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## "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America"

Regina Austin"

In my previous work, I have dealt with black lawbreakers as if they were the exception rather than the rule, and then argued that some of them are more deserving of sympathetic consideration than others.<sup>1</sup> The notion that black lawbreakers are atypical, however, flies in the face of the fact that, in so very many areas of public life, blacks in general are treated like an outlaw people. Blacks are condemned and negatively stereotyped for engaging in activities that white people undertake without a second thought. Among the most significant of these activities is buying and selling goods and services. Despite the passage of state and federal antidiscrimination and public accommodations laws, blacks are still fighting for the right to shop and the right, if not the reason, to sell. Because blacks have not yet secured these rights, those who have the temerity to shop and to sell are very often treated like economic miscreants.

Shopping and selling by blacks, or more broadly consumption

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\*\* Professor of Law, University of Pennsylvania. B.A., 1970, University of Rochester; J.D., 1973, University of Pennsylvania. Various drafts of this Article were presented at conferences on the black public sphere sponsored by the Africana Studies Program of New York University and the Chicago Humanities Institute, and at the Yale Law School Feminist Theory Workshop. I wish to thank Daniel Ecarius for his invaluable research assistance and Manthia Diawara for his support.

1. For example, lawbreakers who contribute either by way of instruction or example (like role models), or by way of material benefit to communal welfare, should be spared from vilification and ostracism from the black community. See generally Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (discussing romanticized and realistic assessments of lifestyles of black lawbreakers). Moreover, law-abiding blacks should understand that the norms and penalties that restrain the lawbreakers tend to limit the freedom and opportunities of the rest of them. See Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877, 878-79 (1992). In mounting this defense of some black lawbreakers, I do not condone anarchy or romanticize violence. Rather, I believe that the law is a site of struggle and resistance. "Because it's the law!" is just not a particularly good excuse for impeding black Americans' socioeconomic progress. Given the ephemeral nature of the boundary between what is and what is not legal, the law should certainly not be an impediment to black Americans' pursuing the informal economic opportunities that other groups have exploited in securing their material well-being. At the margins between the legal and the illegal, it is important that blacks have their own conceptions of deviance. To some extent, I continue my exploration of these themes here.

and commerce, are in essence considered deviant activities by many whites and by many blacks as well. Though it may be hard for some readers to accept the categorization of such mundane activities as deviant behavior, Howard Becker's interactionist or labeling theory of deviance is a particularly apt description of the phenomenon. According to Becker,

*social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an "offender." The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label.<sup>2</sup>*

Deviance, then, is gauged not by the nature of an act, but by the responses of powerful people to that act. Deviance is a social construct and a mechanism of social control. An activity may be labeled deviant even though it does not represent a threat to the social order.

Consider now, in light of this definition of deviance, the experiences of blacks endeavoring to shop.

#### I. THE WARS IN THE STORES AND ELSEWHERE: SHOPPING AS BLACK DEVIANCE

Tales 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<sup>3</sup> 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 or his ability to pay for an item, or stopped and detained for shoplifting.<sup>4</sup> Salespeople either are slow to wait on,

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2. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (citation omitted).

3. I am black. I use the third person plural rather than the first person plural when referring to black people not to distance myself from other blacks, but to avoid the suggestion that (1) there are no differences between my own experience and the experiences of other blacks; and (2) there are no divisions among blacks based on class, gender, sexual orientation, age, religion, and geographical location.

4. See Joe R. Fagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 105-10 (1991) (describing blacks' responses to discrimination in places of public accommodations); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128-29 (1987) [hereinafter Williams, *Spirit-Murdering the Messenger*] (describing author's reaction after being refused entry to a clothing store); Jane Gross, *When "By Appointment" Means Keep Out*, N.Y. TIMES, Dec. 17, 1986, at B1 (describing stores that refuse entry to young males con-

blacks and rude when they do; or they are too quick to wait on blacks whom they practically shove out the door. Although anecdotal evidence suggests that men are more likely to encounter such treatment, women are similarly victimized. As an eighteen-year-old female resident of a Harlem housing project put it: "Some white people are very rude . . . . All black females and boys are treated the same—bad—when they go into a white store."<sup>5</sup> Even the youngest black consumers are in for a good bit of distrust.<sup>6</sup>

Any kind of ordinary face-to-face retail transaction can turn into a hassle for a black person. At the deli counter or the butcher shop, blacks get cheated by short-weighting or being sold inferior products. Empirical research suggests that blacks pay more than whites for standardized products like cars where negotiation is required.<sup>7</sup> Blacks have problems obtaining credit to buy goods, and must endure suspicious scrutiny if they pay by credit card or check.<sup>8</sup> They are also given a hard time when they want to return goods that are defective or unsatisfactory.<sup>9</sup>

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sidered threatening); Lena Williams, *When Blacks Shop, Bias Often Accompanies Sale*, N.Y. TIMES, Apr. 30, 1991, at A1 [hereinafter Williams, *When Blacks Shop*]; see also PHILOMENA ESSED, *EVERYDAY RACISM: REPORTS FROM WOMEN OF TWO CULTURES* 165, 180–81, 195 (Cynthia Jaffee trans., 1990) (recounting instances of discrimination encountered by black American women while shopping); Sara Rimer, *Shawn, 17: Running Past Many Obstacles*, N.Y. TIMES, Apr. 25, 1993, at A1, L47 (seeing neatly dressed young black man admiring shirt in window, shop owner closes door and locks it).

5. Don Terry, *Holding onto Dreams amid Harlem's Reality*, N.Y. TIMES, Feb. 5, 1991, at A1, A14.

6. See ZE'EV CHAFETS, *DEVIL'S NIGHT: AND OTHER TRUE TALES OF DETROIT* 33 (1990) (quoting city neighborhood services official complaining that children are required to walk with their hands at their sides or are allowed into stores "one at a time"); CARL H. NIGHTINGALE, *ON THE EDGE: A HISTORY OF POOR BLACK CHILDREN AND THEIR AMERICAN DREAMS* 125–26 (1993) (describing suspicion white author witnessed when he went shopping with black children from his inner-city Philadelphia neighborhood).

7. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991).

8. Blacks are sometimes asked to supply additional identification in order to pay by check. See Rudolph A. Pyatt, Jr., *The Risks of Check-Coding by Race*, WASH. POST, May 6, 1991, at F3. Moreover, some establishments identify customers paying with checks by race. *Id.*; see also Derrick Z. Jackson, *Two Stores Record Race of Customers*, BOSTON GLOBE, June 6, 1990, at B1. The stores maintain that they need information about race so as to prosecute check fraud claims. *Id.*; see also *Roberts v. Walmart Stores, Inc.*, 769 F. Supp. 1086, 1089–90 (E.D. Mo. 1991) (awarding summary judgment to retailer having policy of recording race of all customers in case brought by black patron who was disturbed by practice); *Roberts v. Walmart Stores, Inc.*, 736 F. Supp. 1527, 1527–30 (E.D. Mo. 1990) (resolving 13th Amendment, § 1982, and Equal Credit Opportunity Act claims in retailer's favor).

9. Joseph N. Boyce, *L.A. Riots and the 'Black Tax,'* WALL ST. J., May 12, 1992, at A24.

Retail establishments are not the only concerns that provide inferior products and poor service. The businesses that treat blacks poorly run the gamut from airlines to banks to movie theaters.<sup>10</sup> Restaurants, for example, have many ways of letting black people know their business is not appreciated.<sup>11</sup> Slow or no service is perhaps the most blatant form of rejection, but I have experienced more subtle techniques, like being escorted past empty tables in the front of a restaurant to a separate room at the back. On another occasion, I was served a crème brûlée (a fancy French dessert) covered with salt, not sugar.<sup>12</sup>

The harm that blacks suffer from disrespectful and disparate treatment in commercial settings goes beyond psychological pain or the sting of injustice in a legal regime supposedly dedicated to racial equality.<sup>13</sup> For me, the most disturbing aspect of the discriminatory service blacks experience in ordinary commercial transactions is the economic exploitation such behavior represents. If blacks pay the same prices as everyone else and get less in the way of service or merchandise, they are being cheated. Moreover, discriminatory service narrows blacks' choices regarding where to consume, and impedes their ability to enter into efficient commercial transactions. Those merchants holding themselves out as being "willing" to deal with blacks can extract a premium for doing so. Also, as is discussed more fully below, many of the maneuvers blacks employ to make consumption easier entail costs that add to

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10. See, e.g., Eugene Morris, *The Difference in Black and White*, AMERICAN DEMOGRAPHICS, Jan. 1993, at 44, 49 (reporting flight attendants confront black travelers storing items in first-class bins because attendants assume blacks do not fly first class); Lorraine Kidd, *African-American Moviegoers Complain About Segregation*, GANNETT NEWS SERV., Sept. 6, 1991 (reporting Wilmington, Delaware NAACP was investigating complaints that films about black life were being shown only in worst theaters); Teresa Simons, *Health Spa Discrimination Suits Settled for \$9.5 Million*, U.P.I., Feb. 27, 1991 (citing claims that Holiday Spas both discouraged blacks from seeking membership and treated black members in discriminatory fashion as in case of black female who was barred from wearing bare-midriff exercise outfits like those worn by whites).

11. See Calvin Sims, *Restaurant Chain Settles Charges of Racial Bias*, N.Y. TIMES, Mar. 26, 1993, at A14 (detailing claims of discrimination against Denny's restaurant chain, including demands that blacks pay cover charge and refusals to honor requests for advertised special offers).

12. The service blacks receive in some restaurants today is reminiscent of what blacks expected during the heyday of Jim Crow. Writes Stetson Kennedy of that period: "In restaurants, the head waiter may insist that all vacant tables are 'reserved,' or he may seat you out of sight or near a hot kitchen, or you may be allowed to sit indefinitely without service, or you may be served food too salty to eat, etc." STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* 194 (1959).

13. See generally NIGHTINGALE, *supra* note 6, at 128-30; Williams, *Spirit-Murdering the Messenger*, *supra* note 4, at 127-30, 139-42.

the price of purchases. Finally, whites too are exploited by the disparate treatment blacks receive (though whites hardly seem to notice). Whites who believe that concerns which discourage black patronage are more desirable than those that do not, pay a price for such exclusivity that has nothing to do with the quality of the goods or services otherwise provided. Blacks who scale the barriers these firms erect get similarly gypped for their effort. Of course, whites who shop for exclusivity may simply be responding to the reality that, when a business begins to serve a disproportionate number of blacks, the quality of goods and services declines.

Service discrimination against blacks is facilitated by a complex ideology about blacks and their money that is compatible with the notion that black consumption is deviant behavior. Blacks are denied the treatment accorded whites because some merchants believe that black people's money is not good enough for them. An equal or greater threat is posed by those merchants who believe that black money is too good, i.e., too good for blacks to be left with much of it. It is assumed that blacks do not earn their money honestly, work for it diligently, or spend it wisely. When blacks have money, they squander it and cannot save it. If blacks are cheated in the course of commercial transactions, it is because they cheat themselves either by being unsophisticated and incompetent consumers or by making it difficult for a decent ethical person to make a profit from doing business with them. As a result, individual entrepreneurs feel perfectly justified in taking advantage of blacks as a means of privately policing or controlling blacks' spending malefactions.

The perception that there is something wrong with blacks' pursuit of consumption impedes their ability to obtain legal redress for discriminatory treatment. Like the participants in widely acknowledged deviant subcultures, blacks have little recourse to law as they pursue their socially censured and discouraged commercial activities. The absence of effective legal remedies against indiscriminant scrutiny and disrespect is not, at least in the opinion of many shopkeepers and storeowners, the product of a regime that zealously favors merchants over shoppers. On the contrary, the proprietors of retail businesses maintain that they resort to tight security and extensive surveillance because the laws designed to deter and punish shoplifting are inefficient and ineffective. Merchant detention statutes permit storeowners to search and detain in a reasonable manner shoppers reasonably suspected of shoplifting.<sup>14</sup> However, a storeowner risks being sued for false imprisonment if

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14. Thomas B. Bishop, *Excerpts from The Law of Shoplifting: A Guide for Lawyers and Merchants*, 19 CUMB. L. REV. 43, 55-56, 62-64 (1988).

the detention proves to have been unwarranted.<sup>15</sup> Criminal prosecution of shoplifters is "expensive because it ties up sales clerks and security officers in municipal court and leaves valuable merchandise parked in police evidence lockers."<sup>16</sup> Shoplifting cases are not given much attention by the criminal justice system; in some jurisdictions storeowners must hire lawyers to prosecute the cases themselves.<sup>17</sup> Civil recovery laws entitle storeowners to recover damages and penalties from shoplifters,<sup>18</sup> but the civil process does not generate as much deterrence as criminal prosecutions, and many shoplifters do not have the funds to pay a monetary judgment.<sup>19</sup>

Forced, in their view, to rely on security and surveillance, storeowners especially target blacks because (1) blacks are supposedly overrepresented among lawbreakers, and (2) storeowners cannot discern a law-abiding black from a potentially law-defying black. There is little in the law to prevent merchants from proceeding on these assumptions. Despite the ubiquity of blacks' experiences of discrimination, case law suggests that storeowners have rarely been charged with watching, detaining, or deterring shoppers in a racially-biased way.<sup>20</sup> When so attacked, storeowners have invoked the objective evidence of shoplifter profiles to justify their conduct,<sup>21</sup>

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15. See, e.g., *Clarke v. K-Mart Corp.*, 495 N.W.2d 820, 822 (Mich. Ct. App. 1992) (holding black woman erroneously detained for obtaining free merchandise from black salesperson could proceed with false imprisonment claim).

16. Angela D. Santi, *A New Law in the War on Shoplifting*, N.Y. TIMES, Aug. 8, 1993, § 13NJ, at 1 (reporting passage of civil recovery law in New Jersey).

17. *Id.*

18. See, e.g., ARIZ. REV. STAT. ANN. § 12-691 (1992); D.C. CODE ANN. § 3-442 (Supp. 1993); N.H. REV. STAT. ANN. § 544-C:1 (Supp. 1993). See generally Melissa G. Davis et al., *Private Corporate Justice: Store Police, Shoplifters, and Civil Recovery*, 38 SOC. PROBS. 395, 396-407 (1991) (reporting results of an empirical study of large retailer's use of civil recovery laws).

19. See Cynthia Mines, *Legislature Gives Retailers New Weapon in Battling Shoplifters*, WICHITA BUS. J., July 16, 1993, § 1, at 9 (discussing economic impact of shoplifting and likely effectiveness of civil penalty law in combatting it); Stephanie Strom, *States Act to Combat Shoplifting*, N.Y. TIMES, Sept. 19, 1991, at D1 (reporting on passage of New York law providing civil penalties for shoplifting).

20. See *Washington v. Duty Free Shoppers, Ltd.*, 710 F. Supp. 1288, 1290 (N.D. Cal. 1988) (denying summary judgment to defendants accused of demanding passports and plane tickets of black customers when store was not restricted to travelers, but was open to general public); *Ross v. Company Store*, No. CV91 0115710-S, 1991 WL 204357 (Conn. Super. Ct. Oct. 1, 1991) (dismissing claim brought under Unfair Trade Practices Act for discriminatory detention of blacks as potential shoplifters).

21. For example, in *K-Mart Corp. v. West Virginia Human Rights Commission*, 383 S.E.2d 277, 278 (W. Va. 1989), the police were called when a family of Syrian nationals entered a K-Mart store. The store had been warned by the police to be on the lookout for a shoplifting band of gypsies. There was some question whether the term "gypsies" was meant to refer to racial or ethnic characteristics, including skin

though this defense does not always succeed.<sup>22</sup>

Furthermore, in the broad range of commercial settings where exclusionary or otherwise discriminatory service is against the law, enforcement is either slack or nonexistent. Violations of blacks' right to shop or consume are treated like isolated social problems.<sup>23</sup> Except in the most egregious circumstances, the discriminatory treatment blacks encounter as consumers is not considered amenable to the law's policing.<sup>24</sup>

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color or dress. *Id.* at 278 n.1. After the customers became aware that they were being watched, the head of the family confronted the store manager who apologized for any embarrassment or inconvenience. The family shortly thereafter left the store. They were followed by the police. The head of the family confronted the officers, a confrontation (witnessed by mall patrons) ensued, and the family left the mall. The family maintained in their complaint to the Human Rights Commission that they were targeted because of their skin color and the loose-fitting Islamic dress worn by one of the women in the group. The Commission's decision awarding the family damages was overturned on appeal to the Kanawha County Circuit Court. The West Virginia Supreme Court affirmed the reversal by concluding that "the shoplifting warnings and the chance fact that the family group happened to fit the profile of the shoplifting band precipitated the police summons, not discrimination." *Id.* at 282. The court, assuming that its conclusion was bolstered by the fact that the family had shopped weekly in the store without incident for over a year prior to the date in question, reasoned: "[W]hile we do not condone merchants calling the police at the sight of a person or party it believes to be a possible thief, our holding today is based solely on the fact that we find no nexus between K-Mart's actions, while hasty and perhaps imprudent, and the Barams' national origin." *Id.* at 283.

22. See *Lewis v. Doll*, 765 P.2d 1341, 1346 (Wash. Ct. App. 1989) (granting judgment in favor of black man barred from entering convenience store because store had experienced problems with blacks shoplifting).

23. See, e.g., *Dawson v. Zayre Dep't Stores*, 499 A.2d 648 (Pa. Super. Ct. 1985) (denying claim of intentional infliction of emotional distress brought by black woman called "nigger" by sales clerk during dispute over layaway ticket); see also *Fear of Blacks, Fear of Crime*, N.Y. TIMES, Dec. 28, 1986, § 4, at 10 (suggesting fear of black criminal behavior can be held in check if whites put themselves in shoes of innocent blacks); *The Jeweler's Dilemma*, NEW REPUBLIC, Nov. 10, 1986, at 18, 21-22 (suggesting disproportionate burden should not be placed on shopkeepers who for their part should discount race factor somewhat in deciding to bar patrons from premises). Seemingly isolated acts of incivility or rudeness that actually conform to a pattern of abuse against a discrete group should, however, be amenable to tort relief. See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

24. Compare *Stearnes v. Baur's Opera House, Inc.*, 788 F. Supp. 375, 376 (C.D. Ill. 1992), *remanded and dismissed*, 3 F.3d 1142 (7th Cir. 1993) (awarding summary judgment to dance bar which changed type of music being played when it wanted to discourage black patrons); *Perry v. Command Performance*, 1991 WL 46475 \*2-\*3 (E.D. Pa. Mar. 27, 1991) (ruling black patron whose hair white hairdresser refused to fix had no action based on 42 U.S.C. § 1982), *aff'd*, 945 F.2d 395 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1166 (1992); *Totem Taxi, Inc. v. New York State Human Rights Appeal Bd.*, 480 N.E.2d 1075, 1077-78 (N.Y. 1985) (refusing to hold cab company vicariously liable for racial slur uttered by driver because company did not encourage, condone, or approve of conduct) with *Harvey v. NYRAC, Inc.*, 813 F. Supp. 206, 213

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As a result of the law's abdication, individual blacks resort either to compensatory moves or informal mechanisms of resistance to secure their right to shop.<sup>25</sup> Most blacks compensate by proving themselves to be worthy shoppers, i.e., they sell themselves in order to be sold to. They 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. Some folks flash their credit cards or engage the salesperson in conversation designed to reveal the shopper's class position or sophistication regarding the product. Others will buy expensive goods they do not really want just to prove that they have been misjudged by a salesclerk. Along the same lines, I sometimes give a waiter or cab driver a generous tip despite poor service in an effort to debunk the common complaint that blacks do not tip; I hope that the next black patron will reap the benefit of my generosity. These role-reversal techniques (which confuse the matter of who is selling what to whom) facilitate the exploitation of black consumers by increasing the costs of going shopping, if not the amount actually spent on purchases.

Complaining about disrespectful treatment is an option, but close to a majority of blacks consider complaining a waste of time.<sup>26</sup> Given the prevalence of poor service not motivated by racial animus, many blacks give the low-status, underpaid employee waiting on them the benefit of the doubt and proceed with caution when making a fuss. More defiant blacks purposefully make an obnoxious salesperson show them goods or otherwise waste her or his time and then leave the store without buying anything. Some blacks simply delight in being served by a subordinate white person and do

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(E.D.N.Y. 1993) (denying defendant's motion for summary judgment in action where car rental agency refused to rent luxury cars to blacks, including plaintiff who had reserved car for daughter's wedding); *Zenon v. Restaurant Compostella, Inc.*, 790 F. Supp. 41, 44-45 (D.P.R. 1992) (allowing action by three black Puerto Ricans who waited for three hours to be served while whites were immediately seated); *Jones v. City of Boston*, 738 F. Supp. 604, 606-07 (D. Mass. 1990) (denying summary judgment based on various laws guaranteeing access to places of public accommodation in case brought by black man whom bartender referred to as "nigger" in addressing white women with whom plaintiff had spoken); *King v. Greyhound Lines*, 656 P.2d 349, 352 (Or. Ct. App. 1982) (holding racial slurs actionable under Oregon public accommodations law in a case brought by black man who attempted to return bus ticket).

25. See Williams, *When Blacks Shop*, *supra* note 4, at A14 (cataloguing stories of "bad service, public humiliation and legal harassment").

26. See Rhonda Reynolds, *Facts & Figures: Courting Black Consumers*, BLACK ENTERPRISE, Sept. 1993, at 43 (citing survey data indicating that, while 65% of blacks consult salespeople and 59% feel disrespected by them, 48% viewed complaining about service as waste of time).

not try to hide their relish. Operating in resistance mode, other blacks dress any way they want and dare store employees to mess with them. As one Philadelphia youngster put it: "When you black, you gotta go in there like I do—like you ain't got a guilty conscience—and they won't even mess with you."<sup>27</sup>

Blacks have also mounted more formal, collective resistance to being denied the right to shop. People who lack political power but possess economic power employ boycotts. Boycotts have long been used by blacks to protest their mistreatment as customers. The Montgomery bus boycott is probably the most notable historical example.<sup>28</sup> The most well-publicized recent consumer boycotts have targeted Korean merchants in black urban enclaves who responded to suspected shoplifters, often black females, with what some in the surrounding communities deem to be excessive force.<sup>29</sup>

Expanded political activity aimed largely or exclusively at improving the terms and conditions on which blacks shop or consume is likely to encounter resistance from blacks on two grounds, both of which involve blacks' labeling their own commercial behavior deviant. First, many blacks consider consumption a vice. They are more than ready to believe that any black person who encounters disrespectful treatment in a store or shop is getting what she or he de-

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27. NIGHTINGALE, *supra* note 6, at 129.

28. See JO ANN G. ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT* (David J. Jarrow ed., 1987).

29. Boycotts have taken place throughout the United States. The two most notable boycotts occurred at opposite ends of the country. In Los Angeles, a female storekeeper got into a verbal altercation with Latasha Harlins, a black teenager, over a \$1.78 bottle of orange juice and wound up shooting Harlins in the back of the head. Protests and a boycott ensued. See Wanda Coleman, *Remembering Latasha: Blacks, Immigrants and America*, *NATION*, Feb. 15, 1993, at 187, 188–91; Seth Mydans, *Two Views of Protest at Korean Shop*, *N.Y. TIMES*, Dec. 24, 1991, at A10. The shopkeeper received a suspended sentence and was placed on probation for the killing which was videotaped by an in-store surveillance camera. *People v. Superior Court (Soon Ja Du)*, 7 Cal. Rptr. 3d 177, 178–79 (Ct. App. 1992). The killing of Ms. Harlins and the shopkeeper's lenient sentence have been offered as explanations for the targeting of Korean-owned businesses during the uprising following the verdict in the state court trial of the police officers who beat motorist Rodney King. See generally Sumi K. Cho, *Korean Americans v. African Americans: Conflict and Construction*, in *READING RODNEY KING, READING URBAN UPRISING 196, 196–214* (Robert Gooding-Williams ed., 1993) (addressing racial violence and social unrest following police beating of Rodney King).

In New York City, the Family Red Apple grocery was boycotted after a black customer alleged that she was assaulted after being falsely accused of shoplifting. See Lisa W. Foderaro, *One Grocery Boycott Ends, But Earlier Siege Continues*, *N.Y. TIMES*, May 17, 1990, § 1, at 38; see also *Jang v. Brown*, 560 N.Y.S.2d 307, 312–13 (N.Y. App. Div. 1990) (requiring police to enforce order enjoining picketing within 50 feet of store); *People v. McLeod*, 570 N.Y.S.2d 431, 436 (N.Y. Crim. Ct. 1991) (upholding contempt action against protestor who violated injunction awarded to Jang).

serves.<sup>30</sup> Second although protests against the conduct of nonblack vendors often proceed on the assumption that a black clientele is better served by businesses owned by blacks, many blacks are skeptical of this proposition. For them, commerce ranks little better than consumption on the list of worthwhile pursuits for black people. Both of these propositions warrant close analysis.

## II. CONSUMPTION IN BLACK CULTURAL CRITICISM

### A. *Consumption as Alienation*

There are roughly two critical assessments of black consumption. The standard story associates black consumption with alienation.<sup>31</sup> It goes something like this: blacks consume conspicuously as a way of compensating for the humiliation and disappointments they incur by reason of being black, exploited, degraded, and oppressed. Blacks use their dollars to buy what they cannot earn, namely status, which is the very thing advertising hype suggests pricey goods can supply. To a certain extent, everyone in the society is enticed by the possibility of creating an identity via consumption,<sup>32</sup> but blacks, starving for rank and recognition because of racial discrimination, are thought to be more easily duped into parting with their hard-earned money, and having little to show for it.

According to the alienation critics, the quest for status through consumption is hopeless because status, like style, is a moving tar-

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30. *Lewis v. McGraw-Hill Broadcasting Co.*, 832 P.2d 1118, 1120-21 (Colo. Ct. App. 1992), offers an unusual illustration of the difficulties black consumers encounter in establishing their legitimacy as victims of improper store behavior. *Lewis* relates the story of a black woman forcibly arrested for shoplifting by J.C. Penney security personnel and then victimized by inaccurate reports of previous criminal activity. The false media report accused the plaintiff of being a prostitute—the quintessential bad black woman. This report was particularly damaging because it undermined her credibility and weakened her claim to being a sympathetic figure deserving of having a fuss made on her behalf.

31. Alienation critiques are not uniquely applied to blacks. The conflict between the base desire to consume and the moral imperative to curb self-indulgence is manifested in the general culture, particularly in the ideology of conservatives concerned about the impact of consumption on worker productivity. See DANIEL HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940*, at 166-71 (1985) (providing brief overview of social criticism of consumption through 1970s); see also ROSALIND WILLIAMS, *DREAM WORLDS: MASS CONSUMPTION IN LATE-NINETEENTH CENTURY FRANCE* 224 (1982) (positing that conflict between consumption and restraint tears the conscience apart). Furthermore, it is conventional wisdom among elements of the political left that mass consumption impedes solidarity and that the only way to restore community is to replace individual narcissism with shared austerity. *Id.* at 397-98.

32. See CARL GARDNER & JULIE SHEPPARD, *CONSUMING PASSION: THE RISE OF RETAIL CULTURE* 45 (1989).

get. Once the black consumer gets the latest thing, she or he will not be satisfied for long because the need for the thing grows out of a sense of inferiority, and the possession of the thing is a constant reminder of that. Devalued, the thing possessed is put aside and the quest continues with another target, i.e., another thing.

The alienationists view the pursuit of status through the consumption of commodities as being detrimental to the black community. Unrestrained consumption diverts energy and resources that might be better used in the struggle against white supremacy. It generates, not cooperation, but competition, which can be exhausting when it is not deadly. Nothing illustrates this better than the shocking stories of black youths attacking and sometimes killing other young people in order to rob the victims of their earrings, sneakers, and leather jackets.<sup>33</sup>

Poorer blacks who try to maintain an appearance of affluence they can ill afford are the primary targets of the alienationists. Poor adults are severely scolded for having perverse priorities, and their spending to buy status is treated like a form of thievery. Not only are they attempting to purloin a rank to which they are not entitled, they are doing so at the expense of their families and their people.

Ever mindful of the goal of advancing the race, the alienation critiques of black consumption do not totally dismiss the search for status via commodities as being contemptible and base. Rather, they distinguish between those statuses that are worth pursuing and those that are not. For instance, many black women feel compelled to conform to white bourgeois female appearance norms in order to combat stereotypes that associate black women with promiscuity, unattractiveness, slovenliness, incompetence, and poverty.<sup>34</sup> Black women convey the message that they are respectable, attractive, professionally adept, and upwardly mobile by how they dress. Consumption for these purposes is acceptable to alienationists because it is associated with the uplift of the race, as distinguished from consumption that is demeaning, coarse, and confirming of the worst black stereotypes.

Cornel West makes similar claims in an essay entitled *The Crisis of Black Leadership*. In a variation on the theme of "clothes

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33. See William E. Schmidt, *A Growing Urban Fear: Thieves Who Kill for 'Cool' Clothing*, N.Y. TIMES, Feb. 6, 1990, at A20; see also NIGHTINGALE, *supra* note 6, at 161-62 (reporting on increase of apparel-related violence, including fights among girls over jewelry).

34. See Kathy Peiss, *Making Faces: The Cosmetics Industry and the Cultural Construction of Gender, 1890-1930*, GENDERS, Mar. 1990, at 143, 156, 158.

make the man," West maintains that "[t]he black dress suits with white shirts worn by Malcolm X and Martin Luther King, Jr., signified the seriousness of their deep commitment to black freedom, whereas today the expensive tailored suits of black politicians symbolize their personal success and individual achievement."<sup>35</sup> By the same token:

The Victorian three-piece suit—with a clock and chain in the vest—worn by W.E.B. DuBois not only represented the age that shaped and molded him; it also dignified his sense of intellectual vocation, a sense of rendering service by means of critical intelligence and moral action. The shabby clothing worn by most black intellectuals these days may be seen as symbolizing their utter marginality behind the walls of academe and their sense of impotence in the wider world of American culture and politics.<sup>36</sup>

Pursuing the same line of analysis, the alienation critiques have traditionally urged poor blacks to adopt a simpler lifestyle, one unburdened by the quest for frivolous, showy things—one in which materialism is deemphasized and consumption is redirected into more refined, muted, and dignified patterns. Poor blacks should be working hard to buy a house or to get their kids out of public school. The panacea is a nostalgic return to the quest for the American dream exemplified by the way of life once known among black Americans as "striving." Strivers saved for the future, planned ahead, worked to overcome obstacles, and helped themselves rather than relying on the government.<sup>37</sup>

There are a number of contemporary versions of the alienation critique that take into account the disastrous impact the crack trade and the hedonistic values of the Reagan era have had on the lives of poor blacks. Cornel West, for example, has given the critique a sophisticated, postmodern spin. According to West, "[p]ost-modern culture is more and more a market culture dominated by gangster mentalities and self-destructive wantonness. This culture engulfs us all—yet its impact on the disadvantaged is devastating, resulting in extreme violence in everyday life."<sup>38</sup> Blacks have fallen into the clutches of "corporate market institutions . . . [that] have created a seductive way of life, a culture of consumption that capitalizes on

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35. CORNEL WEST, RACE MATTERS 37-38 (1993).

36. *Id.* at 40.

37. See Dwight E. Brooks, Consumer Markets and Consumer Magazines: Black America and the Culture of Consumption, 1920-1960, at 139-40 (1991) (unpublished Ph.D. dissertation, University of Iowa) (citing findings of black consumer surveys conducted between 1962 and 1968).

38. WEST, *supra* note 35, at 5.

every opportunity to make money."<sup>39</sup> These purveyors of pleasure have turned black life into one dictated by market forces and market moralities which threaten the very existence of black civil society. The result is a form of nihilism, "the lived experience of coping with a life of horrifying meaninglessness, hopelessness, and most important lovelessness."<sup>40</sup> The cure is a politics of conversion with an ethic of love at its core.<sup>41</sup>

Historian Carl Husemoller Nightingale offers a similar analysis of alienation and the consumption practices of the black urban poor.<sup>42</sup> Nightingale's version, however, concentrates on the very young and also unstintingly indicts mainstream consumer culture for its abuse of poor black urban children. According to Nightingale, poor blacks' current obsession with conspicuous consumption is more intense and its effects more devastating than ever before.<sup>43</sup> Via television, movies, billboards, and other forms of advertising, black children have greater access to mainstream consumer culture than in the past. Moreover, the mainstream has discovered black consumers and is pitching products directly to them. As a result, poor black kids are totally immersed in mainstream consumer culture, their "craving for things has gotten more persistent, and the demands for now outrageously expensive symbols of belonging and prestige have begun earlier in life."<sup>44</sup> But these are hard economic times for blacks on the lowest rungs of the economic ladder, and it is difficult for poor kids and their parents to buy the status symbols the kids feel they need in order to be accorded a measure of respect in this world.<sup>45</sup> The more the children need the commodities, the less likely they are to get them. The children suffer disappointment, hurt, humiliation, anger, and envy which lead to conflict and aggression.<sup>46</sup>

By way of a remedy, Nightingale calls for a

national cultural renewal based around a series of core values that can be imparted to kids in the context of a diversity of ethnic and racial traditions. These values include social responsibility to family, community, and the broader society and polity; opposition to violence and the search for alternative forms of expressing pain; and avoidance of the abuse of dominance across lines of gender, race,

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39. *Id.* at 16

40. *Id.* at 14.

41. *Id.* at 18-19.

42. See NIGHTINGALE, *supra* note 6, at 133-65.

43. *Id.* at 143.

44. *Id.* at 153.

45. *Id.* at 158.

46. *Id.* at 158-62.

class, age, sexual preference, or physical or mental ability, and between humans and the environment.<sup>47</sup>

### B. *Consumption as Resistance*

While alienation critiques like those of West and Nightingale point to significant aspects of black consumption as evidence of defeat and degradation, the alternatives find in many facets of black consumption signs of defiance, emancipation, and victory over despair and self-destruction. This second set of approaches to black consumption is hipper and more fun. To those with an eye for resistance, consumption is about pleasure, performance, and participation in prosperity.<sup>48</sup> Consumption is the site of a struggle to exploit the transformative potential of commodities.<sup>49</sup> Transformation comes with using commodities in ways that reveal the repressed or negated contradictions that underlie their production and distribution, such as wearing an article of apparel with the price tag and labels in plain view. Transformation is achieved by altering the image or "blackening" the most mass of mass/masked produced goods so as to subvert domination and the generally received meaning of the thing. A good example of this is the phenomenon of black women and men bleaching their hair shades of blonde nowhere found in nature.

Resistant conspicuous consumption has been and remains an essential element of black deviant (in the mind of white society) subcultures. Today's B-boys with their baggy jeans, reversed baseball caps, fade haircuts, rap music, and cool poses are the modern day descendants of the zoot suiters of the forties.<sup>50</sup> The zoot suiters defiantly wore fluid, generously cut trousers when cloth was in short supply because of the war, and through dance and song created a time and space in which to escape the strictures of alienating wage labor.<sup>51</sup> The most sought-after look among contemporary B-boys consists of a classic hunting coat layered over baggy khakis

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47. *Id.* at 192.

48. See, e.g., GARDNER & SHEPPARD, *supra* note 32, at 57 (contending shopping is form of recreation in which consumers enjoy spectacle of stores and malls); MICA NAVA, *CHANGING CULTURES: FEMINISM, YOUTH AND CONSUMERISM* 167 (1992) (arguing consumption is "about dreams and consolation, communication and confrontation, image and identity").

49. SUSAN WILLIS, *A PRIMER FOR DAILY LIFE* 126-30 (1991).

50. ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 50-53 (1964).

51. Robin D.G. Kelley, *The Riddle of the Zoot: Malcolm Little and Black Cultural Politics During World War II*, in *MALCOLM X: IN OUR OWN IMAGE* 155, 155-82 (Joe Wood ed., 1992).

and Timberland boots.<sup>52</sup> (Can you imagine George Bush being in vogue?) Style watchers would include this ensemble in the category of the survivalist look, which also includes camouflage fatigues and thermal half-face masks.<sup>53</sup> Females, for whom a tough exterior assures survival and acceptance in a male-dominated public life, may be dressed identically except for large gold earrings. According to cultural studies professor Trish Rose, this survivalist look

taps into a post-Vietnam understanding of the urban terrain as a daily guerrilla war. "These clothes have always been about camouflage . . . . On the one hand, it's like the Bigfoot they're looking for: Homeboy's got a crazy-size jacket on, big shoes, a big ski mask that makes him look like Jason in 'Friday the 13th.' How can you miss him? On the other hand, you can't see him, can you?"<sup>54</sup>

A more cynical explanation for the country estate aspect of the look, according to one Bronx teenager, is that "[t]hese clothes make people look white, rich and important."<sup>55</sup> Of course, the kids do not necessarily acquire their rugged togs the "old fashioned way." In some circles the preferred method of acquisition is shoplifting.<sup>56</sup>

There are other examples of black deviance expressed in consumption. Gang members display their solidarity by wearing the gear of professional athletic teams with their distinctive color combinations and logos. At least in sartorial terms, the gang members are not unlike members of black Greek sororities and fraternities who dress in the hues of their organizations (like pink & green or crimson & cream).<sup>57</sup> The black and Hispanic gay men who partook of the ball scene depicted in the documentary *Paris Is Burning*<sup>58</sup> may have been foreclosed from the world of executives, pampered females, and the military, but they were able to live out their fantasies through consumption conspicuously displayed on the ballroom floor.

The dominant society does not tolerate challenges to the status quo such as are posed by these black consumption-oriented lifestyles. As a general matter, the dominant society responds to devi-

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52. Faye Penn & Chris Erikson, *The Youngest Thieves: High-Priced Fashions Have Teen Shoplifters Working Overtime*, MANHATTAN SPIRIT, Aug. 26, 1993, at 14.

53. Diane Cardwell, *Rapwear, Soulwear, Hipwear*, N.Y. TIMES, Feb. 14, 1993, § 9, at 5.

54. *Id.*

55. Penn & Erikson, *supra* note 52, at 14.

56. *Id.*

57. Lillian O. Holloman, *Black Sororities and Fraternities: A Case Study in Clothing Symbolism*, in DRESS AND POPULAR CULTURE 46, 46-60 (Patricia A. Cunningham & Susan V. Lab eds., 1991).

58. PARIS IS BURNING (Prestige Films 1991).



ant subcultures in either or both of two ways. It may co-opt the styles by turning them into commodities which are sold back to the originators and others, or it may label the styles deviant and attempt to repress them.<sup>59</sup> Either way, the opportunity to use creative consumption to contradict the received meaning of things and to undermine the status quo is impaired.

For example, drag has become a common feature of mass entertainment, and voguing (the gay ball dance form) was popularized by Madonna in a way that practically made it her own. "Once mainstream America began to copy a subculture that was copying it, the subculture itself was no longer of interest to a wider audience, and whatever new opportunities existed for the principals [featured in *Paris Is Burning*] dried up."<sup>60</sup> While B-boy attire has become mainstream adolescent garb, schools, amusement parks, and malls have adopted dress codes that exclude some young people wearing similar apparel (bandannas, athletic team gear, jogging suits, even pajamas with a billiard ball print) on the ground that it is associated with gangs.<sup>61</sup> These regulations are much like uniform requirements that restrict what low-status workers can wear on the job; such controls especially impact on young blacks for whom style is important.<sup>62</sup>

Even black consumption practices that hardly seem anti-social because they are not associated with violent or aggressive behavior may be treated as deviant. For example, more and more blacks are dressing in whole or in part in African garb as an expression of their identity and racial solidarity or their adherence to the ideology of Afrocentricity. Yet African-inspired dress is under attack. A black lawyer in Washington, D.C., was ordered not to wear a kente cloth shawl to court.<sup>63</sup> Employers may forbid black female employees from wearing their hair braided, a practice common among African women.<sup>64</sup> White-owned producers of natural hair care products

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59. DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* 94 (1979).

60. Jesse Green, *Paris Has Burned*, N.Y. TIMES, Apr. 18, 1993, § 9, at 1.

61. See Sue Burrell, *Crime, Dress Codes, and the Schoolhouse Door*, S.F. RECORDER, Feb. 12, 1992, at 8; Robert D. Davila, *Lawsuit Targets Sunrise: Black Teen Calls Dress Code Racist*, SACRAMENTO BEE, May 5, 1993, at A1; *Lawsuit Settled on Youths' Attire*, S.F. CHRON., Nov. 13, 1992, at A23; Teresa Moore, *'Gang Attire' Ejections Prompt Suit Against Park*, S.F. CHRON., July 3, 1991, at A20; Pearl Stewart, *Dress Code Proposed for Oakland Schools*, S.F. CHRON., July 15, 1991, at A15.

62. RICHARD MAJORS & JANET M. BILLSON, *COOL POSE: THE DILEMMAS OF BLACK MANHOOD IN AMERICA* 81 (1992) (arguing blacks resist uniforms because uniforms de-style them).

63. Sabra Chartrand, *A Dispute Over Courtroom Attire, and Principles*, N.Y. TIMES, June 19, 1992, at B8; Patrice Gaines-Carter, *D.C. Lawyer Told to Remove African Kente Cloth for Jury Trial*, WASH. POST, May 23, 1992, at F1.

64. See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y.

have appropriated terms associated with race pride and black ownership like "African" and "kente" and attempted to use trademark law to prohibit smaller black businesses from utilizing the words.<sup>65</sup>

### III. BEYOND ALIENATION AND RESISTANCE: THE HOPE OF A BLACK PUBLIC SPHERE

Both the alienation and the resistance critiques of black consumption have their strengths and limitations. The alienation critiques are on target when they decry conspicuous consumption that is destructive of individuals, families, and neighborhoods. Those who articulate the alienation critiques, however, too often fail to acknowledge class warfare within the black community and the degree to which a bourgeois bias permeates the alienation perspectives. Because of this insensitivity to class concerns, their social censure of the buying behavior of poorer blacks may actually backfire by further entrapping poorer blacks in the cycle of conspicuous consumption. The very idea that a commodity is something that poorer or less well-off folks are not supposed to have may make them want it that much more in order to teach the meddling black bourgeoisie a lesson.

The alienation critiques do not give black folks enough credit for struggling to combat the stifling effect of white supremacy. Blacks' tastes for expensive commodities are not solely attributable to the base reasons the critiques cite. The quest for quality is partly a response to a history of being cheated by inferior goods and inflated prices.<sup>66</sup> Furthermore, the notion advanced by the alienationists that blacks should buy certain things (and only certain things) as a way of gaining a station in life more nearly equal to that of whites leaves too little room for the operation of human agency enlightened by a black critical consciousness. Such a notion in essence denies that black culture and the black public sphere create alternative mechanisms for achieving status and recognition. Blacks in general simply do not pay that much attention to white

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1981); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

65. Maitefa Angaza, *White Co. with "African Pride" Sues Black Co. for Being "African Natural,"* CITY SUN (Brooklyn), Sept. 22, 1993, at 5; Lisa Jones, *Africa™*, VILLAGE VOICE, Aug. 24, 1993, at 42. The litigation was terminated when the maker of African Pride products realized how sensitive the issue was for its consumers. Open Letter to the African-American Community from Brian K. Marks, President of Shark Products, Inc., N.Y. AMSTERDAM NEWS, Jan. 15, 1994, at 19.

66. See Marcus Alexis, *Some Negro-White Differences in Consumption*, in THE BLACK CONSUMER: DIMENSIONS OF BEHAVIOR AND STRATEGY 257, 266 (George Joyce & A.P. Govoni eds., 1971).

people.

The alienation critiques do not say enough about the role consumption might play in blacks' conception of the good life. There has to be more to a black good life than countering what white people do to black people, or doing tomorrow what white people will not let blacks do today. Good things and good times gauged by black folks' standards must figure somewhere in their liberation. If nothing else, consumption fuels production and production creates jobs. Commodities should be thought of as a means of packaging people's needs and desires in ways that generate jobs. The economic survival of black people depends upon their creating a black public sphere that consists of markets and audiences for the products of their labor.<sup>67</sup>

The consumption as resistance approaches avoid some of the criticism leveled against the consumption as alienation approaches by focusing on how black people change consumption, rather than on how consumption changes black people. Nonetheless, the resistance approaches are undermined by the fact that resistance exponents tend to see rebellion everywhere and rarely admit that, when it comes to consuming things, it is difficult to distinguish transformation from co-optation. Exploiting contradictions is not quite the same as taking advantage of openings for reform.

The consumption as resistance approaches overemphasize the significance of symbolic protest. Lifestyles may be a form of political expression or praxis, but they typically entail little strain and no gain because they are not hitched to an agenda for political, social, and economic change.<sup>68</sup> For example, contemporary black youth subcultures, like most other youth subcultures, tend to practice "a politics of metaphor," one that capitalizes on the participants' "pow-

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67. In this Article, I use the term "public sphere" in a deliberately vague way to encompass both markets and audiences. The public sphere to which I refer is somewhat more expansive than the realm of public debate and deliberation with which the term is associated in the work of Jurgen Habermas. On the multiplicity of public spheres, see generally Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in *THE PHANTOM PUBLIC SPHERE* 1, 1-32 (Bruce Robbins ed., 1993) (showing bourgeois conception of public sphere inadequate, while proffering post-bourgeois conception).

68. See WILLIAMS, *supra* note 31, at 209 (arguing lifestyles create communities based not on ideals, but on similar buying preferences and desire to exploit power connected with certain commodities). See generally Adolph Reed, Jr., *The Allure of Malcolm X and the Changing Character of Black Politics*, in *MALCOLM X: IN OUR OWN IMAGE*, *supra* note 51, at 203, 203-32 (arguing theories of cultural resistance which equate consumption with political action are manifestations of politics of evasion).