The common law is color blind on the surface, but it permits individual autonomy to discriminate: A party is free under common law to choose whether to extend an offer to another or to accept an offer from another, regardless of the party’s motivation, even if that motivation is invidiously discriminatory. Congress responded after the Civil War to one facet of this deficiency with the statute now codified in [42 U.S.C § 1981](https://www.law.cornell.edu/uscode/text/42/1981), which provides that “[a]ll persons . . . shall have the right to make and enforce contracts . . . as is enjoyed by White citizens.” After this and other Reconstruction Era statutes fell into disuse for a century, the Supreme Court revived section 1981 by holding that it did more than strike down state laws that discriminate, it also imposed liability for private acts of discrimination in contracting, in that case a private school’s refusal to enter into contracts with the parents of Black children at a time and place of White flight from integrated public schools. [*Runyon v. McCrary*, 427 U.S. 160 (1976)](https://www.oyez.org/cases/1975/75-62).

**Consideration**

**BARFIELD v. COMMERCE BANK**

484 F.3d 1276 (2007)

Chris Barfield, an African-American man, entered a Commerce Bank branch in Wichita, Kansas, and requested change for a $50 bill.   He was refused change on the ground that he was not an account-holder.   The next day, Chris Barfield's father, James Barfield, asked a white friend, John Polson, to make the same request from the bank.   Mr. Polson was given change, and the teller never asked whether he held an account with the bank.   A few minutes later, James Barfield entered the bank, asked for change for a $100 bill, and was told that he would not be given change unless he was an account-holder.

James Barfield then enlisted the help of a white news reporter and his African-American colleague.   The two men, separately, visited the bank to request change.   The African-American man was asked whether he was an account holder, and the white man was not.

The Barfields filed suit under 42 U.S.C. § 1981, alleging racial discrimination in the impairment of the ability to contract.   The Bank moved to dismiss for failure to state a claim.

Originally enacted in the wake of the Civil War, 42 U.S.C.§ 1981(a) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

  As part of the Civil Rights Act of 1991, Congress added part b to the statute:  “For purposes of this section, the term ‘make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”  Id. § 1981(b).  The purpose of part b was to expand the statute to encompass “all phases and incidents of the contractual relationship.”  Rivers v. Roadway Express, Inc., 511 U.S. 298, 302, 308, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

 Section 1981 claims are subject to a three-part test.   The claimant must demonstrate:  “(1) that the plaintiff is a member of a protected class;  (2) that the defendant had the intent to discriminate on the basis of race;  and (3) that the discrimination interfered with a protected activity as defined in § 1981.”  Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091, 1102 (10th Cir.2001).   Only the third prong is at issue here.

All courts to have addressed the issue have held that a customer's offer to do business in a retail setting qualifies as a “phase[ ] and incident[ ] of the contractual relationship” under § 1981. . . . Shen v. A & P Food Stores, No. 93CV1184(FB), 1995 WL 728416 (E.D.N.Y. Nov.21, 1995) (finding a valid § 1981 claim after Chinese customers attempted to purchase apple juice and were refused);  Washington v. Duty Free Shoppers, Ltd., 710 F.Supp. 1288, 1289-90 (N.D.Cal.1988) (finding a valid § 1981 claim when African-American customers were stopped after entering a duty-free shop and asked for their passports but white customers were not).

The question, then, is whether the Barfields' proposal to exchange money at a bank is a contract offer in the same way as an offer to purchase doughnuts or apple juice.

The claim made by the appellees, and accepted by the district court, is that the Barfields' proposed exchange was not a contract because it involved no consideration:  “The bank would not have received any benefit or incurred a detriment if it had agreed to change the Barfields' bills.” App. at 56

In the most straightforward sense, the transaction proposed by the Barfields was a contract of exchange:  they would give up something of value (a large-denomination bill) in exchange for something they valued more (smaller-denomination bills).   It is hard to see why this is not a contract.   If two boys exchange marbles, their transaction is a contract, even if it is hard for outsiders to fathom why either preferred the one or the other.   Consideration does not need to have a quantifiable financial value:

[T]he legal sufficiency of a consideration for a promise [does not] depend upon the comparative economic value of the consideration and of what is promised in return, for the parties are deemed to be the best judges of the bargains entered into․

The Bank, however, argues that the proposed exchange was not a contract because it received no remuneration for performing the service of bill exchange.   In other words, rather than view the transaction as an exchange of one thing for another, the Bank urges us to treat the transaction as a gratuitous service provided by the Bank, for no consideration.   We cannot regard the Bank's provision of bill exchange services as “gratuitous” in any legal sense.   Profit-making establishments often offer to engage in transactions with no immediate gain, or even at a loss, as a means of inducing customers to engage in other transactions that are more lucrative;  such offers may nonetheless be contractual, and they do not lack consideration.   See Idbeis v. Wichita Surgical Specialists, P.A., 279 Kan. 755, 112 P.3d 81, 90 (2005) (holding that unquantifiable consideration, such as an employee's goodwill and professional contacts, is adequate to sustain a contract).   If, as is alleged in the complaint, the Bank effectively extends bill exchange services to persons of one race and not the other, that is sufficient to come within the ambit of § 1981.

**Offer and Acceptance**

[*Gregory v. Dillard’s, Inc*., 565 F.3d 464 (8th Cir. 2009](https://ecf.ca8.uscourts.gov/opndir/09/05/053910P.pdf))

(Shopping while Black)

Thirteen African-Americans appeal the decisions of the district court1dismissing their claims against Dillard’s, Inc., based on alleged race discrimination at the Dillard’s department store in Columbia, Missouri. We affirm the district court’s dismissal of the plaintiffs’ claims under 42 U.S.C. § 1981.

In January 2005, the district court granted Dillard’s motion to dismiss the claims observing that these plaintiffs “tersely allege” that they “have each experienced, within the time period of 1998 to the present, instances at Dillard’s Columbia, Missouri, store in which they were followed and/or otherwise subjected to surveillance based upon their race.” Relying on Garrett v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002), where the court held that “[s]o long as watchfulness neither crosses the line into harassment nor impairs a shopper’s ability to make and complete purchases, it is not actionable under section 1981.” The district court ruled that the failure of the eleven plaintiffs to allege “that they were questioned, searched, detained, or subjected to any physical activity other than being followed or subjected to surveillance” was fatal to their claims. The court concluded that none of the named plaintiffs had been “denied” an opportunity to make purchases at Dillard’s. The court concluded that Gregory presented no evidence that she intended or attempted to purchase merchandise on the day of the incident, and that she therefore failed to demonstrate an interference with an actual contractual interest or relationship. He left the store voluntarily after being subjected to what he believed to be rude behavior. The Seventh Circuit similarly has held that where a shopper opts not to contract with a merchant because the shopper is offended by certain racially motivated activity of an employee of the store, there is no claim under § 1981. In Bagley v. Ameritech Corp., 220 F.3d 518 (7th Cir. 2000), a customer left a store after he was offended by the behavior of an assistant sales manager, who said she “would not serve” the customer and “gave him the finger.” Id. at 520. The court held that while it could not fault the customer for taking offense, this offensive conduct was insufficient to statea claim under § 1981, because the merchant was “not responsible for terminating the transaction.” Id. at 522.

In view of the statute’s focus on protecting a contractual relationship, a shopper advancing a claim under § 1981must show an attempt to purchase, involving a specific intent to purchase an item, and a step toward completing that purchase. See Green, 483 F.3d at 538 (holding that shopper satisfied third element by selecting a specific item in display case and communicating to sales clerk her desire to purchase that item). cf. McQuiston v. K-Mart Corp., 796 F.2d 1346, 1348 (11th Cir. 1986) (holding that when a customer lifts an item from a shelf or rack to determine its price, there is no contractual relationship with the seller).

**Objective Theory of Contract**

*[Morales v. Sun Constructors, Inc](https://www.govinfo.gov/content/pkg/USCOURTS-ca3-07-03806/pdf/USCOURTS-ca3-07-03806-0.pdf)*[.,](https://www.govinfo.gov/content/pkg/USCOURTS-ca3-07-03806/pdf/USCOURTS-ca3-07-03806-0.pdf) 541 F.3d 218 (3d Cir. 2008)

This case requires us to determine whether an arbitration clause in an employment agreement is enforceable where one party is ignorant of the language in which the agreement is written. Juan Morales (Morales) was employed by Sun Constructors, Inc. (Sun). The employment relationship between Morales and Sun was governed by a signed employment agreement (the Agreement)that contained an arbitration clause. Morales was terminated by Sun, and he filed a wrongful termination suit against his former employer in the District Court of the Virgin Islands. Sun moved to stay the proceedings pending arbitration The Agreement was written in English, a language Morales cannot understand, and the District Court concluded that the arbitration clause was unenforceable because Morales did not assent to the clause. On appeal, Sun argues that Morales is bound by the entire Agreement, even if he is ignorant of its terms. We agree.

On April 15, 2004, after Morales had passed a written exam, in English, Sun hired him and required him to attend a 2 1/2-hour orientation conducted entirely in English and to sign an employment agreement.

The Sun employee who conducted the orientation, Mr. Langner, asked Jose Hodge (Hodge), a bilingual applicant who was also present at the orientation, and whom Morales knew, to explain to Morales what Langner was saying and help him fill out the documents. Hodge testified that he generally understands about eighty-five percent of what is said and written in English. He also stated that Morales did not ask him what he was signing and that he did not specifically explain the arbitration clause to Morales. Mr. Langner stated that he did explain the arbitration provisions in English and that, during the orientation, Hodge was speaking to Morales in a foreign language.

The Federal Arbitration Act (FAA), provides that arbitration agreements are “enforceable to the same extent as other contracts,” and “establishes a strong federal policy in favor of the resolution of disputes through arbitration.” When determining “whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”

It is well-settled under the Restatement (Second) of Contracts (the Restatement) that mutual assent between parties is necessary for the formation of a contract. While mutual assent “is sometimes referred to as a ‘meeting of the minds,’”, this phrase must not be construed too literally. Acceptance is measured not by the parties’ subjective intent, but rather by their outward expressions of assent.

The Supreme Court has observed:“ It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.” Upton v.Tribilcock,91 U.S.45, 50(1875).The “integrity of contracts demands” that this principle “be rigidly enforced by the courts.” As one noted treatise explains: “According to the objective theory of contract formation, what is essential is not assent, but rather what the person to whom a manifestation is made is justified as regarding as assent. Thus, if an offeree, in ignorance of the terms of an offer, so acts or expresses itself as to justify the other party in inferring assent, a contract will be formed in spite of the offeree’s ignorance of the terms of the offer. The most common illustration of this principle is the situation when one who is ignorant of the language in which a document is written, or who is illiterate, executes a writing proposed as a contract under a mistake as to its contents. Such a person is bound. The fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable. See Paper Express, Ltd. v. Pfankuch Maschinen, 972 F.2d 753, 757 (7th Cir. 1992) (addressing a contract dispute between an Illinois corporation and a German corporation and holding that parties should be held to contracts, even if the contracts are in foreign languages or the parties cannot read or understand the contracts due to blindness or illiteracy)

Contract is, of course, part of the core legal infrastructure that makes markets possible. But it is more than that. As an ideal type, it is at the core of all individualist social, moral, and political theories that seek to account for human sociality while avoiding social structure. Contract represents the ideal of being able to choose how to calibrate others’ demands with one’s own life plan. It presents the possibility of a social obligation that is not imposed upon one from the outside—by family or tradition or etiquette or the state.

The contractual ideal and the promissory morality that comes with it is part of our culture, and not just our legal culture. Even those of us who have been on the business end of exploitative contracts—for debt, for labor, for rent, for whatever else–have a hard time shaking the notion that we are obligated to do what we said we would (even if we didn’t know what we “said we would” via the fine print): that we chose, and therefore have responsibility for, the rules imposed upon us.

The ideal of free markets to the idealization of the early stages of capitalism before industrialization made private property, free exchange, and free labor mere ideology for corporate dictatorship (which she inexplicably and infuriatingly refers to as “communist”). She then asks how freedom ought to be conceptualized once we take seriously the power that profit-oriented firms have over our lives.

Recasting contract and market ordering as the process of mutual coercion rather than mutual consent is an incredibly useful pivot point for thinking about how contract and market choice are shaped by social structure. Understanding contracts as sociological phenomena governed by situationally variable norms and without clear entry and exit points, that contracts are incomplete and “relational” has been enormously influential, contributing to a growing sense in the legal academy that the classical view of contract as discrete transaction would be subsumed into more collectivist forms of social ordering. The idealization of contract as applied to exploitative systems creates intellectual tensions that have been resolved largely through acceptance by the exploited, or at least insufficient attempts to change the law.

(based on Luke Herrine and the LPE Project).

From start to finish, I present Contracts—perhaps the quintessential “private law” topic—as a study in public power. Ultimately, the question is whether a government institution (a court) will render a judgment and back it up with the threat of publicly authorized violence.

The [very first section](https://www.westlaw.com/Document/Ib0b3a381da5e11e2aa340000837bc6dd/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) of the Restatement (Second) of Contracts. “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”  Well then, when and how does “the law” (speaking for we, the people) choose to transform private promises into legal duties?

There are two subsidiary points here. First, when the law does transform promises into contracts, it delegates public power to private entities. Those entities then choose how to exercise that power, but this space of empowered private discretion is created by public choices. Such choices require justification in terms of public values. Those values might well counsel the establishment of zones of decentralized ordering, structured by individual promising. But we can only have an honest conversation about whether and how to do so after recognizing that the public constructs the private.

A second point underlines the first: the law draws distinctions among the promises it renders as contracts. Promise-ness alone does not command the law’s backing. This substantive point underlies that most notorious and abstruse of Contracts topics, the doctrine of consideration. Consideration can seem only marginally relevant because ordinary commercial cases rarely dispute it. But that is precisely the point: consideration becomes uninteresting only after bracketing out the full range of real-life promissory practices in order to commercialize Contracts. Indeed, one can flip the point. Arguably, applying contract law or not is precisely how we constitute a domain as commercial in character and distinguish it from other realms—realms where legal duties are allocated in different ways, even when they affect “economic” matters. (I have [developed](http://webshare.law.ucla.edu/Faculty/bibs/zatz/Zatz-PrisonLaborParadox.pdf) an analogous argument with regard to employment law.)

What best illustrates this constitutive role are the family relationships that by no coincidence populate many classic boundary-drawing cases around consideration. These family relationships, as well as thick relationships of solidarity, reciprocity, and human concern in employment settings, dominate cases like [*Hamer v. Sidway*](https://h2o.law.harvard.edu/collages/45070) (uncle-nephew), [*Ricketts v. Scothorn*](https://h2o.law.harvard.edu/collages/45082) (grandfather-granddaughter), [*Webb v. McGowin*](https://h2o.law.harvard.edu/collages/45075) (saving the boss’ life), [*Feinberg v. Pfeiffer Co.*](https://h2o.law.harvard.edu/collages/45085) (supporting the devoted long-term employee). These cases trouble the notion that consideration tracks a pre-existing line between the market sphere of bargains (enforceable) and a nonmarket sphere of gifts (unenforceable). Instead, we see a messy reality of “nonmarket” relationships structured through exchange and of “nonmarket” values governing relationships among commercial actors.

This general technique of ventriloquizing policy in the voice of party intent is ubiquitous. We see it also in Cardozo’s declaration in [*Jacob & Youngs v. Kent*](https://h2o.law.harvard.edu/collages/45198) that “[i]ntention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable,” and in the legal fictions of “implied” or “quasi” contracts that overcome the absence of consideration ([*Webb*](https://h2o.law.harvard.edu/collages/45075))—and even the absence of any promise at all. Indeed, such cases raise the tantalizing prospect that not just consideration but even promise is more of a fetish than a firm foundation.

**Contracts and Racialized Mass Incarceration**

**As we have learned, there are no punitive damages in contract law. But see,**

<https://www.aclu.org/issues/smart-justice/mass-incarceration/criminalization-private-debt>

**The Criminalization of Private Debt**

An estimated 77 million Americans, 1 in 3 adults, have a debt that has been turned over to a private collection agency. Thousands of these debtors are arrested and jailed each year because they owe money. Millions more are threatened with jail. The debts owed can be as small as a few dollars, and they can involve every kind of consumer debt, from car payments to utility bills to student loans to medical fees. These trends devastate communities across the country as unmanageable debt and household financial crisis become ubiquitous, and they impact Black and Latino communities most harshly due to longstanding racial and ethnic gaps in poverty and wealth.

Debtors’ prisons were abolished by Congress in 1833 and are thought to be a relic of the Dickensian past. In reality, private debt collectors — empowered by the courts and prosecutors’ offices — are using the criminal justice system to punish debtors and terrorize them into paying, even when a debt is in dispute or when the debtor has no ability to pay.

The criminalization of private debt happens when judges, at the request of collection agencies, issue arrest warrants for people who failed to appear in court to deal with unpaid civil debt judgments. In many cases, the debtors were unaware they were sued or had not received notice to show up in court.

There are tens of thousands of these warrants issued annually, but the total number is unknown because states and local courts do not typically track these orders as a category of arrest warrants. In a review of court records, the ACLU examined more than 1,000 cases in which civil court judges issued arrest warrants for debtors, sometimes to collect amounts as small as $28. These cases took place in 26 states (including FL, TX & CA) (but not, NY & NJ).

Even without arrest warrants, the mere threat of jail can be effective in extracting payment — even if that threat is legally unfounded. In the case of debts involving bounced checks, private collection companies now have contracts with more than 200 district attorneys’ offices that allow them to use the prosecutor’s seal and signature on repayment demand letters. It’s estimated that more than one million consumers each year receive such letters threatening criminal prosecution and jail time if they do not pay up. But review of company practices has documented that letters often falsely misrepresent the threat of prosecution as a means of coercing payments from unknowing consumers.

The Role of Civil Court Judges

State court judges have the power to order the debtor’s employer to garnish the debtor’s wages and authorize a sheriff to seize the debtor’s property. In more than 30 states, judges — including district court civil judges, small-claims court judges, clerk-magistrates, and justices of the peace — are allowed to issue arrest warrants for failure to appear at post-judgment proceedings or for failure to provide information about finances. These warrants, usually called “body attachments” or “*capias* warrants,” are issued on the charge of contempt of court. In some cases, debtors are threatened with jail for contempt of court if they do not pay or agree to payment plans.

Once arrested, debtors may languish in jail for days until they can arrange to pay the bail. In some cases, people were jailed for as long as two weeks. Judges sometimes set bail at the exact amount of the judgment. And the bail money often is turned over to the debt collector or creditor as payment against the judgment.

Many of those arrested said they had no idea a warrant had been issued for their arrest. They learned of the warrant only when police pulled them over for a broken taillight or traffic violation and the warrant showed up in computer records. Some were arrested at home in the middle of the night or at their workplace. In some cases, people were arrested when police officers came to their home because of an incident involving another family member or when they were witnesses to a crime and the police discovered the warrant after obtaining their identifying information. In other cases, debtors with warrants issued against them were arrested when law enforcement conducted a sweep of all residents of public housing who had outstanding warrants for any reason.

These arrests impose real costs on the courts and jails in time and resources. But the damage these arrests do to debtors — including those whose debts are disputed — in terms of lost wages, lost jobs, and psychological distress can be enormous. Arrest warrants, even if they don’t result in jailing, can cause long-lasting harm because such warrants may be entered into background check databases, with serious consequences for future employment, housing applications, education opportunities, and access to security clearances.

Local prosecutors have no role in civil debt collection lawsuits. But they have a central role when it comes to money owed due to bounced checks.

Every state has criminal laws dealing with bad or bounced checks, and prosecutors are required to review these cases to determine if they are subject to prosecution. Unfortunately, in many places, district attorneys seeking to get these cases off their desks and divert defendants from court have decided to hand over enforcement to private collection companies even when no crime has been committed. These companies face a conflict of interest when issuing repayment demand letters threatening criminal prosecution and jail time because they profit when an unwitting recipient pays up in response to a false threat of prosecution.

Private debt collectors have entered into hundreds of partnerships with local district attorneys’ offices to get people to pay on bounced check claims under threat of prosecution. Some collectors with these contracts send letters on the district attorney’s letterhead to threaten people with criminal prosecution, jail, and fines — even when the prosecutor hasn’t reviewed the case to see if a criminal violation occurred.

The people who are jailed or threatened with jail often are the most vulnerable Americans living paycheck to paycheck, one emergency away from financial catastrophe. In the more than 1,000 cases reviewed by the ACLU, many were struggling to recover after the loss of a job, mounting medical bills, the death of a family member, a divorce, or an illness. They included retirees or people with disabilities who are unable to work. Some were subsisting solely on Social Security, unemployment insurance, disability benefits, or veterans’ benefits — income that is legally protected from outstanding debt judgments.