELY ON STATUTORY PROTECTIONS

The New Jersey State Constitution, which explicitly prohibits the denial of any civil right based upon race, does not contain any state action requirement.[90]

(1978) (holding that a single private employer's discriminatory promotion practice violated the state constitution by interfering with the employee's ability to have enough money to acquire necessary property); *see also supra* notes 84-86 and accompanying text. Additionally, Justice Garibaldi's dissent in *New Jersey Coalition* criticized the majority for its reliance upon *State v. Shack*. *See New Jersey Coalition*, 138 N.J. at 400-01, 650 A.2d at 794-95 (Garibaldi, J., dissenting). This dissent concluded that *Shack* was "factually inapposite" to the malls' leafleting because *Shack* was premised on the compelling public policy of protecting disadvantaged and impoverished migrant workers. *See id.* Retail discrimination is more analogous to *Shack* in that it is often the most disadvantaged and impoverished minorities who are excluded from retail stores. *See* Austin, *supra* note 2, at 154 (noting that many black consumers feel that they must "dress up to go shopping in the hope that their appearance will convey the fact that they are both entitled to browse and capable of paying for any item they put their hands on"). Thus, the public policy interest of protecting disadvantaged minorities that animated *Shack* is also applicable to retail discrimination.

Therefore, it can be argued that the *New Jersey Coalition* court's reliance upon *Shack* demonstrates that the court's fact sensitive balancing test should weigh more favorably for the customer who is merely demanding the civil right to purchase food and clothing from a retail merchant. *Cf.* Guttenberg Taxpayers & Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n, 297 N.J. Super. 404, 410, 688 A.2d 156, 158 (Ch. Div.), *aff'd mem.*, 297 N.J. Super. 309, 688 A.2d 108 (App. Div. 1996), *certif. denied*, 149 N.J. 141, 693 A.2d 110 (1997). The Guttenberg court noted the "extremely fact sensitive" balancing test used reconcile the conflicting interests of property owners with the rights of others who seek to use the property to exercise state constitutional rights, and held that once a condominium association adopted the practice of distributing political literature to its residents it implicitly accepted the constitutional obligation to allow nondiscriminatory political leafleting. *See id.* The author argues by analogy that the public dedication of retail business property creates a similar constitutional obligation to allow nondiscriminatory access and purchasing of its consumer products.

[89] *See* Austin, *supra* note 2, at 154 (arguing that retail discrimination exploits "black consumers by increasing the cost of going shopping, if not the amount actually spent on purchases").

[90] *See* State v. Schmid, 84 N.J. 535, 580, 423 A.2d 615, 639 (1980) (Schreiber, J., concurring) (noting that "[u]nlike its counterpart in the Federal Constitution the New Jersey

Nevertheless, there are many practical reasons why New Jersey's equal protection jurisprudence on access to public accommodations has focused exclusively on LAD statutory protections rather than state constitutional protections.[91] According to the New Jersey legislature, the express legislative purpose for enacting the LAD was to fulfill and enforce the equal protection guarantees of the state constitution.[92] New Jersey's LAD is "one of the oldest and most sweeping civil rights laws in the nation."[93] The state originally adopted the LAD in 1945,[94] thirty-five years before the New Jersey Supreme Court's landmark decision in *Schmid* that established the constitutional right to access and conduct expressional activities on private property which had been opened to the public.[95]

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constitutional guarantee of free speech is not circumscribed by the need to find state action"). While an analysis of the Fourteenth Amendment state action doctrine is beyond the scope of this Comment, the United States Supreme Court has recognized a fundamental dichotomy between actions which could fairly be attributed to state authority, which are subject to scrutiny under the Fourteenth Amendment, and private actions which are immune from such Fourteenth Amendment scrutiny. *See* Georgia v. McCollum, 505 U.S. 42, 63 (1992). The state action distinction between the Fourteenth Amendment and the New Jersey Constitution plainly appears on the face of these documents. *Compare* U.S. CONST. amend. XIV, § 1 (providing that "[n]o state shall make any law . . . nor shall any state deprive any person . . . nor deny to any person within its jurisdiction the equal protection of the laws), *with* N.J. CONST. art. I, ¶ 5 (guaranteeing that "[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil" right based on race).

[91] There has only been one published opinion in which the New Jersey Supreme Court applied constitutional, rather than LAD, protections to address a private actor's equal protection violation, and that was in the employment discrimination context. *See Peper*, 77 N.J. at 79, 389 A.2d at 477. *Peper* was factually unique in that the employer, a private university, was specifically exempted from the LAD's employment discrimination provisions when the discrimination occurred, and the LAD was subsequently amended to include private universities before the case reached the court. *See id.* at 72-73, 389 A.2d at 474.

[92] *See* N.J. STAT. ANN. § 10:5-2 (West 1993) ("The enactment hereof shall be deemed an exercise of the police power . . . in fulfillment of the provisions of the constitution of this state guaranteeing civil rights."); *see also* Anderson v. Exxon Co., 89 N.J. 483, 492, 446 A.2d 486, 490 (1982) (noting the relationship between the LAD and the civil rights provisions of the state constitution).

[93] Robert Schwaneberg, *Civil Rights Rulings Create Legal Tangle—Scouts' Case Latest in Contradictory Thinking*, NEWARK STAR LEDGER, Mar. 4, 1998, at 1.

[94] *See Peper*, 77 N.J. at 68, 389 A.2d at 472.

[95] *See Schmid*, 84 N.J. at 562, 423 A.2d at 630.

In fact, there were decades of LAD precedents banning retail discrimination[96] before the court announced in *New Jersey Coalition* that, unlike the federal constitution, the New Jersey Constitution confers affirmative rights that are "secure not only from State interference but—under certain conditions—from the interference of an owner of private property even when exercised on that private property."[97] Thus, many litigants would see little value in pursuing a novel constitutional argument for access to retail stores when this right is already vindicated by the New Jersey LAD.[98]

There are, however, significant institutional arguments for grounding the right to access commercial businesses on the New Jersey Constitution in addition to the LAD; constitutional protections are insulated from majoritarian pressures and are due more deference than mere statutes. In the commercial context, the state's fifty years of LAD statutory protection could hypothetically be repealed by a single vote majority in some future New Jersey legislature. By anchoring equal protection public accommodations rights in both the LAD and the state constitution, the New Jersey Supreme Court could fulfill its countermajoritarian function and prevent this type of "backsliding."[99] As the New Jersey Supreme Court noted in *Peper*, "[T]his Court has the power to enforce rights recognized by the New Jersey Constitution, even in the absence of implementing legislation."[100] The court further explained that the legislature cannot limit constitutional rights through either its enactments or "its silence, and the judicial obligation to protect the fundamental rights of individuals is as

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[96] *See* Evans v. Ross, 57 N.J. Super. 223, 231, 154 A.2d 441, 445 (App. Div. 1959) (holding that the LAD prohibits businesses that are open to the public from excluding individuals based upon their race, color, national origin or ancestry).

[97] New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 352, 650 A.2d 757, 770 (1994) (establishing the constitutional right, under Article I, Paragraph 6 of the state constitution to distribute political literature in regional shopping malls).

[98] *See* discussion *infra* Part II.C.

[99] *See* United States v. Virginia, 518 U.S. 515, 518 (1996) (Scalia, J., dissenting) ("the function of this Court is to preserve our society's values regarding (among other things) equal protection, not to revise them; to prevent backsliding . . . .").

[100] Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 77, 389 A.2d 465, 476 (1978) (relying upon state constitutional protections rather than LAD rights because, at that time, private universities were specifically exempted from the LAD); *see also Schmid*, 84 N.J. at 558, 423 A.2d at 630 ("It has been recognized that the State Constitution, as a wellspring of individual rights and liberties, may be directly enforceable, its protections not dependent even upon implementing legislation.").

old as this country."[101]

From an originalist perspective, the New Jersey Constitution's equal protection "provision should be evaluated in the light of its historical meaning."[102] The court's interpretation of the constitution should reflect those constant and unbroken "traditions that embody the people's understanding of ambiguous constitutional text."[103] In this regard, it should be noted that the LAD represents a constant and unbroken tradition that predates and shaped the contemporaneously-drafted New Jersey Constitution. The LAD was enacted in 1945 by many of the same legislators who called for, and participated in, the New Jersey constitutional convention of 1947.[104]

The constitutional convention's Joint Committee on Constitutional Bill of Rights recognized that the New Jersey legislature enacted the LAD to eliminate racial "discriminations in the field of employment, education, enjoyment of property and pursuit of a livelihood in a business, trade, or profession."[105] The agency charged with enforcing the LAD, the State Division on Civil Rights, "urged the convention to adopt a strong constitutional provision prohibiting racial discrimination in all aspects of public life."[106] To address issues of commercial discrimination, the Joint Committee recommended that a nondiscrimination provision be incorporated into the New Jersey Constitution.[107] That nondiscrimination and equal protection provision was adopted as Article I, paragraph 5 of the state constitution.[108] In 1976, the New Jersey Supreme Court noted the relationship between the constitution's equal rights provision and the LAD, and declared that "[t]hose rights referred to in the statute may be

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[101] *Peper*, 77 N.J. at 77, 389 A.2d at 476 (quoting King v. South Jersey Nat'l Bank, 66 N.J. 161, 177, 330 A.2d 1, 10 (1974)).

[102] Lige v. Montclair, 72 N.J. 5, 15, 367 A.2d 833, 838 (1976).

[103] *Virginia*, 518 U.S. at 518 (Scalia, J., dissenting); *see also King*, 66 N.J. at 178, 330 A.2d at 10 (noting that interpretation of the New Jersey Constitution "requires the reviewing court to look to the 'traditions and (collective) conscience of our people'") (quoting Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)).

[104] *See Lige*, 72 N.J. at 16, 367 A.2d at 838.

[105] *Id.* at 15, 367 A.2d at 838 (quoting the proceedings of 1947 Convention at 344-45).

[106] Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Desegregation in the Pre-*Brown *South*, 44 UCLA L. REV. 677, 744 n.20 (1997).

[107] *See Lige*, 72 N.J. at 15, 367 A.2d at 838.

[108] *See id.*

considered to be those spelled out in greater detail in the 1947 Constitution."[109] Moreover, both the original understanding and subsequent interpretation of the New Jersey Constitution were shaped and contextualized by New Jersey's expansive common law property access rights.[110] Thus, the framers of the New Jersey Constitution fully intended for the constitution's nondiscrimination provisions to directly address private commercial discrimination.

Moreover, the New Jersey Constitution is a vital social compact which represents far more than protection from majoritarian pressures. It is a basic foundational building block of our legal system that embodies the overriding principles and fundamental rights which our people hold dear. Indeed, the embodiment of fundamental rights and beliefs is the very reason why constitutions are enacted, rather than simply relying on legislative enactments with supermajority requirements.[111] Prior to the vote ratifying the New Jersey Constitution, the state distributed pamphlets explaining its equal rights provision.[112] The constitution was ratified by an overwhelming vote of 653,096 to

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[109] *Id.* at 16, 367 A.2d at 838.

[110] *See* King v. South Jersey Nat'l Bank, 66 N.J. 161, 178, 330 A.2d 1, 10 (1974) (noting that Article I, paragraph 1 of the New Jersey Constitution (the provision relied upon by the court in *Peper*) recognized and incorporated each citizen's common law rights). For a discussion of the relationship between the common law and constitutional rights to access private property, see *supra* notes 34, 71, 86 and accompanying text. The New Jersey Supreme Court's 1971 landmark decision in *Shack* cited a 1939 authority to support its common law holding that a farm owner could not use his property in a manner which negatively impacted on the rights of a disadvantaged migrant workers. *See* State v. Shack, 58 N.J. 297, 305, 277 A.2d 369, 373 (1971). The court's reasoning in *Shack* was animated by equal protection concerns for discreet and insular minorities. *See* New Jersey Coalition v. J.M.B. Realty Corp., 138 N.J. 326, 400-01, 650 A.2d 757, 794-95 (1994) (Garibaldi, J., dissenting). The *New Jersey Coalition* court relied upon *Shack* as a common law basis for the constitutional right to access regional shopping malls. *See id.*

[111] *See, e.g.*, Line Item Veto Act of 1996, 2 U.S.C. § 691 (Supp. II 1996); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-1571 (Supp. II 1996); Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997). Professor Steven Calabresi called these budget driven supermajority requirements "quasi-constitutional statutes" for they change the balance of power in the legislature. *See* Steven G. Calabresi, *The Era of Big Government is Over*, 50 STAN. L. REV. 1015 (1998) (reviewing ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION (1997)). Professor Calabresi argued that these proposals embody the "new mood" of the country. *See id.* at 1021. Nevertheless, even if that is true, these economic proposals do not embody or even approach the basic beliefs and fundamental rights, upon which all other laws are based, that are the stuff of constitutions.

[112] *See* Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. REP. 69, 75 (1994).

184,632,[113] which represents a clear mandate for the constitutionalization of LAD and common law rights to nondiscriminatory access to public accommodations. The vote was also a constitutional declaration that these basic and fundamental rights were retained by the people. The state constitution provides countermajoritarian protections for public accommodation access rights against backsliding during times of faction or discord that reflects the basic beliefs and values of the people of New Jersey.

C. THE NEW JERSEY LAW AGAINST DISCRIMINATION: STATUTORY PROTECTION OF THE RIGHT TO NONDISCRIMINATORY ACCESS TO RETAIL STORES

New Jersey has a proud and ongoing tradition of being in the forefront of the fight to eliminate all types of invidious discrimination.[114] The state originally adopted the LAD in 1945, nearly twenty years before the federal government adopted the Civil Rights Act of 1964.[115] New Jersey's LAD is "one of the oldest and most sweeping civil rights laws in the nation."[116] The legislature enacted the LAD to fulfill and enforce provisions of the state constitution that guarantee civil rights.[117]

The LAD is a comprehensive statutory scheme that protects various civil rights, including an individual's affirmative civil right to nondiscriminatory access to retail stores[118] and all other places of public accommodation.[119] The LAD

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[113] *See* MANUAL OF THE LEGISLATURE OF NEW JERSEY 48, 217th Legis. Sess. 1 (N.J. 1996).

[114] *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 80, 389 A.2d 465, 478 (1978); Dale v. Boy Scouts of America, 308 N.J. Super. 516, 549, 706 A.2d 270, 287 (App. Div.), *certif. granted*, 156 N.J. 381, 718 A.2d 1210 (1998).

[115] *See Peper*, 77 N.J. at 68, 389 A.2d at 472.

[116] Schwaneberg, *supra* note 93, at 1.

[117] *See* N.J. STAT. ANN. § 10:5-2 (West 1993) ("The enactment hereof shall be deemed an exercise of the police power . . . in fulfillment of the provisions of the constitution of this state guaranteeing civil rights.").

[118] The New Jersey LAD provides a nonexhaustive list of public accommodations which includes any "retail shop, store, establishment, or concession dealing with goods or services of any kind . . . ." N.J. STAT. ANN. § 10:5-5(l) (West Supp. 1998).

[119] N.J. STAT. ANN. § 10:5-4 specifically provides:

was designed to ensure that establishments which cater to the public generally do not exclude individual members of the public because of their race, color, national origin or ancestry.[120] "Once a proprietor extends his invitation to the public he must treat all members of the public alike."[121] The New Jersey legislature found that such discrimination menaces and imposes grievous harm on the inhabitants, institutions and democratic foundation of the state.[122] Based on this finding, the legislature decreed that the LAD "shall be liberally construed in combination with other protections available under the laws of this state," to provide legal remedies, including punitive damages, to victims of discrimina-

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> All persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

N.J. STAT. ANN. § 10:5-4 (West Supp. 1998). Moreover, N.J. STAT. ANN. § 10:5-12 provides that "[i]t shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:"

> f. (1) For any owner . . . agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality is unwelcome, objectionable or not acceptable, desired or solicited . . . .

N.J. STAT. ANN. § 10:5-12 (West Supp. 1998).

[120] *See* Evans v. Ross, 57 N.J. Super. 223, 231, 154 A.2d 441, 445 (App. Div. 1959).

[121] Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 536, 706 A.2d 270, 280 (App. Div.) (quoting *Evans*, 57 N.J. Super. at 231, 154 A.2d at 445), *certif. granted*, 156 N.J. 381, 718 A.2d 1210 (1998).

[122] *See* N.J. STAT. ANN. § 10:5-3 (West Supp. 1998) (codifying the manifest legislative purpose of the LAD in this statutory provision titled "Finding and Declaration of Legislature").

tion.[123]

The "'overarching goal of the LAD is nothing less than the eradication' of discrimination."[124] The public accommodations portion of the LAD, however, is under-utilized. Most of the published LAD cases on public accommodations discrimination have focused on the narrow issue of defining whether a given organization constitutes a place of public accommodation, rather than determining the standard of proof required to sustain this type of complaint.[125]

1. METHODS AND STANDARDS OF PROOF IN LAD DISCRIMINATION CASES

Generally, LAD complaints can be brought under either a disparate treatment theory or a disparate impact theory.[126] Disparate treatment claims require proof of discriminatory intent; by contrast, disparate impact claims are judged under an effects standard that does not require proof of discriminatory intent.[127] Thus, a plaintiff may establish a disparate impact discrimination claim by showing that a defendant's facially neutral conduct adversely and disproportionately affects a protected class and is not justified by business necessity.[128]

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[123] *See id.*

[124] *Dale*, 308 N.J. Super. at 549, 706 A.2d at 287 (quoting Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, 659 (1988)).

[125] New Jersey courts have determined that private eating clubs at Princeton University, Little League baseball, and the Boy Scouts each constitute "places of public accommodation" for purposes of the LAD. *See* Frank v. Ivy Club, 120 N.J. 73, 102, 576 A.2d 241, 256 (1990); *Dale*, 308 N.J. Super. at 534-39, 706 A.2d at 279-82; National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 531, 318 A.2d 33, 37-38 (App. Div.), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974).

[126] *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81, 389 A.2d 465, 478 (1978).

[127] *See id.* at 81-82, 389 A.2d at 478.

[128] *See id.*; *see also* United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974). In fact, the *Black Jack* court held that

> [t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . whatever our law was once, . . . we now firmly recognize that the ar-

The framework for establishing a violation of the state constitution or LAD need not be identical to the standards applied in federal cases interpreting analogous federal civil rights statutes.[129] Nevertheless, in the interest of uniformity, the New Jersey Supreme Court has adopted these federal standards to the extent that they are appropriate, "useful and fair."[130] For example, in employment discrimination cases brought under either Title VII or the LAD, the New Jersey Supreme Court recognizes and applies the federal standards for both disparate treatment and disparate impact causes of action.[131] Similarly, a housing discrimination plaintiff can prove unlawful discrimination based upon either disparate impact or disparate treatment under both Title VIII and the New Jersey LAD.[132]

There are no published opinions on the issue of whether New Jersey law and the LAD prohibit a retail store from summarily excluding individual minority shoppers based on a mere subjective suspicion of shoplifting. This practice of excluding minority shoppers has a disparate impact upon people of color,[133]

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bitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id.

[129] *See Peper*, 77 N.J. at 81, 389 A.2d at 478.

[130] Bergen Commercial Bank v. Sisler, 157 N.J. 188, 200, 723 A.2d 944, 950 (1999) (quoting *Peper*, 77 N.J. at 81, 389 A.2d at 478).

[131] *See Peper*, 77 N.J. at 81-82, 389 A.2d at 478 (noting that New Jersey has adopted the United States Supreme Court's disparate treatment standard from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973) and the Court's disparate impact standard from *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971)).

[132] *See* In re Township of Denville, 132 N.J. 1, 22, 622 A.2d 1257, 1267-68 (1993).

[133] *See* Austin, *supra* note 2, at 154. Austin noted that

> [t]ales about the obstacles blacks encounter in trying to spend their money in white owned stores and shops are legendary. Blacks are treated as if they were all potential shoplifters, thieves, or deadbeats. There can hardly be a black person in urban America who has not been denied entry to a store, closely watched, snubbed, questioned about her of his ability to pay for an item, or stopped and detained for shoplifting.

Id. (citations omitted); *see also ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998), *available in* 1998 WL 5433617 ("[E]very day in this country . . . [i]n stores across the country, they [referring to black shoppers] are under suspicion simply because of the color of their skin.").

which is inconsistent with public policy and the goals of the LAD. Unfortunately, the question of whether a denial of public accommodations LAD suit can be pursued on a disparate impact theory has never been raised.[134] It is also unclear whether a denial of public accommodations claim can be maintained on a disparate impact theory under Title II of the Civil Rights Act of 1964.[135] Never-

[134] Disability accommodations required by statute under the Americans with Disabilities Act and the New Jersey LAD are beyond the scope of this Comment.

[135] *See* 42 U.S.C. § 2000a et seq. (1994); *see also* Stephen E. Haydon, *A Measure of Our Progress: Testing For Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1251 (1997) (citing Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974)). Professor Haydon cited *Olzman* as the only Title II case that ever suggested a disparate impact theory. *See id.* Since Professor Haydon's 1997 article, there have been two contradictory federal district court decisions on the viability of a disparate impact claim under Title II. *Compare* Robinson v. Power Pizza, 993 F. Supp. 1463, 1464-66 (M.D. Fla. 1998) (expressly adopting a disparate impact standard and holding that discriminatory intent was not necessary under Title II), *with* Arguello v. Conoco, No. CIV.A.3:97-CV-0638H, 1997 WL 446433, at *1-2 (N.D. Tex. July 21, 1997) (dismissing a disparate impact claim on ground that disparate impact is insufficient to establish a Title II violation, stating that "[n]o court has recognized a disparate impact claim under Title II").

In *Robinson*, Power Pizza refused to make deliveries to nearby minority neighborhoods based upon generalized and unsubstantiated security concerns. *See Robinson*, 993 F. Supp. at 1463-65. On a disparate impact theory, the district court enjoined Power Pizza and its employees from the practice of refusing to make deliveries to nearby minority neighborhoods while servicing more distant Caucasian communities. *See id.* at 1466.

Arguello v. Conoco was a class action brought by black and Hispanic customers, who had allegedly suffered discrimination at no less than five different Conoco stores. *See Arguello*, 1997 WL 446433, at *1-2. Individual Conoco-brand stores allegedly conducted a pattern and practice of racial profiling in shoplifting and theft countermeasures. *See* 1997 WL 446433, at *1-5. Examples of this alleged practice included one store's refusal to accept a Hispanic customer's credit card and four different Conoco stores' refusal to serve black customers. *See id.* During the credit card incident, the store clerk yelled racial obscenities at Ms. Arguello, and then utilized the store's loudspeaker system to amplify racial slurs towards the retreating customer. *See* 1997 WL 446433, at *1. Conoco's district manager viewed the store's videotape of this incident, agreed that Ms. Arguello had been mistreated, and transferred the offending clerk to another store. *See* 1997 WL 446433, at *2. Another Conoco-brand store employee insisted that all minority patrons (unlike Caucasian customers) must pre-pay for gasoline purchases and told Hispanic customers that "you Mexicans need to go back to Mexico." *Id.* In three more unrelated incidents, Conoco-brand stores refused to serve black customers based upon generalized shoplifting suspicions, in one incident telling the black patron that "we don't serve you people." *Id.* Nevertheless, the actions against defendant Conoco, Inc. were dismissed at summary judgment. *See* 1997 WL 446433, at *7-8. The intentional disparate treatment claim against Conoco, Inc. was dismissed on ground that the company was not vicariously liable for the discriminatory intent of its individual franchisees and employees. *See* 1997 WL 446433, at *5-8. The disparate impact discrimination claim against Conoco was dismissed at an earlier date based upon

theless, irrespective of whether disparate impact claims are actionable under Title II, it appears likely that they would be actionable under the LAD because section 10:5-12 of the LAD prohibits both discriminatory employment practices and discrimination in access to public accommodations.[136] Nothing in the wording of the LAD suggests that disparate impact should be actionable only in the employment discrimination context. Furthermore, New Jersey courts have consistently interpreted the public accommodations protections in the LAD far more broadly than any federal public accommodation law.[137]

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the District Court's conclusion that "[n]o court has recognized a disparate impact claim under Title II." 1997 WL 446433, at *1-2.

[136] *See* N.J. STAT. ANN. § 10:5-12 (West Supp. 1998). Where the LAD differs substantively from federal civil rights statutes a New Jersey "court must conduct its own analysis to discern the underlying legislative intent." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 201-02, 723 A.2d 944, 950 (1999). *Compare Sisler*, 1999 WL 92438 (concluding that a LAD age discrimination plaintiff can proceed under a disparate impact theory), *with* Mullin v. Raytheon Co., 164 F.3d 696, 703-04 (1st Cir. 1999) (holding that "the ADEA does not impose liability under a theory of disparate impact").

[137] The LAD is broader in many respects than Title II of the federal Civil Rights Act of 1964. For example, the LAD's broader definition of a "place of public accommodation" includes retail stores, which are specifically exempted from Title II. *See* N.J. STAT. ANN. § 10:5-5(l) (West Supp. 1998). Additionally, the LAD, unlike Title II, proscribes discrimination based on sexual orientation. *See* Schwaneberg, *supra* note 93, at 1. The "contradictory thinking" noted in the title of the Schwaneberg article refers to New Jersey's expanded protection of equal opportunity rights over and beyond any protections offered by the federal government and most other states. *See id.* Specifically, the Schwaneberg article addressed the recent decision in *Dale v. Boy Scouts of America*, 308 N.J. 516, 706 A.2d 270 (App. Div.), *certif. granted*, 156 N.J. 381, 718 A.2d 1210 (1998), which held that under LAD, the Boy Scouts of America constituted a place of public accommodation, and thus could not discriminate on the basis of sexual orientation. *See id.* at 534-39, 706 A.2d at 279-82. Interestingly, however, the Seventh Circuit held that the Boy Scouts were not a place of public accommodation under Title II. *See* Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993). Judge Landau's dissent in *Dale* argued that the majority opinion in this Appellate Division decision is not reconcilable with the United States Supreme Court's recent decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). *See Dale*, 308 N.J. Super. at 563, 706 A.2d at 295 (Landau, J., dissenting). In *Hurley*, the Court held that the organizers of the Boston Saint Patrick's Day Parade had the First Amendment right to exclude gay rights marchers. *See Hurley*, 515 U.S. at 580-81. Judge Landau's dissent in *Dale* reasoned that the Boy Scouts' refusal to employ an outspoken gay rights advocate was analogous to the Boston Saint Patrick's Day Parade Organization's exclusion of gay rights marchers since, in both cases, compelling the organizations to accommodate gay rights activists would "trespass on the organization's message itself." *Dale*, 308 N.J. Super. at 563, 706 A.2d at 295 (Landau, J., dissenting) (quoting *Hurley*, 515 U.S. at 580).

2. THE *MCDONNELL DOUGLAS* BURDEN SHIFTING FRAMEWORK FOR PROVING DISPARATE TREATMENT DISCRIMINATION THROUGH CIRCUMSTANTIAL EVIDENCE

Plaintiffs can prove intentional disparate treatment discrimination through either direct evidence or indirect circumstantial evidence. Unsubtle, obvious discriminations can be proven by direct evidence.[138] Moreover, the LAD also prohibits indirect, subtle, and covert discriminatory activities.[139] In order to further the LAD's goal of eradicating hidden discrimination, and to compensate for the evidentiary difficulties inherent in proving subtle sophisticated discrimination, a LAD complainant can use the burden shifting framework set forth in *McDonnell Douglas Corporation v. Green*[140] to prove intentional discrimination through circumstantial evidence.[141]

To establish a prima facie case of public accommodation discrimination under the LAD, a plaintiff must demonstrate: i) membership in a protected class; ii) an attempt to utilize or gain access to a public accommodation; and iii) denial of such access.[142] The defendant then bears the burden of articulating some legiti-

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[138] "Direct evidence" of disparate treatment discrimination is "evidence, which in and of itself, shows discriminatory animus." Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990). An example of direct evidence of discrimination would be the 7-Eleven store clerk's statement in *Lewis v. Doll*, that he would not serve black customers "because the store had recently experienced a problem with blacks shoplifting." Lewis v. Doll, 765 P.2d 1341, 1342 (Wash. Ct. App. 1989). Direct evidence must "demonstrate not only a hostility towards members of the [plaintiff's] class, but also a direct causal connection between that hostility and the challenged . . . decision." *Sisler*, 157 N.J. at 208, 723 A.2d at 954.

[139] *See* Wilson v. Sixty-six Melmore Gardens, 106 N.J. Super. 182, 185-86, 254 A.2d 545, 546-47 (App. Div. 1969).

[140] 411 U.S. 792 (1973).

[141] *See* Goodman v. London Metals Exch., Inc., 86 N.J. 19, 31, 429 A.2d 341, 347 (1981). The *McDonnell Douglas* burden shifting procedure is a three-tiered framework used to prove intentional disparate treatment discrimination cases by circumstantial evidence. *See id.* During the first stage, the plaintiff has the burden of establishing a prima facie case of discrimination. *See id.* This creates a presumption of unlawful discrimination and shifts the burden of going forward to the defendant. *See id.* At the second stage, the defendant can rebut this presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its actions. *See id.* Assuming the defendant comes forward and meets this burden of production, the burden shifts back to the plaintiff in the third stage. *See id.* The plaintiff must then prove that the defendant's proffered reasons were merely a pretext for intentional discrimination. *See id.* at 32, 429 A.2d at 348.

[142] *See* Williams v. Regal Plaza Motor Inn, 97 N.J. Admin. 2d 38, 45 (1996).

mate, non-discriminatory reason for the exclusion.[143] Once the defendant satisfies this burden, the disparate treatment plaintiff must prove that the defendant's actions were motivated by some discriminatory purpose.[144]

For example, in the recent administrative decision of *Williams v. Regal Plaza Motor Inn*,[145] both the administrative law judge (ALJ) and the Director of the Division on Civil Rights found that a motel owner's reluctance to provide accommodations to an African American couple, and the motel owner's refusal to accept the customer's credit card, constituted violations of the LAD.[146] The customer, Dr. Williams, established all three elements of a prima facie case of discriminatory access to public accommodations: he was a member of a protected class;[147] he attempted to access a public accommodation by making a room reservation, appearing at the motel, and tendering a credit card;[148] and the defendant denied him access to this accommodation by refusing his credit card and giving conflicting stories as to room vacancies.[149] The burden of production then shifted to the defendant to articulate a legitimate, nondiscriminatory reason for the denial of access.[150] The defendant met this burden by stating that the motel was overbooked and was not accepting credit cards at that time.[151] In conclusion, both the ALJ and the Director found that the explanations proffered by the motel owner were used as a pretext to conceal racial discrimination against Dr. Williams in violation of the LAD.[152] Specifically, both the ALJ and the Director concluded that the motel owner's explanations were contradictory, incoherent, and "unworthy of credence."[153]

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[143] *See id.*; *see also* discussion *infra* Part II.C.3.

[144] *See Goodman*, 86 N.J. at 32, 429 A.2d at 348.

[145] 97 N.J. Admin. 2d 38 (1996).

[146] *See id.* at 45.

[147] *See id.*

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See id.*

[153] *See id.* at 45-46.

3. THE LAD DEFENDANT'S BURDEN OF ARTICULATING A LEGITIMATE, NONDISCRIMINATORY REASON TO REBUT A PRIMA FACIE INFERENCE OF DISCRIMINATION

Minority customers who are denied access to retail stores meet the criteria for establishing a prima facie case of public accommodations discrimination under the LAD.[154] Therefore, the burden rests with the defendant merchant to articulate a legitimate, non-discriminatory reason for excluding the minority customer.[155] The question becomes whether a merchant's bare subjective suspicion that a minority customer may be a shoplifter would be sufficient to constitute a legitimate, non-discriminatory reason for excluding that customer from a retail store. The answer to this question may differ from jurisdiction to jurisdiction based upon the underlying public accommodations laws and the court's interpretation of the phrase "legitimate, non-discriminatory reason."

For purposes of the LAD, exclusions from retail stores based on the mere subjective suspicion of shoplifting are arguably neither "legitimate" nor "non-discriminatory." In fact, an exclusion may be "discriminatory" if conscious or unconscious racial stereotyping influenced the merchant's suspicion and subsequent exclusion of a minority customer.[156] There is a substantial amount of data on the discriminatory effects of racial profiling in retail shoplifting coun-

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[154] *See id.* (holding that for a plaintiff to establish a prima facie case of public accommodation discrimination under LAD, a plaintiff must demonstrate membership in a protected class, an attempt to utilize or gain access to a public accommodation, and denial of such access).

[155] *See id.* ("The burden of production, but not the burden of persuasion, then shifts to the respondent to articulate some legitimate, nondiscriminatory reason for the denial of access to the public accommodation.").

[156] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989); Zalewski v. Overlook Hosp., 300 N.J. Super. 202, 202-11, 692 A.2d 131, 131-36 (Law Div. 1996). In *Price Waterhouse*, the Court concluded that an employer, who acted upon preconceived stereotypical notions that women cannot be aggressive, had unlawfully acted on the basis of gender. *See Price Waterhouse*, 490 U.S. at 250-52. The Court reasoned that in forbidding businesses from discriminating "against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). Similarly, New Jersey courts have held that the LAD clearly prohibits "discrimination based on gender stereotyping." *Zalewski*, 300 N.J. Super. at 211, 692 A.2d at 136. In *Zalewski*, the court held that the LAD bans discrimination based upon gender and sexual orientation stereotypes. *See id.* The court based this holding on "the United States Supreme Court's reasoning in *Price Waterhouse*, the broad language of the LAD and its dictate that it is to be liberally construed (N.J.S.A. 10:5-3), as well as a common sense approach . . . ." *Id.* at 212, 692 A.2d at 136.

termeasures.[157] Furthermore, these retail exclusions may not be "legitimate" if the New Jersey common law bans summary exclusions based upon the mere suspicion of shoplifting;[158] by definition, an unlawful act cannot be legitimate.[159] Moreover, these exclusions may not be "legitimate" if the actions violate public policy and the LAD's overarching goal of eradicating all forms of discrimination.[160]

The issue of whether a merchant's subjective suspicion of a minority customer could be sufficient to rebut a LAD plaintiff's prima facie inference of discrimination will also turn on the jurisdiction's interpretation of the phrase "legitimate, nondiscriminatory reason." There are several plausible ways of interpreting the term "legitimate" in the context of a LAD defendant's burden of articulating the "legitimate, nondiscriminatory reason"[161] necessary to rebut a

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[157] *See* Austin, *supra* note 2, at 148-49 (maintaining that blacks shopping in white-owned stores are treated as if they are all potential shoplifters. "There can hardly be a black person in urban America who has not been denied entry to a store, closely watched . . . ."). As Professor Austin further noted, "[S]toreowners especially target blacks because (1) blacks are supposedly over-represented among lawbreakers, and (2) storeowners cannot discern a law-abiding black from a potentially law-defying black." *Id.* at 153; *see also ABC News 20/20: Under Suspicion, Security Guards Unfairly Target Black Shoppers* (ABC television broadcast, June 8, 1998), *available in* 1998 WL 5433617 (observing that stores throughout the United States use racial profiles as part of their shoplifting countermeasures, which results in widespread retail racial discrimination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

Stereotyping is a serious problem because a significant amount of discrimination stems from employers' and business operators' perceptions regarding the traits and "abilities of various groups (racial, ethnic, or gender) in society. Part of the danger of stereotypes is that these beliefs may well be held without the [business operators] being aware of them." MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 102 (1997). Business operators, in an effort to reduce business risks and information costs, will sometimes employ stereotypical generalizations about groups or misinterpret objective information regarding individual members of these groups. *See id.*

[158] *See* discussion *supra* Part II.A.

[159] *See* BLACK'S LAW DICTIONARY 901 (6th ed. 1990) (defining "legitimate" as "that which is lawful, legal, recognized by law, or according to law").

[160] *See* Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, 659 (1988) ("Indeed, the overarching goal of the LAD is nothing less than the eradication of the cancer of discrimination.)."

[161] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Goodman v. London Metals Exch., Inc., 86 N.J. 19, 31, 429 A.2d 341, 347 (1981).

plaintiff's prima facie inference of discrimination. "Legitimate" could mean lawful, or it could mean legitimacy in terms of the purposes and goals of the statute, or it could be superfluous, adding nothing beyond the meaning of "non-discriminatory." This last interpretation appears to have been adopted by the United States Supreme Court in *Hazen Paper Company v. Biggins*[162] and *St. Mary's Honor Center v. Hicks*.[163] In these 1993 cases, the United States Supreme Court modified the *McDonnell Douglas* methodology by concluding that an unlawful or demonstrably pretextual reason may be sufficient to rebut a federal plaintiff's prima facie inference of discrimination.[164] It should be noted that the Court's decision in *Biggins* has never been cited in a published New Jersey opinion nor applied to the LAD.

While the New Jersey Supreme Court adopted the *McDonnell Douglas* model as a "starting point" in adjudicating discrimination cases alleging violations of the state constitution or LAD, the court emphasized that these federal standards should be used only where, and to the extent, they appropriately serve state law.[165] The court in *Peper* reasoned that New Jersey's test for deciding discrimination cases "need not be the same as that used in the federal cases arising under Title VII."[166] Indeed, the New Jersey Supreme Court has "not hesitated to depart from the McDonnell Douglas methodology if a rigid application of its standards is inappropriate under the circumstances."[167] The author believes that the New Jersey Supreme Court may apply a different in-

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[162] 507 U.S. 604 (1993). In *Biggins*, the Court held that a defendant could meet its burden of production and rebut an age discrimination plaintiff's prima facie inference of discrimination by articulating another unlawful reason for its discrimination. *See id.* at 612. The Court explained that "it cannot be true that an employer who fires an older black worker because the worker is black violates the ADEA [Age Discrimination in Employment Act]. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA." *Id.*

[163] 509 U.S. 502 (1993). In *Hicks*, the Court held that a defendant's dishonest articulation of a pretextual reason for a discriminatory action was sufficient to rebut a prima facie inference of discrimination. *See id.* at 521-22.

[164] *See supra* notes 162-163.

[165] *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81-83, 389 A.2d 465, 478-79 (1978).

[166] *Id.* at 81, 389 A.2d at 478 ("[W]here state law is involved, the test for a prima facie case of discrimination need not be the same as that used in the federal cases arising under Title VII.").

[167] Bergen Commercial Bank v. Sisler, 157 N.J. 188, 212, 723 A.2d 944, 956 (1999).

terpretation of the phrase "legitimate, nondiscriminatory reason" in the context of discrimination cases arising under the state constitution or LAD.

The classic Hart-Fuller debate on methods of interpreting legal language is illustrative of the reasoning that the New Jersey Supreme Court might apply to define the minimum requirements of a LAD defendant's "legitimate, nondiscriminatory reason."[168] A Hart-positivist interpretation would focus on the language and the meaning of the individual words within the phrase "legitimate, nondiscriminatory reason."[169] Another author, addressing the Court's 1993 modification of the *McDonnell Douglas* framework, noted that "Justice Powell's opinion [in *Burdine*] uses the words 'legitimate' and 'lawful' interchangeably to describe the 'reasons' that will rebut a prima facie case."[170] In contrast, "*Biggins* expands 'legitimate' to include 'unlawful': a reason that is unlawful, but nondiscriminatory under the antidiscrimination statute in question, will rebut a prima facie case."[171]

Thus, Justice Powell, writing for the Court in both *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*,[172] appears to have intended to limit the defendant's universe of possible "legitimate, nondiscriminatory reasons" to those nondiscriminatory reasons which are not inherently unlawful.[173]

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[168] *Compare* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-72 (1958), *with* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-629 (1958). In fact, the famous debate between Professors Fuller and Hart was published in adjoining articles in volume 71 of the Harvard Law Review.

[169] *See* Fuller, *supra* note 168, at 642-43, 662. Professor Fuller characterized Professor Hart's positivist approach to interpretive analysis as follows:

> The task of interpretation is commonly that of determining the meaning of the individual words of a legal rule like "vehicle" in a rule excluding vehicles from a park. More particularly, the task of interpretation is to determine the range of reference of such a word, or the aggregate of things to which it points.

Id. at 662.

[170] ZIMMER, *supra* note 157, at 153.

[171] *Id.*

[172] 450 U.S. 248 (1981).

[173] *See* BLACK'S LAW DICTIONARY 901 (6th ed. 1990) (defining "legitimate" as "that which is lawful, legal, recognized by law, or according to law"). It should be noted, however, that the author is not suggesting that the terms "legitimate" and "lawful" are interchangeable in the context of a defendant's burden of articulating a "legitimate, nondiscrimi-

Other legal scholars might reject this positivist method of interpretation, arguing that the real issue is the purpose of the rule rather than the individual words chosen.[174] Professor Christopher Clancy,[175] noting both the comma after the word "legitimate," and the general consensus of most of the practitioners who applied the *McDonnell Douglas* framework during the decades following this landmark 1973 decision, believes that the word "legitimate" was intended to mean legitimate in terms of the purposes and goals of the Title VII.[176] Professor Clancy views the Court's more recent decisions in *Biggins* and *Hicks* as modifications of the *McDonnell Douglas* scheme which have eviscerated all meaning from the term "legitimate."[177]

Interestingly, both Professor Hart's positivist focus on the language and Professor Fuller's methodology of looking to the purposes and goals of the rule militate against accepting an arbitrary and unlawful justification for discrimination. Both professors' interpretations are thoroughly consistent with Justice Powell's interchangeable use of the terms "legitimate" and "lawful" as well as the goals of the LAD.[178]

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natory reason" sufficient to rebut a prima facie inference of discrimination. Rather, the author suggests that "lawful" is an essential element of "legitimate" in this context. Thus, while every "legitimate" reason would necessarily be "lawful," not every "lawful" reason would necessarily be "legitimate."

[174] *See* Fuller, *supra* note 168, at 664-70 (asking and answering in the negative the rhetorical question of whether it is "really ever possible to interpret a word in a statute without knowing the aim of the statute").

[175] Professor Christopher H. Clancy of Seton Hall University School of Law provided invaluable insight and perspective on the original understanding of the *McDonnell Douglas* framework during the progression of this Comment. Professor Clancy served as the Director of the Columbia University Center on Social Welfare, Policy and Law when it participated in a significant amount of the early Title VII litigation.

[176] Interview with Christopher H. Clancy, Professor of Law at Seton Hall University School of Law, in Newark, NJ (Jan. 19, 1999).

[177] *See id.*

[178] *See, e.g.*, Hill v. Mississippi State Employment Serv., 918 F.2d 1233, 1243-44 (5th Cir. 1990) (Rubin, J., dissenting) (concluding that a defendant's inefficiency, although not itself unlawful, was not a "legitimate" enough reason to rebut a prima facie inference of discrimination). Judge Rubin reasoned:

> Surely the word "legitimate" must mean more than simply non-criminal or not forbidden by law, for we would not as a matter of course accept either a criminal act or one otherwise forbidden by law as sufficient to justify discrimination. Instead, a

There is no reason to assume that New Jersey courts will adopt the *Biggins* rationale that accepts a discriminator's violations of public policy and other substantive law as a sufficient "legitimate, nondiscriminatory reason" to rebut a prima facie inference of discrimination under the LAD. This author believes that the phrase "legitimate, nondiscriminatory reason" gets its context and meaning from the intent and text of the *McDonnell Douglas* scheme as well as the purposes and goals of the underlying statute, constitution and decision-maker.

There are fundamental differences between the Rehnquist Court's interpretation of federal civil rights statutes and the New Jersey Supreme Court's exposition of its state constitution and LAD; these inherent distinctions could produce divergent constructions of the phrase "legitimate, nondiscriminatory reason." Unlike the federal statutes at issue in *Hicks* and *Biggins*, the New Jersey Constitution and LAD affirmatively guarantee each person's civil right to be free from discrimination.[179] The eradication of invidious discrimination is a central theme of the New Jersey LAD, state constitution, and courts.[180] In contrast, this author believes that the Rehnquist Court's main focus, in interpreting federal civil rights laws, is federalism.[181] In the civil rights context, this new federalism limits the availability of federal forums and remedies by increasing the evidentiary burdens on civil rights plaintiffs and requiring progressively higher culpability levels of civil rights defendants before affording a federal remedy.[182]

"legitimate" reason must be one that is justifiable in view of the purposes of the [underlying statute].

Id.

[179] *See* Goodman v. London Metals Exch., Inc., 86 N.J. 19, 30-31, 429 A.2d 341, 347 (1981).

[180] *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 80, 389 A.2d 465, 477-78 (1978); Dale v. Boy Scouts of America, 308 N.J. Super. 516, 549 (App. Div.), *certif. granted*, 156 N.J. 381, 718 A.2d 1210 (1998).

[181] *See* Printz v. United States, 117 S. Ct. 2365, 2398 (1997) (finding that Congress cannot compel state officers to regulate or conduct federal firearms investigations); United States v. Lopez, 514 U.S. 549, 557 (1995) (holding that the Gun Free School Zone Act of 1990 unconstitutionally exceeded congressional commerce clause power under "our dual system of government"); New York v. United States, 505 U.S. 144, 166-76 (1992) (deciding that Congress has no constitutional authority to compel states to regulate or prohibit conduct).

[182] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat 1071 (1991) (codified in scattered sections of 42 U.S.C.) (stating the Act's purpose was "to respond to recent decisions of the Supreme Court [that reduced civil rights protections] by expanding

A New Jersey court's interpretation of the phrase "legitimate, nondiscriminatory reason" in this context would turn on the aims of the LAD and the *McDonnell Douglas* framework. In this regard, "[T]he overarching goal of the LAD is nothing less than the eradication of the cancer of discrimination."[183] The purpose behind the *McDonnell Douglas* framework and requiring the defendant to articulate a legitimate, nondiscriminatory reason for its action was to progressively narrow the inquiry in order to "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[184] In contrast, *Hicks* modified the *McDonnell Douglas* methodology by expanding the last inquiry beyond the issue of pretext and imposing on civil rights plaintiffs the burden of disproving additional nondiscriminatory motivations that were never raised by the defense.[185] This modification is inconsistent with the New Jersey Supreme Court's express reasons for

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the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); ZIMMER, *supra* note 157, at 171 (noting that the Civil Rights Act of 1991 overturned Supreme Court decisions eviscerating Title VII, questioned whether *Hicks* represents the Court's continued effort to weaken civil rights protections, and asked whether Congress should amend Title VII to overturn *Hicks*). For other examples of the Court limiting the federal forums and remedies available to civil rights litigants, see Board of the County Comm'rs v. Brown, 117 S. Ct. 1382, 1396-97 (1997) (Souter, J., dissenting) (arguing that the Court set a new higher culpability standard for municipal liability under 24 U.S.C. § 1983, which requires the plaintiff to prove that the municipality exhibited a deliberate indifference to the plainly obvious consequences of a particular constitutional violation and thus was the moving force behind its employee's constitutional violation); Missouri v. Jenkins, 515 U.S. 70, 95 (1995) (emphasizing the federal court's limited authority in school desegregation cases); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (holding that a defendant's illegal and fraudulent conduct can constitute a legitimate, nondiscriminatory reason to rebut a prima facie showing of discrimination); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521-22 (1993) (holding that a defendant's false and pretextual articulation suffices to rebut a prima facie showing of discrimination).

[183] Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, 659 (1988).

[184] *Hicks*, 509 U.S. at 521-22 (Souter, J., dissenting).

[185] *See id.* at 525, 541-43 (Souter, J., dissenting). As Justice Souter explained,

> Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove.

Id. at 525.

adopting the *McDonnell Douglas* scheme, which were to further the LAD's goal of eradicating hidden discrimination and to compensate for "the difficulty in proving an individual's intent or motive."[186]

In summary, the United States Supreme Court's 1993 modifications of the *McDonnell Douglas* model in *Hicks* and *Biggins* permit a defendant in a federal civil rights suit to rebut a prima facie inference of discrimination by merely articulating an unlawful or demonstrably pretextual reason for discriminating. This is contrary to the plain and original meaning of the phrase "legitimate, nondiscriminatory reason," and inconsistent with the issue-narrowing purpose of the *McDonnell Douglas* scheme.

This author suggests that the Supreme Court's reasoning is more consistent with federalist goals of the decision-maker.[187] These federalism concerns are not relevant to the state court's interpretation of its LAD and state constitution.[188] Moreover, the anti-discrimination goals and scope of the LAD are more ambitious than any analogous federal statutes. Therefore, there is no reason to assume that the recent federal revision of the *McDonnell Douglas* model would be applied to a LAD defendant's burden of articulating a legitimate, nondiscriminatory reason to justify the exclusion of a minority customer from a retail store.

Thus, there remains a colorable argument that a New Jersey plaintiff could combine common law, constitutional and LAD access theories so that an arbitrary, unreasonable or discriminatory reason for excluding a minority member from a retail store would be insufficient to rebut a prima facie inference of discrimination.[189] This novel combination of common law and statutory protections

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[186] Goodman v. London Metals Exch., Inc., 86 N.J. 19, 31, 429 A.2d 341, 347 (1981).

[187] *See supra* notes 181-182 and accompanying text (discussing the Court's federalist structural interpretation of civil rights laws).

[188] *See* State v. Schmid, 84 N.J. 535, 562, 423 A.2d 615, 628 (1980) ("It has been noted that in our interpretation of fundamental State constitutional rights, there are no constraints arising out of principles of federalism.").

[189] The argument may be conceptualized that retail exclusions based on a merchant's bare, unsupported, and often stereotypical suspicions are not "legitimate" under New Jersey's common law and constitutional prohibition of all arbitrary and unreasonable exclusions from public places. *See* discussion *supra* part II.A-B; *see also supra* note 18 (observing that customers who are arbitrarily and unreasonably excluded from New Jersey retail stores could recover on a common law action without proving any class-based animus). Arguably, if these exclusions are unlawful in New Jersey, or have a disparate impact upon people of color, by definition the exclusions cannot constitute "legitimate, nondiscriminatory reasons" to rebut a LAD plaintiff's prima facie case. The New Jersey legislature decreed that the LAD "shall be liberally construed in combination with other protections available under the

would offer the plaintiff many statutory advantages over a pure common law action, such as fee shifting and the choice of economical administrative remedies.[190]

Theoretically, it is only the remedy and not the underlying right that is affected by the question of whether a plaintiff could combine common law protections from arbitrary exclusions with statutory protections. The customer who has either the common law, statutory or constitutional right to access a retail store maintains that right regardless of whether the actions can be combined in the method suggested by the author. Practically, however, without the availability

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laws of this state," to provide remedies to victims of discrimination. N.J. STAT. ANN. § 10:5-3 (West Supp. 1998). Furthermore, the New Jersey Supreme Court recently declared that there is a presumption against a "statutory abrogation of a common law right. To abrogate a common law right, the legislature must speak plainly and clearly." Campione v. Adamar of New Jersey, 155 N.J. 245, 265, 714 A.2d 299, 309 (1998).

[190] *See* Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 652-54, 684 A.2d 1385, 1388-89 (1996) (noting that unlike many federal civil rights statutes, the New Jersey LAD offers plaintiffs an unfettered choice between administrative and Superior Court proceedings with monetary damages, equitable relief and attorney's fees available in both forums). In *Hernandez*, the court explained:

> The LAD provides a complainant with a choice of remedies in seeking redress for alleged discrimination. Persons may pursue their claims either administratively, by filing a verified complaint with the DCR [the Division on Civil Rights], or judicially, by directly instituting suit in the Superior Court. These remedy choices are "complementary," but mutually exclusive.
>
> The LAD provides the Director of the DCR with broad remedial authority to cure unlawful discrimination in cases brought before the Division. In addition to having the power to enjoin further discriminatory practices by an employer, the Director can award incidental monetary relief in the form of compensatory damages, as well as damages for pain and suffering or personal humiliation. The Director also has the power to award attorney fees. A determination by the DCR is a "final order" and is appealable to the Appellate Division.
>
> The provision for an election of remedies conferring the right to bring a LAD claim directly in the Superior Court as an alternative to administrative relief was expressly authorized by a 1979 amendment to the LAD. A court's remedial power under the LAD is similar to that vested in the DCR. Judicial and administrative actions brought under the LAD are intended to be of similar purpose and effect. In addition, the court may award complete compensatory damages and punitive damages.

Id. at 652-53, 684 A.2d at 1388-89 (citations omitted).

of the LAD's administrative remedies and counsel fees, the poor will often lack the legal resources necessary to vindicate their common law access rights, and these rights will "exist only on paper."[191]

New Jersey LAD and common law public accommodation access rights are interrelated; their common purpose is to ensure that businesses that are open to the general public cannot arbitrarily and unfairly exclude individual patrons.[192] All such exclusions are arbitrary, but exclusions based upon invidious discrimination are more odious, harder to prove, and require heightened sanctions. Indeed, the *McDonnell Douglas* framework is based upon the relationship between arbitrary business actions and hidden discrimination.[193] The Court in *Furnco Construction Corporation v. Waters*[194] explained, "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these [arbitrary] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[195] The *Furnco* Court reasoned from "experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."[196]

This presumption of invidious discrimination should be strongest in the context of a New Jersey retail store since the arbitrary exclusion of a customer is both unprofitable and a common law violation.[197] Practically, however, a

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[191] Coleman v. Fiore Bros., 113 N.J. 594, 597, 552 A.2d 141, 142 (1989) (quoting statement of Senator Tunney, 122 CONG. REC. 33313 (1976)). Justice O'Hern, writing for a unanimous court, noted that the underlying purposes of federal and state civil rights fee shifting statutes are to provide a forum and remedy to encourage the vindication of civil rights, to facilitate the enforcement of civil rights laws for the benefit of all society, and to attract competent counsel to these cases. *See id.* at 597-98, 552 A.2d at 142-43.

[192] *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 173, 445 A.2d 370, 375 (1982) (holding that the common law bars businesses that are open to the public from arbitrarily excluding selected individuals); Evans v. Ross, 57 N.J. Super. 223, 231, 154 A.2d 441, 445 (App. Div. 1959) (finding that establishments that are open to the public generally cannot exclude individual customers based upon a protected trait).

[193] *See* Furnco Construction Corporation v. Waters, 438 U.S. 567, 577 (1978).

[194] 438 U.S. 567 (1978).

[195] *Id.* at 577

[196] *Id.*

[197] *See* Uston v. Resorts Int'l Hotel, Inc., 89 N.J. 163, 173, 445 A.2d 370, 375 (1982) (holding that businesses which are open to the general public cannot arbitrarily or unreasonably abridge any individual's common law right to access the property).

racist business operator could easily proffer an arbitrary reason for excluding the most financially disadvantaged people of color and then rely upon both the difficulty of proving the statute's discriminatory intent requirement and the lack of significant common law remedies. The New Jersey Supreme Court or legislature could address both arbitrary and discriminatory exclusions from retail stores by: (1) declaring that a merchant cannot summarily exclude individual customers without first obtaining a court order; and/or (2) declaring that a merchant's mere subjective and stereotypical suspicion of a customer would not rebut a LAD plaintiff's prima facie inference of discrimination in public accommodations.[198] The New Jersey Supreme Court has recognized that the public interest in eradicating the cancer of invidious discrimination is best served through the combination of a complimentary "assortment of remedial weapons to combat discrimination."[199]

III. THE POLICE RESPONSE TO PUBLIC ACCOMMODATIONS DISPUTES

All New Jersey police officers have taken a sworn oath to support the Constitution of the State of New Jersey and to impartially and justly enforce state law.[200] Thus, the responding officer must guard against becoming the unwitting instrument of a merchant's violation of the New Jersey Constitution, LAD, or common law. At present, however, the law regarding suspicion based exclusions from retail stores is vague at best. Moreover, under New Jersey law, police officers do not currently possess the statutory authority to compel a merchant to immediately comply with state public accommodations laws.[201] This

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[198] The New Jersey legislature could choose between various methods of combining these LAD and common law public accommodation rights to combat this type of subtle discrimination. For example, the legislature could extend the scope of statutory counsel fees and the jurisdiction of the Division on Discrimination to include LAD allegations and pendant common law public accommodations actions. While the contours of this new framework are beyond the scope of this Comment, the New Jersey legislature could potentially design a model that would require the plaintiff to establish a prima facie inference of discrimination under the LAD that would anchor the pendant common law claim. This would provide a forum to investigate all unlawful exclusions which give rise to a prima facie presumption of discrimination, to distinguish arbitrary exclusions from invidious ones, and to provide appropriate remedies for each.

[199] Fuchilla v. Layman, 109 N.J. 319, 347, 537 A.2d 652, 666 (1988).

[200] *See* NEW JERSEY STATE POLICE OATH OF OFFICE (on file with the *Seton Hall Constitutional Law Journal*).

[201] In certain situations, a police officer can inform the merchant of the LAD's nondiscrimination requirements and may be required to report the discrimination to the State Divi-

lack of enforcement authority, coupled with the substantive ambiguity of the underlying public accommodations law, have contributed to the lack of a uniform or predictable police response that would comport with the public policy objectives of the LAD and state constitution.[202]

Concerning the police response to these troubling retail exclusions, New Jersey Attorney General Peter Verniero stated:

> In New Jersey, police officers are not permitted to take any action, or to refrain from taking action, on the basis of a person's race or ethnicity. As the state's chief law enforcement officer, I take this issue very seriously. I have no tolerance for any form of discrimination by anyone, particularly in law enforcement.[203]

The New Jersey Attorney General's office has also promulgated extensive reporting requirements for all retail exclusions that are at least partially based upon race.[204] Thus, the responding police officer's actions must conform with the general principles of the New Jersey Constitution, state law, and the Attorney General's guidelines.

Nevertheless, these general principles do not answer the specific question of whether a merchant may exclude an individual minority customer based upon the mere suspicion of shoplifting. As Justice Holmes noted, "General propositions do not decide concrete cases."[205] If police officers are to enforce a pri-

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sion on Civil Rights, but the officer has no statutory authority to take any enforcement action to compel immediate compliance with the LAD. *See* N.J. STAT. ANN. § 10:5-26 (West 1993) (providing this authority to the Attorney General and the Division on Civil Rights).

[202] *See supra* Part II.B-C.

[203] Letter from Peter Verniero, Attorney General of New Jersey, to the author (Feb. 5, 1999) (on file with the *Seton Hall Constitutional Law Journal*).

[204] *See* NEW JERSEY DEP'T OF LAW AND PUBLIC SAFETY, BIAS INCIDENT INVESTIGATION STANDARDS—POLICY AND PROCEDURES FOR NEW JERSEY LAW ENFORCEMENT (1991) [hereinafter 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS] (on file with the *Seton Hall Constitutional Law Journal*); *see also* discussion *supra* Part III.B.

[205] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Justice Holmes stated, "General propositions do not decide concrete cases. The decision will depend on a judgement or intuition more subtle than any articulate major premise." *Id.* Justice Holmes' dissent emphasized that the genius of the American system of law is its procedural protections of individual liberty, rather than any substantive incorporation of social policies. *See id.* at 75-76. Based on this reasoning, the author argues for greater procedural protections of the right to access public accommodation, such as requiring the merchant to obtain a prior court order before excluding any individual customer. *See supra* note 198 and accompanying text; *infra* notes 274-275 and accompanying text.

vate property owner's lawful exclusions, while simultaneously respecting state public accommodations laws which prohibit unlawful exclusions based upon race or arbitrary factors, then the responding officer's actions "will depend upon a judgment or intuition more subtle than any articulate major premise."[206] Indeed, while the officer's actions cannot be based upon race, the legality or illegality of the merchant's exclusion of an individual customer may be inextricably tied to race and the question of whether race played any part in the merchant's decision to exclude this individual minority customer.[207]

A police officer, faced with an irreconcilable standoff between a customer refusing to leave a retail business without being served and a merchant demanding police enforcement of criminal trespass law and his right to exclude, must choose among several courses of action. The officer could either (1) complete all appropriate reports but take no enforcement action; (2) order the customer to leave the property; (3) arrest the customer for criminal trespass and remove him or her from the property; or (4) where appropriate, treat the minority patron as a victim of an unlawful bias incident.

The first option, reporting the incident but taking no enforcement action, may be the best course of action for many retail access disputes. When possible, these property rights disputes should be addressed in the civil courts. There are many situations, however, where this approach could lead to violent self-help actions and unacceptable breaches of the peace. The second option, ordering the customer to leave the store, is non-neutral, may result in unconstitutional state action, and may lead to an arrest (the third option) if the customer refuses the order to leave.[208] Finally, the fourth option, treating the minority patron as a possible victim of a bias incident, is mandatory for all retail exclusions that are at least partially based upon race, color, gender, religion, handicap, ethnicity or sexual orientation.[209]

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[206] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

[207] *See supra* Part II.B-C.

[208] Ordering the customer to leave the store could give the appearance that the officer is enforcing the merchant's exclusion of the customer. There are strong arguments against this course of action. First and foremost, police officers should never allow themselves to become instruments of discrimination. Second, if the customer refuses this order, the officer may be provoked into making an unnecessary and possibly unlawful arrest for criminal trespass. *See infra* Part III.A.

[209] *See* 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 19 (defining LAD violations as bias incidents and mandating that all law enforcement agencies report suspected or confirmed violations of the LAD to the Division on Civil Rights). These 1991 New Jersey Bias Incident Investigation Standards reprinted the full text of N.J. Exec. Dir. No. 1987-3 (1987), issued by then New Jersey Attorney General W. Cary Edwards. *See id.* This directive requires all New Jersey law enforcement agencies to report

New Jersey police officers are required to follow standard bias incident investigation and reporting procedures for racially-based exclusions from retail stores.[210] It is often difficult, however, for a police officer to determine whether a given retail exclusion is based upon race, or upon the customer's improper actions, or a combination of factors. Moreover, while these bias incident procedures contain investigation and reporting requirements, they provide no authoritative guidance on resolving the immediate face-to-face standoff between the merchant and the customer.

Nevertheless, the officer may have a duty to diffuse a tense property access dispute in a manner that avoids violence, maintains the status quo, and allows the parties to pursue a remedy in another forum. Under these circumstances, the best course of action available to the officer may be to gather evidence of any unlawful discrimination, complete a bias incident investigation report, and forward the report to the State Division on Civil Rights, which has ample legal authority to remedy retail discrimination.[211]

This Comment will focus on the professional police response to heated disputes where police intervention is necessary. A professional response requires the officer to administer consistent quality justice. In this regard, it is suggested that officers should be guided by the following passage from the preamble to the Model Code of Professional Responsibility:

> [J]ustice is based upon the rule of law grounded in respect for the dignity of the individual . . . . Law so grounded makes justice possible, for

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these bias incidents to the State Police Uniform Crime Reporting Unit. *See id.*

[210] *See id.* at 3-4, 19 (requiring all New Jersey law enforcement agencies to report these LAD bias incidents to the State Police Uniform Crime Reporting Unit and the Division on Civil Rights); *see also* 1994 Amendment to 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 1-2 (requiring the additional reporting of these bias incidents within twenty-four hours of their occurrence to the Office of Bias Crime and Community Relations in the Division of Criminal Justice).

[211] *See* 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 19 ("When a law enforcement agency is confronted with suspected or confirmed violations of New Jersey's Law Against Discrimination [LAD], the Division on Civil Rights shall be notified."). The criminal provision of the LAD, N.J. STAT. ANN. § 10:5-26, provides that any person who willfully interferes with the duties of any representatives of the Division on Civil Rights, or willfully violates an order of either the Attorney General or the Director of the Division on Civil Rights, "shall be guilty of a misdemeanor and shall be punishable by imprisonment for not more than one year, or by a fine of not more than $500, or by both." N.J. STAT. ANN. § 10:5-26 (West 1999); *see also* N.J. STAT. ANN. § 10:5-14.1 (West 1993) (authorizing the Attorney General to proceed in a summary manner in Superior Court, against any person, to prevent violations of the LAD).

> only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.[212]

A. THE CRIMINAL TRESPASS OPTION

Part II of this Comment addressed the issue of the suspected shoplifters' actual legal right or privilege to access retail stores. This section focuses on the vagueness of the criminal trespass statute in this context, the knowledge element of this offense, and the due process requirement of proving that the defendant knew that he or she did not have the legal right to be in a retail store which is open to the public.

Entry pursuant to a lawful public right is not trespass, and cannot be prohibited by the property owner.[213] The 1971 commentary to the New Jersey criminal trespass statute provides that exclusions from public places "might be unlawful by virtue of . . . statutory or common law requirements of non-discrimination in places to which the public resorts, or for other reason."[214] If a merchant's bare suspicion of a customer, absent objective proof of shoplifting, is insufficient to allow the merchant to lawfully eject the customer, then the customer's actions in demanding access to the retail store cannot constitute criminal trespass.[215] Conversely, while a finding that the customer unlawfully remained in the store after lawfully being ordered to leave may be dispositive on the civil trespass tort issue, it is only the first step of the criminal trespass analysis. The New Jersey criminal trespass statute provides, in relevant part:

> b. Defiant trespasser. A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given . . . .

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[212] MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1981).

[213] *See* Krauth v. Geller, 31 N.J. 270, 272, 157 A.2d 129, 130 (1960).

[214] 1971 Criminal Law Revision Commission Commentary to proposed § 2C:18-3, *reprinted in* JOHN M. CANNEL, TITLE 2C NEW JERSEY CRIMINAL CODE ANNOTATED 430 (Gann Law Books 1997).

[215] *See* State v. Schmid, 84 N.J. 535, 538, 423 A.2d 615, 630 (1980) (refusing an unlawful order to leave private property does not constitute trespass).

> d. Defenses. It is an affirmative defense to prosecution under this section that: . . .
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> (2) The structure was at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the structure.[216]

This statute requires, as an element of the offense, the defendant's knowledge that he or she does not have the legal right/privilege to enter or remain on the property.[217] Furthermore, the criminal trespass statute provides an affirmative

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[216] N.J. STAT. ANN. § 2C:18-3 (West Supp. 1998).

[217] *See* State v. Vawter, 136 N.J. 56, 69, 642 A.2d 349, 355 (1994). The mens rea element of the New Jersey criminal trespass statute requires the defendant's subjective knowledge that he or she has neither permission nor the independent legal right to access the property; this is the meaning of the statutory phrase: "[a] person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains . . . ." N.J. STAT. ANN. § 2C:18-3 (West Supp. 1998). The terms "licensed" and "privileged" are not defined by New Jersey statute or case law. However, other state supreme courts have addressed the meaning of these terms in their criminal trespass statutes. For example, the North Dakota Supreme Court, while addressing the exact same phrase in its criminal trespass statute, defined these terms: "'privilege' means the freedom or authority to act and to use the property. 'Licensed' means a consensual entry." State v. Purdy, 491 N.W.2d 402, 410 (N.D. 1992) (citations ommitted). The Vermont Supreme Court relied on this distinction to reverse a criminal trespass conviction. *See* State v. Kreth, 553 A.2d 554 (Vt. 1988). The *Kreth* court rejected the prosecution's argument that the words "privileged" and "licensed" were practically synonymous. *See id.* The court explained that "'licensed' refers to a consensual entry while 'privileged' refers to a nonconsensual entry." *Id.* at 556. The court in *Kreth* held that each of these terms is a separate and essential element of criminal trespass. *See id.* at 555.

Synthesizing these decisions and Black's Law Dictionary's definition of these terms reveals that "privilege" differs from "license" in that a privilege to enter is based not on the permission of the property owner, but on an independent legal right, such as the common law, constitutional, and statutory property access rights addressed in part II of this Comment. *See* BLACK'S LAW DICTIONARY 919-20, 1197 (6th ed. 1990). Black's Law Dictionary defines "license" as a personal privilege to access land, which is "revocable at the will of the licensor." *Id.* at 919-20. "Privilege" is defined as, among other things, a power, right or "ability to act contrary to another individual's legal right without that individual having legal redress for the consequences of that act; usually raised by the actor as a defense." *Id.* at 1197. "[P]rivileges created by law irrespective of consent . . . arise where there is some important and overriding social value in sanctioning defendant's conduct, despite the fact that it causes plaintiff harm." *Id.* at 1198. Establishing this "privilege" entails reconciling the conflicting rights of the property owner and the alleged trespasser. This balancing was addressed in section II of this Comment. *See supra* Part II.

defense for defendants who complied with all lawful conditions imposed upon access to public places[218] [hereinafter the "affirmative defense of being in a public place"]. The fact that the statute includes a knowledge element and the affirmative defense of being in a public place distinguishes criminal trespass from the civil trespass tort action.[219] Moreover, with criminal trespass, due process requires the state to both: (1) prove beyond a reasonable doubt the mens rea element of the offense, namely that the defendant knew she was not legally privileged to remain on the premises over the property owner's objection;[220] and (2) disprove beyond a reasonable doubt the trespass defendant's affirmative defense of being in a public place.[221]

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[218] *See* N.J. STAT. ANN. § 2C:18-3d(2) (West Supp. 1998) ("It is an affirmative defense to prosecution under this section that: . . . (2) The structure was at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the structure.")

[219] *See* 1971 Criminal Law Revision Commission Commentary to proposed § 2C:18-3, *reprinted in* CANNEL, *supra* note 214, at 430. This commentary to § 2C:18-3 provides that the primary objective of the statute's affirmative defense is

> to exclude criminal prosecution for mere presence of a person in a place where the public generally is invited. Persons who become undesirable by virtue of disorderly conduct may of course be prosecuted for that offense [Disorderly Conduct, New Jersey Statutes Annotated section 2C:33-2]. The Section is not intended to preclude resort by the occupant to civil remedies for trespass, including his privilege, whatever it may be, of barring entry or ejecting.

CANNEL, *supra* note 214, at 430.

[220] *See* State v. Santiago, 218 N.J. Super. 427, 430, 527 A.2d 963, 965 (Law Div. 1986) (acquitting a criminal trespass defendant on ground that "[t]here exists reasonable doubt that the defendant here had knowledge that she was not privileged to enter and examine records").

[221] *See* State v. Delibero, 149 N.J. 90, 99, 692 A.2d 981, 986 (1997) ("The State in a criminal prosecution is bound to prove every element of the offense charged beyond a reasonable doubt. That burden cannot be shifted to the defendant, even when a defendant is asserting an affirmative defense.") (citations omitted). Furthermore, N.J.S.A. § 2C:1-13b(2), which includes the General Provision establishing standards of proof for affirmative defenses under the New Jersey Criminal Code, would require the state to disprove this affirmative defense beyond a reasonable doubt. *See* N.J. STAT. ANN. § 2C:1-13b(2) (West 1995) (declaring that under this default provision, where an affirmative defense is silent as to the standard of proof, and there is any evidence to support the defense, the prosecution must disprove the affirmative defense beyond a reasonable doubt).

1. DUE PROCESS REQUIRES THE STATE TO PROVE THE KNOWLEDGE OR MENS REA ELEMENT BEYOND A REASONABLE DOUBT

A defendant violates the New Jersey criminal trespass statute "if, knowing that he is not licensed or privileged to do so, he enters or remains" on the property.[222] The New Jersey Criminal Code defines "knowing," as having the same meaning as "with knowledge" and "practically certain."[223] Thus, the defendant's subjective knowledge of this lack of license (permission) or privilege (legal right) is an essential element of a criminal trespass offense.[224] As the New Jersey Supreme Court noted, the criminal trespass statute requires "that one knows one is not licensed or privileged to enter . . . ."[225] This knowledge is an awareness of the certainty that the conduct will produce the prohibited result;[226] in this context, the prohibited result would be an unlawful presence on the property. It is this certainty that distinguishes "knowledge" from "recklessness."[227] Recklessness is the awareness of a "substantial and unjustifiable risk that a particular result will occur."[228] Thus, in a New Jersey prosecution for criminal trespass, the State must prove that the defendant had actual knowledge or was "practically certain"[229] that his entry was neither licensed nor privileged.[230] A person who entered the property with the mistaken belief that she was privileged to do so is not guilty of criminal trespass.[231] Thus, a criminal trespass defendant's good faith

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[222] N.J. STAT. ANN. § 2C:18-3 (West Supp. 1998).

[223] N.J. STAT. ANN. § 2C:2-2(b)(2) (West 1995) ("A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. 'Knowing,' 'with knowledge' or equivalent terms have the same meaning.").

[224] *See* Roth v. Golden Nugget Casino Hotel, 576 F. Supp. 262, 266 (D.N.J. 1983).

[225] State v. Vawter, 136 N.J. 56, 69, 642 A.2d 349, 355 (1994).

[226] *See* State v. Sewell, 127 N.J. 133, 148, 603 A.2d 21, 28 (1992).

[227] *See id.* at 148-49, 603 A.2d at 28.

[228] *Id.* at 148, 603 A.2d at 28.

[229] *See* N.J. STAT. ANN. § 2C:2-2(b)(2) (West 1995) (pronouncing the New Jersey Criminal Code's definition of the term "knowing").

[230] *See* State v. Kreth, 553 A.2d 554, 555-56 (Vt. 1988) (holding that the terms "licensed" and "privileged" are separate and essential elements of criminal trespass).

[231] *See* State v. Santiago, 218 N.J. Super. 427, 430, 527 A.2d 963, 965 (Law Div. 1986).

belief that he has the legal right to access the property would negate the knowledge element of the offense.[232]

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[232] After acknowledging this general rule, one esteemed commentator cautioned that there are two cases which approach this culpability issue as though the State were required to prove only "the actual existence or not of the privilege to be on the property rather than whether the defendant knew that he was not so privileged." CANNEL, *supra* note 214, at 428 (referring to State v. Loce, 267 N.J. Super. 10, 630 A.2d 792 (App. Div.), *certif. denied*, 134 N.J. 563, 636 A.2d 520 (1993) and State v. Guice, 262 N.J. Super. 607, 621 A.2d 553 (Law Div. 1993)).

However, the first case Mr. Cannel cited, *State v. Loce*, is distinguishable from the retail disputes addressed in this Comment because although Mr. Loce and his codefendants may have believed that they had the right/privilege to interfere with an abortion, Mr. Loce had already been denied a restraining order to block this very same abortion. *See Loce*, 267 N.J. Super. at 12, 630 A.2d at 793. Thus, before the defendants entered the clinic, they already received a judicial determination which declared that the defendants did not have a legal privilege to interfere with this specific abortion. The knowledge element of the criminal trespass statute, which was not raised at trial or on appeal, was a non-issue in *Loce*. *See* Telephone interview with Richard J. Traynor, attorney for Loce's 14 codefendants, Morristown, NJ (Oct. 29, 1997). Therefore, it would follow that application of the *Loce* precedent to a public accommodations trespass dispute would simply mean that customers could not ignore a prior judicial restraining order barring access to a retail store and then later claim that they lacked knowledge that the exclusions were lawful.

John Cannel also noted that the Law Division in *Guice* upheld a municipal court "trespass conviction where defendants believed that they were constitutionally privileged to be on a campus to engage in political activity." CANNEL, *supra* note 214, at 428. Indeed, the *Guice* court, in a trial *de novo*, convicted the defendants without ever mentioning the elements of the criminal trespass offense, including the knowledge element. *See Guice*, 262 N,J. Super. at 609, 618, 621 A.2d at 554, 558. Rather, the court simply stated that the "issues presented here were addressed by the New Jersey Supreme Court in *State v. Schmid*." *Id.* at 609, 621 A.2d at 554. The *Guice* court failed to note that the legislature had since passed a new criminal code, with a new criminal trespass statute containing a knowledge element. The old criminal trespass statute, which was interpreted in *Schmid*, did not contain this mens rea element. *See Schmid*, 84 N.J. at 541, 423 A.2d at 618 (applying N.J.S.A. § 2A:170-31, the criminal trespass statute in effect when Schmid was arrested). The New Jersey Criminal Code and the current criminal trespass statute, N.J.S.A. § 2C:18-3, became effective on September 1, 1979. *See* N.J. STAT. ANN. § 2C:98-4 (West 1995). One of the central themes of the new criminal code was a departure from the pre-existing criminal law, under which the mental elements of crimes were vaguely defined; the new criminal code adopted specific mens rea requirements and definitions for each offense. John J. Farmer, Jr., *The Evolution of Death-Eligibility in New Jersey*, 26 SETON HALL L. REV. 1548, 1557-58 (1996). Due process should have required the prosecution in *Guice* to prove this mens rea element of the statute regardless of the fact that the prior version of the criminal trespass statute did not contain this knowledge element. *See* State v. White, 98 N.J. 122, 134-35, 484 A.2d 691, 698 (1984) (finding that fundamental fairness requires that criminal statutes be strictly construed so as to avoid arbitrary enforcement and prosecution of those who have been misled by criminal statutes). *Guice* was a trial court opinion which never addressed the elements of the criminal trespass statute and did not cite any criminal trespass case based on

2. THE STATUTE'S AFFIRMATIVE DEFENSE OF BEING IN A PUBLIC PLACE

The criminal trespass statute's affirmative defense of compliance with all lawful conditions of access to a public place[233] was specifically designed to address public accommodations discrimination and the related "sit-in cases;" the intended effect of this provision was to explicitly call into question the issue of "whether the conditions imposed on access to premises open to the public were 'lawful.'"[234]

The affirmative defense of being in a public place would not be available to a criminal trespass defendant who refused to leave a public place after being lawfully ejected for disruptive behavior.[235] Nevertheless, this affirmative defense is written in objective terms, and would seem to require some level of objective proof that the customer/defendant engaged in some improper conduct before he or she could be found guilty of trespassing in a retail store. It seems unlikely that a merchant's bare suspicion of a customer, absent objective proof of shoplifting, could constitute the shopper's noncompliance "with all lawful conditions imposed on access to or remaining in the structure."[236] Thus, while the merchant's mere subjective suspicion might theoretically justify a civil exclusion of

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our current statute. Since *Guice* was not an appellate decision, the case would not constitute binding precedent in any future criminal trespass trials in superior court. *See* Goncalves v. Wire Tech. & Mach., 253 N.J. Super. 327, 333, 601 A.2d 780, 783 (Law Div. 1991) (finding that trial court precedent should be accorded due consideration, but in the absence of appellate authority, it is not binding upon another law division trial court).

[233] *See* N.J. STAT. ANN. § 2C:18-3d(2) (West Supp. 1998) ("It is an affirmative defense to prosecution under this section that . . . (2) The structure was at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the structure.").

[234] 1971 Criminal Law Revision Commission Commentary to proposed § 2C:18-3, *reprinted in* CANNEL, *supra* note 214, at 430. "The Report of the Law Review Commission, issued in October 1971 . . . serves to this day as an underpinning for the New Jersey Criminal Code." Farmer, *supra* note 232, at 1557. Professor Farmer currently serves as Chief Counsel to New Jersey Governor Christine Whitman and has recently been nominated to the position of New Jersey Attorney General.

[235] *See* State v. Slobin, 294 N.J. Super. 154, 156, 682 A.2d 1205, 1206 (App. Div. 1996) (holding that the two blackjack players, who were loud, abusive, disorderly, and obstructed other gamblers' attempts to play blackjack, had not complied with all lawful conditions imposed upon remaining in a casino).

[236] N.J. STAT. ANN. § 2C:18-3d(2) (West Supp. 1998) (the criminal trespass statute's affirmative defense of compliance with all lawful conditions imposed upon access to a public place).

the customer, it seems less likely that a customer could be convicted of criminal trespass absent objective evidence of the customer's improper conduct.[237]

There are no published opinions by any New Jersey court which specifically address this affirmative defense in the context of an exclusion from a retail store based on the mere suspicion of shoplifting or other criminal activity. Nevertheless, the New Jersey Supreme Court's recent analysis of the criminal trespass statute's affirmative defense will be helpful in this discussion.[238]

In *Campione v. Adamar of New Jersey*,[239] a casino excluded a patron for disorderly conduct and for violating an administrative regulation which prohibits its casino gamblers from touching a blackjack dealer's deck of cards.[240] "Although [Campione] knew that he was not permitted to touch the cards, N.J.A.C. 19:47-2.6n, he wanted to preserve the cards as evidence" in the dispute over his bet.[241] A videotape of the incident confirmed that Campione took "physical control of the cards" and repeatedly refused to give them back.[242] There was also testimony that Campione used abusive language and threatened the casino's security personnel.[243] Nevertheless, Campione was acquitted of all criminal charges based on the criminal court's holding that Campione was "legitimately trying to protect his bet."[244]

Mr. Campione then filed a malicious prosecution suit against the casino, and was awarded a verdict totaling over $1,000,000.[245] The appellate division

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[237] *See* 1971 Criminal Law Revision Commission Commentary to proposed § 2C:18-3, *reprinted in* CANNEL, *supra* note 214, at 430 (noting that the affirmative defense of being in a public place that is available to a criminal trespass defendant was not intended to hinder a proprietor's "civil remedies for trespass, including his privilege, whatever it may be, of barring entry or ejecting").

[238] *See, e.g.*, Campione v. Adamar of New Jersey, 155 N.J. 245, 267-68, 714 A.2d 299, 310 (1998) (analyzing the criminal trespass statute's affirmative defense of being in a public place in the context of lawful conditions that can be imposed upon remaining in a gambling casino).

[239] 155 N.J. 245, 714 A.2d 299 (1998).

[240] *Id.* at 268, 714 A.2d at 310.

[241] *Id.* at 252, 714 A.2d at 302.

[242] *See id.* at 268, 714 A.2d at 310.

[243] *See id.*

[244] *Id.* at 253, 714 A.2d at 303.

[245] *See id.* at 248, 714 A.2d at 300.

reversed and remanded the malicious prosecution award because of inadequate jury instructions concerning the criminal trespass statute's affirmative defense of being in a public place.[246] The New Jersey Supreme Court affirmed this portion of the appellate court's opinion,[247] noting that the jury instruction lacked any "explanation of the fact that casino management may, under certain circumstances, lawfully require a person to leave the premises though a casino is otherwise 'open to members of the public.'"[248]

The New Jersey Supreme Court concluded that on remand, the testimony of Campione's abusive language and threatening behavior would, if believed, "support a finding that [the casino] was justified in concluding that [Campione] had committed the offenses" of criminal trespass and disorderly conduct.[249] In contrast, the casino personnel's subjective suspicion that Campione violated administrative regulations and committed these offenses by seizing the dealer's cards, and the videotape confirming this seizure, apparently were insufficient to justify the casino's actions.[250]

This precedent is not completely on all fours with the retail exclusions discussed in this Comment because of differing public policy concerns between the state's strong interest in regulating casino gaming in *Campione* and the state's equally strong interest in protecting every citizen's right to access retail stores.[251] Unlike a chair, which will function the same in any room, concepts of justice cannot always be taken from one area and used in another. Nevertheless, applying *Campione* to the retail exclusions addressed in this Comment would seem to indicate that a merchant's mere subjective suspicion of a customer would not justify the customer's exclusion or criminal trespass arrest; however, the cus-

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[246] *See id.* at 267, 714 A.2d at 310.

[247] *See id.* at 269-70, 714 A.2d at 311. The New Jersey Supreme Court also modified other portions of the appellate divison's opinion which dealt with the relationship between administrative and common law remedies; the Supreme Court declared there is a presumption against a "statutory abrogation of [Campione's] common law right. To abrogate a common law right, the legislature must speak plainly and clearly." *Id.* at 265, 714 A.2d at 309.

[248] *Id.* at 267, 714 A.2d at 310 (quoting Campione v. Adamar of New Jersey, 302 N.J. Super. 99, 119-20, 694 A.2d 1045, 1055 (App. Div. 1997)).

[249] *Id.* at 268, 714 A.2d at 310.

[250] *See id.* at 268-69, 714 A.2d at 310-11.

[251] *See supra* note 30 (discussing statutory and regulatory provisions which require licensed New Jersey gambling casinos to exclude members of organized crime whose presence in a casino would be inimical to the policy interests of the state of New Jersey).

tomer's abusive or disorderly reaction to that suspicion would justify the customer's exclusion from the store.

Campione also illustrates the significant likelihood that a retail trespass defendant would be acquitted in a criminal action. This is because the prosecution has the onerous burden of proving "beyond a reasonable doubt" both the defendant's objective misconduct and the defendant's subjective knowledge that he or she did not have the legal right to access the retail store. Moreover, when the criminal prosecution inevitably fails, the merchant or police officer complainant may be faced with a civil action for malicious prosecution, false arrest, defamation and various civil rights violations.[252] As a result, the aggressive use of the criminal trespass statute is clearly not a panacea for all store security problems. Indeed, civil damages may be appropriate against the merchant or police officer who signed and prosecuted the criminal complaints because trying these public accommodations disputes as criminal, rather than civil actions, unduly burdens the criminal courts and unjustly employs the coercive power of the criminal law to resolve civil disputes.

B. TREATING THE MINORITY PATRON AS A VICTIM OF AN UNLAWFUL BIAS INCIDENT

The New Jersey Attorney General's office requires all law enforcement officers and agencies within the state to follow the "1991 Bias Incident Investigation Standards"[253] issued by the Department of Law and Public Safety. These guidelines provide the following definition for the term "bias incident:"

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[252] *See* Roth v. Golden Nugget Casino Hotel Inc., 576 F. Supp. 262, 268 (D.N.J. 1983) (denying summary judgment in alleged trespasser's false arrest and malicious prosecution claims); *Campione*, 155 N.J. at 267-71, 714 A.2d at 310-11 (remanding an acquitted trespasser's malicious prosecution judgment because of confusing jury instructions).

[253] *See* 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS and the attached directive from Robert T. Winter, then-Director, Division of Criminal Justice, to All Law Enforcement Chief Executives (Sept. 7, 1991) (on file with the *Seton Hall Constitutional Law Journal*). This directive provides:

> In compliance with the instructions of the Attorney General Robert J. Del Tufo, and pursuant to the Criminal Justice Act of 1970, N.J. STAT. ANN. § 52:17b-97 *et seq.*, it is hereby directed that all New Jersey law enforcement officers shall follow the attached Bias Incident Investigation Standards, and all New Jersey law enforcement agencies shall adopt such standards as agency policy and procedure.

Directive issued by Robert T. Winter, then-Director of the New Jersey Division of Criminal Justice (Sept. 7, 1991).

> For New Jersey law enforcement purposes, a bias incident is defined as any suspected or confirmed offense or unlawful act which occurs to a person . . . on the basis of race, color, religion, gender (except [criminal sexual assault]), handicap, sexual orientation or ethnicity. An offense is bias based if the motive for the commission of the offense or unlawful act pertains to race, color, religion, gender, handicap, sexual orientation or ethnicity.[254]

By including within the definition of bias incident both offenses and other unlawful acts, the drafters of this provision evinced the intention to include those violations of the criminal law and the LAD which are motivated by class-based animus. This is further evidenced by the provision's requirement that all law enforcement officers report all suspected or confirmed violations of New Jersey's LAD to the Attorney General's Division on Civil Rights.[255] Thus, retail exclusions that occur on the basis of race are both bias incidents and violations of the LAD that must be reported to the proper authorities.

The Bias Incident Investigation Standards would clearly apply to a situation similar to the 7-Eleven store dispute noted earlier, where the store employee refused to serve any African-Americans "because the store had recently experienced a problem with blacks shoplifting."[256] Retail discrimination is often disguised, however, and it is usually more difficult to determine whether or not the exclusion occurred on the basis of race. For example, consider a situation where the merchant suspects and excludes minority customers who, while browsing through the store, surreptitiously watched and discussed the location of the store's security personnel. From the merchant's perspective, these customers were excluded based upon their suspicious actions and not their race. If the minority customers were not shoplifters, however, but were simply noting to each other the common minority experience of being watched and followed by store security, then the exclusion may have been based upon race.[257]

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[254] 1995 Amendment to the 1991 Bias Incident Investigation Standards, directive from Terrence P. Farley, then-Director, Division of Criminal Justice, to All Law Enforcement Chief Executives (Oct. 11, 1995) (on file with the *Seton Hall Constitutional Law Journal*). This amendment expanded the definition of "bias incident" to include offenses or unlawful acts dealing with gender or handicap biased motivations. *See id.* This amendment was effectuated pursuant to the instructions of then-Attorney General Deborah T. Poritz. *See id.*

[255] *See* 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 19.

[256] Lewis v. Doll, 765 P.2d 1341, 1342 (Wash. Ct. App. 1989). *See supra* text accompanying note 4.

[257] *See* Austin, *supra* note 2, at 148-49 (discussing how black customers are commonly targeted for shoplifting suspicion).

The Bias Incident Investigation Standards stress that police officers should apply common sense and "consider the totality of the circumstances" to determine whether a specific incident was motivated by discriminatory class bias.[258] These factors include the statements made by all parties and witnesses, any prior history of similar incidents, the number of minority customers who frequent this store, and whether the victim and suspect are members of the same or different racial groups.[259] The guidelines mandate that all suspected bias incidents should be treated, investigated and reported as bias incidents unless and until it is definitely determined that they do not fall within the definition of bias incidents.[260]

These Bias Incident Investigation Standards were promulgated to "establish uniform law enforcement procedures for the response to and investigation of bias incidents."[261] As previously noted, the fact that police lack the authority to enforce anti-discrimination laws seriously undermines their ability to adequately respond to unlawful race-based exclusions from retail stores and other places of public accommodation.[262] Nevertheless, consistent uniform investigation and reporting of these incidents by police, in accordance with the Attorney General's Bias Incident Investigation standards, is both mandatory and necessary to maintain respect for the rule of law.[263]

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[258] 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 15-16.

[259] *See id.*

[260] *See id.* at 7, 15.

[261] *Id.* at 2

[262] *See supra* note 12 and accompanying text; *see also infra* Part IV.

[263] *See supra* notes 209-210 and accompanying text (noting that all police officers and departments are affirmatively required to report all bias incidents, including all suspected or confirmed violations of the LAD). To support the contention that a consistent application of this rule, rather than treating each incident in an ad hoc fashion, is necessary to maintain respect for the law, see the preamble to the Model Code of Professional Responsibility:

> [J]ustice is based upon the rule of law grounded in respect for the dignity of the individual . . . . Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble (1981).

There are also practical and pragmatic reasons for police officers to follow these Bias Incident Investigation Standards. Police officers responding to a race-based exclusion cannot legally order the customer to leave the store, and these officers cannot permit themselves to become instruments of discrimination.[264] In this situation, the officer should inform the merchant of the LAD's nondiscrimination requirements and strongly suggest that the merchant abide by the law. Unfortunately, however, police officers currently have no statutory authority to enforce the LAD or compel a racist merchant to serve a customer.[265]

Nevertheless, the responding officer has a duty to ensure that the incident does not escalate into a violent confrontation.[266] Under these deplorable circumstances, the best course of action currently available to an officer may be to gather evidence of the unlawful discrimination, inform the victim of the remedies available under the LAD, and ask the victim to accompany the officer to another location to complete the bias incident investigation report. This report will be forwarded to the Division on Civil Rights, which has ample legal authority to remedy the discrimination.[267]

Admittedly, when a police officer asks the victim of discrimination to leave a retail store, such action contravenes the public policy of the LAD and the New Jersey Constitution by temporarily allowing a race-based exclusion from a retail store.[268] As Professor Hart stated, "[T]he occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness

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Moreover, the officer who does not report suspected bias incidents may be committing nonfeasance. In contrast, the officer who adequately investigates the alleged bias incident and forwards a suspected but unconfirmed bias incident report is on firmer legal ground. The Division on Civil Rights would then be responsible for further investigation of alleged violations of the Law Against Discrimination.

[264] Ordering the customer to leave the store could give the appearance that the officer is enforcing the merchant's unlawful exclusion of the customer and may constitute an unconstitutional state action. Moreover, police officers should never allow themselves to become instruments of discrimination.

[265] *See* N.J. STAT. ANN. § 10:5-26 (West 1993); *see also supra* note 201 and accompanying text.

[266] *See* 1991 NEW JERSEY BIAS INCIDENT INVESTIGATION STANDARDS, *supra* note 204, at 10 (the law enforcement officer shall "[t]ake steps to insure that the incident does not escalate").

[267] *See* N.J. STAT. ANN. §§ 10:5-14.1, -26 (West 1993).

[268] *See* discussion *supra* Parts II.B-C.

that they are what they are."[269] In some sense, Professor Hart's "positivism" and "fidelity to law" are required of police officers, who must separate "law as it is from law as it ought to be."[270] Professor Fuller described this dichotomy in terms of "the everyday problems that confront those who are earnestly desirous of meeting the moral demands of a legal order, but who have responsible functions to discharge in the very order toward which loyalty is due."[271]

A far better solution to the problem of the discriminatory exclusion of minorities from retail stores would be for the New Jersey Legislature to empower police officers to enforce public accommodation laws. That solution would bring the "law as it is" into balance with the "law as it ought to be." Until that time, the course of action recommended by this author may be the least objectionable option available when some police action is required to diffuse a heated and tumultuous dispute over access to a public store that has the potential of deteriorating into a violent confrontation. By treating the customer as a possible victim of an unlawful violation of the LAD and by completing the bias incident investigation, the police officer may be able to resolve the standoff by affording the victim with both a dignified retreat and the opportunity for the ultimate vindication of his or her rights.

IV. CONCLUSION

Based on its state constitution, LAD, and common law, New Jersey has expanded each person's right of reasonable access to retail stores and other places of public accommodation. These textual and common law causes of action are interrelated; they share the common purpose of protecting each person's right to be free from arbitrary and discriminatory treatment by businesses that serve the general public.[272] The LAD provides additional remedies in recognition of the fact that invidious racial discrimination is more detrimental to both victims and society.[273] Nevertheless, at present, there is no clear resolution to a diffi-

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[269] Hart, *supra* note 168, at 620 (debating with Professor Fuller the propriety of taking post-war criminal actions against Nazi informants, whose immoral wartime actions were sanctioned by the Nazi statutes in place at the time the acts were committed).

[270] *Id.* at 617.

[271] Fuller, *supra* note 168, at 646.

[272] *See supra* text accompanying notes 192-196 (noting that the *McDonnell Douglas* methodology is based upon the relationship between arbitrary business actions and hidden discrimination).

[273] *See supra* notes 189-191 and accompanying text (discussing LAD remedies and public policy). These overlapping New Jersey LAD and common law property access rights

cult and volatile issue: whether a retail business may legally exclude individual minority customers based on a mere subjective suspicion of shoplifting.

The absence of clear, unambiguous law on suspicion-based retail exclusions and the lack of authority to enforce anti-discrimination laws constitute systemic limitations on a police officer's ability to fairly, adequately, and impartially deal with these public accommodation disputes. The legislature should empower police officers to enforce public accommodation laws that purport to guarantee every citizens' right to reasonable and nondiscriminatory access to retail stores.[274]

In addition to these substantive concerns, the legislature and courts should establish procedural safeguards that delineate the instances where a merchant may, or may not, summarily exclude a patron without first obtaining a court order. One race-neutral standard, set forth by either the legislature or court, would apply to constitutional, LAD, and common law access rights.[275] This uniform process would defend the rights and obligations of the customer and merchant, vindicate New Jersey LAD and common law protections of every citizens' right to access public places, and promote social justice. Furthermore, by requiring the merchant to comply with a uniform procedural standard before excluding any customer, a standard that does not turn on the race of the customer or racial animus of the merchant, the responding police officer would be insulated from the divisive racial issues implicated by some private businesses' shoplifting countermeasures.

These recurring public accommodations disputes involve important public policy determinations which should not be delegated to police officers to resolve on an inconsistent and ad hoc basis. Absent clear and objective evidence of the customer's wrongdoing, police officers should not participate in the

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have distinct remedies. Thus, the question of whether the minority customer has the immediate right to access the retail store must be bifurcated from the issue of the remedies that should later be available for violations of these property access rights.

[274] The author suggests that the legislature should enact this disorderly persons provision which would be heard before a judge at the local municipal court. The penalties imposed for violation of this provision would be independent of, and unrelated to, the customer's personal civil or administrative case against the merchant. This public accommodations enforcement provision could be modeled after N.J.S.A. § 10:5-26 which provides for a $500 fine and a short term of imprisonment for the willful violation of an order of either the Attorney General or the Director of the Division on Civil Rights. *See* N.J. STAT. ANN. § 10:5-26 (West 1993).

[275] The procedural protection afforded by requiring the merchant to obtain a court order before excluding any individual customer would complement the substantive remedies applicable to public accommodations claims based upon either the state constitution, LAD, or common law.

summary exclusion of a retail customer. Realistically, some percentage of these retail exclusions are tainted by racial stereotypes and racial profiling utilized in retail shoplifting countermeasures. Requiring the merchant to obtain a prior judicial determination that the exclusion was lawful and racially neutral would avoid the appearance and perception that a responding police officer is participating in discriminatory activities. This procedural safeguard would further New Jersey Attorney General Peter Verniero's zero tolerance policy for discrimination and his directive that "New Jersey police officers are not permitted to take any action, or to refrain from taking any action, on the basis of a person's race or ethnicity."[276]

Finally, the Division on Civil Rights and local law enforcement should work together to assist victims of retail discrimination with the filing of public accommodation complaints. Discrimination victims alleging violations of the LAD and state constitution should be able to file complaints at their local police department or municipal court, which could then forward the complaints to the Division on Civil Rights. In fact, the public accommodation provisions of New Jersey's LAD are significantly underutilized because many of the victims of public accommodation discrimination are poor and often cannot afford or coordinate transportation to offices of the Division on Civil Rights. Affording LAD complainants with the ability to file administrative complaints at a local facility would effectively level the playing field as merchants presently enjoy the convenience of filing criminal trespass complaints at the local court or police precinct.

This Comment began with a hypothetical scenario where a police officer responded to a retail merchant's exclusion of a minority customer. This exclusion was based upon nothing more than the merchant's subjective suspicion that the minority customer might be a potential shoplifter. Under the current state of the law, the police officer could offer little assistance to a victim of public accommodations discrimination. The officer would complete a bias incident investigation report to document the discrimination, but the officer does not have any authority to enforce state public accommodations laws. Indeed, the only enforcement action potentially available to the officer would be to remove the customer from the store.[277]

If all the changes suggested in this Comment were effectuated, the officer could resolve the dispute by enforcing the merchant's compliance with a neutral standard that requires the merchant to obtain a prior court order before ex-

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[276] Letter from Peter Verniero, Attorney General of New Jersey, to the author (Feb. 5, 1999).

[277] *See supra* Part III.A (discussing the problematic and possibly unlawful aspects of removing the customer or prosecuting a criminal trespass action).

cluding any individual customer.[278] Both the merchant and the customer could then conform their actions to a clear and unambiguous rule of law, rather than relying upon the ad hoc decisions of the responding police officer. In the unlikely event of the merchant's continued noncompliance with this unambiguous law, the officer could issue the merchant a summons for a criminal violation of state public accommodation law and provide the discrimination victim with the opportunity to complete a Division on Civil Rights administrative LAD complaint against the merchant.

[278] The author is not suggesting that this new standard should not have exceptions, such as the heavily regulated gambling and tavern industries. In those areas, state administrative agencies with special expertise in gambling and alcohol problems establish rules governing the exclusion of individual patrons. Indeed, the New Jersey Supreme Court has implicitly recognized that exclusions from public places that are based upon such generally applicable administrative rules should receive more deference than other exclusions that are based upon nothing more than the arbitrary whims of individual business operators. *See supra* note 30 and text accompanying notes 29-32 (discussing the New Jersey Supreme Court's deference to the administrative rules of the New Jersey Casino Control Commission and New Jersey Racing Commission).