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Taxi! Why Hailing a New Idea About Public Accommodation Laws May Be Easier than Hailing a Taxi

Danita L. Davis

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TAXI! WHY HAILING A NEW IDEA ABOUT PUBLIC ACCOMMODATION LAWS MAY BE EASIER THAN HAILING A TAXI

I. INTRODUCTION "TAXI!"

In recent years, many of the Nation's largest cities have reported instances of race discrimination by taxicab drivers.¹ After the widely publicized complaint made by popular actor Danny Glover that he was unable to hail a cab while visiting his daughter in Harlem, Former New York City Mayor, Rudy Giuliani, ordered undercover police officers to "put the sting on" taxi drivers who discriminate against black Americans trying to hail cabs.² Five cabs passed the black actor while he waited curbside for service.³ Chicago has also experienced a plethora of difficulty with its own cab fleet, including refusals to serve neighborhoods mostly occupied by minority residents and refusing black American fares altogether.⁴ Chicago's Commerce Commission has recently implemented a "Fare-A-Day" program that requires cabs to take at least one fare a day to an underserved (and mostly minority) neighborhood.⁵ Yet, many Chicago cabbies are outraged with the program, claiming that the program threatens drivers' safety by requiring them to take fares in dangerous parts of the city.⁶ Washington, D.C., also has been plagued with continuous litigation regarding taxicab discrimination over the past decade.⁷ As a result of mounting concerns,

¹ Stuart Taylor, Jr., *Cabbies, Cops, Pizza Deliveries, and Racial Profiling*, NAT'L J. (June 20, 2000), at <http://www.theatlantic.com/politics/nj/taylor2000-06-20.htm> (last visited Oct. 20, 2002); see also Marcus Cole, *Medallion Monopoly Drives Taxicab Racism*, 9 LIBERTY & L. (Feb. 2000), at http://www.ij.org/publications/liberty/2000/9_1_00_e.asp (last visited Oct. 20, 2002).

² Elisabeth Bumiller, *Cabbies Who Bypass Blacks Will Lose Cars, Giuliani Says*, N.Y. TIMES, Nov. 11, 1999, at A1; see also Monte Williams, *Danny Glover Says Cabbies Discriminated Against Him*, *id.*, Nov. 4, 1999, at B8.

³ Bumiller, *supra* note 2; Williams, *supra* note 2.

⁴ John Stinneford, *Cabbies Struck for Economic Liberty; City's New Taxi Law is a Lemon*, CHI. TRIB., July 8, 2001, at C19; see also Jill Blackman, *Cab Driver Sues City Over Anti-Discrimination Law*, *id.*, May 16, 2000, at M1; Clarence Page, *Putting a Stop to Taxicab Bias*, *id.*, Nov. 17, 1999, at C31.

⁵ Blackman, *supra* note 4; Page, *supra* note 4; Stinneford, *supra* note 4.

⁶ Blackman, *supra* note 4; Page, *supra* note 4; Stinneford, *supra* note 4.

⁷ See *Floyd-Mayers v. Am. Cab Co.*, 732 F. Supp 243 (D.C. Cir. 1990); see, e.g., WASHINGTON LAWYERS COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; PUBLIC ACCOMMODATIONS PROJECT, at <http://www.washlaw.org> (last visited Oct. 20, 2002) (listing cases filed by the committee which include *Green v. Your Way Taxi* (D.D.C.) (purporting

Washington, D.C. Mayor Anthony Williams met with representatives of the metropolitan area taxicab drivers, as well as concerned citizens, to discuss the issue.⁸ Mayor Williams agreed that a balance must be struck between the taxi drivers' safety and the civil rights of citizens.⁹

Congress passed Title II of the Civil Rights Act of 1964¹⁰ ("Act of 1964") to prohibit racial discrimination in places of public accommodation. However, for reasons examined in this Note, the Act of 1964 is rarely used to litigate claims of race discrimination by taxi drivers.¹¹ Furthermore, states have a varying degree of their own public accommodation statutes, leaving many to question whether common carriers are even included.¹² Municipal policies have also been developed to combat the problem, some demanding automatic confiscation of the cab if a complaint is alleged, others requiring cab drivers to take at least one fare a day to underserved neighborhoods or face suspension.¹³ Many of these policies fail to balance the interests of drivers, consumers, and taxi medallion owners in the attempt to eradicate racial discrimination in the taxi industry.

This Note examines Title II of the Civil Rights Act of 1964 with regard to public accommodation laws and common carriers. Specifically, this Note discusses why racial discrimination exists in taxicab service and how modern public accommodation laws and municipal polices often fail at addressing the issue. Part II of this Note examines the history of public accommodation laws beginning from the passage of the civil rights acts after the Civil War, up to the effects of the decisions in *The Civil Rights Cases*¹⁴ and *Plessy v. Ferguson*.¹⁵ This Part also discusses the exclusion of "duty to serve" and the emergence of

that plaintiff was refused a ride because of his race); *Jones v. Standard Taxi Cab* (D.D.C) (arguing that plaintiff was discriminated against on the basis of race and her residence)); see also *Bolden v. J & R Inc.*, No. 99-1255 (6K), 2001 U.S. Dist. LEXIS 3231 (D.C. Cir. 2000), *aff'd on other grounds*, 135 F. Supp. 2d 177 (D.C. Cir. 2001) (arguing that Bolden was discriminated against on the basis of race when the cab driver refused to service him).

⁸ Emory Julian Mills, *Taxi Troubles: Balancing Safety, Civil Rights*, THE COMMON DENOMINATOR (Nov. 29, 1999), at http://www.thecommondenominator.com/112999_new8.html (last visited Oct. 20, 2002).

⁹ *Id.*

¹⁰ 42 U.S.C. § 2000a (2000).

¹¹ See *infra* Part III.A.

¹² See *infra* notes 201-07 and accompanying text.

¹³ See *infra* notes 217-36 and accompanying text.

¹⁴ 109 U.S. 3 (1883).

¹⁵ 163 U.S. 537 (1896); see *infra* Part II.

contractual rights.¹⁶ Part III discusses the elements necessary to prove a case of taxicab discrimination and evaluates the different theories and dynamics behind race discrimination by taxicab drivers.¹⁷ Part IV examines modern civil rights laws, exploring the reasons for the ambiguity in public accommodation laws regarding common carriers.¹⁸ Furthermore, this Part discusses why modern public accommodation laws and policies do not suffice in combating racial discrimination in the taxicab industry.¹⁹ Finally, by presenting a model municipal anti-discrimination policy for taxicab service, as well as a model state public accommodation statute that extricates language from effective state statutes regarding discrimination in common carriers, Part V suggests a reemergence of the common law "duty to serve."²⁰

II. THE FLAT TIRE: THE ORIGINAL CIVIL RIGHTS LAWS AND THE BLOWOUTS OF *THE CIVIL RIGHTS CASES* AND *PLESSY V. FERGUSON*

Congress passed multiple Civil Rights Acts from 1866 to 1875.²¹ The first of these acts, enacted on March 13, 1866, was reenacted on April 9th

¹⁶ See *infra* Part II.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part IV.

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part V.

²¹ CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY 227 (Albert P. Blaustein & Robert L. Zangrando eds., 1968) [hereinafter CIVIL RIGHTS AND THE AMERICAN NEGRO]; see LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 655 (2d ed. 1995). The Civil Rights Acts of 1866, 1870, 1871, and 1875 were laws passed by Congress after the Civil War to guarantee the rights of blacks. EPSTEIN & WALKER, *supra*. The first civil rights act passed by Congress after the Reconstruction period was the Civil Rights Act of 1957. *Id.* The 1957 Act, through empowering the Department of Justice to seek injunctions against any deprivation of voting rights, was designed to secure the right to vote for African Americans. *Id.* In addition, the Act established a Civil Rights Division and a Commission to investigate civil rights violations. *Id.*; see also JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN 54 (1999). The Civil Rights Act of 1866 was the first act that specifically addressed the black codes. HOWARD, *supra*. President Johnson vetoed the bill, which eventually became the Act of 1866, because "the measure represented an unprecedented intrusion of the Federal Government into local affairs." *Id.* The Act was the first major piece of legislation passed over presidential veto. *Id.* at 53. The second Act, the Enforcement Act of 1870, criminalized official and private interference with voting or registering to vote to help ensure compliance with the newly enacted Fifteenth Amendment. *Id.* at 64. To strengthen the Enforcement Act, Congress passed the Klan Act of 1871, which aimed at the group by prohibiting obstruction of law via the use of force, intimidation, or threat. *Id.* at 65. The Civil Rights Act of 1875 prohibited discrimination on racial grounds in the operation of inns, public conveyances on land or water, theaters, and other places of public amusement. *Id.* at 68.

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of that same year over President Andrew Johnson's veto.²² This Act was designed to safeguard the newly emancipated slaves from discrimination by giving African Americans "full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens."²³ The last of the acts, and the last until 1957, included a public accommodation section which stated:

All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous conditions of servitude.²⁴

Yet, even before these Acts, there was a common law notion of "duty to serve" which, for the purposes of this Note, should be analyzed before a full evaluation of the legal framework of public accommodation laws can be made.²⁵

A. *Wanna Ride? Holding Oneself Out as Open to the Public and the Duty to Serve*

Early English cases defined a "common carrier" as "any man undertaking for hire to carry the goods of all persons indifferently."²⁶ The decisive part of whether one was a common carrier was "whether one held oneself out as available to take on business from anyone in the

²² See Civil Rights Act of 1866, 14 Stat. 27, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 229-30.

²³ CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 228 (quoting the original Civil Rights Act of 1866).

²⁴ See Civil Rights Act of 1875, 18 Stat. 335, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 241.

²⁵ See *infra* this Part, Part II.

²⁶ See *Gisborn v. Hurst*, 91 Eng. Rep. 220 (K.B. 1710), cited in Joseph William Singer, *No Right to Exclude, Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1306-08 (1996) (explaining that "any man undertaking for hire to carry the goods of all persons indifferently . . . is, as to this privilege, a common carrier . . ."); *Lane v. Cotton*, 88 Eng. Rep. 1458 (K.B. 1701), cited in Singer, *supra*, at 1304-06 (explaining that "one that has made profession of a public employment, is bound to the utmost extent of that employment to the public").

public.”²⁷ American legal commentators in the early nineteenth century agreed that the basic duty of common carriers is to serve the public.²⁸ Justice Joseph Story, in his commentaries regarding the law of bailments, explained the duty of common carriers as “to receive and carry all goods offered for transportations upon receiving a suitable hire.”²⁹ Justice Story further defined a common carrier as one who performs his trade as a public employee and whose obligation is to take passengers whenever they offer their services.³⁰ Before new civil rights laws were passed during the Reconstruction period, there was a general idea that holding oneself out as open to the public requires one to fulfill the service undertaken, especially when others rely on you to fulfill this obligation.³¹ Contemporary definitions mirror the same idea, stating that a common carrier is “a business or agency that is available to the public for transportation of persons, goods, or messages.”³²

²⁷ Singer, *supra* note 26, at 1306-08. Singer believes that “common” and “public” are synonyms and if they held themselves out to the public, then they were engaged in a public trade or employment. *Id.*

²⁸ JAMES KENT, COMMENTARIES ON AMERICAN LAW 1826-1830, at 464-65 (photo reprint in 1971), cited in Singer, *supra* note 26, at 1312. Chancellor James Kent, in his commentaries, defined common carriers as “those persons who undertake to carry goods generally, and for all people indifferently, for hire,” and further noted “[t]hey are bound to do what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action.” *Id.*; see also *infra* note 30 and accompanying text.

²⁹ Singer, *supra* note 26, at 1312 (citing JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW (1812)).

³⁰ STORY, *supra* note 29, §§ 495-508. In his opinion in *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835), a case involving transportation of passengers on a steamboat, Justice Story stated that

There is no doubt, that this steamboat is a common-carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff.

Jencks, 13 F. Cas. at 443. Justice Story further listed examples of common carriers as “innkeepers, farriers, and other carriers for common public employment.” *Id.*

³¹ See *Pinkerton v. Woodward*, 33 Cal. 557, 597 (Cal. 1867), which bases the duty to serve the public on the “public policy” of providing “for the protection and security of the travelers.” *Pinkerton*, 33 Cal. at 597. *Pinkerton* suggests a conception of a social relationship that understands the act of holding oneself out to the public as the voluntary acceptance of a social role that creates a duty when others rely on one’s fulfillment of that role. *Id.*

³² MERRIAM WEBSTER’S DICTIONARY OF LAW 88 (1996). *Cf. id.* at 104 (defining contract carrier as “a transport line that carries persons or property to one or a limited number of shippers”).

Even though there appeared to be a common law duty to serve, the law was often silent as to issues of race discrimination in public accommodations. There were few statutes and little case law that fully delved into the discussion of discrimination in public accommodations until after the Civil War.³³ The first materials to scrupulously discuss the issue were about railroad travel.³⁴ Edward Lillie Pierce's *A Treatise on American Railroad Law* included a passage that extended access to places of public accommodation to black passengers.³⁵ Yet, despite this attempt to include black Americans in public accommodations, discrimination still existed.³⁶ Even though scholarly and judicial opinions suggested the duty to serve applied to businesses that held themselves out to the public, racist implications after the Civil War led to a narrowing of public accommodation law.³⁷ After the Civil War and emancipation, a

³³ Singer, *supra* note 26, at 1334. Singer states that the first cases that expressly addressed the question of obligation of common carriers were decided in 1858 and 1859. *Id.* at 1331. He suggests the cases to mean that "in the North . . . common carriers had duties to serve free Negroes but that racial segregation in these facilities would constitute a 'reasonable regulation' and thus not constitute a violation of the duty to serve." *Id.* at 1331-32.

³⁴ EDWARD LILLIE PIERCE, *A TREATISE ON AMERICAN RAILROAD LAW* 489 (1857), *cited in* Singer, *supra* note 26, at 1334 (explaining that Pierce's statement on race in public accommodations was one of the first in the United States to explicitly confirm the right of access to public accommodations to black Americans).

³⁵ *Id.* Pierce wrote:

Duty of the company to receive Passengers and to carry them according to its Professions. -The company is under a public duty, as a common carrier of passengers, to receive all who offer themselves as such and are ready to pay the usual fare, and is liable in damages to a party whom it refuses to carry without a reasonable excuse. It may decline to carry persons after its means of conveyance have been exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language, or vulgar conduct—renders them an annoyance to other passengers. But it *cannot make unreasonable discrimination between persons soliciting its means of conveyance, as by refusing them on account of personal dislike, their occupation, conditions in life, complexion, race, nativity, political or ecclesiastical relations.*

Id. at 1334-35 (emphasis added).

³⁶ See *Day v. Owen*, 5 Mich. 520 (1858) (holding to the effect that common carriers *could not entirely* refuse to serve African Americans; yet, in the 1890s when the Jim Crow laws produced the separate but equal doctrine, so too did it produce an immunization from the duty to serve); see also *State v. Kimber*, 3 Misc. 58 (Ct. Common Pleas 1859), *explained in* Singer, *supra* note 26, at 1357. The Jim Crow Laws were justified with the absence of a right to social equality and the emergence of property rights. Singer, *supra* note 26, at 1357.

³⁷ Singer, *supra* note 26, at 1344; see *McCrea v. Marsh*, 78 Mass. 211 (1858) (establishing the idea that places of entertainment were free to choose their customers at will). In *McCrea*, the plaintiff bought a ticket to a theater and was refused admittance on the basis of

right to exclude, which served to limit these newfound civil rights, substituted the presumption of equal access.³⁸

B. *A Temporary Stop: The Passage of the Civil Rights Act of 1875*

Although the Civil War and the Reconstruction period elevated black Americans to the status of free citizens, little effort was put forth to ensure the right to equal and full access of public accommodations.³⁹ During this era, racial hostility often manifested itself as a denial to public accommodations.⁴⁰ States continued to perpetuate black

color. *McCrea*, 78 Mass. 211. The judge ruled that the ticket was only an executory contract, and when the owner refused to allow him to enter, the owner intended not to fulfill the contract, thus allowing an action on the contract and not a tort action. *Id.* at 212. Singer further notes that actions taken after this ruling led to a narrowing of public accommodation law, authorizing businesses to choose customers at will. Singer, *supra* note 26, at 1344. The presumption of access to public accommodations free from racial discrimination was being reversed and eventually being replaced by a right to exclude. *Id.* at 1345. The issue of public access was amalgamated in the issue of racial segregation, thus limiting its separate struggle. *Id.*

³⁸ Singer, *supra* note 26, at 1344. Singer notes that when the courts were forced to address the issue of segregation in public accommodations, "the courts appeared to adopt the position that the longstanding custom of racial segregation constituted a reasonable regulation of property to protect the interests of the majority of patrons, while acknowledging a duty to serve customers of all races." *Id.*; see LEON F. LITWACK, *NORTH OF SLAVERY, NEGRO IN FREE STATES* 107-12 (1961). After the Civil War, establishments, even in the North, did not provide access to African Americans in public accommodations, and those that did were almost certain to segregate. *Id.*

³⁹ EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 29 (1990). The country after the Civil War struggled to piece itself back together. *Id.* Many Republicans who found themselves in power after the war focused their attention on reconstruction of the Nation. *Id.* In the first decades after the completion of the war, the Congress found itself contemplating federal action on civil rights as an aspect of reconstruction policy and later proposing amendments to the Constitution to rectify concerns of the unjust treatments of blacks. *Id.*

⁴⁰ A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 94 (1996). Higginbotham suggests that the Supreme Court continued to legitimize the resurrection of the inferiority precept of African Americans by "blinding itself to the unequal treatment, and partly by creating unnecessary legal doctrine that had harsh racial consequences." *Id.* Although formal law of public accommodations made no distinctions based on race in the period after Reconstruction, other laws were passed that did draw this distinction. Singer, *supra* note 26, at 1336. A number of states passed laws prohibiting the immigration of free blacks into the states. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 26 (1988); see, e.g., Acts of the General Assembly of the State of South Carolina 1864-1865, reprinted in *CIVIL RIGHTS AND THE AMERICAN NEGRO*, *supra* note 21, at 218. The Act of South Carolina, better known as a "black code," stated that people who did not have a known place of abode and some lawful and reputable employment would be punished for the crime of "public grievance." Acts of the General Assembly of the State of South

inferiority in many ways, in particular, through exclusion from equal access to major public accommodations, such as railways.⁴¹ Since the inception of the United States, there has been a constant struggle by many minority Americans to acquire equal access to public accommodations.⁴² Congress eventually took up this debate in the 1870s and, despite intense hostility and tension, passed the Civil Rights Act of 1875 to provide black Americans with equal access to public accommodations.⁴³

However, despite its clear and precise language entitling full and equal enjoyment of public accommodations, the passage of the 1875 Act failed to secure black Americans' access to public accommodations.⁴⁴ As

Carolina 1864-1865, reprinted in *CIVIL RIGHTS AND THE AMERICAN NEGRO*, supra note 21, at 218. These statutes are evidence of the most vituperative type of law, which gave places of public accommodation the right to exclude free blacks from their establishments. Singer, supra note 26, at 1336.

⁴¹ Patricia Hagler Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI.-KENT L. REV. 993, 995 (1995); see HIGGINBOTHAM, supra note 40, at 94. Higginbotham notes that the "unfair and unjust treatment of African-Americans in public accommodations during the 1860's, 1870's, and 1880's was not much different from the treatment they received during the antebellum period." HIGGINBOTHAM, supra note 40, at 95; see, e.g., *Smoot v. Ky. Cent. R.R. Co.*, 13 F. 337 (C.C.D. Ky. 1882). Belle Smoot purchased a ticket in the first class ladies' car and was refused entrance on the basis of race. *Smoot*, 13 F. at 340. Smoot sued under the Civil Rights Act of 1875 and was denied damages, based on the court's rationale that the prohibitions of the Civil Rights Act applied only to state action, not to those of individuals. *Id.* at 338. For examples of cases that show the evolution of the "separate but equal" doctrine, see also *Hall v. DeCuir*, 95 U.S. 485 (1877); *Green v. City of Bridgeton*, 10 F. Cas. 1090 (S.D. Ga. 1879); *United States v. Dodge*, 25 F. Cas. 882 (W.D. Tex. 1877); *Chicago & N. W. R.R. Co. v. Williams*, 55 Ill. 185 (Ill. 1870); *Westchester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (Pa. 1867).

⁴² HIGGINBOTHAM, supra note 40, at 95. Higginbotham points out the "continuous tension among some white Americans as to whether hatred of African-Americans is to be sanctioned or whether the state and federal government must assure African-Americans the full panoply of citizenship rights, including equal access to public accommodations." *Id.*

⁴³ Civil Rights Act of 1875, 14 Stat. 27, reprinted in *CIVIL RIGHTS AND THE AMERICAN NEGRO*, supra note 21, at 241. The preamble of the 1875 act states that equality was "the appropriate object of legislation." *Id.*

⁴⁴ *Id.* at 218. The Act contained a provision which stated:

That all persons within the jurisdiction of the United States shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

a result of increased class tensions and the inability of judge-made doctrines to address these tensions of interracial contracts, a vast majority of states adopted their own public accommodation laws.⁴⁵ Determination of the status of black Americans took shape gradually under the influence of economic and political conflicts among the divided whites—conflicts that were eventually resolved at the expense of the black Americans.⁴⁶ For example, many of the states interpreted the statutes in a manner that defined separate accommodations as being equal.⁴⁷ These new separate accommodation laws and segregation codes were comparable to the black codes of the earlier era.⁴⁸ This practice was judged sufficient to comply with the mandate of equal service and illustrated how custom and actual practice diverged from the formal

Id. at 241. Despite the clear language of this Act, many African Americans experienced racial violence that was analogous to the restoration and redemption governments in the South. HOWARD, *supra* note 21, at 125. For example, in April 1873, after a disputed gubernatorial election in Louisiana, an army of Klan members stormed the Courthouse in Grant Parish, Louisiana, and killed and mutilated the bodies of at least sixty freed men. HIGGINBOTHAM, *supra* note 40, at 88. Investigators reported that the mob viewed the conflict over the local political offices as a “test of white supremacy” and joined with other mobs to restore white rule. *Id.* Following a two-month trial, the jury acquitted one defendant and was unable to reach a verdict on the other nine. *Id.* On retrial, only three were convicted of conspiracy and the eight remaining were acquitted of the murder charges. See *United States v. Cruikshank*, 92 U.S. 542, 544-45 (1876).

⁴⁵ Minter, *supra* note 41, at 1009. By 1896, all but three states in the former Confederacy—South Carolina, North Carolina, and Virginia—enacted laws separating railroad cars on the basis of race. *Id.* The Supreme Court’s decision in *Plessy v. Ferguson* removed any barrier to their enforcement. *Id.*; see Louisiana Railway Accommodations Act, Louisiana Laws, 1890, No. 111, 152-54, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 297. Section 1 of the Act stated:

[T]hat all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations

Louisiana Railway Accommodations Act, Louisiana Laws, 1890, No. 111, 152-54, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 297.

⁴⁶ C. VANN WOODWARD, *STRANGE CAREER OF JIM CROW* 7 (1957).

⁴⁷ See generally Act of Mar. 24, 1875, ch. 130 § 1 Tenn. Pub. Acts (prohibiting racial discrimination by railroads and other common carriers), referenced in Singer, *supra* note 26, at 1356-57. For example, in response to the federal public accommodations act, Tennessee passed an anti-public accommodation act that released businesses from “any obligation to entertain, carry or admit, any person, whom he shall for any reason, choose not to entertain, carry or admit.” Singer, *supra* note 26, at 1356. Furthermore, these businesses could “control the access and admission or exclusion of persons in any manner as perfect and complete as that of the owners of any private house, carriage, or private theater, or places of amusement for his family.” *Id.*

⁴⁸ WOODWARD, *supra* note 46, at 7.

law.⁴⁹ As a result of the ambiguous, often changing, and confusing legal treatment of the public accommodation laws, and because black Americans began to challenge the new laws under the guise of the Act of 1875, the Supreme Court was forced to address the constitutionality of the Civil Rights Act of 1875 in its landmark decision of *The Civil Rights Cases*.⁵⁰

C. *A Bump in the Road: The Civil Rights Cases*

The Civil Rights Cases were a consolidation of five lower court cases, which attempted to seek redress for violations of unequal treatment of black Americans.⁵¹ The cases arose in five states and involved charges of denial of public accommodations in inns, denial of seats in theaters, and the unequal treatment of black Americans who sought to ride in the ladies' car of a train.⁵² These cases provided the Supreme Court with the opportunity to affirm the national antidiscrimination policy and, more specifically, to condemn racism in the area of public accommodations.⁵³ On their face, these consolidated cases determined whether the Supreme Court was willing to assure equal dignity to black Americans in places of public accommodation, and the clear answer that emerged was that it was not.⁵⁴

The formal legal issue that arose in these cases was whether Congress had the authority, under the Thirteenth or Fourteenth

⁴⁹ Singer, *supra* note 26, at 1357. For example, the Tennessee anti-public accommodation act abrogated the duty to serve. *Id.* at 1356. Inns, common carriers, and places of entertainment were released from "any obligation to entertain, carry or admit, any person, whom he shall for any reason, choose not to entertain, carry or admit." *Id.* (citing 1875 Tenn. Pub. Acts 216-17).

⁵⁰ 109 U.S. 3 (1883). The decision was a compilation of cases involving alleged private racial discrimination. *Id.* In each of these cases, persons of color were denied access to public facilities covered under the 1875 act. *Id.* The Supreme Court found no authority in the Constitution for the passage of the law and declared the Act void. *Id.*

⁵¹ *Id.* at 3. Five cases were consolidated under the name of the *Civil Rights Cases* to address the issues of the constitutionality of the Civil Rights Act of 1875-*United States v. Stanley, United States v. Ryan, United States v. Nichols, United States v. Singleton, and Robinson & Wife v. Memphis & Charleston Railroad Co.* *Id.*; see also ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* 46 (1995).

⁵² *The Civil Rights Cases*, 109 U.S. at 3. These states include: Kansas, Missouri, California, New York, and Tennessee. *Id.*

⁵³ HIGGINBOTHAM, *supra* note 40, at 98.

⁵⁴ *Id.* at 104. Higginbotham notes that the Court's reasoning in the cases "demonstrates that it was unwilling to sanction federal protection and guarantees for rights for African Americans, whereas previously it had no reluctance to enforce the total repression of African Americans." *Id.*

Amendment, to enact the Civil Rights Act of 1875, prohibiting discrimination in public accommodations.⁵⁵ The Court held that Congress could not prohibit racial discrimination, asserting that the Fourteenth Amendment does not give Congress the power to legislate subjects that are within the domain of state legislation, nor does it authorize Congress to create a code of municipal law for the regulation of private rights.⁵⁶ The opinion advocated that a “social right, rather than a civil right, was involved in these cases . . . [and] this social right . . . was . . . used to preclude African Americans from equal treatment in public accommodations regardless of their individual character or merit.”⁵⁷ Justice Bradley further opined that when African Americans were denied access to public accommodations, the denial had nothing to do with any badge or incidence of slavery or servitude prohibited by the Thirteenth Amendment, nor did it involve the privileges and immunities and equal protection guarantees of the Fourteenth Amendment.⁵⁸

The creation of a “racially hostile constitutional doctrine” resulting from this decision did not go unnoticed by all members of the Court.⁵⁹ In his dissenting opinion, Justice Harlan noted that the first sentence of the Fourteenth Amendment, which declares that all persons born or naturalized in the United States are citizens of the United States and of the state wherein they reside, gave Congress the power to declare, through legislation, the civil rights of citizens according to the Amendment’s fifth section.⁶⁰ Harlan concluded that one of these civil

⁵⁵ *The Civil Rights Cases*, 109 U.S. at 5.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 24. Bradley wrote:

[I]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guest he will entertain, or as to the people he will take into his *coach or cab or car* or admit to his concert of theatre or deal with in other matters or intercourse or business.

Id. at 24-25 (emphasis added).

⁵⁹ HIGGINBOTHAM, *supra* note 40, at 106. The Court could have found that the Fourteenth Amendment gave Congress the power to declare, through legislation, what the civil rights of citizens were. *Id.* But, the Court disregarded the first sentence of the Amendment, which purports that the citizens are subject to the jurisdiction of the United States and the state in which they reside, and instead focused solely on the validity of the Amendment as a grantor of universal rights. *Id.*

⁶⁰ *The Civil Rights Cases*, 109 U.S. at 45-47 (Harlan, J., dissenting). Justice Harlan stated, “I am of the opinion that such discrimination practised [sic] by corporations and individuals in exercise of their public or quasi-public functions is a badge of servitude the

rights was freedom from racial discrimination.⁶¹ Yet, Harlan's ideas did not persuade the rest of the Court.⁶²

The decision in *The Civil Rights Cases* hindered the civil rights movement of black Americans by "distorting the definition of social rights."⁶³ The decision was "oblivious . . . to the precept of black inferiority and the enforcement mechanisms used by whites to make African Americans powerless."⁶⁴ This effort to revitalize the precept of black inferiority, however, could be seen as intentional, in light of the fact that seven years later the Court legitimized the tolerance of unequal treatment with the doctrine known as "separate but equal."⁶⁵

D. *The Swallowing Pothole: The Decision of Plessy v. Ferguson and the "Separate But Equal" Doctrine in Public Accommodations*

As the Reconstruction Acts and their enforcement slowly waned, political forces in the South began to reassert the discriminatory precepts that were once the focus of the new legislation.⁶⁶ During this period, also known as the Jim Crow era, the movement to achieve racial equality

imposition of which Congress may prevent under its power, by appropriate legislation." *Id.* at 43.

⁶¹ *Id.* at 48.

⁶² *Id.* at 11.

⁶³ HIGGINBOTHAM, *supra* note 40, at 106. Higginbotham implies that the ruling in the *Civil Rights Cases* was advocated on fictitious, unfounded constitutional principles. *Id.* Justice Bradley proposed the idea that what was at stake in the cases was not a civil right but a "social right." *Id.* The "social right" notion was then used to preclude blacks from equal treatment in public accommodations. *Id.* Furthermore, Higginbotham notes that the majority could have found, as Harlan noted in his dissent, that the first sentence in the Fourteenth Amendment, which states that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State where they reside," gave Congress the power to declare the civil rights of the citizens. *Id.* "The Court's relative disregard of the first section of section 1 and its focus solely on the second sentence diluted the vitality of the Amendment as a guarantor of universal civil rights." *Id.*

⁶⁴ *Id.* at 106.

⁶⁵ *Id.* at 107.

⁶⁶ EPSTEIN & WALKER, *supra* note 21, at 658. Although Congress attempted to give force to the new amendments to the Constitution passed during Reconstruction to ensure rights of blacks (Thirteenth, Fourteenth, and Fifteenth Amendments), the Supreme Court did not follow suit. *Id.* The Court did not construe the new amendments broadly, nor did they support legislation designed to enforce them. *Id.* In *United States v. Harris*, 106 U.S. 629 (1883), and *The Civil Rights Cases*, 109 U.S. 3, major provisions of the Civil Rights Acts passed in 1871 and 1875 were nullified. *Id.* In the South, where ninety percent of the minority population lived, states began to enact laws that reimposed an inferior legal status that commanded a strict separation of races. *Id.*

came to a standstill with the enactment of laws that reimposed the idea of black inferiority.⁶⁷ The segregation statutes of the 1890s put black Americans back into an “ambiguous” status, which had existed immediately after the Civil War.⁶⁸ One such state statute was the subject of controversy in *Plessy v. Ferguson*, arguably the most important civil rights case ever to be decided by the Supreme Court.⁶⁹

In 1868, Louisiana adopted a number of measures to promote legal equality.⁷⁰ Black Americans were given “the same civil, political, and public rights and privileges, including the equal access to public conveyances and all places of business, or of public resort, or for which a license is required and equal educational opportunity” as white Americans.⁷¹ However, less than twenty years later, segregation laws replaced the idea of equality and revived the idea of black inferiority.⁷² The Louisiana Railway Act, enacted in 1890, required segregation on railroads and was premised on notions of black inferiority.⁷³ This new statute was an example of how white-controlled southern legislatures attempted to “assure white superiority” by requiring segregation of the

⁶⁷ Laws of Tennessee, 1901, Ch. 7, House Bill No. 7, at 9, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 315. The Tennessee Jim Crow Law in education is a typical example of Jim Crow legislation enacted throughout the South. Section I provides: “Be it enacted by the General Assembly of the State of Tennessee, That hereafter it shall be unlawful for any school, academy, college or other place of learning to allow white and colored persons to attend the same school, academy, college or other place of learning.” *Id.*

⁶⁸ HIGGINBOTHAM, *supra* note 40, at 109. Higginbotham notes that within twenty years after the Civil Rights Act of 1875, the first circular civil rights journey was complete: “from non-rights to rights to non-rights again.” *Id.*

⁶⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896); see Louisiana Railway Accommodations Act, Louisiana Laws, 1890, No. 111, 152-54, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 29.

⁷⁰ HIGGINBOTHAM, *supra* note 40, at 109. See generally LA. CONST. of 1868, arts. I, XIII, CXXXV (giving African Americans the same civil, political, and public rights, as well as including equal access to public conveyances and equal educational opportunities as whites).

⁷¹ HIGGINBOTHAM, *supra* note 40, at 109-10.

⁷² *Id.* at 110.

⁷³ Louisiana Railway Accommodations Act, Louisiana Laws, 1890, No. 111, 152-54, reprinted in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 297. The statute provided:

[A]ll railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations

Id.

racess.⁷⁴ The true meaning of the statute would become obvious when its constitutionality was challenged seven years later.⁷⁵

Homer Adolph Plessy was arrested for refusing to ride in the colored coach on a Louisiana railway.⁷⁶ After being imprisoned in New Orleans for a violation of the Louisiana Railway Act of 1890, Plessy instituted an action based on the constitutionality of the statute, claiming it violated the Thirteenth and Fourteenth Amendments.⁷⁷ The majority opinion in *Plessy* opined that segregation in public accommodations did not amount to servitude or a state of bondage for black Americans.⁷⁸ After rejecting the Thirteenth Amendment argument, the majority also concluded that the statute's use of a legal distinction founded in the color of the two races was not violative of the Constitution and, furthermore, found no validity in the argument that racial segregation stamps the colored race with a badge of inferiority.⁷⁹ Ironically, the Court relied on a number of cases that were decided *prior* to the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments when constructing its decision.⁸⁰

⁷⁴ HIGGINBOTHAM, *supra* note 40, at 111. Higginbotham suggests that 1890 segregation law was premised on notions of black inferiority and "[i]nteraction with whites on an equal basis challenged these notions and threatened to overthrow the racial thinking that developed during slavery." *Id.* at 110-11. Consequently, the white-controlled legislature attempted to enforce the precept of black inferiority by enforcing their segregationist statutes. *Id.* at 111.

⁷⁵ See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (challenging the segregation statute passed by Louisiana).

⁷⁶ *Id.* at 541-42.

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguishable from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

Id. at 543.

⁷⁷ *Id.* at 537. Homer Adolph Plessy, one-eighth African American and seven-eighths white, was arrested for refusing to ride in the colored coach on a Louisiana railway. *Id.* Plessy was forcibly ejected from the train and imprisoned in New Orleans for a violation of the Railway Act of 1890. *Id.* The defendant, Ferguson, was the judge designated to conduct the trial. *Id.* The pleas by Plessy to prohibit Ferguson from hearing the cases were denied by the Louisiana Supreme Court, and, thus, the Supreme Court heard the issue. *Id.*

⁷⁸ *Id.* The Court concluded that the segregation statute separating the races did not promote the inferiority of African Americans and stated, "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

⁷⁹ *Id.* at 549-51.

⁸⁰ *Id.* at 537. The Court cited to *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850), a decision in the 1850s which allowed school segregation. *Id.* at 544. The Court also cited to

This reliance led to the precept that the intent and meaning of the Civil War and Reconstruction Amendments were irrelevant.⁸¹

Although many states endorsed Jim Crow laws before *Plessy*, the Supreme Court's approval of the "separate but equal" doctrine legitimized racism under state law.⁸² *Plessy* sanctioned the continuing oppression of black Americans by sanctioning the concept of "separate but equal" when, in fact, the system in practice was "separate and unequal."⁸³ This precept of racial segregation prevailed for the next half-century.⁸⁴

E. *Why the Detour? What Happened to the Duty to Serve?*

According to *Plessy*, separation did not constitute inequality under the Fourteenth Amendment as long as the facilities and opportunities were similar.⁸⁵ The "separate but equal" doctrine helped maneuver full-scale segregation.⁸⁶ Legislatures in the South passed a variety of statutes as a result of *Plessy*.⁸⁷ These statutes, designed to keep black Americans

West Chester & Philadelphia Railroad Co. v. Miles, 55 Pa. 209 (1867), in which the court used racial fears and precepts of natural law to justify segregation. *Id.* at 548. In *Miles*, the court stated that "[t]he tendency of intimate social intermixture is to amalgamation, contrary to the law of races." *Miles*, 55 Pa. at 213.

⁸¹ HIGGINBOTHAM, *supra* note 40, at 114. Higginbotham suggests that the Supreme Court's use of the *Miles* case, which announced that "God has made" African Americans "dissimilar," further supported that the Civil War Amendments were futile. *Id.*

⁸² *Id.* at 117. Higginbotham characterizes the opinion in *Plessy* as the "final and most devastating judicial step in legitimization of racism under state law." *Id.*

⁸³ *Id.* at 117-18 (citing ANTHONY LEWIS, *THE SCHOOL DESEGREGATION CASES, PORTRAIT OF A DECADE 17* (1965)). Lewis notes that the "equality" part of the "separate but equal" doctrine was being ignored. *Id.* Segregated public facilities became increasingly unequal, and the blacks became more and more disadvantaged. *Id.*; *see id.* at 117 (citing DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 452 (1973)). For example, in South Carolina in 1915, schools were paying an average of \$23.76 on the education of a white student, compared to \$2.91 spent on black students in the segregated schools. *Id.*

⁸⁴ *Id.* at 118.

⁸⁵ *Plessy*, 163 U.S. at 548 (stating that "enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of the law, nor denies him the equal protection of the laws").

⁸⁶ EPSTEIN & WALKER, *supra* note 21, at 661. Since, according to the Supreme Court, separation of the races did not constitute inequality under the Fourteenth Amendment, as long as facilities were somewhat similar, the Equal Protection Clause permitted this separation. *Id.*

⁸⁷ Laws of Tennessee, 1901, Ch. 7, House Bill No. 7, at 9, *reprinted in* CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 315. For example, Tennessee's Jim Crow Law in education is typical legislation enacted throughout the South. The law prohibited Negroes

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segregated, affected “transportation, schools, hospitals, parks, public rest rooms and water fountains, libraries, cemeteries, recreational facilities, hotels, restaurants, and almost every other public and commercial facility.”⁸⁸

After the *Plessy* decision, most American state courts interpreted the Constitution to allow racial discrimination.⁸⁹ During the first half of the twentieth century, the “separate but equal” doctrine dictated race law as the states continued to pass and enforce discriminatory laws guarded from legal consequences.⁹⁰ During this era, the laissez-faire ideology emerged as industry progressed, as did the classical legal thought that brought with it the expansive protections for freedom of contract and private property rights.⁹¹

The Jim Crow era narrowed the common law duty to serve, with courts finding valid substantial regulations regarding property that were specifically designed to promote segregation.⁹² Although it appears to

and whites from being educated in the same classrooms and also forbade their attending the same schools. *Id.*

⁸⁸ EPSTEIN & WALKER, *supra* note 21, at 661-62.

⁸⁹ A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 495 n.49 (1990).

⁹⁰ EPSTEIN & WALKER, *supra* note 21, at 662. Courts in the South began to pass laws to keep whites segregated from blacks in transportation, places like schools, hospitals, parks, public rest rooms, water fountains, libraries, recreational facilities, and almost every other public and commercial facility. *Id.*

⁹¹ Singer, *supra* note 26, at 1395. Singer also notes that

The post-Civil War era, which saw increasing protections for property rights as well as a narrowing of the duty to serve, was also the Jim Crow era when the courts found valid substantial regulations of property designed to promote racial segregation. Although the narrowing of public accommodation law appears, on the surface, to cohere with emerging protections for property owners, the inconsistency between property rights as conceived in this period and Jim Crow statutes suggests that changes in public accommodations law are far more tied to racial politics than to *laissez-faire* philosophy or the protection of property from government regulation.

Id.

⁹² *Id.* For example, in *Brown v. J.H. Bell Co.*, a coffee merchant was entitled to refuse to serve black customers at a food show despite a state civil rights act that prohibited racial discrimination in restaurants, eating houses, lunch counters, and where other refreshments were served. 123 N.W. 231, 233 (Iowa 1909). The court ruled that the statute only intended to regulate places that had always been considered quasi-public. *Id.* The court further stated that “[i]t is the right of a trader whose business is purely of private character to trade with whom he will, and he may discriminate as he pleases.” *Id.* The Supreme Court also contributed to the narrowing of public accommodation law with its decision in *Hall v.*

follow the emergence of protectionist notions among property interests, the narrowing of the public accommodation laws were tied more to racial politics than to a laissez-faire philosophy or the protection of property from government interference.⁹³ No longer did the duty to serve fit into the emerging theory of property or contract law, which now purported that owners are free to use their property as they saw fit rather than owing an obligation to serve.⁹⁴ Under the guise of freedom of choice and new notions of property rights, discrimination by race was commonplace and the duty to serve no longer was evident.⁹⁵

The change in legal precepts revolved around the blurred distinctions between civil, political, and social rights.⁹⁶ Black Americans knew none of their rights in these capacities, since civil rights were those exercised by a white person, such as the right to property and to enter into contracts and the ability to bring suit to defend those rights.⁹⁷ These rights were arguably denied because white Americans feared these forms of associations would "obliterate status distinctions" that had previously helped suppress African Americans.⁹⁸ White Americans grappled with the idea that equality in public accommodations was a

Decuir. 95 U.S. 485 (1877). The Court struck down Louisiana's 1869 public accommodation law because of its alleged burden on interstate commerce. *Id.* Because of the discrepancies between neighboring states' public accommodation laws, the Chief Justice conceded that the statute "purports only to control the carrier when engaged within the State." *Id.* at 489. Because across one state line, both whites and Negroes were allowed to occupy the same cabin, as opposed to a different state where they could not, the Court felt that the statute burdened interstate commerce and repealed the statute. *Id.*

⁹³ Singer, *supra* note 26, at 1396. Singer notes that the combined effect of *Plessy*, along with the states' practices of striking down their own public accommodation statutes, "opened the way for changes in state law to abolish or limit the duty to serve and replace it with a rule giving businesses freedom to choose their customers." *Id.* at 1401 (emphasis added).

⁹⁴ *Id.* at 1402.

⁹⁵ Kirsten L. McCaw, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, 7 SETON HALL CONST. L.J. 195, 202 (1996). McCaw notes that the anti-discrimination principle on its face actually conflicts with the traditional right of freedom to contract. *Id.* "Anti-discrimination laws prohibit freedom of choice when that freedom is exercised in a manner which discriminates against persons on the basis of impermissible criteria." *Id.* at 202-03.

⁹⁶ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997). It was understood that economic rights were those exercised by *economic men*, such as those able to own property, enter into contracts, and vote—all of which did not realistically include the black man during this era. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

civil right, especially when questions of the social rights of blacks threatened the status of relations that were forged in the past century.⁹⁹ Thus, the notion that citizens had a right to discriminate against the customers they would serve materialized, and the precept that law neither could, nor should, enforce social equality among the races emerged as a legal commonplace.¹⁰⁰

F. *The Light at the End of the Tunnel: Brown v. Board of Education and the Civil Rights Act of 1964*

By the late 1940s, a movement to challenge racial discrimination had emerged, partly because of the experiences from World War II.¹⁰¹ Strict separation of the soldiers was reduced, and, at home, workers of both races labored to support the war effort.¹⁰² When World War II was over, many black soldiers returned with hopes of a better life for themselves and their families.¹⁰³ In this changing political environment, the

⁹⁹ *Id.* at 1124. Courts rationalized segregation by invoking a social rights discourse, finding that segregation was necessary to preserve the status relations of inequality that originated in slavery. *Id.* Siegel quotes a decision regarding interpretation of The Civil Rights Act of 1875:

The colored men were formerly slaves, and the condition of servitude rendered them greatly wanting in education, refinement and social nature. White men often came into contact with colored men, but the association was that of superiors and inferiors. Before the war, white men who associated with colored men on terms of social equality became degraded in the eyes of the community. These social prejudices are too deeply implanted to be eradicated by any legislation.

Id. (quoting Charge to the Jury—The Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875)).

¹⁰⁰ Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 489 (2000). Both the *Civil Rights Cases* and *Plessy* drew on the concepts of freedom of association. *Id.* The decisions handed down in both cases were founded on the idea that the Constitution bestowed on former slaves equality in civil but not social rights. *Id.* However, as Post and Siegel note, according to this notion, the law was unable to enforce nor should enforce social equality among the races. *Id.* "The commitment to provide emancipated slaves equality at law was thus bounded by a competing commitment to protect the freedom of 'all' Americans to discriminate in the choice of their associates." *Id.* at 489-90.

¹⁰¹ EPSTEIN & WALKER, *supra* note 21, at 662. From the approval and support of Presidents Roosevelt and Truman, strict separation of the armed forces was reduced, and black and white men fought together on the battlefields. *Id.*

¹⁰² *Id.* Many African Americans joined the war effort on the home front by working together to produce arms and supplies for the troops abroad. *Id.*

¹⁰³ *Id.* It is suggested that since African Americans were able to serve with white men and women, bringing to light the unfound principles behind racial inequality, both races would question more and more the wisdom of segregation and promote racial equality. *Id.*

Supreme Court was called to reevaluate the “separate but equal” doctrine.¹⁰⁴ In *Brown v. Board of Education*,¹⁰⁵ official racial segregation was challenged in schools.¹⁰⁶ The Court found there was no place for the doctrine of “separate but equal” and held that “any language in *Plessy v. Ferguson* contrary to this finding is rejected.”¹⁰⁷

After invalidating the “separate but equal” doctrine under the Fourteenth Amendment,¹⁰⁸ the Supreme Court regularly confronted questions of racial discrimination.¹⁰⁹ The response to *Brown* and the

¹⁰⁴ *Id.*

¹⁰⁵ 347 U.S. 483 (1952).

¹⁰⁶ *Id.* at 487. Linda Brown was an eight-year old black girl who lived in a predominantly white neighborhood only a short distance from the local elementary school in Topeka, Kansas. The Supreme Court Historical Society, *History of the Court; the Vinson Court—1946-1953*, at http://www.supreme.courthistory.org/02_history/subs_history/02_c13.html (last visited Apr. 5, 2003). The Board of Education required its elementary schools to be racially divided, yet the Browns did not want their daughter to go to the school reserved for blacks. *Id.* They filed suit, challenging the segregated school system as violating their daughter’s rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* The *Brown* appeal was eventually joined by those of four other suits argued in December of 1952. *Id.*

¹⁰⁷ *Brown*, 347 U.S. at 494-95.

¹⁰⁸ *Id.* at 495. The Court looked to the reasoning of the lower court which stated:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro [sic] group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro [sic] children to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. at 494 (alteration in original). The Court concluded that the “separate but equal” doctrine had no place in the field of education and that the segregation deprived the plaintiffs of equal protection of the laws guaranteed by the Fourteenth Amendment. *Id.* at 495.

¹⁰⁹ EPSTEIN & WALKER, *supra* note 21, at 672. Since the decision handed down in *Brown* had declared unconstitutional the laws of twenty-one states and the District of Columbia, which all permitted racial segregation in the schools, action was demanded to comply with the decision. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 453. Many states complied, but many forestalled or ignored federal court action. *Id.* For example, in Arkansas, there was violence in response to the nine black children who were scheduled for admission to a Little Rock high school. *Id.* National Guardsmen were ordered on the premises by Arkansas Governor Orval Fabus to forestall the plan. *Id.* President Eisenhower responded by issuing an Executive Order authorizing the use of federal troops to ensure the court orders. *Id.* Soldiers stood at the front of the building to protect the nine students as they entered the school. *Id.* at 454. The school board petitioned for a delay in its desegregation program, but in a special session by the Supreme Court, the delay was denied by a unanimous decision. *Id.*; see *Cooper v. Aaron*, 358 U.S. 1 (1958) (denying the

demands of a social movement for civil rights made evident the reality that change would not come voluntarily.¹¹⁰ During the two decades after *Brown*, a wide range of proposals to aid the enforcement of the decision was offered by civil rights organizations and their supporters.¹¹¹ However, *Brown* failed to significantly change the segregation doctrine until Congress passed the Civil Rights Act of 1964.¹¹²

Since the Supreme Court lacked the formal enforcement powers to gain public acceptance of its ruling in *Brown*, a wave of protests and a plethora of lobbying occurred in the aftermath to provoke social change.¹¹³ Powerful advocates began to press for equal rights for black Americans.¹¹⁴ In his famous speech, "I Have A Dream," the champion of civil rights for black Americans and respected advocate, Dr. Martin Luther King, Jr., called for equal access to places to which whites are afforded access.¹¹⁵ Politicians, as well as many Americans, took notice of

claim that there is no duty on state officials to obey federal court orders rested on the Supreme Court's interpretation of the United States Constitution).

¹¹⁰ CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 453-54.

¹¹¹ Gary Orfield, *The 1964 Civil Rights Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 91 (Bernard Grofman ed., 2000). The first proposal empowered the Attorney General to enter civil rights litigation on behalf of the federal government and to cut off federal funding from those who discriminated in defiance of the constitutional requirements. *Id.* This idea was part of Eisenhower's civil rights bill that was eventually defeated in 1957 for lack of support. *Id.* A second proposal by the NAACP urged federal aid to be given only to those educational systems complying with the requirements. *Id.* Because it was deemed radical even by congressional liberals, this bill found little support as well. *Id.*

¹¹² *Id.* Many schools remained segregated a decade later, mainly because the Supreme Court did not create a set of principles capable of desegregating schools. *Id.* The *Brown* decision failed to change schools until the Civil Rights Act of 1964 was enforced. *Id.*

¹¹³ Randall Kennedy, *The Struggle for Racial Equality in Public Accommodations*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 111, at 156; see CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 477. Four college students who decided to sit in at a segregated lunch counter in Greensboro, North Carolina, started the phenomenon of mass nonviolent protest. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 21, at 447. This tactic launched mass demonstration and rallies throughout the South in the early 1960s. *Id.* Dr. Martin Luther King, Jr. coordinated a campaign to attack segregation by the use of sit-ins, picketing, demonstrations, and rallies in Birmingham in April of 1963. *Id.* at 501. King defied a judge's injunction that banned Negro protest marches, and the world watched as the city responded with mass arrests and the use of police dogs, nightsticks, and high-pressure fire hoses. *Id.*

¹¹⁴ Kennedy, *supra* note 113, at 156.

¹¹⁵ *Id.* at 157-58.

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned We can never be satisfied as long as our bodies, heavy with the fatigue of travel, cannot gain lodging in the motels of the highways and the hotels of the cities

this plea, and legislators proposed federal legislation outlawing racial discrimination in places of public accommodation.¹¹⁶ The proposed legislation was challenged by legislators who were committed to old-fashioned white supremacy, those who feared it would prompt overreaching and impingement on private entrepreneurs, and others who questioned its constitutionality.¹¹⁷ Despite many qualms, the Civil Rights Act of 1964 was passed into law.¹¹⁸ Title II of the 1964 Civil Rights Act provided that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.”¹¹⁹

The Civil Rights Act of 1964 was the farthest reaching civil rights legislation since Reconstruction and was designed to erase racial

... We can never be satisfied as long as our children are stripped of their selfhood and robbed of their dignity by signs stating: “For Whites Only.”

Id. at 158 (citing Dr. Martin Luther King, Jr., “I Have a Dream” speech of August 28, 1963).

¹¹⁶ President John F. Kennedy, Address to the Nation (June 11, 1963), in *CIVIL RIGHTS AND THE AMERICAN NEGRO*, *supra* note 21, at 486. For example, President Kennedy, in light of the multiple injustices suffered by those who attempted to desegregate schools, addressed the nation as to the status of African Americans on June 11, 1963:

This nation was founded by men of many nations and back-grounds. It was founded on the principle that all men are created equal, and that rights of every man are diminished when the rights of one man are threatened

... We are confronted primarily with a moral issue. It is as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities; whether we are going to treat our fellow Americans as we want to be treated.

If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public; if he cannot send his children to the best public school available; if he cannot vote for the public officials who represent him; if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?

... I am, therefore, asking the Congress to enact legislation giving all Americans the right to be served in facilities which are open to the public—hotels, restaurants and theaters, retail stores and similar establishments. This seems to me to be an elementary right

Id. at 484-87.

¹¹⁷ Kennedy, *supra* note 113, at 158.

¹¹⁸ EPSTEIN & WALKER, *supra* note 21, at 655. For example, the Act was passed after the longest debate in Senate history, lasting eighty-three days. *Id.* Cloture was invoked for the first time to cut off the filibuster. *Id.*

¹¹⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000).

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discrimination.¹²⁰ The Act outlawed arbitrary discrimination in voter registration, authorized the government to bring suits to desegregate public facilities and schools, extended the Civil Rights Commission, provided for the withholding of federal funds as a sanction of racial discrimination, established the right of equality in employment opportunities, and established a Community Relations Service to help resolve civil rights problems.¹²¹ The most important provision, in reference to the issue of discrimination in common carriers, is Title II, which bars discrimination in places of public accommodation.¹²²

¹²⁰ EPSTEIN & WALKER, *supra* note 21, at 655. The law regulated discrimination in employment, education, and public accommodations. *Id.* The law fostered regulations on appropriations and promoted programs that would end discrimination. *Id.* It outlawed discrimination not only on race, but also on national origin, religion, and sex discrimination in employment. *Id.*

¹²¹ See generally 42 U.S.C. § 2000a; see also EPSTEIN & WALKER, *supra* note 21, at 655.

¹²² 42 U.S.C. § 2000a(a)-(c). The full text of these subsections provide:

(a) Equal Access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodations; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodations within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment in his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for the consumption on the premises, including but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such

One of the underlying reasons to pass civil rights legislation to prohibit discrimination in places of public accommodation was the idea of economic strength.¹²³ In the congressional hearings regarding the Act, the idea that a market filled with racial discrimination places undue burdens on commerce was used to support the passage of the Act.¹²⁴

covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) Operations affecting commerce; criteria; "commerce" defined

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Id.

¹²³ BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 33 (1997) ("Just as unity may require a moral consensus as to what business practices are permissible, so also the free flow of commerce may be impeded if some businesses are allowed to discriminate while their competitors are not."); *see also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537 (1949) (stating that "our economic unit is the Nation").

¹²⁴ LANDSBERG, *supra* note 123, at 33. Landsberg cites to President Kennedy's message to Congress made in 1963 in which he noted, "An end to racial and religious discrimination—which not only affronts our basic ideals but burdens our economy with waste—offers an imperative contribution to growth." *Id.*; *see also* H.R. 7152, 88th Cong. (1963), H.R. Rep. No. 914, (1963), S. 1732, 88th Cong. (1964), S. Rep. No. 872 (1964) (discussing the passage of the Civil Rights Act of 1964); *see also* Kennedy, *supra* note 113, at 159. Kennedy purports that the success of Title II can be attributed to the fact that it attacked a simpler and more vulnerable target. Kennedy, *supra* note 111, at 161. Title II freed white entrepreneurs in the South to sell their goods and services to a larger clientele without fear of retaliation. *Id.* Kennedy also suggests economic forces helped in desegregation efforts, stating that Title II "gave them cover to do what market forces would have prompted them to do anyway, absent the emotional factor of racial prejudice." *Id.* at 162.

The legality of Title II was challenged immediately by the owner of the Heart of Atlanta Hotel who alleged that Congress had no authority to prohibit racial discrimination in places of public accommodation.¹²⁵ Although eight justices agreed with the opinion of the Court, two showed reluctance in basing the decision solely on the powers of the Commerce Clause.¹²⁶ The concurring justices believed that the Court should have based the decision on the Fourteenth Amendment to ensure Americans the right to be treated as equal members of the community with respect to public accommodations and to put an end to all obstructionist strategies to “finally close one door on a bitter chapter in American history.”¹²⁷ The Court instead chose to uphold the Act based on the Commerce Clause and left the choice to pursue other methods of eliminating discrimination as a matter of policy that rests with Congress and not with the courts.¹²⁸

Although the passage of the Act, as well as the decision in *Heart of Atlanta v. United States*,¹²⁹ resembled victory for advocates of equal rights, the Act quickly faded in significance as a deterrent to racial

¹²⁵ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The appellant contended that the prohibition of racial discrimination exceeded Congress' power under the Commerce Clause and violated other parts of the Constitution. *Id.* The appellant also relied on the Court's holding in the *Civil Rights Cases*. *Id.*

¹²⁶ *Id.* at 279. In his concurring opinion, Justice Douglas opined:

My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the “right of persons to move freely from State to State” “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines.”

Id. (Douglas, J., concurring) (citation omitted). In citing a Senate report regarding the passage of the Civil Rights Act, Justice Goldberg stated:

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

Id. at 292 (Goldberg, J., concurring) (quoting S. REP. NO. 872, at 16 (1964)).

¹²⁷ *Heart of Atlanta Motel*, 379 U.S. at 280.

¹²⁸ *Id.* at 261.

¹²⁹ *Id.*

discrimination since its foundation rested not on equal rights for all but instead on removing obstructions to commerce.¹³⁰ Since courts were reluctant to interpret the Act as securing racial equality, and because Congress has not revisited this specific issue since the decision in *Heart of Atlanta*, what is left is an ambiguous idea of how far Title II reaches in terms of prohibiting racial discrimination in certain places of public accommodation. In terms of litigating complaints of taxicab discrimination, it may leave questions as to whether an argument advancing the common law duty to serve without unjust discrimination can measure up when backed by a policy grounded not on racial equality but the ability to move freely without obstruction of commerce.

III. WHAT'S UNDER THE HOOD? TAXICAB LITIGATION AND SOURCES OF RACISM

In order to lay a foundation regarding the complexities of the problems surrounding litigation of taxicab discrimination, it is important to discuss the possible motivation behind this behavior. By discussing the complexity of the tenets behind racial discrimination in taxicab service, it may impart some explanation as to why many modern public accommodation statutes and policies are ambiguous or even nonexistent.

A. *Policing the Cabbies: Litigation of Race Discrimination by Cab Drivers*

Litigation of taxicab discrimination is often costly and time consuming, limiting victims' ability to file a claim.¹³¹ These combined factors are often coupled with the perception of "powerlessness" that black Americans experience as a result of racial discrimination encountered on a daily basis.¹³² In a search of federal and state opinions

¹³⁰ *Id.* at 241; see Kennedy, *supra* note 113, at 159. Although the statute prohibits racial discrimination in public accommodations, it only lists a minimal number of places where discrimination is outlawed. Kennedy, *supra* note 113, at 160. Not only was litigation to enforce the Act expensive, but because of its ambiguity, decisions as to whether the statute was inclusive or exhaustive was a question many courts were reluctant to grapple with. *Id.* at 160-61.

¹³¹ Loren Page Ambinder, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342, 347 (1996).

¹³² *Id.*

regarding public accommodations, a small number actually exist, despite the fact that discrimination occurs on a daily basis.¹³³

Bringing suit under public accommodation laws can be effective, but public accommodation laws are often interpreted by courts as statutes which are intended to afford remedies to large classes of people, thus limiting their application when pertaining to individual claims.¹³⁴ A potential litigant may also attempt to bring a common carrier tort action.¹³⁵ Success in a common carrier tort action may be difficult since the litigant must persuade the factfinder that the wrong suffered was more than "a minor insolence."¹³⁶ In light of these limits, most common carrier litigation is brought under § 1981, whose origination is not rooted in modern civil rights legislation but instead found in the Civil Rights Act of 1866.¹³⁷

Section 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."¹³⁸ Some courts have applied § 1981 in a way

¹³³ Peter Siegelman, *Racial Discrimination in "Everyday" Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?*, in THE URBAN INSTITUTE, A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA 82 (1998). Siegelman notes that, "[a]lthough there have been tens of thousands of federal employment discrimination cases filed since 1990, and several thousands of opinions written, . . . [the] search turned up a mere 23 opinions in public accommodation cases in both state and federal courts." *Id.*

¹³⁴ BELL, JR., *supra* note 83, at 128-29.

¹³⁵ RESTATEMENT (SECOND) OF TORTS § 48 (1965). Section 48 of the American Legal Institute ("ALI") Restatement (Second) of Torts states that "[a] common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment." *Id.*

¹³⁶ *Id.* § 48(c). Section 48(c) notes that "[t]he rule of this Section does not extend to mere trivialities. Even at the hands of public servants, the public must be expected and required to be hardened to a certain amount of rudeness or minor insolence, which any reasonable man would consider offensive but harmless and unimportant." *Id.*

¹³⁷ Ambinder, *supra* note 131, at 348.

¹³⁸ 42 U.S.C. § 1981 (2002).

§1981. Equal rights under the law

(a) Statement of equal rights

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

Id.

that may convert it into a public accommodation law.¹³⁹ Section 1981 governs not only governmental actors but also nongovernmental actors who refuse to enter business transactions because of race.¹⁴⁰ While this section seemed promising in litigating racial discrimination regarding public accommodations, its effect may be disappointing considering Justice Powell's concurring opinion in *Runyon v. McCrary*.¹⁴¹ Powell's idea that certain personal relationships, whose contractual decisions are racially motivated, may in fact be outside the scope of § 1981.¹⁴² Powell's suggestion has arguably narrowed the statute, offering the idea that there are certain contracts which are just too personal to enforce.¹⁴³

Many instances of taxicab discrimination occur when a minority passenger is passed up, usually so that a white passenger may be picked up, or is refused service to a minority neighborhood. In order for a minority American to establish a prima facie case of racial discrimination by a taxicab driver under § 1981, one must show the following: (1) the plaintiff is a minority; (2) the plaintiff presented himself or herself properly on a public thoroughfare frequented by taxicabs; (3) the plaintiff attempted to hail a cab; and (4) the vehicle passed the plaintiff and picked up a white passenger, or a taxicab stopped for a plaintiff and

¹³⁹ Singer, *supra* note 26, at 1425; see *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990) (using § 1981 in a case where a beauty parlor refused to serve an African American customer); *Floyd-Mayers v. Am. Cab Co.*, 732 F. Supp. 243 (D.D.C. 1990) (using § 1981 in a case where a taxi driver passed up a black customer to serve a white customer instead).

¹⁴⁰ See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436-37 (1968) (holding that § 1981 and § 1982 apply to acts of private discrimination); see *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439-40 (1973) (acknowledging that the language of § 1981 is traceable to the first section of the Civil Rights Act of 1866 and, therefore, there was no reason to construe its applicability to private actors differently).

¹⁴¹ 427 U.S. 160 (1976) (prohibiting a racially motivated refusal by a private school to contract with a black student).

¹⁴² *Id.* at 187.

¹⁴³ *Id.* Justice Powell stated in his concurring opinion:

In certain personal contractual relationships, . . . such as those where the offeror selects those with whom he desires to bargain on a individualized basis, or where the contract is the foundation of a close association, . . . there is no reason to assume, that although the choice made by the offeror is selective, it reflects a 'purpose of exclusiveness' other than the desire to bar members of the Negro race. Thus, although section 1981 encompasses racial discrimination committed by private actors, personal contracts involving a few individuals who are chosen on a particular basis, as opposed to a first come, first serve basis, may not fall within the statute's scope.

Id.

then refused to drive the plaintiff to a certain location in the city.¹⁴⁴ In the latter situation, the litigants would have to show that the driver refused to take them to a certain location because of their race or because the neighborhood has primarily minority residents.¹⁴⁵

The difficulty in proving the required factors in a case of taxicab discrimination may limit a victim of taxicab discrimination from bringing suit.¹⁴⁶ One reason is that the driver and passenger tend to have "transitory" contact, making the determination of racially motivated behavior difficult.¹⁴⁷ This causes problems in discerning whether the taxicab driver intended to discriminate on the basis of race—an element that is often imperative in successful taxicab discrimination cases.¹⁴⁸

B. *Why I Can't Get a Cab: Motivation Behind Taxicab Discrimination*

Proving an actual case of taxicab discrimination may further be complicated by the rationalization often afforded to instances of racial discrimination. Americans have a common cultural and historical heritage in which racism has been constant and influential in regard to beliefs and ideas about minorities.¹⁴⁹ A large part of racial discrimination is influenced by unconscious racial motivation.¹⁵⁰ The

¹⁴⁴ Ambinder, *supra* note 131, at 355; see also *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (discussing who bears the burden of establishing a prima facie case of disparate treatment in employment discrimination). Ambinder applies the *McDonnell Douglas-Burdine* framework established in *Texas Department of Community Affairs v. Burdine* in the context of litigation of taxicab discrimination. Ambinder, *supra* note 131, at 355. See also *Nicoletti v. NYC Taxi & Limousine Com'n*, 1999 WL 349949 (S.D.N.Y. May 28, 1999) (unpublished opinion); *Bolden v. J. & R. Inc.*, 135 F. Supp. 2d 177 (D.D.C. 2001), for examples of claims of discrimination by taxicab drivers.

¹⁴⁵ Ambinder, *supra* note 131, at 355. Plaintiffs could prove that the driver refused to take them to a neighborhood because it was predominately black by proving that taxicabs were not servicing the area because of race discrimination. *Id.*

¹⁴⁶ *Id.* at 347.

¹⁴⁷ *Id.* Ambinder points out that often no verbal conversation takes places when a cab purposely passes by an individual. *Id.* Unless a driver picks up a white customer instead, it is difficult for the passenger to assess whether actual racial discrimination is the cause of the fare refusal. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ CHARLES LAWRENCE, *The ID, the EGO, and Equal Protection: Reckoning with Unconscious Racism*, in *CRITICAL RACE THEORY* 237 (Kimberlé Crenshaw et al. eds., 1995). "Because of this shared experience . . . [Americans] inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites." *Id.*

¹⁵⁰ *Id.* at 236. Lawrence suggests that in dealing with discrimination cases, the burden of persuasion is on the wrong side of the dispute. *Id.* "Improper motives are easy to hide.

idea of unconscious racism is usually transformed through the tacitly transmitted cultural stereotype.¹⁵¹ It may be difficult to identify a morally culpable person who has consciously discriminated on the basis of race since most people are unaware of their actions.¹⁵² For example, when the cab drivers in New York refused to pick up Danny Glover, they perceived him not as an Oscar-winning actor, but as a potential risk as a minority fare-holder who had a greater potential to mug or steal from the driver.¹⁵³

Motives behind racial discrimination by common carriers can be discussed by using different theories that evolve from many different facets of moral, social, and economic policy.¹⁵⁴ One such theory is that a particular group is treated differently because the group is disliked or hated by other groups.¹⁵⁵ Conventional reasoning suggests, however, that minority cab drivers would not purposely discriminate against other minorities because it would go against their own beliefs.¹⁵⁶ This argument may be too simplistic, particularly in the common carrier context, since most cab drivers are not just black Americans, but also ethnic immigrants who may not identify with other racial stereotypes.¹⁵⁷

And because behavior results from the interaction of a multitude of motives, [one may] . . . always be able to argue that racially neutral considerations promoted their actions." *Id.*

¹⁵¹ *Id.* at 241; see *infra* note 153 and accompanying text.

¹⁵² LAWRENCE, *supra* note 149, at 241. A person is unaware that his actions, or what he thinks is a racially neutral feeling, has a racist origin. *Id.*

¹⁵³ Ambinder, *supra* note 131, at 367; Bumiller, *supra* note 2; Williams, *supra* note 2; see LAWRENCE, *supra* note 149, at 241. Lawrence's explanation of unconscious racism could give some insight into why a cab driver would pass up Danny Glover on the street:

A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. If an individual has never known a black doctor or lawyer or is exposed to blacks only through mass media where they are portrayed in the stereotypical roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles.

Id. LAWRENCE, *supra* note 149, at 241.

¹⁵⁴ See generally LAWRENCE, *supra* note 149, at 235-36 (giving examples of different types of motivation behind discriminatory behavior).

¹⁵⁵ Ambinder, *supra* note 131, at 364 (citing Professor Gary Becker, calling this theory "taste discrimination" or "animus-based discrimination").

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 365. Immigrants make up at least ninety percent of New York City driver applicants. *Id.*; see Sheryl Fragin, *Taxi!*, ATLANTIC MONTHLY, May 1994, at 30. Chicago and Washington, D.C., also have a predominantly immigrant taxicab force. *Id.* at 31.

Another theory involving a rationalization of racial discrimination is based on risk assessment by many common carriers.¹⁵⁸ Under this theory, minority groups will be treated differently based on an assumption that they pose a greater risk than other groups.¹⁵⁹ For example, in the taxicab context, drivers may fear greater danger of injury when they pick up a minority fare or have to serve a minority neighborhood that is known for its high crime statistics.¹⁶⁰ Drivers may decide whom to pick up based on generalized ideas or their own experiences with passengers.¹⁶¹ However, this poses a fundamental problem since there is a tendency, especially when dealing with race, to rationalize this behavior because of flawed and inaccurate representations of minorities.¹⁶²

¹⁵⁸ Courtland Milloy, *For Cabbies, Judging Fares Isn't Simple*, WASH. POST, Jan. 15, 2000, at B1 (discussing the risks of picking up passengers or refusing the fare outright). For example, Thomas Redmond with the Madison Cab Association in Washington, D.C., stated, "It's a tricky situation . . . [o]n one hand, you're talking about my losing my license, which is my livelihood; on the other hand, you're talking about losing my life." *Id.*

¹⁵⁹ LAWRENCE, *supra* note 149, at 247. Lawrence states:

The unconscious racial attitudes of individuals manifest themselves in the cultural meaning that society gives their actions in the following way: In a society that no longer condones overt racist attitudes and behavior, many of the attitudes will be repressed and prevented from reaching awareness in an undisguised form. But as psychologists have found, repressed wishes, fears, anger, and aggression continue to seek expression, most often by attaching themselves to certain symbols in the external world.

Id. Hence, discrimination will attach itself to those symbols that society itself has projected as fearful, like the black male. *Id.*

¹⁶⁰ Milloy, *supra* note 158; see James Hill & Sarah Downey, *Taxis Still Can Be Rare Despite Law*, CHI. TRIB., May 24, 1998, at C1. The Chicago City Council passed a taxicab law that required taxis to serve areas usually shunned by fearful or money-motivated drivers. *Id.* Cabbies complained that the ordinance would force them to drive in bad areas where they risk harm and also in which they cannot make money. *Id.*; see also CHI., ILL., MUNICIPAL CODE § 9-112-450 (1997).

¹⁶¹ Ambinder, *supra* note 131, at 368.

According to the risk-based theory of discrimination, drivers may decide who to pick up based on publicized crime statistics and their own generalized experiences with passengers. . . . A fundamental problem with accepting such behavior is the tendency, particularly in the context of race, for the statistics to be subjectively flawed and inaccurate.

Id.

¹⁶² LAWRENCE, *supra* note 149, at 236; see Jeff Jacoby, *Is It Racism or Is It Fear?* BOSTON GLOBE, Nov. 18, 1999, at A27. Jacoby reports that, according to a 1994 report by the Bureau of Labor Statistics, the occupation of cab driver accounted for one-tenth of all victims of job-related homicides. Jacoby, *supra*. Trips to secluded areas, especially at night, makes the

In Washington, D.C., Taxicab Commissioner Sandra Seegers gave a general warning to urge cabbies to pass up “dangerous looking people” and to stay out of “dangerous neighborhoods” after the murder of a taxicab driver.¹⁶³ Seegers stated that a dangerous looking person would be “a young black guy . . . with his hat on backwards, shirttail hanging down longer than his coat, baggy pants down below his underwear and unlaced tennis shoes. That’s the look.”¹⁶⁴ Seegers’ interpretation of a “dangerous looking person” caused an uproar as many minority riders were refused fares due to her warning.¹⁶⁵

The main argument advanced by most common carriers to justify their refusal of fares or refusal to serve minority neighborhoods is that they may choose with whom they want to contract.¹⁶⁶ Common carriers suggest that they should not be forced to accept a fare that will jeopardize their safety.¹⁶⁷ For example, after a driver was robbed and carjacked in March of 2000, he sued the city of Chicago for violation of his Fourteenth Amendment right to personal security, arguing that the ordinance prohibiting drivers from discriminating against passengers endangered his life.¹⁶⁸ However, a federal judge dismissed the case, saying it failed to show constitutional grounds to overturn the ordinance, since it is intended to protect consumers, particularly African

drivers particularly vulnerable; almost half the cabdrivers died from 9:00 p.m. to 3:00 a.m. *Id.*; see also Janice Windau & Guy Toscano, *Workplace Homicides in 1992*, COMPENSATION AND WORKING CONDITIONS, Feb. 1994, at 1-8 (reprinted in US DEPARTMENT OF LABOR STATISTICS REPORT 870, April 1994, *Fatal Workplace Injuries in 1992: A Collection of Data and Analysis*) (stating further that “taxicab drivers and chauffeurs face unusually high risks of becoming homicide victims, with a rate of 43 homicides per 100,000 workers”).

¹⁶³ Milloy, *supra* note 158.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* As Seegers sees it, “a small group of uncouth blacks is giving all blacks a bad name, and either that group cleans up its act or else they’ll be singled out for punishment while the rest of us will just have to tolerate a certain amount of inadvertent discrimination.” *Id.*

¹⁶⁶ Tom McCann, *Cabbie Sues City, Blames Carjacking on Mandate; Driver Wants Right to Choose Passengers*, CHI. TRIB., May 3, 2000, at N3. “I should be allowed to act on my gut feeling that the person who’s flagging me down is only doing it to rob and beat me,” said a Chicago cab driver of seventeen years. *Id.*

¹⁶⁷ Hill & Downey, *supra* note 160. During the publishing of Hill & Downey’s article, Steve Weidersberg, President of the Chicago Professional Taxi Driver’s Association, said he was tired of drivers, many of them from minority groups, being portrayed as racist and rude. *Id.* “Cabbies aren’t racist; we drive everywhere. But mama raised two sons and no dummies You do whatever it takes to watch your back, if you don’t you become a statistic.” *Id.*

¹⁶⁸ McCann, *supra* note 166.

Americans and Hispanics, who have complained about the taxi service.¹⁶⁹

Many cabbies suggest that refusing fares to underserved neighborhoods has a viable economic justification.¹⁷⁰ Often times, cabbies are not able to pick up return fares after traveling to an underserved destination.¹⁷¹ Thus, requiring drivers to take a fare to an underserved neighborhood may prove burdensome since the driver could have stayed where there is a greater opportunity to pick up a fare instead of losing revenue by not returning with a passenger.¹⁷²

In addition, it is important to note that cab drivers have a viable argument, suggesting that taxicab use would be safer and more profitable for drivers since they reduce risks by not taking chances on minority fares.¹⁷³ Drivers often have to make a gut decision when a fearful situation arises whether to take the perceived risk or pass up the fare.¹⁷⁴ However, when race is used as a proxy, it could generate errors and may prove to be inefficient in the long run.¹⁷⁵ Racial discrimination based on generalized stereotypes discourages minorities from participating in public activities.¹⁷⁶ For minority citizens, it also calls into question the legitimacy of a legal and judicial system that asserts an

¹⁶⁹ *Judge Dismisses Cabbie's Pleas Against Picking Up All Riders*, CHI. TRIB., Aug. 31, 2000, at N3.

¹⁷⁰ Sabrina Walters, *Cabbies Out as Fourth Roles In*, CHI. SUN TIMES, July 4, 2001, at 11.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Marcus Cole, *Medallion Monopoly Drives Taxicab Racism*, LIBERTY AND LAW (Institute for Justice, Washington, D.C., Feb. 2000).

¹⁷⁴ *Id.*

¹⁷⁵ Stephan C. Fehr, *Cab Official Repudiate on Warning; Williams Wants Shields to Protect D.C. Drivers*, WASH. POST, Jan. 25, 2000, at B1. After the slaying of a driver, the D.C. cab commissioner told cabbies to stay out of low-income black neighborhoods and to be cautious of dangerous looking young black men. *Id.*

¹⁷⁶ Furmin D. Sessoms, *All Chicagoans Deserve Cab Service*, CHI. TRIB., Jan. 15, 1998, at N22 (Voice of the People letter). In a Commentary written to the Chicago Tribune, Furmin D. Sessoms, Executive Director of the Chicago Southside NAACP, stated,

Freedom of movement is essential to a free society, and our constitutional concepts of personal liberty require that all citizens be free to travel freely. People should be able to count on taxi service that does not unreasonably burden or restrict their movement. Taxicab owners' common illegal practices of discrimination lock people into neighborhoods and frustrate their aspirations by denying them equal access to educational opportunities, church, work and associations enjoyed by others.

Id.

antidiscriminatory purpose, yet often justifies race-based conduct by taxicab drivers that furthers the stereotype of minorities and African Americans as criminals.¹⁷⁷

Permitting racial discrimination in common carriers produces great social and moral costs.¹⁷⁸ The stereotypes may appear to be a rational interpretation of situations and the surrounding facts but instead are often “the product of tacitly ‘learned cultural preferences.’”¹⁷⁹ If these racist attitudes and behaviors are not condemned, they will be repressed and prevented from reaching awareness.¹⁸⁰

IV. WHAT’S WRONG WITH THE ALIGNMENT? AMBIGUITIES IN PUBLIC ACCOMMODATION LAWS AND WHY THE POLICIES DO NOT WORK

Taxicab discrimination destroys the fullness of the lives of African Americans, and others who are victims of discriminatory actions, by disallowing participation in community activities by making them inaccessible.¹⁸¹ Taxicab discrimination inflicts psychological harm on the individuals by rendering black persons invisible and making them feel like less than full human beings.¹⁸² Many blacks discover that, no matter how affluent and influential they are, there is little escape from the stigma of being black.¹⁸³ It is for these reasons that an examination of

¹⁷⁷ Fehr, *supra* note 175.

¹⁷⁸ Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 795 (1994) (quoting PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 46 (1991)). Armour purports that “taxicab discrimination destroys ‘the fullness of African Americans’ public, participatory selves’ and causes blacks to avoid engaging in integral community activities that take place in locations of the city which are effectively made inaccessible.” *Id.*

¹⁷⁹ Ambinder, *supra* note 131, at 369.

¹⁸⁰ LAWRENCE, in *CRITICAL RACE THEORY*, *supra* note 149, at 247.

¹⁸¹ Armour, *supra* note 178, at 795 (quoting WILLIAMS, *supra* note 178, at 46). Discrimination forces blacks to avoid ostensibly public places like white neighborhoods, teller machines, as well as community activities like shopping, sightseeing, or “hanging out” since their motivations are often mistaken for suspicious behavior. *Id.*

¹⁸² Ambinder, *supra* note 131, at 344 (quoting a WRC Channel 4, Washington D.C. Investigative report on Taxicab Discrimination, reported by Pat Muse on November 10-11, 1994, where Muse solicited statements from black victims of taxicab discrimination).

¹⁸³ Joe R. Feagin, *The Continuing Significance of Race: Antiblack Discrimination in Public Places*, 56 AM. SOC. REV. 101, 111-12 (1991). Feagin gives a vivid example of a black student who walks home from a campus job in a predominantly white neighborhood. *Id.* In an interview, the student stated,

[When I pass,] white men tighten their grip on women. I’ve seen people turn around like they’re going to take blows from me. The police constantly make circles around me as I walk home, you know,

taxicab discrimination and the failure of public accommodation laws is long overdue. It is important to look not only at the social policies surrounding the issue, but also the legal limitations of the unsettled principles behind Title II, individual state public accommodation statutes, and municipal policies designed to alleviate the problem.

A. *The Traffic Jam: Ambiguities and Their Impact on the Interpretation of Public Accommodation Laws*

Although Title II of the Civil Rights Act of 1964 states that “[a]ll persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, or national origin,” it fails to give an exhaustive list of places of public accommodation.¹⁸⁴ There are many reasons to explain why Congress chose not to include common carriers or list other public accommodations, one being that Congress specifically left out common carriers in the Civil Rights Act because they believed they should not be included.¹⁸⁵ Or, it could be argued that Congress intended for the Act to be read more broadly when deciding what is included under “public accommodation” and what would obscure “commerce.”¹⁸⁶ Whatever the line of reasoning, an explanation may be found by comparing the common law definition of duty to serve and the language of modern state public accommodation statutes with the language and intent of the 1964 Act.¹⁸⁷

for blocks. I'll walk, and they'll turn a block. And they'll come around me just to make sure, to find out where I am going. So, every day you realize [you're black]. Even though you're not doing anything wrong; you're just existing. You're just a person. But you're a black person perceived in an *unblack world*.

Id. (emphasis added).

¹⁸⁴ See 42 U.S.C. § 2000a (2000).

¹⁸⁵ Singer, *supra* note 26, at 1415.

¹⁸⁶ David B. Filvaroll & Raymond E. Wolfinger, *The Original Enactment of the Civil Rights Act of 1964 in LEGACIES OF THE 1965 CIVIL RIGHTS ACT*, *supra* note 111, at 29. The Act's passage was aided by a spirit of the times. *Id.* During this time, there was optimism, hope, and conviction that things could change based on the broad ideology of equal rights. *Id.*

¹⁸⁷ Singer, *supra* note 26, at 1415. Because of their broader language and issues regarding public accommodations, current statutes may be useful in filling in the ambiguities found in the Civil Rights Act. *Id.*

One argument is that Congress could have intended for the 1964 Act to be read in light of the changing common law.¹⁸⁸ The common law rule in 1964 was that “innkeepers and common carriers . . . had duties to serve the public without *unjust discrimination*.”¹⁸⁹ In order to implement that aspect of the common law rule, the 1964 Act only cited examples of property that was “separate but equal.”¹⁹⁰ In a sense, it may be inferred that Congress was responding to those establishments that posed the greatest problem.¹⁹¹ However, one cannot ignore the fact that there was great opposition to the Act of 1964, and much of it rested on the rights of private property owners, suggesting that leaving out common carriers was necessary for the Act to pass and not indicative of its true purpose to alleviate racial inequality.¹⁹²

At the core of the Civil Rights Act of 1964 is the section that states that all persons shall be entitled to the full and equal enjoyment of the services of “any place of public accommodation.”¹⁹³ While the statute is ambiguous in many respects, its purpose is to afford equal access to businesses that serve the general public.¹⁹⁴ In order to achieve the purpose of the Act, it could be argued that the courts should interpret the statute broadly, so as not to defeat its intent.¹⁹⁵ Congress only mentions certain types of establishments, yet that does not mean Congress intended for discrimination to continue in other businesses that serve the public—an activity that would arguably violate its original purpose.¹⁹⁶

¹⁸⁸ Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

¹⁸⁹ Singer, *supra* note 26, at 1416 (emphasis added).

¹⁹⁰ *Id.* Singer suggests that the only purpose of the 1964 Act was to implement the aspect of the common law, which suggested a duty to serve, while over-turning the notion that segregation was a “reasonable regulation of private property open to the public and that separate facilities were equal.” *Id.*

¹⁹¹ *Id.* at 1418. Singer notes that the legislatures were not obliged to solve all the problems with the signage of one particular act. *Id.* “There is no obligation on a legislature to address a problem fully or not at all; it is empowered to address specific aspects of a problem that are brought to its attention and for which a reasonable compromise or consensus can be reached among the legislators.” *Id.*

¹⁹² *Id.* at 1417.

¹⁹³ 42 U.S.C. § 2000a (2000).

¹⁹⁴ See *infra* note 198 and accompanying text; see also Singer, *supra* note 26, at 1421.

¹⁹⁵ Singer, *supra* note 26, at 1421.

¹⁹⁶ *Id.* Singer notes that, with the purpose to afford equal access to businesses that serve the general public, Congress wanted to make “crystal clear” that discrimination was not allowed in those establishments listed in the Act. *Id.* However, this did not mean that

If statutes are to be read in light of the common law, and in order to evaluate the meaning of the Civil Rights Act today, it may be beneficial to look at recent statutes related to public accommodations to ascertain the social policy and intent behind the codification of the statutes.¹⁹⁷ Title III of the Americans with Disabilities Act, passed to prohibit, among other things, discrimination on the basis of disability in public accommodations, lists many more places of public accommodation than are listed in the Civil Rights Act of 1964.¹⁹⁸ The statute does not

Congress would encourage or allow discrimination in other establishments. *Id.* “[S]uch a result would violate the policy underlying the entire regulatory scheme.” *Id.*

¹⁹⁷ See Llewellyn, *supra* note 188, at 401.

¹⁹⁸ 42 U.S.C. § 12181 (2000).

§ 12181. Definitions

As used in this subchapter:

(1) Commerce

The term “commerce” means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country

(2) Commercial facilities

The term “commercial facilities” means facilities—

(A) that are intended for nonresidential use; and

(B) whose operation will affect commerce

....

(3) Demand responsive system

The term “demand responsive system” means any system providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term “fixed route system” means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

....

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities effect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other exhibition or entertainment;

specifically name “common carriers” or “taxicabs” as public accommodations, yet it alludes to “specified public transportation” meaning transportation “by bus, rail, or any *other conveyance . . . that provides the general public with general or special service . . . on a regular and continuing basis.*”¹⁹⁹ This suggests that interpretation of antidiscrimination laws should prohibit discrimination in common carriers, such as taxicabs.

In addition to ambiguities in federal statutes concerning common carriers, state statutes offer little guidance as well.²⁰⁰ State public accommodation statutes that list specific places as examples of public accommodations may cause the determination of what is encompassed by the statute to be all the more confusing.²⁰¹ Some state statutes go so

(D) an auditorium, convention center, lecture hall, or other place of gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment,

(G) a terminal, depot, or other station used for *specified public transportation*;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

....

(10) Specified public transportation

The term “specified public transportation” means transportation by bus, rail, or any other conveyance (other than by aircraft) *that provides the general public with general or specific service (including charter service) on a regular and continuing basis.*

Id. (emphasis added). This is relevant because the 1990 Americans with Disabilities Act contains a much longer list of “places of public accommodation,” suggesting that a broad interpretation of the 1964 Act could be justified by reference to these contemporary values. Singer, *supra* note 26, at 1423.

¹⁹⁹ 42 U.S.C. § 12181(10) (emphasis added) (discussing the definition of specified places of public transportation).

²⁰⁰ See *infra* note 204 and accompanying text.

²⁰¹ 775 ILL. COMP. STAT. ANN. 5/5-101 (West 1993). For example, the Illinois Human Rights Act defines a place of public accommodation to mean:

far as to list omnibuses, streetcars, and funeral hearses, but give no mention to taxicabs.²⁰² One may ask why a legislature would distinguish even hearses from other businesses open to the public, rather than those that are used more commonly, such as taxicabs. Furthermore, it would be difficult to justify a legislative choice to continue discrimination in places such as taxicabs, while service establishments are prohibited from exercising such action.²⁰³

On the other end of the spectrum, many state statutes provide an open, functional definition, rather than listing those places which fall under a definition of public accommodation.²⁰⁴ With this in mind, it is

a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise available to the public.

(2) By way of example, but not of limitation, "place of public accommodation" includes facilities of the following types: inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors, taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theatres, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, airplanes, street cars, boats, funeral hearses, crematories, cemeteries, and public conveyances on land, water, or air, public swimming pools and other places of public accommodation and amusement.

Id.

²⁰² *Id.*

²⁰³ Singer, *supra* note 26, at 1417. Singer notes that the Civil Rights Act of 1964, if read on its face, would

allow discrimination to continue in barber shops, beauty parlors, many other service establishments, retail stores, bowling alleys, and other places of recreation It is hard to follow a morality when it allows one bowling alley to remain segregated, while another bowling alley down the street which serves sandwiches must allow Negroes to bowl.

Id.; see also 42 U.S.C. § 12181(10).

²⁰⁴ See, e.g., CAL. CIV. CODE § 51 (West 1999). California's Civil Rights Act states that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Id.*; see also IND. CODE ANN. § 22-9-1-3 (West Supp. 1999) (defining "'public accommodation' . . . [as] any establishment that caters or offers its services or facilities or goods to the general public"). The Kansas statute states that "[p]ublic accommodations means any person who caters or offers goods, services, facilities and accommodations to the public," and then goes on to give a nonexhaustive list of places of public accommodation. KAN. STAT. ANN. § 44-1002 (Supp. 1999). Minnesota's public accommodation statute states that a "[p]lace of public accommodation means a business, accommodation, refreshment, entertainment, recreation, or transportation facility

noted that legislation is almost always a compromise of competing interests, and, in this case, the competing concern is the interest in not being discriminatorily excluded from the marketplace on the basis of race, versus property rights and the freedom to contract.²⁰⁵ It could be argued that statutes are left broad in order to create a fluctuating interpretation of what is a place of public accommodation so as to prohibit discrimination in a wide-range of places.²⁰⁶ Inconsistencies in what constitutes a public accommodation for purposes of the Civil Rights Act have not only led to confusion in determining what constitutes a service or place within public accommodation laws, but also have produced discrepancies in the actual enforcement of the law.²⁰⁷ Some of these discrepancies are evident in current issues facing common carriers in many cities today.²⁰⁸

Many Americans believe that a core function of the federal government is to prohibit discrimination in the public and private sectors.²⁰⁹ Yet, when the constitutionality of the civil rights laws is based not on equal protection, but the Commerce Clause, the government avoids a crucial role it should play in enforcing civil rights.²¹⁰ Common carriers assert that anti-discrimination laws interfere with their freedom to contract.²¹¹ What is overlooked is the idea that contractual freedom does not hold the same footing as imperative equality since § 1981 and

of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." MINN. STAT. ANN. § 363.01 (West Supp. 1999). North Dakota regards public accommodations to mean "every place, establishment, or facility, of whatever kind, nature, or class that caters or offers services, facilities, or goods to the general public for a fee, charge, or gratuity." N.D. CENT. CODE § 14-02.4-02 (1997). Cf. 775 ILL. COMP. STAT. ANN. 5/501.

²⁰⁵ Singer, *supra* note 26, at 1417.

²⁰⁶ Llewellyn, *supra* note 188, at 401.

²⁰⁷ LANDSBERG, *supra* note 123, at 42.

²⁰⁸ See *infra* Part IV.B for examples of current issues facing taxi drivers and taxi consumers.

²⁰⁹ Post & Siegel, *supra* note 100, at 502. The authors suggest that, because of the fervent and highly publicized debate surrounding the Civil Rights Act of 1964, many Americans' beliefs of the role of the federal government changed, including its function to prohibit racial discrimination. *Id.*

²¹⁰ *Id.* In Supreme Court decisions, the Court, "in contrast to its treatment of the Commerce Clause power, offers no positive account of the appropriate relationship between the federal and state governments in matters of civil rights enforcement." *Id.*

²¹¹ Cole, *supra* note 1. "Rather than pick up customers because of the desire for additional business, or enter underserved neighborhoods to circumvent competition, these monopolists are empowered to pick and choose their customers." *Id.*

Title II explicitly limit the freedom to contract.²¹² Although the narrowing of § 1981 by the ideas advanced in the concurring opinion in *Runyon* seem to support most cabbies' contention that refusal of fares is a right not to be relinquished, those who control the enforcement of regulations pertaining to cab drivers have devised different methods to convalesce this issue.²¹³ What is advanced as the fundamental issue in the taxicab context is not the freedom of contract or the legislating of morals, but instead it is the attainment of equal access to public accommodations.

B. Trouble Starting the Cab: Difficulty in Litigation

Along with the ambiguities and inconsistencies found in public accommodation statutes, overreaching municipal policies add to the complexity of issues concerning taxicab service. Often, interests of taxicab drivers regarding their safety and financial restraints are not addressed.²¹⁴ The distinction between decisions to refuse fares based on economic concerns or safety issues are often blurred with what are actual incidents of taxicab discrimination.²¹⁵ Not only is litigation expensive and overwhelming for the consumer, the unclear distinction between racially motivated behavior and contractual decision-making in the taxicab context has made combating taxicab or common carrier discrimination an even more daunting task.²¹⁶

Because of the difficulty in proving cases of racial discrimination by taxicab drivers and the abundance of complaints received regarding fare refusal and limited service, cities such as Chicago and New York City have taken two different approaches to alleviate the problem.²¹⁷ Near the end of 1997, Chicago passed an ordinance which prohibited the refusal of fares to neighborhoods the drivers felt were too dangerous.²¹⁸

²¹² Bernard Grofman, *Civil Rights, the Constitution, Common Decency, and Common Sense, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT*, *supra* note 111, at 220. Civil rights policy lost sight of its original goal of ending discrimination and requiring race-neutral treatment. *Id.*

²¹³ See *infra* notes 217-34 and accompanying text for a discussion of municipal policies designed to alleviate taxicab discrimination.

²¹⁴ Dan Ackman, *City Work; Yellow Cab Drivers Get No Relief*, *NEWSDAY*, Mar. 21, 2001, at A38.

²¹⁵ *Id.*

²¹⁶ Ambinder, *supra* note 131, at 347.

²¹⁷ See *infra* notes 218-36 and accompanying text for a description of the two different approaches Chicago and New York City have devised to alleviate taxicab discrimination.

²¹⁸ CHI., ILL., MUNICIPAL CODE § 9-112-450 (1997). This section makes it "unlawful to refuse any person transportation to any place within the city . . . in any taxicab unoccupied

Two years later, lack of taxi service was still a reported problem in many city neighborhoods.²¹⁹ The issue was thrust into city news when a cab driver sued the city, arguing that the ordinance prohibiting drivers from discriminating against passengers endangered his life.²²⁰ The driver noted that, although he did not condone the refusal of fares, drivers need to be able to look out for their own personal safety.²²¹ The city tried to alleviate some of the economic concerns for the drivers by issuing an increase in cab fares in turn for the implementation of a "Fare-A-Day" program where the drivers were required to take a fare a day from an underserved community.²²² As drivers continued to complain and consumers continued to file complaints, the dispute eventually led to a strike of cab service.²²³ Although the strike left the visitors for the Fourth of July weekend limited in finding transportation, the city did not bend on its stance.²²⁴

The program implemented in Chicago introduces a viable method to alleviate taxicab discrimination, but the cabbies have significant concerns as well. The drivers complain that the fare increase does not outweigh the economic or social consequences surrounding the program.²²⁵ Most

by a passenger for hire, unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason." *Id.* The ordinance requires cabs to respond to service calls from all neighborhoods within thirty minutes or face a \$750 fine or license suspension or revocation. *Id.*

²¹⁹ Gary Washburn, *Cab Service Woes Continue, City's Consumer Chief Says*, CHI. TRIB., Oct. 26, 1999, at N3. In the first ten months of 1998, 120 drivers were found guilty by city hearing officers of violating the ordinance prohibiting the refusal of fares to underserved neighborhoods. *Id.*

²²⁰ McCann, *supra* note 166. Steve Wiedersberg, President of the Chicago Professional Taxicab Drivers Association, filed the lawsuit, alleging it violated his "14th Amendment right to personal security." *Id.* A federal judge later dismissed the suit. See *Cab Driver's Suit Against City Denied*, CHI. TRIB., Aug. 30, 2000, at C1.

²²¹ McCann, *supra* note 166. The driver stated, "I should be allowed to act on my gut feeling that the person who's flagging me down is only doing it to rob and beat me." *Id.*

²²² John-John Williams IV, *Taxicab Bias Hits Close to Home, Blacks Say; Snubs, Slurs are Common Among Complaints*, CHI. TRIB., Aug. 26, 2001, at C1.

²²³ Walters, *supra* note 170. The two-thousand member taxicab drivers association protested the city mandate requiring them to take at least one call a day from underserved, mostly minority neighborhoods. *Id.* The cab drivers said "such a rule is impractical because of the low volume of calls to those areas, and it unfairly restricts their business." *Id.*

²²⁴ *Id.* "This sucks," said a passenger who stood with his family at a taxi stand. *Id.* "I don't know what we are going to do," as his family had traveled to Chicago from Milwaukee for the Fourth of July holiday and was unable to get taxicab service. *Id.*

²²⁵ *Id.* The drivers complained that the requirement is nearly impossible because most drivers would never receive one of the one thousand estimated calls a day. *Id.*

fares to underserved neighborhoods occupy more of the drivers' time because destinations are farther than the normal service, and the drivers are often unable to retain a return fare.²²⁶ Furthermore, no plan has been implemented to ease safety concerns when the drivers are sent into dangerous neighborhoods.²²⁷ Despite the efforts and attempts to contend with common carrier discrimination, access to taxis remains limited, and actually hailing one is still a chore for many of Chicago's black residents and those living in underserved neighborhoods.²²⁸

New York City took an arguably more aggressive approach to taxicab discrimination by setting up a program in which drivers who discriminate will have their licenses suspended on the spot and their cars impounded and held at police precincts.²²⁹ Undercover sting operations are frequently executed in order to catch drivers who ignore the policy.²³⁰ Many drivers complain that this policy is overstepping the law by depriving them of their livelihood on the basis of an accusation, advancing a denial of due process claim.²³¹ The drivers have a significant concern, since most drivers depend on their cabs to create enough revenue to pay for the lease expenses, and confiscating the cabs on allegations significantly hinders their livelihood.²³² Although the New York City Taxi and Limousine Commission does offer a post-

²²⁶ *Id.*

²²⁷ McCann, *supra* note 166.

²²⁸ Williams, *supra* note 222. Vincent Williams, a Chicago native, says he sometimes asks women friends to hail cabs for him since "females are less of a threat, and drivers will stop for them." *Id.* Other customers report that they have had cabdrivers lock the doors so that they could not get into the car. *Id.* One woman reports that since most of her friends have been passed up before, they must now take the bus. *Id.*

²²⁹ Pete Donohue, *Taxi Union Rips Sting: Crackdown Will Cause Slaying of Cabbie, Leader Says*, DAILY NEWS (New York), Nov. 12, 1999, at 4. The policy was announced after Danny Glover filed a racial-bias complaint. *Id.*

²³⁰ NYC *Cabbies Fare O.k. in Response to Sting*, CHI. TRIB., Nov. 14, 1999, at C14. The program was named "Operation Refusal" and teams of undercover police officers and taxi inspectors, black and white, hailed cabs throughout the Manhattan area. *Id.*

²³¹ Somini Senqupta, *More Cabdrivers Are Cited in Part 2 of City Campaign Against Discrimination*, N.Y. TIMES, Nov. 20, 1999, at B3. Danny Glover returned to New York for a forum aimed at ending cabbie bias and agreed that the crack down was harsh stating, "I trust conscientious people in a democratic society are capable of having a dialogue to settle their differences and explore ways of dealing with issues. Compromise, understanding and dialogue. Once we have that, we're capable of coming up with our own solutions." See Donohue, *supra* note 229.

²³² Daniel Ackman, *City Denies Due Process to Cabbies*, NEWSDAY, Sept. 21, 2000, at A51. Ackman reports that by the time the cabbie receives a full hearing, weeks or months have passed; meanwhile, the suspension continues. *Id.*

deprivation hearing, many times the economic damage is already too significant for the driver to recover.²³³

Since the popularized attention brought by Danny Glover's race-based denial of access to a New York cab and Guiliani's "get tough" sting operations to target discriminating drivers, New York City has produced an alarm which rings out for reform in the taxicab industry.²³⁴ As proposals filter in from New York City Borough Presidents and taxicab associations, it is evident that the two sides advance different objectives.²³⁵ One must sift through the competing interests to determine whether the problem stems from racism or from well-founded principles of economics and safety since there often is a difference between drivers who refuse fares based on race and those who refuse to take a passenger, regardless of race, to a truly dangerous area.²³⁶

Whether the problem is found in ambiguous statutes and interpretations or overreaching programs designed to eradicate taxicab discrimination, what is evident is that a balancing of social policy and cab driver concerns is needed in order to create a new solution to the problem of race discrimination by taxicab drivers. An answer may be to revive and apply the duty to serve to the tenets of cab services while purporting new safety requirements and driver incentives to assure compliance so that no passenger becomes a victim of taxicab discrimination.

²³³ *Id.*

²³⁴ Peter Demarco, *Taxi Proposals Aim to Put Brakes on Bias*, DAILY NEWS (New York), Mar. 15, 2001, at 3; see Annie Ciezadlo & Dan Janison, *Seeking Solutions; Glover Joins Discussion on Cabbie Relations with Blacks*, NEWSDAY, Dec. 6, 1999, at A8. Glover, once a taxi driver in San Francisco, called for "citizen action, not punitive action," as a reaction to New York City's policy to take any cabbie off the job when they were charged with discrimination. Ciezadlo & Janison, *supra*. Glover suggested sensitivity training rather than Guiliani's "get tough" approach of confiscating cabs. *Id.*

²³⁵ Bill Egbert, *Beep: Put the Heat on Cabbies*, DAILY NEWS (New York), Mar. 16, 2001, at 8. Some of Manhattan Borough President Virginia Field's recommendations to reduce taxi service conflict with taxicab operations and their relations to the medallion owner. *Id.* For example, Fields suggests that medallion owners be held liable for fare refusals initiated by their drivers. *Id.* However, this is illegal since cabbies technically lease their cab for their shift, rather than working as an employee. *Id.*

²³⁶ Ackman, *supra* note 214. Ackman cites data from the New York Police Department and the Taxi and Limousine Commission which shows that "between ninety and ninety-nine percent of all cabbies stop for whomever hails them." *Id.* Ackman further notes that "these facts give little solace to the black men in particular who are passed by. But talk to the drivers—including black and Hispanic drivers—and they will tell you with one voice: The problem is not racism, but economics and safety." *Id.*

V. THE TUNE UP: REEMERGENCE OF THE DUTY TO SERVE
AND STRATEGIES TO ERADICATE TAXICAB DISCRIMINATION

Before developing strategies to eradicate taxicab discrimination, it may prove useful to review the changes in public accommodation law from its inception.²³⁷ In the period leading up to the Civil War, the common law duty to serve mandated that any persons holding themselves out to the public had an obligation to serve their customers.²³⁸ This law rested on a combination of moral and social policies.²³⁹ In addition, businesses that voluntarily held themselves out to serve the public were held to their commitment.²⁴⁰ What is different from that period, compared to the common carrier precepts today, is that it was recognized that property owners had an *obligation to serve the public*, as well as their individual property rights.²⁴¹

From the time of the Civil War until the Civil Rights Act of 1964, public accommodation law was constantly changing, mostly involving the question of whether access to public accommodations should be extended to black Americans.²⁴² The ambiguities in the laws, as well as the ambiguities of a common notion of civil rights, helped to substantially narrow the common law duty to serve.²⁴³ The Civil Rights Act of 1964 attempted to alter the social practice of racial discrimination, causing the new idea of public accommodation laws to emerge as a mixture of the Jim Crow model, which authorized exclusion, and the common law duty to serve.²⁴⁴

A. *Washing the Windshield: Cleaning Up the Ambiguities in Public Accommodation Statutes*

Litigation of taxicab discrimination, when predicated on the Civil Rights Act of 1964, has been infrequent, arguably as a result of the ambiguities surrounding the law, as well as other social and economic

²³⁷ See *supra* notes 26-32 and accompanying text for a discussion of the common law duty to serve.

²³⁸ See *supra* notes 30-31 and accompanying text.

²³⁹ See *supra* note 31 and accompanying text.

²⁴⁰ See *supra* note 30 and accompanying text.

²⁴¹ See *supra* note 30 and accompanying text.

²⁴² See *supra* Part II for a discussion of the changes in public accommodation laws.

²⁴³ See *supra* Part IV.A for an examination of the ambiguities found in modern public accommodation statutes.

²⁴⁴ See *supra* notes 184-99 and accompanying text.

factors.²⁴⁵ However, attempting to amend the Civil Rights Act of 1964 to explicitly include common carriers may be too burdensome and difficult to consider because of the need for immense time, lobbying efforts, and a large contingency of support.²⁴⁶ Furthermore, as discussed in Part IV, Congress may have intended only to lay the foundation for eradicating discrimination by leaving Title II of the Civil Rights Act of 1964 an open and broad statute, leaving room for leeway in its interpretation.²⁴⁷ Thus, a more feasible solution may be for states to author public accommodation statutes in order to redefine the idea of public accommodation law as they pertain to common carriers by including the common law duty to serve.

The following model statute offers a detailed example of a public accommodation statute that attempts to alleviate some of the ambiguities found in the current statutes by incorporating achievements of a few state laws, while also addressing the difficulties that victims of taxicab discrimination have encountered. The model statute seeks to include common carriers in public accommodation laws, as well as reintroduce the common law duty to serve.

MODEL STATE PUBLIC ACCOMMODATION STATUTE

General Statement

It is unlawful to deny, directly or indirectly, all persons, no matter what their sex, race, color, religion, ancestry, national origin, disability,²⁴⁸ martial status, or sexual orientation,²⁴⁹ full and equal accommodation, advantages, facilities, and privileges of any place or public accommodation without any distinction, discrimination, or restriction.²⁵⁰

²⁴⁵ See *infra* this Part, Part V, for a discussion of the ambiguities of current public accommodation statutes, as well as an examination of social and economic factors that have lead to infrequent litigation of taxicab discrimination claims.

²⁴⁶ Offering amendments to the Civil Rights Act of 1964 is beyond the scope of this Note but another aspect to consider in reinventing public accommodation laws.

²⁴⁷ See *supra* 195-98 and accompanying text.

²⁴⁸ CAL. CIV. CODE § 51 (West 1991).

²⁴⁹ Bill Smith, *Cab Company's Owner Apologizes for Driver's Refusal to Take Man to Gay Bar*, ST. LOUIS POST, Dec. 11, 1999, at 6. In St. Louis, a cab driver refused to take a customer to an establishment because it was a known "fag bar." *Id.*

²⁵⁰ OR. REV. STAT. § 30.670 (1987).

Commentary

The purpose of this clause is to provide a restriction on discrimination in places of public accommodation while also providing a broad functional conception of what is covered under the statute. To encompass the idea of a flexible statute, direct and indirect denial of public accommodations is deemed unlawful. This may help to combat blatant and unconscious instances of racism, specifically those situations where denial was an indirect result.²⁵¹ Furthermore, the inclusion of marital status and sexual orientation expands the categories historically covered by state statutes.²⁵² This expansive coverage embraces the common law duty to serve by requiring places of public accommodation to uphold their commitment to serve the public by not tolerating discrimination under any precept.²⁵³

Definition of Public Accommodation

A place of public accommodation shall include, but is not limited to: business, accommodation, entertainment, recreation, refreshment, or transportation facility,²⁵⁴ including common carriers,²⁵⁵ licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.²⁵⁶

Commentary

This section attempts to provide a working definition of a place of public accommodation. By choosing not to restrict the statute to only the places listed, it allows discretion in determining what should be included. Since many state statutes list specific examples of places of

²⁵¹ See *supra* Part IV.B for a discussion of the motivation behind unconscious racism. By including indirect, as well as direct denials of public accommodations, unconscious racism will not be tolerated.

²⁵² Singer, *supra* note 26, at 1491 (Appendix II) (listing those categories covered under public accommodation statutes; marital status is included in seventeen states, while sexual orientation is included in ten state statutes).

²⁵³ See *supra* note 30 and accompanying text for an example of the common law duty to serve. By requiring the cab driver to fulfill his obligation to the public, there is less room for arguments purporting that denial of service is a personal choice the cab drivers are entitled to make.

²⁵⁴ MINN. STAT. ANN. § 363.01 (West Supp. 1999).

²⁵⁵ See *supra* note 32 and accompanying text for a definition of "common carrier."

²⁵⁶ MINN. STAT. ANN. § 363.01.

public accommodation such as buses or trolleys, including common carriers to the list of public accommodations lends a broad definition which encompasses those places typically covered by the public accommodation statutes, while also leaving room to include other services that hold themselves out to the public, such as taxicabs.²⁵⁷

Definition of Common Carrier

*“Common carrier” means any business or agency that is, or holds itself out to be, available to the public for transportation of persons, goods, or messages.*²⁵⁸

Commentary

In order to ease some of the difficulty in bringing a suit alleging discrimination by a taxicab driver, it may be important to allude to the duty of a common carrier to serve the public. This section provides a broad definition of what is a common carrier while also focusing on its commitment to the public. As explained in the definition of public accommodations above, some state statutes lists specific places of public accommodation which include examples of common carriers. Therefore, including an open-ended definition would allow for flexibility when determining what fits into the description of common carrier.²⁵⁹

B. A Little Body Work and It Is as Good as New: Redefining Goals of Municipal Statutes

While redefining common carrier laws may benefit states with many large cities, not all states may need to focus on reworking their public accommodation laws. However, enforceable municipal policies may also prove successful in combating racial discrimination in common carriers. Since most large cities have individual taxicab commissions, or license their cab fleet through their commerce commissions, it may prove more effective to initiate a policy at the local level to meet the individual needs of the communities in which the cab service operates. The following model municipal policy seeks to balance the responsibilities of

²⁵⁷ See *supra* note 204 and accompanying text for examples of state statutes with broad definitions. Using a broad definition of what is covered by the statute may help clear up some discrepancies as to whether certain types of common carriers are actually governed by the law.

²⁵⁸ Cf. *supra* text accompanying note 29 (describing the duties of a common carrier).

²⁵⁹ Cf. *supra* text accompanying note 29 (describing the duties of a common carrier).

taxicab drivers with the responsibilities of municipalities, as well as provide initiatives for drivers and cab medallion owners to promote service to, and operate in, underserved neighborhoods. While they are not inclusive, these policies are suggestions to remedy the most common complaints proffered by drivers, owners, and consumers.

MUNICIPAL POLICY REGARDING TAXI SERVICES

Training and Testing

The Commission shall conduct road, written, and oral examinations to test cab drivers' knowledge of rules and geography of the city in both complex and practical situations.

This test shall continue to be administrated after the initial licensing every three years.

All licensed drivers must participate in sensitivity training regarding race relations.

All drivers are required to pass a minimum of eighty percent of the questions.

Commentary

Most cab drivers are required to attend training and participate in testing before receiving their license.²⁶⁰ Yet, many cab companies do not require their drivers to take refresher courses or administer tests in order to evaluate whether or not the driver had the adequate training to continue taking fares. This section suggests that cab drivers are retested after a minimum number of years and required to maintain a certain proficiency in order to retain their license. This ensures that drivers are aware of new neighborhood geography, new cab company policies, and new city policies. Mandatory sensitivity training would also help cab drivers learn to deal with different situations and all types of customers. Exposing drivers to many different types of situations may prove helpful

²⁶⁰ Washburn, *supra* note 219. Chicago cabbies go through six days of training that includes a bus tour of the city so that drivers can see for themselves there are great neighborhoods that are underserved. *Id.*

in combating generalized race-based stereotypes that often prove to be inaccurate.²⁶¹

Policy Against the Refusal of Fares

The Commission is responsible for educating taxi drivers about all laws, federal, state, and local, regarding equal service, free from discrimination.

An adequate complaint process, whereby customers can file complaints and seek reprisal regarding refusal must be in place.

A discipline policy, including a process for hearings, must be clear and understandable by all drivers regarding service refusals.

The Commission must have accessible offices and schedule hearings at appropriate times so as to be as convenient and accessible to the public as possible.

Commentary

Most cab drivers receive minimal training on their duties under public accommodation laws and the policy against fare refusals.²⁶² The Commission should be responsible for ensuring that all drivers receive adequate education regarding the applicable laws and statutes. In addition to education, the Commission should have an adequate and accessible complaint process so that the public may issue complaints. All drivers should understand the grievance process and any repercussions they may encounter for failing to follow the antidiscrimination policy.

²⁶¹ See *supra* Part III.B for a discussion of race-based stereotypes that are present in the taxicab industry.

²⁶² See Chicago Department of Consumer Services, at <http://www.ci.chi.il.us/ConsumerServices/courses.html> (last visited Mar. 27, 2003). Chicago cab drivers are offered a four-hour session to inform them of the laws and responsibilities under public accommodation statutes, and the session costs fifty dollars to attend. *Id.* Drivers are not required to attend any other training if the laws or policies change. *Id.* Requiring mandatory training will inform the drivers of their responsibilities under public accommodation laws.

Application of Law Against Service Refusal

The Commission should issue hearing summonses to drivers when a complaint regarding refusal is alleged.

The hearing should be held before administrative law judges who are independent of the Commission.

Administrative law judges have discretion to reject a license, invoke suspension, mandate further education regarding service requirements, and elect to impose a fine based on driver history, circumstances of the incident, and other mitigating factors.

Commentary

In order to address complaints filed by consumers, the Commission should have an adequate hearing process. An administrative law judge who is independent of the Commission shall oversee all hearings. The penalties for violation of these policies should be fair according to the type of infraction so that cab drivers' rights are not unjustly affected. If suspension or confiscation of a car is warranted, then the driver should automatically have a timely hearing so as to limit the economic burden of the loss of the ability to work.²⁶³

Public Education

The Commission shall organize a community outreach program to inform the public of the complaint process and their rights as taxicab consumers.

Commentary

Many consumers are not aware of the grievance procedures for victims of taxicab discrimination. The Commission should have the responsibility of setting up an outreach program throughout the communities to educate the public on the remedies available to them. Conducting town meetings, giving presentations at local civic organizations, and making pamphlets available that describe the grievance procedure are just examples of what the Commission may do

²⁶³ See *supra* notes 231-33 and accompanying text for a discussion of the impact on the length of time it takes to receive a hearing regarding a claim of taxicab discrimination and how the confiscation of a cab burdens the taxi driver.

in order to provide the public with information regarding the complaint procedures.

Taxi Medallion²⁶⁴ Owner's Responsibility

The Commission shall implement a regulatory device to notify medallion owners of drivers who repeatedly refuse to service customers.

Taxi Medallion Owners shall work with the Commission to install security cameras, shields, and equip cars with "9-1-1 only" cell phones.

Taxi Medallion Owners must have eighty percent of their cab fleet equipped with some type of mechanism or be subjected to fines.

Commentary

While drivers are responsible for their individual actions, medallion owners should also be notified of repeated instances of service refusal. Forming a partnership with the medallion owners to alleviate discrimination by drivers may increase pressure on the cabbies to follow the regulations and policies. This may decrease the likelihood of continuous discrimination if the medallion owners are notified and can speak to the drivers regarding their behavior and, furthermore, discuss the relevant law and policies regarding taxicab discrimination.

Another main concern of taxi drivers is their personal safety when sent into dangerous neighborhoods. Taxi medallion owners and the Commission should work with the drivers to ensure that every cab be equipped with some type of security device to protect the driver and deter crime. Many cities have started to implement safety measures, such as cab-cams and bullet-proof glass barriers, so that cab drivers may feel safer when working.²⁶⁵ If drivers feel protected in their cars, it is less likely they will refuse fares for fear of their personal safety.

²⁶⁴ A medallion is "a permit issued by a governmental agency to operate a taxicab." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1193 (2d ed. 1987). An owner of this permit leases cabs to individual drivers under the aquired medallion.

²⁶⁵ Amy Worden, *NYC Taxis Get Anti-Crime "Cabby Cams;" Images Hoped to Nail Criminals, Fare Beaters*, at http://www.apbonline.com/safetycenter/transport/1999/11/17/Cabcam1117_01.html (last visited Nov. 7, 2001).

Responsibility of the Taxicab Commission

The Commission shall initiate strict enforcement of important safety and public service regulations and, furthermore, ensure that these regulations are not used to raise revenue.

The Commission shall be fair, reasonable, and sensitive to the complexities of driving a taxi.

If the Commission elects to have "testers" or an "inspection" program whereby the Commission initiates random testing of taxicab services, the testers and inspectors must be appropriately supervised and held accountable for fair enforcement of the law.

The Commission shall ensure that taxi courts are streamlined and organized to minimize waiting times and advance efficient repairation.

The Commission shall work with the municipality to erect taxi stands in underserved neighborhoods that are in well-policed and well-traveled routes to ease the burden on cab drivers to pick up return fares.

The Commission shall ensure that the rights of Taxi Medallion Owners and taxi drivers are protected.

Commentary

The Commission, while implementing policies designed to alleviate racial discrimination, should be sensitive to the complexities of driving a taxi. This may require the taxicab drivers' associations to partake in strategic planning sessions or have substantial input in policy decisions. While the Commission's main goal is to operate an efficient and fair service, it must also be aware of the difficulties many cab drivers face on a daily basis with respect to economic pressures and safety concerns. The Commission may ease economic burdens and safety concerns by working with the city to erect taxi stands, similar to bus stops, on well-traveled and policed locations within the underserved neighborhoods so that cabbies may have an increased chance of picking up a return fare and feel more comfortable in doing so.²⁶⁶

²⁶⁶ See C. VIRGINIA FIELDS, MANHATTAN BOROUGH PRESIDENT, CONFRONTING DISCRIMINATION IN THE TAXI INDUSTRY: A ROADMAP TO BETTER TAXI SERVICE vi (2001). See

VI. CONCLUSION

By reintroducing the common law duty to serve into public accommodation statutes and specifying the duty of a taxicab driver to fulfill his obligation to the public, consumers may find it easier to bring a claim of taxicab discrimination. Currently, the ambiguities found in Title II of the Civil Rights Act, state public accommodation laws, and overreaching municipal policies regarding the duties of common carriers create many obstacles for those who are victims of race discrimination to bring suit, while also burdening cabbies who fear for their personal safety. The current law allows little hope for reparation since it is often silent as to whether common carriers are included as a place of public accommodation. Furthermore, the municipal policies that are proposed and adopted by some of the nation's largest cities fail to balance the needs of taxicab drivers and the complexities surrounding the profession.

This Note asserts that by reintroducing the common law duty to serve and also implementing safety programs and incentives for taxicab drivers to service underserved neighborhoods, a balance may be reached so that minority consumers may equally access taxicab fleets. The model state public accommodation statute imparts a more direct responsibility on common carriers to fulfill their obligations to the public by codifying the common law duty to serve. The model municipal policy balances the needs of consumers and drivers alike by implementing continuous training and safety measures so that both passengers and drivers feel safe and comfortable hailing or driving a cab. By clarifying the duty of taxicab drivers and balancing both the needs of cabbies and consumers, a realignment of public accommodation laws may procure a place where both the popular actor Danny Glover and all taxicab consumers can hail a cab with no hesitation.

Danita L. Davis*

also *supra* notes 224-28 and accompanying text for an explanation of why serving underserved neighborhoods may prove burdensome for drivers.

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