ACCOMMODATING BIAS IN THE SHARING ECONOMY

Norrinda Brown Hayat[*]

forthcoming in Brooklyn Law Review, vol. 83, issue 2 (2018)

African-Americans have a more challenging time renting travel accommodations in the "sharing economy" than whites, which poses questions about the former's current and future access to travel. The scope of this problem is illustrated by Airbnb, the sharing economy's travel accommodations giant. With 2 million listings and counting Airbnb now dwarfs the largest American hotelier, Marriott. At least one study has found that requests on Airbnb from guests with distinctively African-American names are approximately 16% less likely to be accepted than identical guests with distinctively white names. Ancedotal evidence supports the study's findings. In the spring of 2016, a movement emerged on the Internet under the hashtag #AirbnbWhileBlack that recounted difficulties blacks had renting on Airbnb's website. Left unchecked this bias in the sharing economy threatens to set back the advances black travellers gained after the passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations. The question then is whether listings for travel accommodations in the sharing economy are public accommodations. This article posits that they are.

Some "hosts" listing houses for rent on Airbnb insist that they are not subject to Title II relying on First Amendment and property law for support. These "libertarian" arguments are not novel nor are they persuasive. Indeed, they are identical to arguments raised in opposition to blacks' right to travel prior to the Civil War, at the outset of the Jim Crow era and, which were dismissed at dawn of the passage of Title II itself. Further, an evaluation of Title II's enforcement in the over 50 years since its passage offers compelling evidence that this question of balancing white hosts' freedom of association against blacks patrons' dual freedom to associate is resolved by the nuances within the statute itself.

Scholars writing in this area of law are appropriately concerned with the impact of Title II's "Mrs. Murphy Boardinghouse" exception on travel accommodations offered in sharing economy and call for a legislative amendment. The "Mrs. Murphy Boardinghouse" exception, excludes hosts with five units or less that are host-occupied, from Title II's reach. The extraction of the Mrs. Murphy exception from Title II would be a welcome amendment, but is not likely in the near term. A focus on so-called Mrs. Murphy also ignores the fact that a significant majority of Airbnb hosts do not fall within the exception.

It is the thesis of this article that hosts in the sharing economy's travel sector are, generally, prohibited under Title II and similarly worded state laws from discriminating. And a regulatory model similar to that used to root out discriminating landlords in the fair housing arena at the federal level and bed and breakfast owners on the local level, can be employed to chill this discrimination in the short term. A failure to enforce Title II and state level public accommodation laws now poses a serious threat to blacks' access to travel presently and in the future, but also to the "multiplicity of spheres" that underpin black citizenship writ large.

Contents

Introduction

Airbnb spent an estimated $5million for its 30-second "#weaccept" ad to air during Super Bowl 51.[1] The ad was a montage of 24 faces of people of different nationalities while an "uplifting melody play[ed] and a caption about inclusion appear[ed]."[2] The caption read: "We believe no matter who you are, where you're from, who you love or who you worship, we all belong. The world is more beautiful the more you accept."[3] The #weaccept ad was considered a bold response on the part of the company to the Trump Administration's controversial order (signed just nine days earlier) banning entry into the United States of refugees and immigrants from certain countries.[4] And it was that. But those familiar with Airbnb recognized the ad as also saying something related, but different. They recognized it as a message to the company's own hosts to also "accept."[5] Indeed, Airbnb had released an almost identical version of the ad, called "Accept," in November 2016 (before the order was executed) to address its own hosts' also controversial problems with inclusion.[6]

Empirical evidence has suggested that Airbnb hosts discriminate against

---

[*]Assistant Professor of Law, University of the District of Columbia David A. Clarke School of Law, Director of Housing and Consumer Law Clinic, J.D. 2002, University of Virginia School of Law, A.B. 1999, Dartmouth College.

I am grateful for comments received on a draft from Wendy Bach, Nadell Grossman and Jamie Lee. I am also grateful for the feedback from attendees at presentations I gave at Marquette University School of Law's Junior Faculty Works-in-Progress Conference, NYU Clinical Law Review Writer's Workshop, the Mid-Atlantic Clinical Writer's Workshop and the Mid-Atlantic People of

Color Scholarship Conference at George Washington University Law School in 2017. I thank the UDC Law librarian John Jensen for outstanding reference support and Jessica Galvan and Mi Chau for research assistance.

[1] Superbowl Tv, *Airbnb Super Bowl Commercial 2017 (We Accept)*, YouTube (Feb. 5, 2017), https://www.youtube.com/watch?v=5qUTYHnLz2.

[2] Jeff John Roberts, *Airbnb's Super Bowl Ad Is Not What It Seems, Critics Say*, Fortune (Feb. 6 2017), http://fortune.com/2017/02/06/super-bowl-2017-airbnb-ad/.

[3] Superbowl Tv, *supra* note 1.

[4] *Id.*

[5] Sam Byford, *Airbnb's Super Bowl ad says 'we accept' every*one (Feb. 5, 2017, 7:37 PM), http://www.theverge.com/2017/2/5/14517708/airbnb-super-bowl-ad-donation-aid.

[6] Christina Warren, *Hmm…Airbnb's Super Bowl Commercial Sure Looks Familiar*, Gizmodo (Feb. 6, 2017, 5:56 PM), http://gizmodo.com/hmm-airbnbs-super-bowl-commercial-sure-looks-familia-1792058308; *See also* David Gianatasio, *Ad of the Day: Airbnb Preaches, and Pledges, Acceptance in Evocative Post-Election Ad*, Adweek (Nov. 11, 2017), http://www.adweek.com/brand-marketing/ad-day-airbnb-preaches-and-pledges-acceptance-evocative-post-election-ad-174579/.

black guests because of their race.[7] Anecdotal reports from African-American potential guests confirm the study's results.[8] And some hosts openly admit they are not accepting blacks for what would be discriminatory reasons under Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodation.[9] The outrageous nature of some of the discrimination led to a public outcry for changes to Airbnb's platform.[10] In response to this public pressure, Airbnb released an anti-discrimination policy in September 2016 requiring users to agree to a

---

[7] Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment 1* (Harv. Bus. Sch., Working Paper No. 16-069, 2016), http://www.hbs.edu/faculty/Publication%20Files/16-069_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf [https://perma.cc/KM8Z-EAZQ] [hereinafter Edelman]. (Benjamin Edelman, Michael Luca and Dan Svirsky released findings from their paper "Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment" in January 2016.)

[8] In May 2016, the hashtag #Airbnbwhileblack cropped up on Facebook and Twitter as African-American would-be-guests expressed frustration over their inability to successfully book units using the platform. And on May 17, 2016, the first lawsuit against Airbnb alleging race discrimination, *Selden v. Airbnb, Inc.*, was filed alleging that an Airbnb host rejected plaintiff's initial application but subsequently accepted the same application when plaintiff re-applied using profiles imitating white men. *See Selden v. Airbnb, Inc.*, 2016 U.S. Dist. LEXIS 150863 (D.D.C. Nov. 1, 2016).

[9] In May 2016, it was widely reported that a North Carolina host had used racial slurs towards a potential Airbnb renter. A screen shot of the exchange between the two revealed the host stating: "I hate you niggers, so I'm gonna to cancel you. . . This is the South darling. Find another place to rest your nigger head." *See* Caroline O'Donovan, *Racist Host Kicked Off Airbnb,* BuzzFeedNews (Jun. 1, 2016, 2:46 PM), https://www.buzzfeed.com/carolineodonovan/airbnb-removes-host-for-racist-remarks?utm_term=.neyjqQZ2X#.qvBByPVqa; *See also* Kate Irby, *Airbnb host who called guest racial slur*, The Charlotte Observer (June 2, 2016, 10:11 AM) http://www.charlotteobserver.com/news/local/article81314892.html.

The election of Donald Trump as the 45th President of the United States stands to increase the breadth and scope of the discrimination that has been shown to already exist on Airbnb's platform. In the fall 2016, on the campaign trail, Donald Trump stated in response to a protester who was in attendance at one of his rallies: "Look, see, he's smiling. See, he's having a good time . . . You know what I hate? There's a guy, totally disruptive, throwing punches, we're not allowed to punch back anymore. I love the old days. You know what they used to do to guys like that when they were in a place like this? They'd be carried out on a stretcher, folks." Michael E. Miller, *Donald Trump on a protestor: 'I'd like to punch him in the face,'* Wash. Post (February23, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/23/donald-trump-on-protester-id-like-to-punch-him-in-the-face/?utm_term=.a8f2956a90b7. Statements like these have been interpreted to be intended to incite violence more generally, but also to be a "dog whistle" back to the time of the KKK and lynching.

[10] Tracey Lien, *Airbnb tries to fight racism with rule changes*, Los Angeles Times (September 8, 2016, 4:20 PM), http://www.latimes.com/business/technology/la-fi-tn-airbnb-discrimination-20160908-snap-story.html.

"Community Commitment."[11] These changes were met with praise.[12] Yet, questions remained about whether these moves were sufficient. Could Airbnb regulate its own hosts in this arena or should the government be charged with that task instead?

The few legal scholars who have written in this area suggest public accommodations in the sharing economy expose a "soft spot" in our discrimination laws where Title II may be eluded.[13] Those scholars express appropriate concern over the impact of the "Mrs. Murphy Boardinghouse" exception found in Title II.[14] The Mrs. Murphy exception exempts from compliance any "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 as his residence."[15] These scholars and commenters conclude that legislative fixes are necessary to make Title II's application to public accommodations in the sharing economy explicit.[16]

---

[11] *See The Airbnb Community Commitment*, The Airbnb Blog – Belong Anywhere (Oct. 26, 2016), http://blog.airbnb.com/the-airbnb-community-commitment/ ("…[W]e'll begin asking each host and guest to agree to the Airbnb Community Commitment, which says: I agree to treat everyone in the Airbnb community – regardless of their race, religion, national origin, ethnicity, disability, sex, gender identity, sexual orientation, or age – with respect and without prejudice or bias."); *See also* Norrinda Brown Hayat, *Trying to appear "not too black" on Airbnb is exhausting*, CNN.com (Nov. 4, 2016, 10:48 PM) ("Among other actions, Airbnb's plans to address discrimination on its site include developing a feature to help prevent hosts from rejecting one guest by alleging that their space is unavailable and then renting to another, by automatically blocking the calendar for subsequent reservation requests for that same trip. Airbnb also indicated that it would work with a team of engineers and designers to experiment with reducing the prominence of guest photos in the booking process.")

[12] *See* Noah Feldman, *Airbnb's Anti-Discrimination Upgrade Gets It* Right, BloombergView (Sept. 12, 2016, 9:00 AM), https://www.bloomberg.com/view/articles/2016-09-12/airbnb-s-anti-discrimination-upgrade-gets-it-right. *See also* Christine Cauterucci, *Airbnb's New Anti-Discrimination Policy Is a Victory for Trans People*, Slate (Sept. 9, 2016, 3:43 PM), http://www.slate.com/blogs/xx_factor/2016/09/09/airbnb_s_new_anti_discrimination_policy_is_a_victory_for_trans_people.html.

[13] *See infra*, note 16.

[14] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[15] *Id.*).

[16] Michael Todisco, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 Stan. L. Rev. Online 121, 123 (2015) [hereinafter Share and Share Alike], http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/03/67_Stan_L_Rev_Online_121_Todisco.pdf ("Airbnb users find themselves in a soft spot of the law: somewhere between the commercial sphere, where discrimination is strictly prohibited, and the intimate-relationship sphere, where discrimination, even if socially reviled, is beyond governmental reach.") Nancy Leong and Aaron Belzer in their article, *The New Public Accommodations*, also argue that our current public accommodations law is insufficient to cover discrimination by Airbnb hosts against would be guests, that the sharing economy presents new issues that existing laws do not

While legislative fixes to remove the Mrs. Murphy exception from Title II would be welcome, such amendments are highly unlikely in this political climate. In the meantime, the risk of normalization of blacks' exclusion from travel and dignity writ large is too great to leave this industry unregulated. In the meantime, Title II can be used now to chill discrimination in the sharing economy by those not exempted by the exception.

The reader will naturally wonder whether Airbnb itself can and should be held liable under Title II for the discrimination by host's using its platform. That is, of course, an important question. There are persuasive arguments for and against holding Airbnb liable. Guideposts for making these arguments and how courts might come down can be found in opinions such as *Chicago Lawyers' Committee for Civil Rights v. Craigslist*[17] and *Fair Housing Council v. Roommate.com, LLC.*[18] This debate, however, is not the subject of this article.

Instead, this article focuses on the hosts. This is for two reasons. First, the hosts are the actual discriminators. Airbnb is not. Second, the path to liability for the hosts seems more certain. This article makes three principle claims in support of the idea that Title II applies to hosts providing public accommodations in the sharing economy. First, while the Mrs. Murphy exception offers a nuance to the application of Title II to public accommodations in the sharing economy, it will not affect a majority of listings. Second, Title II in its current iteration can reduce discrimination in the sharing economy. Third, the regulation of landlords under the Fair Housing Act is instructive for how we might consider regulating Airbnb hosts under Title II.

---

entirely capture and thus existing laws must be amended to address race discrimination in the sharing economy. See Nancy Leong & Aaron Belzer, *The New Public Accommodations*, 105 Georgetown L.J. (forthcoming 2017) [hereinafter Leong & Belzer], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687486. Leong suggests that Airbnb is offering something different than the traditional public accommodation and therefore is outside of the purview of our civil rights laws. *Id.* In her essay, *Shut Out of Airbnb*, Jamila Jefferson argues for Congress to amend the Communications Decency Act (CDA) "and remove the protections afforded to online platforms that foster housing discrimination." Jamila Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Era of the Sharing Economy*, 43 Fordham Urb. L.J. 12, 14-15 (2016) [hereinafter Shut Out], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772078. It is unclear whether the CDA affords Airbnb the same protections that it has other platforms that merely post third party listings such as Craigslist.

[17] *See generally Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. Ill. 2008).

[18] *See Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1220-1221 (9th Cir. Cal. 2012).

This article proceeds in three parts. Part I outlines how modern travel accommodation sites operate in the sharing economy. Part I also explores the claims of discrimination that have been lodged against Airbnb and its hosts. Finally, in Part I, the article reviews the current literature in this area, which argues for amending Title II and why that proposal is unlikely for the foreseeable future. Part II traces the evolution of public accommodation law beginning with the innkeepers' duty to serve at common law through the passage of Title II. Part II also surveys cases that have applied Title II to hotels, motels and bed and breakfasts to draw a parallel to the discrimination alleged against Airbnb hosts today. Finally, Part III explores the Mrs. Murphy Boardinghouse exception and other libertarian arguments for excluding public accommodations offered in the sharing economy from Title II's reach and analyzes why those arguments fail when applied to a significant number of Airbnb hosts. Part III also argues that the associational deprivation that blacks experience when they are denied access to public accommodations is as necessary to guard against as hosts' right to associate is to protect. The article concludes by proposing that federal and local governments look to the Fair Housing Act, which includes an identical Mrs. Murphy exception, for an example of how hosts can be regulated under Title II's current iteration.

I. BIAS IN THE SHARING ECONOMY

In this Part, the article explores the differences and similarities between historical forms of sharing, like bed and breakfasts, and modern forms, like Airbnb. Further, the article discusses evidence of bias in the sharing economy, using the Airbnb hosts as an example.

A. The Modern Sharing Economy

People have long shared unused or underused assets.[19] Bed and breakfasts, timeshares and car pools are just a few examples of types of goods that we have historically shared.[20] While sharing assets has been

---

[19] What distinguishes goods offered on the sharing economy from their predecessors is really on the transactional side. The reduction in transaction costs makes sharing on a larger scale possible. *The rise of the sharing economy*, The Economist (March 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy ("You might think this is no different from running a bed-and-breakfast, owning a timeshare or participating in a car pool. But technology has reduced transaction costs, making sharing assets cheaper and easier than ever—and therefore possible on a much larger scale. The big change is the availability of more data about people and things, which allows physical assets to be disaggregated and consumed as services.").

[20] *Id.*

possible for many years, in many cases transaction costs made sharing appear more cumbersome than it was worth.[21] The availability of the Internet, however, has substantially reduced the transaction costs associated with sharing making it easier than ever to borrow what you do not have and lend what you are not using.[22] The Internet allows companies to tap into these otherwise personal assets through the use of Web- and app-based platforms that connect buyers and sellers of goods, labor and services.[23] These transactions, between buyers and sellers, are often referred to as "peer to peer" transactions.[24] Sharing platforms in particular make excess capacity accessible in three major ways; they either 1) slice, 2) aggregate, or 3) open it.[25] Together, this makes the new so-called "sharing economy."[26] The type of assets and services offered through the sharing economy are vast and diverse ranging from taxi alternatives, delivery services, personal property sales and home rental.[27] Companies offering the services range from explicitly commercial to free exchanges.[28]

The type of exchange offered in the sharing economy is seen as beneficial for several reasons.[29] First, owners make money from underused assets.[30] Second, renters benefit from only having to pay for assets when

---

[21] *Id.*; Robin Chase, co-founder of Zipcar, describes in her book *Peers Inc*., how instrumental companies like hers are to making sharing possible. Robin Chase, *Peers Inc.: How the Collaborative Economy is Creating Radical Prosperity* ## (PublicAffairs 2015) [hereinafter *Chase.]*. She writes: "Think about what it takes to forge a resilient, frictionless platform for peer-to-peer sharing. Acquiring the appropriate group insurance is at best a year-long effort (and at worst five years and counting in the United States) that no individual or insurance company would undertake for just one person's policy . . . Few have the skill and capital to build the Apple iOS and Google Android apps that enable people to made snow owners and renters can connect easily through websites; smartphones assist potential renters identify where the nearest rentable car is parked; through social networks owners can assess the people they rent to; and online payment systems handle the billing." *Id.*

[22] *Peers Inc., supra,* note 23 at #.

[23] *Id.* at 36. ("Platforms make it simple for peers to participate and to exploit the excess capacity identified by: 1) establishing an enforcing contracts; 2) routinizing the logistics of the transaction such as when and where to pick up a car, refueling and dropping off, and 3) setting penalties for bad behavior. . . . Peers chose to participate on platform because a bigger entity (the Inc) has spent lots of time and money turning something complex and expensive into something simple and inexpensive.")

[24] Steven Hill, *Raw Deal: How the "Uber Economy" and Runaway Capitalism Are Screwing American Workers* 40 (St. Martin's Press 2015) [hereinafter *Raw Deal*].

[25] *Id.*

[26] *Id.*

[27] *Id.* at 39.

[28] Rachel Botsman and Roo Rogers, *What's Mine is Yours: The Rise of Collaborative Consumption* xv (Harper Collins 2010).

[29] *Id.* at xx-xxi; 49-51; 97-100.

[30] *Id.* at xviii.

they need them.[31] Finally, there are environmental benefits as well. For example, there are fewer cars on the street because of car shares like Zipcar.[32]

As for public accommodations offered through the sharing economy, they allow individuals to utilize their homes essentially as hotel rooms or more aptly, bed and breakfasts.[33] Using websites and apps on mobile devices, a guest can connect with a host to rent a room or an entire apartment or home for short and long term periods.[34] In virtually all cases, including Airbnb, before accepting or denying any request, a host is furnished with the guest's first name, a picture, and other personal information.[35] Some of these sites encourage guests to share as much information as possible with their prospective hosts to increase their odds of acceptance in an effort to build "community" with one another.[36]

B. Airbnb, the Paradigmatic Modern Public Accommodation

Airbnb,[37] is the poster child for what is possible in the modern sharing economy.[38] Airbnb's superstar status originates with its "cataclysmic" rise and staying power.[39] In 2007, Airbnb started with one room in one city.[40] Today, Airbnb boasts 2 million listings, in 34,000 cities and is valued at $25.5 billion dollars.[41] The sheer number of Airbnb's listings means that it

---

[31] *Id.* at 97-103.

[32] *Id.* at. 74

[33] *Id.* at ix-x

[34] *Id.*

[35] Airbnb now has a feature, Instant Book, where "listings don't require approval from the host before they can be booked." *What is Instant Book?*, Airbnb, Inc., https://www.airbnb.com/help/article/523/what-is-instant-book. Also, guests can "filter" their search "to only view listings that are available through Instant Book." *Id.*

[36] All of this sharing is largely thought to be good. With respect to individual transactions, sharing information makes the renter feel more comfortable with the owner and the owner feel more comfortable with the renter. And at a larger level, sharing democratizes consumption and entrepreneurship.

[37] Owner Nathan Blecharczyk has said that the name Airbnb came from "the idea that with the Internet and a spare room, anyone can become an innkeeper."

[38] *Raw Deal* at 41.

[39] It was October 2007 when Airbnb's CEO, Brian Chesky, and his roommate (soon to be business partner), Blecharczyk, shared their own San Francisco apartment for the first time with three strangers attending an industrial design conference. That first week they made $1000. From there, they moved to Denver. Barack Obama was speaking at 75,000 seat arena and only 40,000 hotel rooms were available. By early 2008 the business had a website. "In April 2010, Airbnb.com had nearly 85,000 registered users with more than 12,000 properties across 3,234 cities in 126 countries."

[40] *Id.*

[41] Max Chaftkin, *Can Airbnb Unite The World,* Fast Company (Jan. 12, 2016, 6:00

dwarfs the largest traditional hotel chain, Marriott, by half.[42] The company is pursuing an even larger share of the market in years to come.[43] Airbnb is not alone in the sharing economy's travel hosting market. Other sites such as HomeAway[44], OneFineStay[45] and KidandCo.[46] offer similar travel-related hosting services.

In its infancy, there were questions in the minds of local government officials, in particular, about what Airbnb's true identity was. Should Airbnb be regulated as a home or a hotel, both or neither?[47] For its part, Airbnb contributed to the ambiguity. And one can understand why – increased regulation is cumbersome and costly, even if not impossible. Largely in response to pressure from local governments and competitors in the hotel industry, there became little doubt that Airbnb was the canonical modern public accommodation. Airbnb began partnering with airlines and credit card companies.[48] In some instances, Airbnb even voluntarily

---

AM).

[42] *Id.* In 2016, Marriott had just over 1 million units.

[43] Airbnb intends to grow its market share by recruiting more hosts and offering more services in the years to come. For example, in 2016, the company started piloting a project to package three-day stays in San Francisco with airport transfers, meals and day trips. And with the addition of services like these, Airbnb projects that by 2020 it will make $10 billion a year. *Id.* In November 2016, Airbnb unveiled "Trips" at its host conference in Los Angeles. See Seth Porges, Airbnb Is Moving Beyond Room Rentals And Into Full-Trip Experiences, Forbes (Nov. 17, 2016), https://www.forbes.com/sites/sethporges/2016/11/17/at-company-conference-airbnb-announces-moves-beyond-room-rentals-into-full-trip-experiences/#75e5ae082d50. Trips is a full-service travel program that will allow guests to "[b]ook hundreds of experiences designed and led by local experts…," using one app. Airbnb, Welcome to the world of trips, https://www.airbnb.com/new. For instance, you can "surf and sleep under the stars with an avid outdoorsman who knows the best surf breaks" in Los Angeles or "sway to the sounds of musical history" in Havana.

[44] https://www.homeaway.com/ (Upgrade to a whole vacation.)

[45] onefinestay.com (Handmade hospitality for the finest homes.)

[46] https://www.kidandcoe.com/ (Book your perfect family vacation.)

[47] *See* Emily Badger, *Why we can't figure out how to regulate Airbnb*, The Washington Post (April 23, 2014) https://www.washingtonpost.com/news/wonk/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/?utm_term=.862d74c945ec; The Editorial Board, *How to regulate Airbnb and 'homesharing'*, The Los Angeles Times (June 22, 2016, 55:00 AM) http://www.latimes.com/opinion/editorials/la-ed-homesharing-law-20160622-snap-story.html; Kate Benner, Airbnb Sues Over New Law Regulating New York Rentals, The New York Times (Oct. 21, 2016) https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html?_r=0.

[48] Delta frequent fliers can earn airline points for Airbnb stays. http://travelskills.com/2016/11/02/delta-jetblue-sharing-economy/. American Express customers can also use points to book Airbnb. https://www.americanexpress.com/us/content/airbnb/.

subjected itself to regulation – collecting hotel taxes[49] in some of its largest markets and attempts at striking a deal with the largest union of hotel housekeepers.[50] Each of these moves has helped to solidify Airbnb's position as a public accommodation.

Even while Airbnb submitted its hosts to some regulation, it feigned ignorance to whether they should be subjected to regulation for discrimination. Early iterations of Airbnb's website barely mentioned discrimination at all.[51] Over time, as evidence of bias on Airbnb's platform became publicized, the company's position evolved. Airbnb issued increasingly strong statements decrying bias in its online "community."[52] In November 2016, Airbnb released its first anti-discrimination policy. The policy included, among other things, Airbnb's plans to: 1) develop a feature to help prevent hosts from rejecting one guest by stating that alleging that their space is not unavailable and then renting to another, by automatically blocking the calendar for subsequent reservation requests for that same trip

---

[49] Emily Badger, *Airbnb is about to start collecting hotel taxes in more major cities, including Washington* (Jan. 29, 2015) The Washington Post https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/?utm_term=.77189b95a4df..

[50] Airbnb unsuccessfully attempted to form an alliance with the Services Employees International Union (SEIU) to have its hosts only employ unionized home cleaners who would be paid no less than $15 per hour. The deal ultimately fell apart because housing advocates alleged it legitimized home-sharing at the expense of affordable housing. *See* Elizabeth Dwoskin, *Airbnb is forming an alliance with one of the nation's biggest labor unions*, The Washington Post (April 18, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/04/18/airbnb-is-forming-an-alliance-with-one-of-the-nations-biggest-labor-unions/?utm_term=.bc7feb19ec9f. *See also* Brian Mahoney, *SEIU, UNITEHere meet over proposed Airbnb deal*, Politico (April 19, 2016 10:00 AM) http://www.politico.com/tipsheets/morning-shift/2016/04/seiu-unite-here-meet-over-proposed-airbnb-deal-213839.

[51] Citation needed [to old website].

[52] On September 8, 2016, Airbnb issued a 32-page report, "Airbnb's Work to Fight Discrimination and Promote Inclusion," that indicated the company was committed to making "a series of product and policy changes that will fight discrimination and bias." Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion* 10 (Sep. 8 2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf. On November xx, 2016, it sent an email requesting that all users agree to a "Community Commitment." *See* Madison Kircher, *Airbnb Will Now Require Hosts to Agree to Anti-Discrimination Policy*, N.Y. Mag: Select All (Nov. 1, 2016, 11:49 AM), http://nymag.com/selectall/2016/11/new-airbnb-mandatory-anti-discrimination-policy-for-hosts.html. More specifically, hosts who decline a guest based on discrimination or post a listing with discriminatory language, "will be forced to edit the listing or else face suspension. *Id.* This is a significant improvement from Airbnb's previous policy and public position on bias on its site. Yet, these changes are not likely to eradicate the discrimination that black users are facing.

and 2) work with a team of engineers and designers to experiment with reducing the prominence of guest photos in the booking process.[53]

C. Evidence of Bias by Airbnb Hosts

1. Empirical Evidence of Discrimination

In January 2016, Edelman, Luca and Svirsky released findings from their paper "Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment," which revealed "that requests from guests with distinctively African-American names are roughly 16% less likely to be accepted than identical guests with distinctively White names."[54] The experiment consisted of inquiring into the availability of 6,400 listings on Airbnb in five major American cities—Baltimore, Dallas, Los Angeles, St. Louis, and Washington.[55] All of the requests were identical except for the names they gave their make-believe travelers.[56] Some requests were made using African American-sounding names like Jamal or Tanisha and others had stereotypically white-sounding names like Meredith or Todd.[57] The Edelman study found "widespread discrimination against African-American guests."[58] Requests from guests with distinctively African-American names received a positive response approximately 42% of the time compared to the approximately 50% positive response rate for White guests.[59] The study's authors asserted that this discrepancy amounted to an approximately 16% penalty for being African-American.[60] The Edelman study found this penalty particularly notable when comparing Airbnb to "the discrimination-free setting of competing short-term accommodation platforms such as Expedia."[61]

According to the Edelman study, these differences in acceptance rates based on race persist whether the hosts are African-American or White,

---

[53] See *supra* note 69 (Airbnb's report acknowledged the ways in which hosts have used its platform to discriminate against African-American would-be guests and released its new anti-discrimination policies.).

[54] *See* Edelman *supra* note 7, at 1.

[55] *Id.* at 2.

[56] *Id.* at 3-7.

[57] *Id.* at 3.

[58] *Id.* at 9 (The names the Edelman group selected were based on a list of distinctively White and African-American names drawn from a Bertrand and Mullainathan study that was conducted in 2004 in the employment context. The original list was compiled with data regarding the frequency of names on birth certificates of babies born between 1974 and 1979 in Massachusetts.).

[59] *Id.* at 10.

[60] *Id.* at 3.

[61] *Id.* at 4.

male or female.[62] And, importantly for our discrimination laws, this difference persisted whether the host shared the property with the guest or not, whether the host was experienced (with many properties listed or not) and whether the property was cheap or expensive.[63] It appears from the Edelman study Airbnb hosts discriminate against African-Americans a lot and often.

The Edelman study argued that Airbnb could revise its platform to reduce this discrimination by concealing guests' names and/or by moving the entire platform in the direction of the "Instant Book" option currently available.[64] The authors also suggested individual Airbnb hosts, especially those with many properties, might be liable for discriminating themselves under the federal Fair Housing Act.[65]

2. Anecdotal Evidence of Discrimination

In the spring of 2016, anecdotal evidence of discrimination began to emerge from potential black Airbnb guests who had been denied the opportunity to book a listing they presumed because of their race. Quirtina Crittenden reported suspecting that she was being discriminated against on Airbnb when she would attempt to book a listing, be denied and check back later only to see the dates still available.[66] Crittenden posted the tales of her denials on social media using the hashtag #Airbnbwhileblack.[67] Crittenden was not alone. For example, @aksala13 posted: "I've tried to use @Airbnb ... Funny how the dates I request are ALWAYS booked even when they show as 'available'. #fuckem #AirbnbWhileBlack."[68] @jbouie posted: I'll

---

[62] *Id.* at 1.

[63] *Id.*

[64] *Id.* at 22. "Instant Book" on Airbnb mirrors a more traditional hotel booking system where hosts accept guests without pre-screening them. *See* supra note 38.

[65] *See* Edelman *supra* note 7, at 23.

[66] Maggie Penman, Shankar Vedantam, & Max Nesterak, *#AirbnbWhileBlack: How Hidden Bias Shapes The Sharing Economy*, Hidden Brain: National Public Radio (Apr. 26, 2016, 12:10 AM), http://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy [hereinafter *#Airbnbwhileblack*] (Crittenden reports conducting her own experiment where she shortened her name to "Tina" and replaced her profile photograph with a picture of a landscape.[66] She has not had problems renting on Airbnb since. NPR article.).

[67] On April 29, 2016, following its story on Crittenden's experiences, NPR hosted a Twitter chat on the topic on #Airbnbwhileblack. *See* Leah Donnella, *Code Switch And Hidden Brain Teamed Up For An #AirbnbWhileBlack Twitter Chat*, Code Switch: National Public Radio (Apr. 29, 2016, 12:10 PM), http://www.npr.org/sections/codeswitch/2016/04/29/476164589/join-us-at-noon-today-for-an-airbnbwhileblack-twitter-chat.

[68] @aksala13, Twitter (Apr. 26, 2016, 10:56 AM), https://twitter.com/aksala13/status/726107877958635521.

say that despite having good reviews on Airbnb, my hit rate for a place is roughly 1 reservation for every 4 tries. #AirbnbWhileBlack."[69] @ScottyLiterati posted: "In the US, I only use Instant Book which auto-accepts requests. It spares me the BS excuses. Never any trouble abroad tho!"[70] And @lexbthinking posted: "When you have to (use Airbnb) have the most Caucasian looking and most generic sounding named friend to make the requests #AirbnbWhileBlack."[71] The #AirbnbWhileBlack movement continued to expand in the months after Crittenden's story was first covered.[72]

3. Selden v. Airbnb, Inc.: The First Lawsuit Alleging Discrimination in Sharing Based Public Accommodations

On May 17, 2016, the first lawsuit alleging race discrimination on Airbnb was filed.[73] Gregory Selden was the named plaintiff in a class action complaint alleging that Airbnb's hosts were engaged in discriminatory acts.[74] Specifically, Selden alleged that in March 2015 he inquired about the availability of a listing in Philadelphia, Pennsylvania, and he was told the listing was not available.[75] While still searching for an accommodation, Selden came across the same listing, which appeared to still be available.[76] Selden grew suspicious that he had been discriminated against and created two "imitation" Airbnb profiles: one under the "Jessie" and another under the name "Todd."[77] Jesse had the same demographic information as

---

[69] Aja Romano, *Airbnb has a discrimination problem. Ask anyone who's tried to #Airbnbwhileblack.*, Vox (May 6, 2016, 10:00 AM), http://www.vox.com/2016/5/6/11601180/airbnbwhileblack-racism.

[70] @ScottyLiterati, Twitter (Apr. 29, 2016, 10:49 AM), https://twitter.com/ScottyLiterati/status/726106174316269568.

[71] *See #Airbnbwhileblack supra* note 85.

[72] A coalition critical of Airbnb, ShareBetter, aired an ad featuring Crittenden and calling for changes to Airbnb's operations on cable networks in Philadelphia and New York during the Democratic National Convention. *See* Kenneth Lovett, *Airbnb battle heads to Democratic National Convention,* N.Y. Daily News (Jul. 25, 2016, 4:00 AM), http://www.nydailynews.com/news/politics/lovett-airbnb-battle-heads-democratic-national-convention-article-1.2724368. ShareBetter also purchased a full-page ad in USA Today on Monday, July 25, 2016, the first day of the Democratic Convention. *Id.* ShareBetter had individuals passing our printed materials outside of the convention and stationed a truck in downtown Philadelphia, which played videos detailing Airbnb's discrimination. *Id.*

[73] Hope King, *Airbnb sued for discrimination,* CNN Tech (May 18, 2016, 4:56 PM), http://money.cnn.com/2016/05/18/technology/airbnb-lawsuit-discrimination/.

[74] *Id.*

[75] Class Action Complaint at 5, *Selden v. Airbnb, Inc.*, 2016 U.S. Dist. LEXIS 150863 (D.D.C. Nov. 1, 2016) (Civil Action: 1:16-cv-00933).

[76] *Id.*

[77] *Id.* at 6.

Selden.[78] On the same day that Selden was rejected, the host accepted both imitation potential guests.[79] Selden alerted Airbnb to the discriminatory treatment that he received when trying to reserve a unit on Airbnb's website and his communications went unanswered.[80] Silence from Airbnb prompted the lawsuit.[81] In November 2016 (during the same week that Airbnb announced its anti-discrimination policy), it moved the federal district court to dismiss *Selden* and send the case to mandatory arbitration.[82] The result in *Selden* foreshadows the problems with leaving regulation of discriminating landlords to Airbnb.

II. THE STEADY EVOLUTION OF OUR PUBLIC ACCOMMODATION LAWS

II. This Part explores the evolution of our public accommodation laws, including tracing the lapses in the general duty to serve, which have historically arisen at times of national political and cultural strife.

A. The Duty to Serve at Common Law

The innkeeper had a duty to serve[83] at common law, which can be traced back to 16th century England.[84] And at common law, a patron could not be excluded from an inn solely because of race, color, or creed.[85] In 1837, in the case *Markham v. Brown*, the Supreme Court of New Hampshire directly addressed wrongful discrimination in the context of innkeepers.[86] There, an innkeeper was prohibited from excluding drivers of rival stage lines from his establishment, a prohibition which could be lifted if the driver engaged in some sort of misconduct.[87] The answer in the 1800's as it should be now, was that "[p]roperty becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at

---

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] C. Ryan Barber, *Airbnb Defends Arbitration in Push to Dismiss Discrimination Suit*, The National Law Journal (Oct. 12, 2016), http://www.nationallawjournal.com/id=1202769794542/Airbnb-Defends-Arbitration-in-Push-to-Dismiss-Discrimination-Suit?slreturn=20170127020155.
[83] The right to exclude in places of entertainment.
[84] *See generally White's Case*, 2 Dyer 158b, 73 Eng. Reprints 343 (K. B. 1558)
[85] *Innkeeper's Right to Exclude or Eject*, Fordham L.R. 427 (1938), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1162&context=flr.
[86] *See Markham v. Brown*, 8 N.H. 523, 31 Am. Dec. 209 (1937); *State v. State*, 105 N.C. 766, 11 S.E. 478 (1890).
[87] *Id.*

large."[88] Others, including most notably James W. Fox, have already detailed that long history and I do not seek to repeat that work here.[89] It is worth noting, that centuries ago the law first wrestled with the question of how much authority "the public through its Government, can exert over commercial enterprises dealing with the public" and the result was a general duty to serve.[90]

The legal concept that the innkeeper had a duty to serve regardless of a patron's race first retreated in the late 1850's during the Civil War Era.[91] Cases decided after 1850, while acknowledging the duty serve, also began to advance the notion that an innkeeper must also not tramp on the rights of his other guests.[92] Segregation of passengers and guests was commonly offered at this time as a solution to the dilemma of having a duty to serve one set of customers and to protect the rights to associate freely of another set of customers.[93] In a Michigan case, *Day v. Owen*, the state court held "a common carrier can not [sic] refuse to carry any person of legal conduct and intention upon the ground of any physical or personal quality or defect (including race), or to suit the preference or antipathies of other passengers."[94] The law continued to move in this direction – "appearing to require service regardless of race"[95] even while sanctioning segregation

---

[88] *Munn v. Ill.*, 94 U.S. 113, 126 (U.S. 1877) (stating that when private property is "affected with a public interest, it ceases to be *juris privati* only" (quoting Lord Chief Justice Hale, *De Portibus Maris*, 1 Harg. Law Tracts, 78)).

[89] James M. McGoldrick, *The Civil Rights Cases: The Relevancy of Reversing a Hundred Plus Year Old Error*, 42 St. Louis U.L.J. 451 (1998).

[90] Brian K. Landsberg, *Public Accommodations and the Civil rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y, 18 n. 65 (2015) [hereinafter Landsberg], http://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1134&context=facultyarticles.

[91] McGoldrick at ##.

[92] *Day v. Owen*, 5 Mich. 520, 527 (Mich. 1858) ("14utomobilit[e] the mass of persons who have a right, and are in a habit of traveling on his boat (without comingling with blacks").

[93] Fox, Jr. at164-166.

[94] *Id.* at 525.

[95] It is worth noting that regardless of the law, the custom in many places of public accommodation was still to deny service to blacks even in free northern states. According to historian Leon Litwack: "Racial segregation or exclusion . . . haunted the northern Negro in his attempts to use public conveyances, to attend schools, or to sit in theaters, churches, and lecture halls. But even the more subtle forms of twentieth-century racial discrimination had their antecedents in the ante bellum North: residential restrictions, exclusion from resorts and certain restaurants, confinement to menial employments, and restricted cemeteries. The justification for such discrimination in the North differed little from that used to defend slavery in the South: Negroes, it was held, constituted a depraved and inferior race which must be kept in its proper place in a white man's society. Leon F. Litwack, *North of Slavery: The Negro in the Free States* viii (2009).

until the end of the Civil War.[96] Despite the ambiguity between practice and law, "no court ruling before the Civil War states that African-Americans are not entitled to be served in places of public accommodation."[97]

B. The Civil Rights Act of 1875

Segregation obviously persisted in much of the country during the Civil War period. Yet, during Reconstruction, passage of a public accommodations law was high on the list of priorities for African-American legislators.[98] Public accommodations laws were seen as "key to the implementation of reconstructed free citizenship" because "[r]acial subordination and segregation in public facilities, and especially in the most common facilities of railroads, streetcars, inns and theatres, was one of the most pervasive ways in which Whites asserted their racial power."[99] Southern states, including Texas, Louisiana, Mississippi, Florida, and South Carolina, all passed antidiscrimination laws during this time.[100] And movement from the states ultimately encouraged Congress to pass its own bill, which became the Civil Rights Act of 1875. Section 1 of the Act provided that:

> 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, 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.

C. The Civil Rights Cases

Five years after the passage of the 1875 Act, the Court struck it down in *The Civil Rights Cases.*[101] Writing for the majority, Justice Bradley

---

[96] Joseph William Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U.L. Rev. 1283, 1344 (Summer 1996) [hereinafter Singer].

[97] *Id.*

[98] James W. Fox Jr., *Intimation of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow,* 50 How. L.J. 113, 138 (2006).

[99] *Id.*

[100] *Id.* at 137.

[101] *The Civil Rights Cases* were five cases that were consolidated and jointly decided

described the right to nondiscrimination as a "social" one for which the Constitution offered no protection in the absence of state action.[102] Justice Harlan in his dissent agreed that the Fourteenth Amendment did not reach inequalities in social rights.[103] His disagreement rested instead on the categorization of this right not to be discriminated against as a civil right and not a social one.[104] The invalidation of the Civil Rights Act of 1875 had very real costs for blacks. In black communities throughout the country people reacted to the Court's decision in the *Civil Rights Cases* with dismay. They were keenly aware of what this meant for their lives.[105] African-Americans were virtually excluded from mainstream American travel in the United States for the eight decades beginning when the Supreme Court struck down Civil Rights Act of 1875[106] through the passage of the Civil Rights Act of 1964.[107]

---

by the Court all concerning the denial of privileges in public places on the basis of race, color or previous servitude. *See* The Civil Rights Cases, 109 U.S. 3, 59-60 (1883) (*United States v. Stanley, United States v. Ryan, United States v. Nichols, United States v. Singleton, and Robinson v. Memphis & Charleston Railroad*). Two of the five cases considered the legality of denying blacks access to hotels on the basis of their race under the Act. *Id.* at 8.

[102] Samuel Bagenstos analyzes the Court's distinction between social and civil rights in his essay "*The Unrelenting Libertarian Challenge to Public Accommodations Laws*." 66 Stan. L. Rev. 1205, 1212 (2014) [hereinafter Bagenstos]. Baganstos explains "[t]here was consensus at the time that social equality was beyond the power of the law to achieve. For many during the Reconstruction era, the civil-rights/social-rights distinction served a function like the one that the structurally similar public-private distinction would later be understood to serve – to persevere a sphere of private, individual choice . . ." where practices of race discrimination were outside of the purview of the law. *Id.*

[103] The Civil Rights Cases, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting).

[104] *Id.* at 59-60.

[105] *See generally* Marianne L. Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases – Freedom: Constitutional Law,* 70 Chi.-Kent. L. Rev. 1123 (1995).

[106] Civil Rights Act of 1875, Ch. 114, 18 Stat. 335 (1875); W.E.B. Du Bois, *The Souls of Black Folk*

[107] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Alton Hornsby Jr., *Looking Back on the Fight for Equal Access to Public Accommodations*, Economic Policy Institute (Jul. 2, 2014), http://www.epi.org/files/2014/Hornsby-07-02-2014a.pdf. The fight for equal access to public accommodations dovetailed with the fight for civil rights of the 1960s. Prior to the civil rights movement, however, the fight for equal access to public accommodations was marked by "a long history of temporary advancements precipitated by protest, followed by legal retrenchments at the hands of lawmakers and the courts," starting at the dawn of Reconstruction. *Id.* at 2. The Civil Rights Act of 1866 was the first national legislative action to provide equal access to public accommodations for all Americans. This act, "promoted African American citizenship and foreshadowed the 14th Amendment to the U.S. Constitution," was opposed in general, but especially in the former Confederate states. *Id.* at 4. The act was from the onset poorly enforced or ignored altogether and as soon as Southern legislatures were restored to white Democratic control,

As a result of the Nadir and Jim Crow laws that persisted in the country during this time, traveling could be perilous for blacks, generally.[108] Those blacks endeavoring to make a trip despite the potential danger were unwelcome in public accommodations throughout the country – not only in Southern states.[109]

"public accommodations were segregated or forbidden to blacks by statutes." *Id.* Blacks continued to advocate for increased access. For example, between 1900 and 1906 in 25 cities, blacks engaged in "streetcar boycotts," which on occasion led to brief desegregation of the streetcars. *Id.* Even after the Supreme Court struck down the Civil Rights Act of 1875, black protest over access was not stifled. *Id.* Blacks engaged in direct protest and legal challenges regarding the segregation of railroad cars. *Id.* Protests continued throughout the 1940's with the bus boycotts of Montgomery and into the 1960's with sit-ins at lunch counters and restaurants and perhaps, most notably, the March on Washington for Jobs and Freedom.)

[108] Cotton Seiler, *Republic of Drivers: A Cultural History of Automobility in America* 110 (Univ. of Chi. Press 2008) ("A disproportionate number of black road narratives impress upon the reader the traveler's near-constant anxiety on unfamiliar roads." Also, recounts Courtland Milloy's narrative recalling from his childhood that "so many black travelers were just not making it to their destinations."); Tanvi Misra, *These Jim Crow-Era Guides for Black Travelers Are Sadly Still Relevant*, CityLab (Oct. 30, 2015), http://www.citylab.com/work/2015/10/these-jim-crow-era-guides-for-black-travelers-are-sadly-still-relevant/413311/ ("In many towns black travelers were greeted with unthinkable violence and even death if they stayed past sundown.").

[109] James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism, "Between 1890 and about 1960, *most* hotels in America would not let African Americans stay the night." (emphasis in original). During this time blacks' relied exclusively on word of mouth recommendations for locating potential resting places where they might safely stay.[109] So widespread was this problem that by 1936 the Negro Motorist Green Book had come into publication "to aid black travelers in identifying places where they could comfortably eat, sleep or purchase gas free from discrimination while traveling." Publication of the Green Book ceased in 1964 after the passage of Title II, when it was assumed it would no longer necessary because blacks were free to travel.

It is important to note that the Green Book served both a practical purpose (providing details) while also advancing a narrative of cultural uplift. "Poised between the Jim Crow and civil rights eras, Travelguide and The Negro Motorist Green Book simultaneously protests the discrimination that confronted black motorists on American roads and proffered the hegemonic image of American freedom through driving. They articulated a collectivist racial politics, mobilizing their midcentury audiences for social change; yet they also rehearsed the individualistic market-oriented strategies of black capitalism and the vital-center consensus, where, as Lizabeth Cohen notes, 'the individual's access to the free market was a sacred concept.' This dualism was not so novel; many progressive publications by and for African-Americans, from The Crisis to Ebony, deployed rhetoric affirming black communal struggle in society that 'spoke individualism' to the exclusion of other social philosophies. The salient novel element of Travelguide and The Negro Motorist Green Book was their focus on automobility as the practice through which African Americans could reconcile, both in symbolic and practical terms, the competing values of individual agency and collective uplift…From the first then, these guidebooks emphasized the proximity, in matters of temperament and class, of black and white drivers. In the teeth of Jim Crow, they sounded a tone of aggrieved entitlement, mildly articulated

D. Title II of the Civil Rights Act of 1964

In the 1960's, pressed to action by the Civil Rights Movement and international opinion generated as a result, the federal government once again proposed civil rights legislation.[110] Both the Kennedy and Johnson administrations actively lobbied for a civil rights bill that would include protections for black travelers.[111] By 1964, there was enough political backing to make a public accommodations law reality.[112] When the Civil Rights Act of 1964, was passed Title II contained a prohibition on discrimination in public accommodations.

Unlike its predecessors, Title II did not rely solely on Congress' powers under the 13th and 14th Amendments. Having learned from the demise of the 1875 Act, Congress relied on its powers to regulate interstate business under the Commerce Clause when passing the 1964 Act.[113] Also in contrast to the earlier civil rights laws, Title II "(wa)s carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people," including inns.

---

as when The Negro Motorist Green Book reports that most of the better conveyances, hotels resorts and restaurants are 'not available…" *Id.* at #.

In recent years, interest in the narrative of the black travel guides has grown. In September 2015, New York Public Library's Schomberg Center for Research in Black Culture digitized 21 volumes of the Green Book, from 1937 through 1964. *See generally* New York Public Library Digital Collections, The Green Book, https://digitalcollections.nypl.org/collections/the-green-book#/?tab=about (last visited February 11, 2017). In 2010, Calvin Alexander Ramsey wrote a children's book called *Ruth and The Green Book*, which tells the story of a young black girl in the 1950's embarking on a road trip with her family during which she learns that "black travelers were not always treated very well in some towns." Calvin A. Ramsey, *Ruth and the Green Book* (2010). After an attendant at a gas station showed Ruth's family The Green Book, Ruth could finally make a safe journey from Chicago to her grandma's house in Alabama. *Id.* In 2016, Ramsey produced a film. *See The Greenbook Chronicles* (Calvin Alexander Ramsey and Becky Wible Searles 2016). And when the National Museum of African American History and Culture opened in September 2016, it included an interactive exhibit on The Green Book.

[110] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[111] Citation needed.

[112] Citation needed.

[113] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. at 243 ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . ."). Reliance on the commerce clause is contrary to the Court's reasoning in Title II of the Civil Rights Act of 1875, which broadly prescribed discrimination in "inns, public conveyances of land or water, theatres, and other places of public amusement," without limiting those with connections to interstate commerce. Civil Rights Act of 1875, 18 Stat. at 336.

Title II provides that:

> All 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, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.[114]

There are four classes of business establishments covered by the statute: 1) hotels, 2) restaurants, 3) movie theatres and 4) any establishment located within one of the previous three.[115] With respect to hotels, the statute includes "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 as his residence.[116] The primary purpose behind the passage of Title was to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments."[117]

E. Post-1964 Enforcement of Title II

Opposition to Title II continued after its passage.[118] The first case to challenge the breadth and application of the new law was *Heart of Atlanta Motel, Inc. v. United States.* In *Heart of Atlanta,* appellant sought a declaratory judgment on the question of whether Congress had a right to legislate who private hoteliers could or could not rent to.[119] Appellant was the owner and operator of a motel with 216 rooms that were available to transient guests, and was located near the center of the city.[120] The motel was easily accessible to four major highways.[121] The appellant solicited guests from outside of the state via various national advertising media, including magazines of national circulation.[122] Approximately 75% of its guests were from outside of state. Prior to the Act's passage, the motel had

---

[114] Civil Rights Act of 1964, 78 Stat. at 243.

[115] *Id.*

[116] *Id.*

[117] *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (*quoting* S. Rep. No. 872 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370.).

[118] *See* Landsberg *supra* note 109, at 13.

[119] *Heart of Atlanta,* 379 U.S. at 243-244.

[120] *Id.* at 243.

[121] *Id.*

[122] *Id.* at 274.

engaged in a practice of refusing to rent to blacks and wished to continue to do so.[123] Appellant motel operator argued that Congress had exceeded its Commerce Clause powers in passing Title II.[124] Moreover, appellant argued it was being "deprived of the right to choose its customers and operate its business . . . resulting in a taking of its liberty and property without due process of law."[125] At the trial level, the district court sustained the constitutionality of the Act at issue and issued a permanent injunction "restraining appellant from 'refusing to accept Negroes as guests in the motel by reason of their race or color."[126] The motel operator appealed.[127] The Court, relying on the Commerce Clause, stated that the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people."[128]

Despite the early challenges in *Heart of Atlanta*, widespread compliance with the Act followed in the years immediately following Title II's passage.[129]

a. Federal Enforcement of Title II Against Hotel and Motel Operators

There were outliers, however, with public places of lodging continuing to engage in discriminatory behavior prohibited by the Act especially in times of upheaval in the country, in the aftermath of 9/11, for example. At the federal level, historically, enforcement has been focused on institutional actors. There are just 22 Title II cases reported on the Department of Justice's website, only five of which are against operators of hotels and motels and none against bed and breakfasts or individual renters.[130] In *United States v. Thomas d/b/a Best Western Scenic Motor Inn*, the United States filed a complaint in the Eastern District of Arkansas alleging that defendants, doing business as Best Western Scenic Motor Inn, violated Title II by discriminating against African Americans in the provision of public accommodations.[131] The Complaint alleged that defendants had engaged in a pattern or practice of denying African Americans "full and equal use and

---

[123] *Id.* at 249.
[124] *Id.* at 242.
[125] *Id.* at 244.
[126] *Id.*
[127] *Id.* at 242.
[128] *Id.* at 250.
[129] *See* Landsberg *supra* note 109, at 13.
[130] *See* Department of Justice Civil Rights Division Housing and Civil Enforcement website *found at* https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#pa.
[131] Complaint of *USA v. Thomas, et al.*, Dep't of Just.: C.R. Div. (Jan. 18, 2001), https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-103.

enjoyment of the goods, services, privileges, advantages, and accommodations" by "instruct[ing] desk clerks to attempt to determine if prospective guests who called to make reservations were African Americans or other racial or ethnic minorities" and "to deny a reservation to the caller [if they were believed to be African American] and to inform the caller rooms were unavailable when in fact rooms were available."[132] When, on rare occasions, Defendants did rent rooms to African Americans, "[they] routinely rented rooms to those guests under less favorable terms and conditions than to white guests, including steering those guests to less desirable rooms, solely on the basis of race, color or national origin."[133]

---

[132] *Id.* "[D]efendants established and implemented policies and procedures that denied lodging to African Americans and other minorities when in fact lodging was available." Consent Decree of *USA v. Thomas, et al.*, Dep't of Just.: C.R. Div. ¶ 5 (Sept. 27, 2001) [hereinafter Consent Decree], https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-369. Defendants violated Title II by: 1) "directing their employees to deny African Americans and other minorities available rooms because such rooms could be rented to 'better people'" and 2) "instructing their employees to provide false information to callers they concluded were minorities based on speech or accents." *Id.*at ¶¶ 6-7. On at least one occasion, "Defendant Stephen Thomas observed individuals approach the motel from a vacant room overlooking the parking lot, telephoned employees working at the registration desk, and instructed them to deny rooms to African Americans and other prospective minority guests." *Id.* at ¶ 8. It was determined that "the majority of prospective African American and other minority guests were illegally refused lodging at the Best Western based on their race, color, or ethnicity." *Id.* at ¶ 9.

[133] Consent Decree *supra*, note 152 at ¶ 9. "On occasions when African Americans and other minorities were not denied lodging at the Best Western, defendants on their own or through their employees provided such guests inferior quality lodging when superior quality lodging was available and was provided to white guests. To implement their discriminatory room assignment policies, defendants established a color coding system for room assignments. Red tabs signified "bad" or poorer quality rooms, and white tabs signified "good" or higher quality rooms. Defendant Stephen Thomas changed room assignments on the basis of race, color, and ethnicity in order to place African Americans and other minority guests in bad rooms. Defendants instructed Best Western's employees to flag the ethnicity or race of guests on reservation cards and registration log books. Specifically, defendants instructed employees to note "h.r." or "high risk" for African American and other minority guests on the reservation cards in order to ensure that such guests would be placed in bad rooms. In 1996, a group of African American guests attending a church revival in Batesville reserved three rooms at the Best Western. When one of the African American guests requested an extension of her group's stay for an additional week, her request was denied. When the same guest requested that accommodations for her group be extended only through the weekend, that request was also denied. Defendant Stephen Thomas indicated to his employees that a folk festival, attended primarily by white people, was scheduled over that same weekend and that he did not want black guests at the motel at the same time as the white guests who would be attending the festival. Although enough rooms were available to accommodate the guest's request to extend her group's stay, Defendant Stephen Thomas falsely stated to her that the motel was booked for the weekend and that no rooms were available. Defendants

In another case, *United States v. HBE Corporation d/b/a Adam's Mark Hotels*, the United States claimed that the HBE Corporation, which operates 21 Adams' Mark Hotels and Resorts throughout the country, violated Title II of the Civil Rights Act of 1964 by discriminating on the basis of race or color.[134] The United States' complaint alleged a pattern or practice of resistance to, and denial of, the full and equal enjoyment by non-white persons of the goods, services, facilities, privileges, advantages, and accommodations offered by the Adams' Mark hotels throughout the country.[135] The United States initiated the investigation based on events surrounding the Black College Reunion in Daytona Beach, Florida held in April 1999.[136] The Department's action followed a private class action lawsuit filed against the company claiming violations of Title II and other civil rights statutes.[137]

As a final example, in *Marriott International Settlement*, the United States alleged that in the wake of the September 11th terrorist attacks on Washington and New York, the Des Moines Marriott engaged in discriminatory conduct against Arab Americans[138] by denying Arab Americans hotel rooms and access to banquet facilities when rooms and banquet facilities were available.[139]

---

established an atmosphere of antipathy toward African Americans and other minorities by freely using racial epithets or making racially derogatory remarks, including the statement, "We don't like blacks." Additionally, qualified African American applicants were denied interviews for jobs while defendants gave white applicants immediate interviews. *Id.* ¶¶ *6-15*.

[134] Revised Settlement Decree of *United States v. HBE Corporation d/b/a Adam's Mark Hotels*, Dep't of Just.: C.R. Div. (Nov. 6, 2000) [hereinafter HBE Settlement Decree], https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-606.

[135] Complaint of *United States v. HBE Corporation d/b/a Adam's Mark Hotels*, Dep't of Just.: C.R. Div. ¶ 8 (Dec. 16, 1999), https://www.justice.gov/crt/housing-section-documents-0.

[136] *See generally* HBE Settlement Decree *supra*, note 154.

[137] *Id.*

[138] It is worth observing the timing of the discriminatory conduct.

[139] Settlement Agreement Between the United States, Midwest Federation of Syrian-Lebanese Clubs, and the Des Moines Marriott, Dep't of Just.: C.R. Div. (Aug. 15, 2002), https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-53. "[More specifically,] during the Spring and Summer of 2001, a representative of the Midwest Federation had several discussions with the Marriott's Sales Manager about holding the Midwest Federation's 2002 convention at the hotel. In August 2001, the details were verbally finalized and on September 5, 2001, the Marriott faxed a signed agreement to the Midwest Federation for the Midwest Federation's signature. The contract specified that the Midwest Federation had until September 20th to sign the agreement . . . On September 11, 2001, at approximately 2:30 pm, a Des Moines Marriott representative informed the Midwest Federation that the Marriott had decided to revoke its offer to the Midwest Federation because another group wanted the space for the same weekend as the Midwest Federation." *Id.* There was no other group that was definitely interested for that time frame.

These cases share common facts – the denial to travelers because of their race and/or national origin.

b. Using State Law to Prohibit Discrimination in Bed and Breakfasts

Bed and breakfasts - smaller, independently-owned and operated rooming houses - provide a natural analogy to Airbnb and other public accommodations offered in the sharing economy for obvious reasons.[140] None of the cases on the Department of Justice's website involved bed and breakfasts. Those cases, a few of which are summarized below, appear to instead be litigated at the state level in local courts and before commissions. Importantly, the language of the statues and patterns of discrimination summarized in the state law cases closely mirror that seen in Title II cases.

In *In the Matter of: Todd Wathen and Mark Wathen and Walder Vacuflo, Inc.*, the Illinois Human Rights Commission found that "Complainants proved by a preponderance of the evidence a *prima facie* case of unlawful discrimination based on denial of a place of public accommodation."[141] In *Wathen,* Complainants alleged they had been denied their "equal enjoyment of Respondent's bed and breakfast facilities on account of their homosexual orientation when Respondent refused to host a same-sex civil union ceremony" on the premises.[142] Respondent- bed and breakfast owners argued among other things that their facilities were not "a place of public accommodation."[143] Moreover, Respondents argued that "any application of the public accommodation provisions of the Human Rights Act under the particular facts of th[at] case would violate the terms of the Illinois Religious Freedom Restoration Act (RFRA). . . "because forcing it to hosts a same-sex civil union ceremony that publicly communicates messages that conflict with its sincerely held religious beliefs would violate its and its owners statutory constitutional rights."[144] The

---

Id. "Nonetheless, during this week the Marriott denied the Midwest Federation the use of the hotel's facilities for its convention on at least seven separate occasions." *Id.*

[140] The "bnb" in Airbnb stands for bed and breakfast.

[141] *Wathen and Vacuflo, Inc.*, IHRC, ALS No. 11-0703C Sep. 15, 2015) (recommended liability determination), http://www.aclu-il.org/wp-content/uploads/2015/09/Wathen-liability-determination.pdf.

[142] *Id. See also* Andrew Maloney, *Men denied service get $30k award,* Chi. Daily Law Bulletin (Nov. 29, 2016, 2:26 PM), http://www.chicagolawbulletin.com/Archives/2016/11/29/30K-gay-bias-B-B-11-29-16.aspx; Vikki Ortiz Healy, *Ruling sides with same-sex couple turned away by bed-and-breakfast,* Chicago Tribune (Sep. 17, 2015, 6:11 PM), http://www.chicagotribune.com/news/local/politics/ct-lgbt-business-services-decision-met-20150917-story.html.

[143] *See Wathen and Vacuflo, Inc. supra,* note 162 at 8 ¶ 4.

[144] *Id.* at 1-2.

Commission found it relevant that "Respondent offered to the public sleeping accommodations and breakfast meals and advertised its services on its website. . . . Respondent served approximately 1200 guests per year and hosted 49 opposite-sex weddings in 2011."[145]

Similar arguments were made in a Hawaii case, *Cervilli, et. al, v. Aloha Bed and Breakfast,* where "a for-profit, commercial business establishment (failed) to provide accommodations at a bed and breakfast to a lesbian couple because of their sexual orientation, in violations of state's law prohibiting discrimination in public accommodations."[146] The complaint noted that the Defendant offers "bed and breakfast services to the general public," operates as a sole proprietor and remits transient accommodations tax in connection with Defendants' provision of transient accommodations."[147] The complaint also noted that "Defendant advertises its bed and breakfast services to the public through a wide range of outlets, including several Internet websites used by the general public to locate bed and breakfast facilities" such as Frommer's Travel Guides, TripAdvisor, Yahoo! Travel and bnbHawaii.com.[148] It was also noted in the complaint that Defendant's own website specified a "two-person occupancy limit per room, a required three-night minimum stay, daily rates to rent the rooms and pictures." Plaintiffs complained to the Hawaii Civil Rights Commission.[149] During the Commission's investigation, the owner admitted

---

[145] *Id.* at 4 ¶ 6. On February 15, 2011, one of the complainants inquired of Respondent whether it would begin allowing same sex civil unions on June 1 when those unions were scheduled to become legal in the State of Illinois. *Id.* at 5 ¶ 11. Respondent replied that it did not plan to do so and that it only allowed "weddings" on its premises. *Id.* at 5 ¶ 12. When Complainants pressed further and raised the specter of discrimination, Respondent replied, "We will never host same-sex civil unions. We will never host same-sex weddings even if they become legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If this is discrimination I guess we unfortunately discriminate." *Id.* at 5 ¶ 13. Respondent later changed its website to reflect that it did not allow civil unions. *Id.* at 7 ¶ 20. The Commission found that Complainants proved by a preponderance of the evidence a prima facie cases of unlawful discrimination based on denial of a place of public accommodation. *Id.* at 8 ¶ 4.

[146] Complaint for Injunctive Relief, Declaratory Relief, & Damages, *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11–1–3103–12 ECN, 2 ¶ 1 (Haw. Circ. Court 1st Cir. 2013) [hereinafter Cervelli Complaint, https://www.lambdalegal.org/sites/default/files/cervelli_hi_20111219_complaint.pdf.

[147] *Id.* at 3 ¶ 4.

[148] *Id.* at 4-5 ¶¶ 10-11.

[149] *Id.* at 4 ¶ 10. HRS § 489-1, et seq. states that "[u]nfair discriminatory practices that deny, or attempt to deny, a person full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of sexual orientation. . . are prohibited." Haw. Rev. Stat. Ann. § 489-1 et seq. (West 2016). Under § 489-2 a "place of public accommodation" is a "business" and "an accommodation . . . whose goods, services, facilities, privileges, advantage, or

that she had refused to rent to the couple because they were lesbians.[150] The court held that defendant had discriminated in violation of the law.[151]

III. A REVIEW OF THE LITERATURE: CALLS FOR LEGISLATIVE REFORM

At the time of the writing of this article, only a few scholars[152] - Nancy Leong and Aaron Belzer (together) and Jamila Jefferson-Jones - have written directly on this question of whether current anti-discrimination laws cover public accommodations offered in the sharing economy, such as Airbnb.[153] Both pieces suggest public accommodations offered in the

---

accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors." Haw. Rev. Stat. Ann. § 489-2 (West 2016). Defendant in Cervelli was also a public accommodation because it as "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests." Haw. Rev. Stat. Ann. § 489-2 (West 2016) (definition of "place of public accommodation").

[150] *See* Cervelli Complaint *supra*, note 167 at 8 ¶ 24. When trying to rent a room via email one of the plaintiffs was told that a room was available. *Id.* at 6 ¶ 16. Once they decided to book the room, the owner requested the name of the second person staying in the room. *Id.* Upon hearing another female name, the owner "asked pointedly, 'Are you lesbians?" *Id.* When plaintiff answered that they were, defendant-owner refused to rent to the couple stating that she would be "very uncomfortable having lesbians in her house." *Id.* at 6 ¶ 17. The second plaintiff called back again to confirm that they were being denied a room because of their sexuality and were again told that they were. *Id.* at 6 ¶ 18. The owner cited her religious views. *Id.* Plaintiff explained that this was discrimination. *Id.* at 6-7 ¶ 19. To this, the owner replied that "she could exclude whomever she wanted to exclude." *Id.*

[151] Order Granting Plaintiffs' and Plaintiff-Intervenor's Motion for Partial Summary Judgment For Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgment, *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11–1–3103–12 ECN, 2 (Haw. Circ. Court 1st Cir. 2013), http://www.lambdalegal.org/in-court/legal-docs/cervelli_hi_20130415_order.

[152] In his Note, Michael Todisco, helpfully outlines three solutions, including legislative changes to the CDA, a version of the solution that I propose in this Article – holding hosts accountable, which he dismisses as too inefficient and lobbying Airbnb to voluntarily change its practices. *See* Share and Share Alike *supra*, note 16 at 127. With respect to this last proposal, Todisco offers that Airbnb could rely less on profile pictures and names or, alternately, run analysis on hosts to determine who is discriminating and ban them. *Id.* at 128. It is worth noting that Airbnb has signaled a willingness to make these types of changes to its platform that Todisco and others have suggested. The company appears to sincerely want to open the platform up to everyone and why would it not from a business perspective the larger pool of guests the more money there is to be made. And, yet, this goodwill has limits. In *Selden v. Airbnb, Inc.*, Airbnb urged a federal court presiding over the first lawsuit against it alleging discrimination to have that cases send to mandatory arbitration avoiding both the public shame and prolonged litigation that would have resulted if the case had moved forward in the trial court. *See Selden v. Airbnb, Inc, supra* note 8.

[153] *See* Leong & Belzer *supra* note 16; Shut Out *supra* note 16. There is a somewhat larger body of literature in the employment context that explores the impact of the sharing economy, particularly Uber, in that arena. *See, e.g.*, Aabid Allibhai, *On Racial Bias and the*

sharing economy, including Title II, expose weaknesses in our discrimination laws for regulating discrimination in travel now and in the future. While acknowledging that many of the sharing economy's platforms serve traditional functions that ought be covered by anti-discrimination laws these scholars are unconvinced that Title II is robust enough to do so in its current iteration. To cure this weakness and alleviate ambiguity, Leong, Belzer and Jefferson-Jones ultimately call for legislative fixes.[154]

In their article, *The New Public Accommodations*, Leong and Belzer, identify scenarios under which that existing public accommodation laws may not be sufficient for the "unique" features of the sharing economy and thus must evolve.[155] Specifically, in Part III of their article the authors

query whether a host who rents out his house while traveling overseas (presumably for a short period of time though that is not expressly stated) can be said to "occupy" the property such that Title II is evaded.[156] Leong and Belzer pivot away from the question of whether individual hosts might be covered the "more important question . . . is whether Title II would apply" to Airbnb itself.[157] In their view, reaching Airbnb and other peer-to-peer platforms is "critical" to providing a meaningful remedy.[158] Here, Leong and Belzer argue that peer-to-peer platforms should be treated as public accommodations and subject to Title II and other discrimination laws, but acknowledge section 230 of the Communications Decency Act (CDA) as a challenge to doing so. In Leong and Belzer's view the CDA poses challenges, but not necessarily insurmountable ones.[159] This uncertainty regarding the application of the CDA to Airbnb leads the authors to argue that the most "straightforward way to prohibit race discrimination in the sharing economy is federal legislation" by updating Title II to explicitly cover sharing economy platforms that serve the same function as traditional public accommodations.[160]

Sharing Economy, onlabor: Workers, Unions, and Politics (Apr. 21, 2016), https://onlabor.org/2016/04/21/on-racial-bias-and-the-sharing-economy/; Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L. Rev. Dialogue 84 (2015).

[154] *See generally* Leong & Belzer *supra* note 16; Shut Out *supra* note 16.

[155] *See* Leong & Belzer *supra* note 16, at 67.

[156] *Id.* at 36.

[157] *Id.* at 37.

[158] *Id.* at 49.

[159] *Id.* at 50. For instance, looking to the outcome in the Ninth Circuit cases, in *Fair Housing Counsel of San Fernando Valley v. Roommate.com* the court held the CDA did not bar a lawsuit under the Fair Housing Act (FHA) for liability arising from certain types of discriminatory preferences in housing. *Id.* Leong and Belzer note the importance in *Roommate* of the fact that the website was "an active developer of information and not merely a passive intermediary." *Id.* at 51. Of course, in other circumstances other courts have held that the CDA is a shield against anti-discrimination laws.

[160] *Id.* at 63.

In her essay, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, Professor Jamila Jefferson-Jones also argues for legislative reform.[161] Jefferson-Jones argues more strenuously than Leong and Belzer that the CDA is a barrier to the application of anti-discrimination laws to the peer-to-peer platforms.[162] In Part IV of the article, the author explains why covering sharing economy online platforms under current anti-discrimination laws is not only desirable, but necessary. Looking to *Chicago Lawyers' Committee for Civil Rights v. Craigslist*, where the Seventh Circuit declined to apply the FHA because the Internet platform in question was only a "forum" for posting purely user-generated content, Jefferson-Jones concludes that Airbnb is unlikely to be covered by Title II as currently drafted.[163] Specifically, the author analogizes what she calls "sharing economy online platforms" such as Airbnb to "old economy real estate brokers and agents who are subject to the FHA."[164] Jefferson-Jones uses this analogy to argue for the necessity of Congress enacting an exception to the CDA.[165]

Each of these scholars conclude that Airbnb listings are a public accommodation and should be covered by civil rights laws. Each of them also concludes that one or more pieces of legislation must be amended to bring this coverage to fruition. This author agrees with the growing consensus that the Mrs. Murphy exception is over-broad especially when considered in the public accommodation context, more generally, and even more so in light of the burgeoning sharing economy. An exception in CDA for platforms such as Airbnb also makes good sense. Yet, taking the view that with the birth of each new product or technology we must consider anew whether discrimination laws cover conduct no one doubts they are meant to cover is troubling. First, this solution may prove to be impractical given how technology is advancing at a breakneck pace while Congress is working at a glacial one. Second, and more worrisome, is the implication that the Mrs. Murphy exception, which has historically had "limited practical significance"[166] is greater than the rule itself, which favors coverage. Finally, the impact of these two positions together could result in all "others," including blacks, gays, bi-sexual and transgender persons,

---

[161] Shut Out *supra* note 16, at 25.

[162] *Id.* at 22.

[163] *Id.*

[164] *Id.* at 23; *See also generally Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

[165] Shut Out *supra* note 16, at 23.

[166] James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 Harv. C.R.-C.L. L. Rev. 605 (1999) [hereinafter Walsh], http://harvardcrcl.org/wp-content/uploads/2015/07/Reaching-Mrs.-Murphy-A-Call-for-Repeal-of-the-Mrs.-Murphy-Exemption-to-the-Fair-Housing-Act.pdf.

immigrants, Muslims, and families with children, being excluded from the sharing economy's travel industry waiting for proposed legislative changes.[167] We should not content ourselves with waiting as the answer to the questions presented here.[168]

IV. COMPETING ARGUMENTS SURROUNDING THE APPLICATION OF TITLE II IN THE SHARING ECONOMY

Beginning with *Heart of Atlanta* and continuing since private owners of public accommodations have argued for freedom from Title II's reach on freedom of association grounds. The owner of a public accommodation's right to free association, however, competes with the right of a patron to have access. Both rights have "deep roots" in the common law.[169] Arguably, the right to access - is greater than the right to freedom of association in virtually all circumstances.

A. The Age Old Libertarian View

1. A Host's Right to Free Association

The opposition to Title II's passage was strong and diverse, as has been noted above.[170] Some opponents argued that the proposed law violated what can be articulated as both the individual's right of association[171] and property rights."[172] The Mrs. Murphy Boardinghouse exception,[173] which

---

[167]

[168] There is a long history in this country of asking blacks to "wait."

[169] *Uston v. Resorts International Hotel, Inc*., 445 A.2d 370, 373 (N.J. 1982).

[170] *See* Landsberg *supra* note 109, at 4; *See also id.* at 5.

[171] *Id.* ("The Attorney General of Virginia argued that the Ninth Amendment to the Constitution guaranteed 'the right to discriminate in private business establishments such as those covered by the Civil Rights Law of 1964.' The Attorney General of North Carolina argued that the Commerce Clause was not 'designed to destroy the individualism of the citizens of a state nor to prohibit the social groupings and classes which are naturally created and molded by personal inclination.'").

[172] *Id.* at 7 ("Barry Goldwater, who became the Republican nominee for President later that year, argued that the bill would lead to a police state and threaten 'loss of our God-given liberties.'").

[173] Senator George Aiken of Vermont is attributed with first coining the term "Mrs. Murphy" when he argued that Congress should "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent their rooms to those they choose." *See* Walsh *supra* note 189, at 605 n. 3. Subsequently, the reference to "Mrs. Murphy" came to describe the exemption from Title II for owner-occupied housing accommodations with five rooms or less. *Id.; See also* Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964,* at 51 (1990).

exempts from Title II owner-occupied public accommodations with five rooms or less, arose out of this dissention.[174] Yet, as is discussed below, there are clear limits to this exception and the right to free association.

It is unclear whether there is an exact constitutional source for the right to intimate association.[175] Kenneth Karth has been attributed with first defining the right of intimate association in his article, *The Freedom of Intimate Association*.[176] There, Karth defined it as a "hybrid right born out of substantive due process, equal protection and First Amendment jurisprudence."[177] The Court first articulated the right to intimate association in *Roberts v. U.S. Jaycees*.[178] There Justice Brennan opined it was a "fundamental element of personal liberty" and a protected right.[179] Jaycees was a national all-male organization that challenged state law forbidding the discrimination on the basis of sex in public accommodations.[180] Jaycees argued that by requiring it to admit women the law infringed upon its members' right to free association.[181] In deciding whether the Jaycees members' rights to intimate association had been infringed upon, the Court determined the members' relationships were not sufficiently intimate to warrant constitutional protection.[182] The relationships did not resemble that of a family, which was critical to a relationship receiving constitutional protection.[183] According to the *Jaycees* Court family relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[184] By contrast, the Court noted that the Jaycees local chapters

---

[174] *See* 42 U.S.C. § 2000a(b)(1) (1994) (stating the exemption). Four years later, the "Mrs. Murphy" exemption was added to the Fair Housing Act and also came to describe landlords exempt from the FHA under § 3603(b)(2). *See, e.g.*, 114 CONG. REC. 2495 (1968).

[175] Chief Justice Rehnquist writing for the majority in *City of Dallas v. Stanglin*. 490 U.S. 19, 28 (1989) (the last of only three cases reviewing the right to intimate association since *Jaycees* which opined that "[w]hile the First Amendment does not in terms protect a 'right of association,' our cases have recognized that it embraces such a right in certain circumstances."); *See also* Collin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 Tex. J. Women & L. 231, 237 (1998).

[176] 89 Yale L.J. 624 (1980) [hereinafter Karth].

[177] *Id.* at 625.

[178] 468 U.S. 609 (1984).

[179] Udell argues that Justice Brennan consulted Karth's article when writing *Jaycees* and that heavily informed his "hybrid" definition. *See* Karth *supra* note 200, at 236-237.

[180] *See generally Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

[181] *Id.* at 612.

[182] *Id.* at 620.

[183] *Id.* at 620-621.

[184] *Id.* at 620.

were large, unselective and admitted members with very little reference to their background.[185]

The right to intimate association then is not absolute.[186] And, in the case of the sharing economy, particularly where the host is absent from the entire home that is being offered to the public, the freedom of association argument is similarly weak.

2. A Host's Property Rights

Property law has also been used by private owners of public accommodations to argue against the application of discrimination laws to their business dealings.[187] Property law generally affords owners of property used for personal consumption the right to choose "whether and with whom to share their property."[188] Personal consumption property has been defined as "property that is designed and purchased for personal use."[189] Consumption property "is presumed to foster intimate relations founded on familiarity, closeness, and trust."[190] This distinction between personal consumption property and commercial property is often justified by values of "individual autonomy, dignity, freedom, and privacy."[191] Sharing one's personal property with family members, friends and neighbors is consistent with this paradigm.[192] "This type of sharing [with family and friends] is considered part of the extended self."[193] And the home is the paradigmatic example of personal consumption property.[194] On the other hand, commercial property, which is defined by property exchanged for monetary value, is afforded none of these particular

---

[185] *Id.* at 621.

[186] *Id.* at 623.

[187] Shelly Kreiczer-Levy, Consumption Property in the Sharing Economy, 43 Pepp. L. Rev. 61, 109 [hereinafter Kreiczer-Levy]. There is a body of scholarship arguing strongly for understanding property as a platform for personal relations.

[188] *See Id.*; Gregory S. Alexander, *Intergenerational Communities,* 8 L. & Ethics Hum. Rts. 21, 21 (2014).

[189] Kreiczer-Levy *supra* note 212, at 68.

[190] *Id.* at 72.

[191] *Id.* at 71; *See also* D. Benjamin Barros, *Home as a Legal Concept,* 46 Santa Clara L. Rev. 255, 259 (2006).

[192] Kreiczer-Levy *supra* note 212, at 72.

[193] *Id.*

[194] *See* Margaret Jane Radin, *Reinterpreting Property* 57 (2009) (arguing that the home is closely connected to personhood "because it is the scene of one's history and future, one's life").

protections.[195] Historically, offering one's home to the public transformed private property into commercial property.[196]

As discussed, above, however, the Mrs. Murphy exception blurred this distinction by taking "a property right belonging to the public - an easement of access to businesses open to the public with a concomitant duty on businesses to serve the public - and replac[ing] it with a business right to exclude[.]"[197] There the line is drawn.

B. The Age Old View in Favor of Right to Access and Dignity

Access to travel is seen as critical to full citizenship, and thus dignity for blacks since Reconstruction.[198] Recall that Title II's passage fundamentally altered the landscape for blacks travelling in this country.[199] After it, in theory, blacks no longer needed to sleep in their cars along the roads they travelled, but could stay in any hotel room offered publicly to whites.[200] There is broad consensus that Title II was not merely a theoretical achievement, but a practical success.[201] In the little over 50 years since the passage of the Act blacks have enjoyed previously unprecedented freedom to travel, including the right to stay at any hotel of their choosing, bringing

---

[195] Kreiczer-Levy *supra* note 212, at 68.

[196] *Id.* at 89-90.

[197] Singer *supra* note 116, at 11.

[198] W.E.B. DuBois frequently wrote on this subject. In his essay, *On Being Crazy*, published in the June 1923 Crisis he wrote:

> "After the theatre, I sought the hotel where I had sent my baggage. The clerk scowled.
> "What do you want?" he asked.
> Rest, I said.
> "This is a white hotel," he said.
> I looked around. Such a color scheme requires a great deal of cleaning, I said, but I don't know that I object.
> "We object," said he.
> Then why -, I began, but he interrupted.
> "We don't keep 'niggers,' he said, "we don't want social equality."
> Neither do I. I replied gently, I want a bed.

Writings p. 1199.

[199]

[200]

[201] *See* Bagenstos *supra* note 121, at 1206 ("Although the controversy was discussed in the earlier era in terms of civil versus social rights, and in the later era in terms of property, contract, and association, the same fundamental concerns motivated objections to public accommodations laws in both periods.").

them closer to full citizenship than at any other time since Reconstruction.[202]

This right to free access is as integral to full citizenship as the right to free association. Obviously, blacks understood this being that they were the parties denied and excluded.[203] But whites fully understood this as well.[204] "Indeed, the power of Whites to treat African American business and political leaders as inferior on a train or a sidewalk denied Black citizens the attributes of equal citizenship that they were otherwise claiming through their own success and achievement. Segregation in these public arenas served as a check on and denial of freedom and equality in other spheres."[205] Similarly, if Airbnb hosts only wish to associate with white guests, the black guests excluded suffer associational deprivation.[206] And it is their rights that Title II seeks to protect in the first place by "vindicating

---

[202] This is not to say that discrimination in public accommodations ceased to exist completely. It did not. Yet, unlike on the education and voting fronts where resistance persisted, it appears that in the area of public accommodations civil rights largely took hold. *See generally League of Women Voters of the United States v. Newby*, 838 F.3d 1 (D.C. Cir. 2016); *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. N.C. 2016); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2414 (U.S. 2013).

[203] Professor Laurence H. Tribe offers this example as an illustration of the right the patron's right to associate: "If a group of men wish to associate in a certain social context with men only, the women excluded necessarily suffer associational deprivation in that same context." *American Constitutional Law* 1401 (2d ed. 1988).

[204] "For Whites, then, having African Americans present in first-class rail cabins, or in the prime theatre seating, represented a public recognition of equality in social standing, wealth and success, educational achievement, and, at the bottom, a recognition of equality in all the spheres of personal and communal relations that Whites were fighting so hard to preserve for themselves." *See* Fox, Jr. at 143.

[205] *Id*. This type of check continues in modern times. In July 2009, Harvard professor Henry Louis Gates, Jr., a prominent African American scholar who taught at Harvard for two decades, had unjammed his front door upon returning from a trip abroad. He had barely gotten inside when officers from the Cambridge Police Department showed up allegedly in response to at least one report of a two "suspicious" black men on the porch. Abby Goodnough, "*Harvard Professor jailed; Officer accused of bias*," The New York Times (July 20, 2009) http://www.nytimes.com/2009/07/21/us/21gates.html. In the summer of 2016, Andre "Dr. Dre" Young, a music industry mogul with a net worth estimated at $700 million, was arrested by five Malibu police officers outside of his own home for objecting to a white male motorist blocking his driveway. *See* Richard Winton, "*Dr. Dre is handcuffed and cited after a man claims he pointed a gun; deputies find no proof*," The Los Angeles Times (July 25, 2016, 6:50 PM)(found at http://www.latimes.com/local/lanow/la-me-ln-dre-cited-gun-20160725-snap-story.html). *See also* Ryan Broderick, "*Stefan "STEFisDOPE" Grant, a 27-year old rapper from Washington, D.C., staying in a Decatur, Georgia Airbnb (Oct. 9, 2015, 3:44 PM), https://www.buzzfeed.com/ryanhatesthis/these-rappers-say-the-neighbors-called-the-cops-on-them-for?utm_term=.kqavvJ0d5#.de9VV7BxX*.

[206] Hofmeister at 1013.

deprivation of personal dignity that . . . accompanies denials of equal access to public establishments."[207]

V. TITLE II REACHES THE SHARING ECONOMY; THE FHA SHOWS US HOW

V. Title II, as drafted, already contemplates the balance between the hosts' freedom of association and the potential guests' freedom of access.[208] Indeed, the Mrs. Murphy exception is best viewed as the result of the compromise that was reached between those two competing rights.[209] As noted in section #, above, federal, state and local governments are all currently enforcing Title II and its equivalents within these lines. There is no need to suggest that they could not continue to do so in the sharing economy where viable. To suggest the opposite, overlooks Title II's robustness.

The volume of transactions that occur in the sharing economy raises appropriate concerns about the ability of the current system to handle the potential uptick in complaints. In 2016, Airbnb had 15,000 hosts in New York City alone.[210] Regulation of landlords under the FHA is instructive as a model here. There is a robust regulatory scheme setup to enforce the FHA.[211] The Department of Justice successfully brings cases against individuals and small companies using renting personal property including in some cases privately-owned, single homes under 42 USC § 3604.[212] It

---

[207] *Heart of Atlanta Motel*, 379 U.S. at 250. (*quoting* S. Rep. No. 872 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370.). In *Norwood v. Harrison*, 413 U.S. 455 (1973), and *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court concluded that choices private schools made to exclude blacks were discriminatory and not entitled to protection as rights of association. In *Norwood*, plaintiffs challenged the provision of textbooks to private segregated schools. *See* 413 U.S. 455 (1973). In *Runyon*, the plaintiffs sued private schools for excluding black students. *See* 427 U.S. 160 (1976). In both opinions, the Court makes clear that, "the Constitution . . . places no value on discrimination'. . . and while 'invidious private discrimination may be characterized as a form of exercising freedom of association . . . it has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 469-470; *Runyon*, 427 U.S. at 176.

[208]

[209]

[210] Christina Chaey, Air*bnb Study Says Airbnb is Great for New York City*, (Oct. 22, 2013, 4:08 PM), https://www.fastcompany.com/3020347/fast-feed/airbnb-study-says-airbnb-is-great-for-new-yorks-economy.

[211] *See* 42 U.S.C. 3601 et seq.

[212] While the "Mrs. Murphy Boardinghouse" exception found in Title II predates the passage of the FHA and its identical exception, the latter has been more hotly litigated and debated in the years since its passage than the former. *See* Walsh *supra* note 189, at 607. As mentioned in Part I, some commentators have questioned whether the fact that some commercial hosts live in these homes, even if infrequently, is enough to bring them within the "Mrs. Murphy" exception. The answer here should plainly be no.

also operates a "testing program" that seeks to root out discrimination.[213] HUD investigates and conciliates a good deal more fair housing cases itself.[214] In 2015, HUD investigated xx and conciliated xx fair housing cases.[215] HUD delegates its authority to FHIPs and FHAPs for another set of fair housing cases. State and local governments are also a part of the fair housing enforcement matrix state and local courts and commissions spend considerable resources adjudicating fair housing matters.[216] There is no reason that an identical scheme could not be utilized in the public accommodation context, to regulate discrimination in the sharing economy.

VI. CONCLUSION

> *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. . . . . No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters, and righteousness like a mighty stream.*
>
> *- Martin Luther King, Jr., "I Have A Dream", August 28, 1963*

There are good reasons to amend Title II to remove the Mrs. Murphy exception, including the fact that its very existence continues to signal that discrimination in some public accommodations is acceptable. The exception was rooted in racism and its modern day proponents use it to perpetuate racism still. Yet, applying Title II to the sharing economy now and moving forward with such an amendment are not mutually exclusive. Airbnb hosts can be regulated under Title II in a manner that respects the limited exception in the current law without allowing it to render the entire statute impotent. To do otherwise, and to wait for such day as Title II is amended without a Mrs. Murphy exception puts off to some unknown date in the future the protection of black travelers' right to access potentially undoing five decades of advancements. In the meantime, and as a result of this confusion, we will have normalized the absence of blacks from a critical aspect of the public accommodations marketplace and upended the dignity gained with Title II's passage.

---

[213] https://www.justice.gov/crt/fair-housing-testing-program-1.

[214] https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp

[215] *Id.*

[216] *Id.*