ARTICLES & ESSAYS: The Washington Lawyers' Committee's Fifty-Year Battle for Racial Equality in Places of Public Accommodation

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INTRODUCTION

The Washington Lawyers' Committee for Civil Rights and Urban Affairs was established in 1968, just four years after the enactment of the landmark Civil Rights Act of 1964. A small group of concerned Washington, D.C. lawyers founded the Committee in response to a 1968 National Advisory Commission on Civil Disorders report identifying racial segregation and poverty as root causes of the city riots that erupted during the late 1960s. [1] The report's recommendations focused **[*75]** on eliminating discrimination in education, housing and employment opportunity; and on dedicating the public resources necessary to ensure all Americans have "a minimum standard of decent living." [2] Since its inception, the Lawyers' Committee has accepted the Commission's clarion call, as other articles in this volume demonstrate, working tirelessly to fight the effects of poverty and to ensure equal access to schools, housing and jobs.

However, the Commission emphasized that the national action necessary to achieve the Report's "major goal[,] the creation of a true union - a single society and a single American identity"-would require more than simply eliminating "barriers to … choice of jobs, education, and housing" and helping "[the poor] to deal with the problems that affect their own lives." [3] What was also critically needed was "increased communication across racial lines to destroy stereotypes, halt polarization, end distrust and hostility, and create common ground for efforts toward public order and social justice." [4] In support of this then-transformational objective, the Washington Lawyers' Committee also took on the challenge of integrating those aspects of everyday life where frequent interaction between and

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[1] History, Wash. Law. Comm., *http://www.washlaw.org/about-us/history* (last visited Sept. 15, 2018).

[2] Id.; Report of The National Advisory Commission on Civil Disorders, Nat'l Advisory Comm'n on Civ. Disorders, 12 (1968), *https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS* .pdf [hereinafter Nat'l Advisory Comm'n on Civ. Disorders].

[3] Report of The National Advisory Commission on Civil Disorders, Nat'l Advisory Comm'n on Civ. Disorders, 11 (1968), *https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS* .pdf.

[4] Id.

among strangers is most common-the public places where consumers make purchases, find entertainment, and utilize services. As this article will describe, some of the Committee's most impactful and important work has come in this "public accommodations" arena over the years.

Title II of the 1964 Act was intended, as President Kennedy proclaimed in 1963, to ensure it would be "possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores, without being forced to resort to demonstrations in the street." [5] In service of this integrative goal, the Lawyers' Committee enlisted and worked with private firms to investigate and litigate public accommodation cases in the Washington area from the time of the Committee's creation and the early days of the post-Civil Rights Act **[*76]** desegregation movement. [6] Then, starting in 1988, the Committee played a leading role in a series of significant, high-profile national civil rights cases against major hotels and restaurant chains. [7] The Committee has since steadfastly pursued the elimination of race discrimination uncovered by diverse consumers, in the D.C. area and beyond, seeking to utilize the services of hotels, restaurants, rental car agencies, retail stores, health clubs, taxicabs and even nightclubs. [8] The Committee's pioneering fight against consumer racism - on-going even now more than forty years after the legendary sit-ins at segregated lunch counters - has resulted in important victories for victims of discrimination and changed the way companies do business.

This Article is written as part of a series of articles to commemorate the Washington Lawyers' Committee's fiftieth anniversary. For the first time, it seeks to chronicle the Committee's role in combatting discrimination in the provision of public accommodations over its fifty years, and to place this work in the context of the broader development of applicable law and the evolution of American society. While cases that have set beneficial precedent or generated landmark settlements deserve the attention they receive, what has been truly remarkable about the Lawyers' Committees' achievements in this area are the innovative and inclusive strategies the Committee has employed to pursue its work. The Committee has successfully marshaled the efforts of prominent members of the private bar and partnered with leading civil society and civil rights organizations. From its effective coordination with the Department of Justice to developing and pioneering the use of illuminating empirical studies, the Washington Lawyers' Committee's groundbreaking methods have strengthened the effectiveness of the use of civil rights litigation to challenge and modify the behavior of discriminating businesses that provide public accommodations. [9] These innovations should continue to serve the interests of promoting "a single society and a single American identity" in the face of today's changing political and societal divides, and the evolution of disruptive new technologies that are shifting the ways public accommodations are delivered. [10]

[*77] Parts II and III of this Article will review the history of public accommodations law in the United States and discuss the most important work of the Washington Lawyers' Committee over the years in the public accommodations space. We recount the evolution of public civil rights law and practice in Part II; from the end of the Civil War Reconstruction era and Jim Crow, through the Supreme Court's decisions in Plessy v. Ferguson and the Civil Rights Cases, to the Civil Rights Movement and Title II of the Civil Rights Act of 1964. We also describe how Section 1981 of the Reconstruction-era Civil Rights Act of 1866 has been used since the 1960's to broaden and strengthen enforcement of civil rights in the public accommodations arena. In Part III, we then review how the Washington Lawyers' Committee put Title II and Section 1981 into practice as it first responded to "lunch-counter" like refusal to serve discrimination in the 1970's and early 80's, and then handled less obvious refusal to serve and nationwide differential treatment cases in the 80's and 90's. We also review how the Lawyers' Committee later

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[5] John F. Kennedy, U.S. President, Civil Rights Address (July 11, 1963), http://www.americanrhetoric.com/speeches/jfkcivilrights.htm.

[6] Wash. Law. Comm., supra note 1.

[7] Id.

[8] Id.

[9] See generally id.

[10] *Nat'l Advisory Comm'n on Civ. Disorders, supra* note 2, at 11.

focused on the effects of resistant residual racial bias that still triggered "situational" differential treatment problems in the late 90's, and well into the first decade of the early twenty-first century.

Part IV of this Article will look at where the promise of equal treatment in public accommodations stands today; identifying outstanding relevant legal questions and issues, highlighting new age/sharing economic industries likely to present future public accommodations discrimination issues, and hypothesizing on the potential impacts of the Trump phenomenon and presidency in this area. We will conclude, in Part V, by recognizing the impact public accommodations civil rights efforts have had to date, and close with thoughts on the need for public interest organizations such as the Lawyers' Committee and the private bar to continue to be vigilant in championing consumer integration going forward.

I. PUBLIC ACCOMMODATIONS CIVIL RIGHTS LAW AND PRACTICE FROM THE CIVIL WAR TO THE 1964 CIVIL RIGHTS ACT AND THE BIRTH OF THE

WASHINGTON LAWYERS' COMMITTEE

The story of public accommodations civil rights law in the United States begins at the close of the Civil War. In 1865, Congress promptly ratified the *Thirteenth Amendment to the U.S. Constitution*, banishing slavery when the Confederate states surrendered to **[*78]** end the Civil War. [11] During the post-war Reconstruction era, federal troops occupying Southern states protected the newly installed Republican governments looking to grant full citizenship to freed slaves and to offer them the opportunity to participate in the broader society. [12] The Fourteenth and Fifteenth Amendments, ratified in 1868 and 1870, respectively, guaranteed former slaves equal protection of the laws and the right to vote. [13] Southern Blacks became increasingly politically and socially active, and equal interaction between the races gradually became more common. [14]

But federal troops were withdrawn from the South as part of the 1877 Compromise of the disputed presidential election between Democrats, who controlled the House of Representatives and wanted the troops out, and Republicans, whose candidate was permitted to assume the presidency in exchange for their agreement to the removal of the troops. [15] The departure of the soldiers brought the period of Reconstruction to an end, and enabled the implementation by new "redeemer governments" of Jim Crow laws enforcing segregation and restricting Black participation in virtually all aspects of public society, from access to bathrooms and water fountains to service in restaurants and the use of sidewalks. [16] Institutional and societal racism quickly returned to the American South with full force.

In 1883, the U.S. Supreme Court overturned the Civil Rights Act of 1875. [17] The Act had been put in place to ensure freedom of access to hotels, inns, and other places of public accommodation, deriving its authority from the Fourteenth and Fifteenth Amendments. [18] But the Court rejected this legislative justification in the Civil Rights Cases, [19] a group of cases involving African-Americans suing private providers of a public accommodation that

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[11] From Emancipation to the Present, Encyclopedia of African-American Civil Rights 520-22 (Charles D. Lowery & John F. Marszalek eds., 1992).

[12] Philip A. Klinkner & Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America 79-80 (1999).

[13] From Emancipation to the Present, supra note 12, at 186-87.

[14] Michael L. Levine, African Americans and Civil Rights: From 1619 to the Present 98-103 (1996).

[15] Id. at 105-06.

[16] Id. at 114-17; Klinkner, supra note 13, at 90-92.

[17] Id. at 90; see Civil Rights Act of 1875, ch. 114, ***43 Stat. 335-37 (1875).***

[18] Michael Bitzer, 1 Encyclopedia of American Civil Liberties 300 (Paul Finkelman eds., 2013).

[19] *Civil Rights Cases, 109 U.S. 3, 14 (1883).*

excluded Blacks from state law sanctioned "whites only" rooms, sections, or services. [20] The Supreme **[*79]** Court ruled that this part of the Act was unconstitutional because it did not follow from the Fourteenth Amendment [21] and it impinged on individual private property owners rights to control their businesses as they saw fit. [22] A Louisiana law mandating segregated train cars was then upheld in the now notorious 1896 Supreme Court decision in Plessy v. Ferguson, which enunciated the infamous "separate but equal" doctrine for public facilities. [23] This inauspicious state of affairs was to continue for the next half-century.

Democratic President Harry S. Truman's comments on the importance of ending discrimination, and his decision to desegregate the military in 1948, [24] were early signs of a shift in the many decades long tide of institutionalized racism and public segregation that Democratic national political dominance and the Supreme Court's Civil Rights Cases and Plessy v. Ferguson decisions had nurtured in the South. The Civil Rights Movement began to slowly dismantle Jim Crow restrictions on African-Americans in the 1950's, and the Supreme Court disavowed the "separate but equal" concept in Brown v. Board of Educ. in 1954. [25] While the Southern states' "massive resistance" to the integration of public schools, and to desegregation in general, continued largely unabated, [26] civil rights advocates turned increasingly from courts to direct actions targeting restaurants and other places of business that discriminated based on race. [27] In the year following the famous 1960 sit-in at the Woolworth's lunch counter in Greensboro, North Carolina, for example, an estimated 70,000 people participated in sit-ins at "restaurants, lunch counters, and libraries; 'stood in' at movie theaters; 'kneeled in' at churches; and 'waded in' at beaches." [28]

These protests and perhaps even more importantly, the media coverage of violent responses to them by racist officials and white supremacists proved to be an extremely effective way of bringing attention to the discrimination that was taking place in these sorts of locations. [29] Democratic President Lyndon Johnson signed the John F. **[*80]** Kennedy-authored Civil Rights Act of 1964 [30] into law ten years after the Supreme Court decided Brown v. Board of Education. While the legislation sought to end discrimination in several contexts, Title II of the Act made it illegal to "withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive any person of" [31] the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation" [32] because of "race, color, religion, or national origin." [33] The 1964 Act relied on

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[20] *Id. at 4-9.*

[21] *Id. at 18.*

[22] *Id. at 14.*

[23] See generally *Plessy v. Ferguson, 163 U.S. 537 (1896).*

[24] Levine, supra note 14, at 174-76.

[25] See generally *Brown v. Bd. of Educ., 347 U.S. 483 (1954).*

[26] See generally Massive Resistance: Southern Opposition to the Second Reconstruction 80 (Clive Webb, ed., 2005).

[27] Levine, supra note 14, at 179-86.

[28] Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality, Oxford Univ. Press, 373 (2004).

[29] Id. at 435-36, and ch. 7.

[30] ***42 U.S.C. § 1981*** (1991).

[31] Id. § 2000a-2(a).

[32] Id. § 2000a(a).

[33] Id.

Congress's power to regulate activities impacting interstate commerce in an effort to insulate the Act from the challenge that doomed the earlier Civil Rights Act of 1875. [34]

This time, the Supreme Court, concluding that Congress had a rational basis for finding that segregation in restaurants had a "direct and highly restrictive effect upon interstate travel by Negroes," [35] upheld the civil rights legislation as a constitutional regulation of commerce in two landmark decisions. In Katzenbach v. McClung, the Court held that a barbeque restaurant just off a major interstate highway in Birmingham, Alabama, could no longer refuse to serve Black guests. [36] The Court reached a similar result in connection with a whites-only hotel in Heart of Atlanta Motel, Inc. v. U.S. [37] Within six months of its enactment, Title II thus became a battle-tested implement for combatting discrimination in public accommodations.

While the changing legal landscape resulted in some resistance-and resulting violence in some locations-, [38] it has been said that many, perhaps most, hotels, restaurants and other places of public accommodation altered their formal segregationist policies and behavior to comply with the equal treatment mandate of Title II fairly promptly **[*81]** after its enactment and the early failed challenges. [39] In fact, once businesses serving a particular market were required to integrate, they tended to increase their customer base, and thereby profit by doing so (or lose out on the expanded customer base if they refused). [40] Some southern business communities actually welcomed Title II for its ability to provide cover for expanding markets and eliminating a barrier to investment from outside the South. [41] In his 1965 and 1966 annual reports, the U.S. Attorney General reported "gratifying" levels of "voluntaryy desegregateion" in places of public accommodation in southern cities known to have had serious racial issues, and "a high incidence of voluntary compliance … in cities and urban areas," while acknowledging "significant patterns of non-compliance … in rural areas in several Southern states." [42]

Because Title II was by political and practical necessity aimed at reducing the dramatic disruption occurring due to high-profile sit-ins and lunch counter protests, however, certain features of Title II curtailed its effectiveness from early on as a tool for realizing the goal of equal public integration when individualized resistance did occur. First, it was limited to places of public accommodation that could be said to fall within the remit of Congress's power to regulate under the Commerce Clause. Since Title II emerged against the backdrop of the long and winding history

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[34] Id. § 2000a(b). The section defining "public accommodation" specifically includes references to interstate commerce. Id.

[35] *Katzenbach v. McClung, 379 U.S. 294, 300 (1964).*

[36] *Id. at 304.*

[37] *Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, 241 (1964).*

[38] Brian K. Landsberg, Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?, ***36 Hamline J. Pub. L. & Pol'y 1, 13-15 (2015)*** (citing *U.S. v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965))* (responses of Sherriff Clark of Selma Alabama to efforts of African Americans to eat at the Thirsty Boy Drive-In and see a show from the formerly white section of the Wilby Theatre); U.S. v. Warren Co., 10 Race Relations Law Reporter (RRLR) 1293 (S.D. Ala. 1965) (other Selma restaurants); Williams v. Connell and Bolden v. Allen, 9 RRLR 1427, and Plummer v. Brock, 9 RRLR 1399 (M.D. Fla. 1964) (St. Augustine, Florida restaurants).

[39] See Landsberg, supra note 38, at 13 (citing Taylor Branch, Pillar of Fire: America in the King Years, 1963-65 at 388 (1989)); see also Rebecca E. Zeitlow, Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights 122 (2006).

[40] Landsberg, supra note 38, at 23-24.

[41] Id. at 19 (citing Clay Risen, The Bill of the Century: The Epic Battle for the Civil Rights Act 247 (2014)).

[42] Id. at 16 (citing Atty. Gen., Annual Report 182 (1965); Atty. Gen. Annual Report 207 (1966)).

of the civil rights movement, state Jim Crow laws, and prior Supreme Court rulings described above, its drafters had specific places of discrimination in mind. [43]

In fact, the statute enumerates fairly clear-cut categories of enterprises that count as "public accommodations." [44] Though many cases **[*82]** involving restaurants, hotels, or places of entertainment were relatively straightforward, the applicability of the statue to other businesses could be less clear. [45] While broad, the specificity of the definition of "public accommodation" in the statute presented opportunities for challenges to enforcement lawsuits in less clear-cut contexts, and in some cases relieved discriminating businesses from responsibility under it. [46] In other instances, courts read the statute broadly to prohibit discriminating businesses from evading its reach by attempting to re-characterize themselves as establishments that would not meet the statutory definitions. [47]

Second, Title II was designed primarily as a tool to enable the government to take action to enforce the federal civil rights provisions. As a result, remedies under the Act were limited to injunctive relief, and while private litigants could bring claims under Title II, they could not obtain damages. [48] The incentives for private assistance in enforcement were thus extremely limited given the unavailability of monetary relief. [49] Early litigation-most of which was initiated by the **[*83]** Justice Department-reflected this government action dependency. [50] Moreover, the lack of financial risk also constituted a figurative racist thumb on the non-compliance risk/benefit scale for businesses that were inclined not to embrace integration, or even to affirmatively reject it absent actual government intervention. [51]

In response to these constraints, private civil rights litigators dusted off the largely dormant Section 1981 of the Civil Rights Act of 1866, [52] which had been drafted and passed in the Reconstruction era for the purpose of confirming and reinstating the rights of newly-freed slaves. [53] Although brief, the statute is powerful. It simply states that African-Americans have the same rights as anyone else in the country to make or enforce a contract. [54] This gave activists broad power to challenge discriminatory practices of a wide variety of businesses - even those that were

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[43] Telephone Interview with John Relman, Founder/Director, Relman, Dane & Colfax (July 17, 2017) [hereinafter J. Relman 7/17/17]; see also *U.S. v. DeRosier, 332 F. Supp. 316, 319 (S.D. Fla. 1971),* rev'd on other grounds, *473 F.2d 749* (stating that from the very language of the statute, it seems clear that Congress did not intend to include every public place).

[44] See *42 U.S.C. § 2000a*(b) ("Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action: (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station; (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.").

[45] See, e.g., *Bartley v. Virgin Grand Villas, 197 F. Supp. 2d 291, 296 (D. V.I. 2002)* (finding that timeshare at a resort hotel is not a place of public accommodation under Title II); *Dean v. Ashling, 409 F.2d 754, 755-56 (5th Cir. 1969)* (finding that a trailer park is a place of public accommodation); *U.S. v. DeRosier, 332 F. Supp. 316, 317 (S.D. Fla. 1971),* rev'd on other grounds, *473 F.2d 749* (finding that a bar with jukebox and pool table is a "place of entertainment" and thus covered by Title II); *Fazzio Real Estate Co. v. Adams, 396 F.2d 146, 148 (5th Cir. 1968)* (finding that a bowling alley with a snack bar inside was covered by Title II).

[46] See, e.g., *Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1541 (N.D. Ill. 1992),* aff'd, *993 F.2d 1267 (7th Cir. 1993)* (finding that the Boy Scouts is not a public accommodation); *Halton v. Great Clips, Inc., 94 F. Supp. 2d 856, 862 (N.D. Ohio 2000)* (finding that hair salons are not a public accommodation).

not designated as public accommodations under Title II. [55] Refusal to conduct commerce equally with people of different races could now support a claim by a victimized private party for damages, even if the business involved did not meet the technical definition of a public accommodation under Title II. Moreover, compensatory damages were obtainable, creating incentives, and recompense, for private enforcement activity. [56]

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II. THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS PUBLIC ACCOMMODATIONS CIVIL RIGHTS WORK AND DEVELOPMENTS FROM 1968 TO 2017

It was into this milieu that the Washington Lawyers' Committee entered upon its formation in 1968 as an affiliate of the National Lawyers' Committee, which was founded in 1963 at the request of President Kennedy to enlist the leaders of the private bar in the effort to secure racial justice in the South. [57] The Washington Committee's arrival on the scene of the drive for racial equality in the D.C. area at this moment in time was both appropriate and needed. After all, the region was still recuperating from embarrassing and dangerous racial incidents that played a role in prompting the enactment of the Civil Rights Act of 1964 just a few years earlier. The city was just beginning to recover from the destructive rioting that broke out in Washington, D.C., after the assassination of Martin Luther King, Jr., in 1963, [58] for instance. Virginia's key role in the massive public school integration resistance movement following the Brown decision had only ended, reluctantly, in 1959. [59] Large areas of Maryland near D.C. did not even begin to desegregate public schools until the early 1960's. [60] Additionally, a significant portion of the state's many restaurants along its principal north-south thruway remained segregated as of the early 1960's in spite of well documented "Freedom Rider" styled sit-ins. These demonstrations were spurred by President Kennedy's pleas that restaurant owners stop refusing service to representatives of the newly decolonized African nations - that Kennedy was trying to woo away from the communists - as they traveled to D.C. from the United Nations in New York. [61]

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[47] See, e.g., *U.S. v. La. Rest. Club, 256 F. Supp. 151, 154 (W.D. La. 1966)* (enjoining association of restaurants from evading the statute by claiming they were private clubs); *Presley v. City of Monticello, 395 F.2d 675, 676 (5th Cir. 1968)* (finding that gas stations are public accommodations); *U.S. v. Beach Assoc., Inc., 286 F. Supp. 801, 807 (D. Md. 1968)* (finding that privately-owned beaches charging admission are public accommodations); *Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966)* (finding that golf courses are public accommodations); *Rousseve v. Shape Spa for Health & Beauty, Inc, 516 F.2d 64, 67 (5th Cir. 1975),* reh'g denied *520 F.2d 943* (finding that health clubs and spas are public accommodations); *Evans v. Seaman, 452 F.2d 749, 751 (5th Cir. 1971),* cert. denied ***92 S.Ct. 2493, 408 U.S. 924, 33 L.Ed.2d 335*** (finding that roller skating rinks are public accommodations).

[48] J. Relman 7/17/17, supra note 43; see also Drew S. Days III, "Feedback Loop": The Civil Rights Act of 1964 and Its Progeny, *49 St. Louis U. L.J. 981, 985 (2005).*

[49] J. Relman 7/17/17, supra note 43; Amanda G. Main, Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief, *39 Brandeis L.J. 289, 314-15 (2000).*

[50] J. Relman 7/17/17, supra note 43; see, e.g., *U.S. v. DeRosier, 473 F.2d 749, 750 (5th Cir. 1973)* (Justice Department suit to integrate bars using Title II); *Katzenbach v. Gulf-State Theaters, Inc., 256 F. Supp. 549, 551 (N.D. Miss. 1966)* (action to integrate movie theaters) (Katzenbach was the Attorney General); see generally *Katzenbach v. McClung, 379 U.S. 294 (1964)* (case brought by government to integrate restaurants); *Heart of Atlanta Motel Inc. v. U.S., 379 U.S. 241 (1964)* (case brought by government to integrate hotels).

[51] J. Relman 7/17/17, supra note 43; John Hope Franklin, The Civil Rights Act of 1866 Revisited, 41 Hastings L.J. 1135, 1135-39 (1990).

The D.C. metropolitan area may not have been **[*85]** the "deep South," but much of it remained segregated, had been part of the Confederacy, and was still "southern" in many ways, including with respect to race relations.

A. Correcting Resistant Blatant Refusals to Provide Equal Accommodations in the 70's

Upon its formation, the Lawyers' Committee immediately became very busy monitoring and facilitating equality of access to education, housing, employment and consumer credit, as other Articles in this 50th Anniversary collection reflect. The D.C. area experience with respect to access to public accommodations, however, seemed generally to duplicate the kind of quiet compliance that was evident elsewhere in the years after the enactment of the '64 Act. But the Committee did begin to act on indications that some places of public accommodation were still refusing to serve African-American consumers. In the first few years of its existence, the D.C. law firm of Hogan & Hartson was enlisted to research legal remedies that might be available to take action against businesses in the city that purported to serve all citizens, but in fact did not serve inhabitants of predominantly Black residential areas. [62] And in 1972, the D.C. law firms of Arnold & Porter and Steptoe & Johnson joined with the Committee to challenge racial restrictions in the use of a hall for a wedding reception and to open private athletic facilities in the Washington area to African-Americans, respectively. [63]

In the mid-70's, the Committee and the firm Mullin, Connor & Rhyne sued Beltway Movers, Inc. in federal court in D.C., under *42 U.S.C § 1981,* challenging its refusal to carry out its contractual obligation to provide moving services, and obtaining a monetary settlement for the aggrieved integrated couple plaintiffs. [64] The Sachs, Greenebaum & Taylor and Johnson & Smith law firms worked with the Committee to challenge the dismissal of a Black youngster from an Annapolis Maryland Elks Lodge team participating in Anne Arundel County Youth Football League in federal court in Maryland. [65] The case, which rested on both Title II and § 1981, was settled favorably - **[*86]** after two years of active litigation and the denial of the Elks Lodge motion to dismiss - for monetary damages, attorneys' fees and costs, and a commitment to non-discrimination in Elk's youth programs going forward. [66]

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[52] To note, the Civil Rights Act of 1866 is a different act from the Civil Rights Act of 1875, which, as mentioned previously, was largely struck down by the Civil Rights Cases.

[53] J. Relman 7/17/17, supra note 43.

[54] ***42 U.S.C § 1981***(a)-(b) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.").

[55] In fact, the Lawyers' Committee represented one of the plaintiffs in *Gonzales v. Fairfax-Brewster Sch., 363 F. Supp. 1200, 1200 (E.D. Va. 1973),* which the Supreme Court upheld when consolidated into *Runyon v. McCrary, 427 U.S. 160 (1976).* In Runyon, the Supreme Court held that Section 1981 was applicable to "purely private acts of racial discrimination," such as the denial of entry to a private school in that case, contrary to the earlier ruling in the Civil Rights Cases. *Id. at 170, 192* (White, J., dissenting).

[56] *Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968)* (discussing case under § 1981 regarding housing discrimination). Though alleged violations of Title II were withdrawn prior to trial, the court in Gonzales stated that Title II was not a limitation on Section 1981, thus opening the gates for plaintiffs to claim both Title II and Section 1981 violations in the same suits. *Gonzales, 363 F. Supp. at 1205.*

[57] Carl M. Brauer, John F. Kennedy and the Second Reconstruction 275 (1977); see generally Ann Garity Connell, The Lawyers' Committee for Civil Rights Under Law: The Making of a Public Interest Law Group (2003).

Through the latter half of its first full decade, the Committee continued to challenge, often with the assistance of volunteer lawyers from law firms, one-off instances of "lunch counter"-like "refusals to serve" African-Americans. The Law Offices of Gary Howard Simpson and the Levitan, Ezrin, Cramer, West and Weinstein firm worked with the Committee to bring successful claims before the Maryland Human Rights Commission and in federal court in Maryland on behalf of a Black customer who was refused service by Rita's Beauty Parlor, for example. [67] Rita's agreed to injunctive relief to resolve the agency action, and to damages in settlement of the § 1981 claim. [68] The Committee also settled a "shopping while Black" lawsuit filed by Arnold & Porter in Maryland federal court in 1979 on behalf of an African-American mother and son who were detained and harassed by security personnel at a Korvettes department store. [69] The two, who had been escorted to a private room and interrogated about a claim that the boy had stolen two needles to inflate basketballs, settled the case in 1981 for $ 55,000. [70]

As the 70's came to a close, the Committee also pursued claims to contest the denial of check cashing privileges to Blacks, [71] raced-based exclusion from a motel swimming pool, [72] and substandard service and racial insults directed at a small group of African-Americans dining at a Crystal City restaurant. [73] As was the case across the country, some white-owned American businesses found it difficult to put aside long-held prejudices and fears that impacted the way they operated. The **[*87]** Committee marshaled the assistance of the local bar to push them along.

B. Establishing the Right to Full Fee Recovery for Refusal to Serve Legal Work in the '80's

With the dawn of the 1980's, the Committee's public accommodations efforts began to turn toward new, more complex, second-generation issues. Committee staff assisted a civil rights lawyer in Alexandria, Virginia, whose attorney's fees submission was cut in half despite his successful prosecution of a suit brought by three Black women who were denied entry to a restaurant. [74] The restaurant responded to the fee petition by accusing the lawyer of unlawful solicitation and champerty because he had informed the women of the restaurant's policy and urged them to conduct the "test" that precipitated the lawsuit. [75] Judge Merhige then awarded the lawyer only half

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[58] Neely Tucker, The Wreckage of a Dream, Wash. Post (Aug. 24, 2004), http://www .washingtonpost.com/wp-dyn/articles/A27044-2004Aug23.html; Denise Kersten Wills, "People Were Out of Control": Remembering the 1968 Riots, Washingtonian (Apr. 1, 2008), https://www.washingtonian.com/2008/04/01/people-were-out-of-control-remembering-the-1968-riots/.

[59] Klarman, supra note 28, at 349, 398-99, 410, 417-18.

[60] See id. at 347.

[61] Nick Bryant, The Bystander: John F. Kennedy and the Struggle for Black Equality 219-22 (2006).

[62] Wash. Law. Comm., Annual Report, 1971, at 4 (1971).

[63] Wash. Law. Comm., Annual Report, 1972, at 9 (1972).

[64] Wash. Law. Comm., Annual Report, 1975-76, app. B at vii (1976); Wash. Law. Comm., Annual Report, 1976-77, at 14 (1977).

[65] Bryant v. Elks Lodge, 622 (D. Md. # H-75-1864, H-76-801) D. MD 1976; Annual Report, 1976-77, supra note 65, at 15 (1977); Wash. Law. Comm., Annual Report, 1977-78, app. B at vii (1978). Over twenty depositions were taken by Wash. Law. Comm. Attorney, Rod Boggs, and an attorney from the Department of Justice also assisted with this case. Conversation with Rod Boggs. Interview with Rodd Boggs, Attorney, U.S. Department of Justice.

[66] Wash. Law. Comm., Annual Report, 1978-79, at 16 (1979).

[67] Weaver v. Riva's Beauty Parlor; Weaver v. Shifflet (D. Md. #A-79-363); Wash. Law. Comm., supra note 66, at app. B at x.

[68] Wash. Law. Comm., Annual Report, 1979-80 at 24 (1980).

[69] Alston v. Korvettes; Wash. Law. Comm., supra note 68, at 24-25, app. B at viii.

of the fees listed in the petition, holding that the testers, having failed to recover compensatory damages, had necessarily achieved only a minimal level of success. [76] In Jackson v. McCoy (4th Cir. No. 85-2141), the Fourth Circuit reversed and remanded in favor of the lawyer, holding in a case of first impression that success in a civil rights case must be judged according to the goals of the litigation. [77] The Committee's work thus helped establish the important proposition that in cases involving civil rights testers, whose goal in participating is not individual "compensation," a limited damages award does not necessarily signal limited success. [78]

The Committee remained vigilant for refusal to serve incidents during this time period, as well, pursuing such cases even as the discriminatory activities became more subtle and veiled. The best example was a Prince Georges County, Maryland, Best Western motel's policy denying admission to those living within 60 miles of the location, most of whom "just happened" to be Black. [79] After the plaintiffs survived a motion for summary judgment, [80] the jury found for the **[*88]** Committee's African-American clients, and awarded nominal damages. [81] The federal judge then awarded plaintiffs prevailing party attorney's fees, but only up to the point when plaintiffs had rejected a settlement offer. [82] The Fourth Circuit reversed and remanded the case, finding that rejection of a settlement offer alone is an improper basis upon which to deny a fee award. [83] These early successful restaurant and motel cases turned out to be precursors to cases in which the Committee would employ increasingly sophisticated testing and other investigative techniques to root out and combat the less "blatant" and trickier-to-prove "refusal to serve" approaches and excuses employed by businesses still discriminating on the basis of race in the late 1980's and 90's.

C. Confronting the Long-Standing Problem of Taxi Discrimination in D.C. in the late 80's

The Committee teamed with the firm of Schiff, Hardin & Waite to support three Black women alleging discrimination by cab drivers in the late 70's, [84] and had heard widespread complaints about inequitable taxi services for many years. Inspired to action by a Black Washington Post editorial staff member who wrote in 1989 about being passed up by taxi-cabs in favor of whites, [85] the Committee worked with Hogan & Hartson to assist a coalition of

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[70] Wash. Law. Comm., Annual Report, 1981-82, at 21 (1982).

[71] Wash. Law. Comm., Annual Report, 1980-81, at 18 (1981). Administrative charges were pursued by Allen M. Lencheck, P.C.

[72] Wash. Law. Comm., supra note 71. Jackson was handled by the law firm of Cohen & Ann and the Wash. Law. Comm.).

[73] Wash. Law. Comm., Annual Report, 1983-84, at 12, 19 (1984). The firm of Stewart & Garland ultimately obtained a damages verdict from a jury in favor of the patrons of the restaurant in this case, Vaughn v. Albert Lee Co. See id.

[74] Wash. Law. Comm., Annual Report, 1984-85, at 1920 (1985).

[75] Id.

[76] Wash. Law. Comm., Annual Report, 1985-86, at 1419 (1986); Wash. Law. Comm., Annual Report, 1987, at 18 (1987).

[77] ***Jackson v. McKoy, 809 F.2d 785, 785 (4th Cir. 1987).***

[78] Wash. Law. Comm., supra note 76.

[79] Wash. Law. Comm., Annual Report, 1989-90, at 28 (1990); ***Clark v. Maryland Hosp., Inc., 972 F.2d 338 (4th Cir. 1992).***

[80] *Clark v. Sims, No. CIV. A. HAR-89-1577, 1990 WL 27867, at 2* (D. Md. Feb. 15, 1990).

[81] Wash. Law. Comm., Annual Report, 1994, at 41 (1994).

[82] Id.

[83] *Clark v. Sims, 28 F.3d 420, 422 (4th Cir. 1994).*

[84] Wash. Law. Comm., supra note 68, at 23.

concerned community organizations seeking to analyze and document the extent of discriminatory practices in the Washington, D.C. taxi industry. [86] Buoyed in part by the Fourth Circuit's appreciation of the value of testing results in the civil rights context, the Committee then set out to attack the unequal treatment the research revealed using testing techniques it had pioneered in the fair housing context. [87] In a series of 300 tests conducted under the direction of a team of social scientists at Howard University, Black testers proved to be seven times less likely to be picked up than similarly dressed white testers standing nearby. [88]

[*89] Teaming with Hogan & Hartson, the Committee then sued eight drivers and the three taxi-cab companies most frequently involved in rejecting Black customers in the first action of its kind nationally. [89] In a landmark ruling that provided a model for similar challenges in other cities, civil rights claims brought by tester-plaintiffs against the companies survived a motion for summary judgment in Floyd-Mayer v. Am. Cab Co., meaning that the companies could be held liable for the discriminatory conduct of their "independent contractor" drivers. [90] Faced with the extraordinary pass-by statistics and the testers' finding that service to predominantly Black neighborhoods was more than twice as difficult to procure as was a ride to equally distant white neighborhoods, the companies settled for $ 50,000 and injunctive relief requiring greater discipline over drivers and affirmative measures to facilitate complaints and curb discriminatory conduct. [91] A similar § 1981 case brought with Hogan & Hartson in 1990 against another cab company on behalf of two Black patrons who were denied service after white friends hailed a cab for them was also successful, resulting in a $ 35,000 damages award, attorney's fees and similar injunctive relief. [92] As a result of the Committee's work, taxi companies in D.C. were put on notice that they could be held responsible for discriminatory conduct by drivers if they did not find ways to stop it.

D. Combatting Clandestine Discrimination in Health Spa Membership in the early '90's

While the taxi cases were underway, the Committee recruited a phalanx of other firms to step in to work on a highly publicized § 1981 class action lawsuit brought in 1990 against Holiday Spas on behalf of Blacks who had been discouraged from joining fitness centers in the Washington area. [93] The suit, which had quickly expanded to include clubs in Atlanta, Boston, Philadelphia and Baltimore and become one of the largest public accommodations cases in history to that point, alleged that implementation of the policy included costlier membership **[*90]** fees for African-Americans, less favorable payment terms, long delays and rude treatment. [94] The Committee coordinated a legal team comprised of dozens of attorneys in the five key metropolitan areas from Wilmer, Cutler & Pickering,

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[85] Ronald D. White, Left at the Curb, Wash. Post (July 15, 1989).

[86] Wash. Law. Comm., Annual Report, 1988 at 28 (1988).

[87] Wash. Law. Comm., supra note 79, at 12.

[88] Stanley E. Ridley, James A. Bayton, & Janice Hamilton Outtz, Wash. Law. Comm. for Civil Rights Under the Law, Taxi Service in the District of Columbia: Is it Influenced by the Patrons' Race and Destination? 17 (1989). This report of Howard University social scientists is described in the Equal Rights Center's report. Equal Rights Center, Service Denied: Responding to Taxi Cab Discrimination in the District of Columbia 2 (Oct. 2003).

[89] Wash. Law. Comm., Annual Report, 1990, at 11 (1991).

[90] *Floyd-Mayers v. Am. Cab Co., 732 F. Supp. 243, 248 (D.D.C. 1990).*

[91] Wash. Law. Comm., supra note 89.

[92] Wash. Law. Comm., supra note 89, at 26; Cooper v. Conn. Cab Assoc., (D.D.C. No. 90-1758).

[93] *Kernan v. Holiday Universal, Inc., No. JH90-971, 1990 WL 289505, at 1* (D. Md. Aug. 14, 1990) (granting motion for class certification).

[94] Wash Law. Comm., supra note 89, at 12.

Onek Klein & Farr, Piper & Marbury, Southerland Asbell & Brennan, Pepper Hamilton & Scheetz, and Sullivan & Worchester to prosecute the massive lawsuit, captioned Kernan v. Holiday Universal. [95]

They faced off against a concerted and far-reaching policy of racially discriminatory membership practices at over fifty Holiday Spas locations. [96] Over 400 depositions were taken and more than 65 former Holiday employees were persuaded to testify about discriminatory practices. [97] Investigations uncovered the existence and meaning of coded notations regarding African-Americans on applicant lists ("DNWAM," meaning do not want as member) and on applications themselves (circling the "B" in the word "BASIC" to indicate a Black prospect, the "A" for Asian, or the "C" to identify Caucasians). [98] After nearly two and a half years of vigorous litigation, a landmark settlement was reached in March 1992, on the eve of trial. [99] Holiday consented to entry of judgment against it, agreed to pay $ 9.5 million in damages and attorney's fees over four years, offered free one-year memberships to each of the 5,000 members of the plaintiff class, and accepted injunctive relief that resulted in a sweeping overhaul of marketing procedures at the defendant Holiday locations and several hundred other clubs owned by Holiday's new parent, Bally Manufacturing Corp. [100]

The Holiday Spas case resulted in one of the largest monetary settlements and some of the most wide-ranging injunctive relief ever achieved in a racial discrimination suit under Section 1981 and Title II of the 1964 Civil Rights Act to that time. [101] It was also undoubtedly the Committee's most ambitious undertaking in its first twenty years of existence, exemplifying the unique and key role the Committee has played in battling unlawful discrimination in its modern forms by marshaling **[*91]** substantial premiere legal teams, covering broad geographic areas, coordinating class members, and achieving substantial monetary and injunctive outcomes. In addition, the case highlights the role that the Department of Justice has played in public accommodations discrimination suits, as the Civil Rights Division initially filed a complaint against Holiday Spas and obtained a consent decree before the class action was filed. [102] The discovery-and successful public defeat-of such widespread institutionalized racism in the health club industry also led the Committee to look carefully into efficacy of the membership policies and practices of other health clubs.

In Manuel v. World Gym of Wheaton, seven Black patrons challenged membership practices that offered them only the highest-priced memberships and denied them financing options offered to white patrons. [103] Assisted by Hogan & Hartson, the Committee's clients obtained a Maryland federal court jury verdict of nearly $ 100,000 in compensatory and punitive damages in 1991, and the judge ordered the club to pay plaintiff's lodestar attorney's fees. [104] The Department of Justice, which had entered the case as a plaintiff, helped obtain important broad

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[95] Id.

[96] Id. at 10.

[97] Id.

[98] Wash. Law. Comm, 1968-1993 Making a Difference: Reflections on Six Cases 1517 (1993).

[99] Wash. Law. Comm., supra note 89, at 27.

[100] Id.; Wash. Law. Comm, supra note 98.

[101] Wash. Law. Comm., supra note 89, at 27.

[102] Tracy Thompson, Suit Against Holiday Spa Expands, Wash. Post (Nov. 14, 1989), https://www.washingtonpost.com/archive/local/1989/11/14/suit-against-holiday-spa-expands/9709 a387-a9b4-4dfb-9096-d9c204c7e26f/?utm term=.15da6866a90f.

[103] Wash. Law. Comm., supra note 89, at 10.

[104] Id. at 27.

injunctive relief as well. [105] The Committee also represented prospective Black gym patrons challenging the equality of membership practices under Title II and § 1981 in Mosley v. Defensive Arts Inc. [106] Confronted with evidence that the Norfolk, Virginia club was destroying racially coded records former employees said were similar to those uncovered in the Holiday Spas case, the Committee and Crowell & Moring initiated the litigation with an ex parte temporary restraining order and a search warrant that was enforced by gun-carrying U.S. Marshalls. [107] Reams of incriminating records, some carrying codes indicating the race of applicants, were seized. [108] Although class certification was denied, the club agreed to settle the case in 1991 for $ 50,000 and injunctive relief to avoid continued litigation. [109] The Committee had helped make sure that the health club industry received **[*92]** the message that segregated facilities were no longer acceptable, or good business.

E. Ensuring that Denny's Restaurants Treat all Customers Equally Nationwide

It was not long before the Committee was presented with its next daunting opportunity to serve the goal of ensuring equal access to public accommodations. Like the taxi and health club cases, it presented new challenges, required responses to new demands, achieved a successful conclusion, and had a tremendous long-term impact. In 1992, based on evidence indicating that Denny's restaurants in California were requiring African-American customers to pre-pay, subjecting Blacks to inferior and substandard service, and ejecting Black customers, the U.S. Department of Justice put the Denny's company on notice that a government investigation had shown it to be discriminating. [110] Settlement discussions resulted in the entry of a consent decree in a Title II case between Denny's and the Justice Department, but did not resolve claims asserted on behalf of African-American customers of Denny's restaurants in California by the law firm of Saperstein, Mayeda, Larkin & Gouldstein. [111]

On April 1, 1993, the effective date of the DOJ's consent decree, six Black Secret Service officers assigned to protect President Bill Clinton on a visit to the Naval Academy were denied service at a Denny's restaurant in Annapolis, Maryland. [112] All of the white officers who were part of the same uniformed detail sitting in the same area of the restaurant were served promptly, while the Black officers were ignored. [113] Within weeks of filing a complaint in federal court in Baltimore on behalf of the six agents alleging violations of Title II and Section 1981, the extensive media coverage of the "lunch-counter"-sit-in invoking circumstances brought scores of complaints of discrimination against Denny's to the Committee from African-Americans nation-wide. [114] On the Committee's motion, supported by fifty declarations alleging discrimination at thirty-three Denny's restaurants around the country, the court granted leave to amend the complaint in Dyson v. Denny's Inc. & Flagstar Corp, to include class **[*93]** action claims challenging Denny's Restaurant's discriminatory policies nation-wide. [115]

The legal team undertook a massive year-long nationwide investigation, interviewing hundreds of Denny's' customers and former employees who detailed dozens and dozens of haunting tales of discrimination in Denny's

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105 Id.

106 Id. at 11, 27.

107 Id.

108 Id.

109 Wash. Law. Comm., Annual Report, 1968-1993, at 21 (1993).

110 Wash. Law. Comm., Update, Fall 1993, at 4.

111 Id.

112 Id.

113 Id.

114 Id.

115 Id.

restaurants coast-to-coast, while other members of the team handled numerous discovery and other motions. [116] As the accumulated evidence mounted, and its damning nature became increasingly clear, the company and the Committee, co-counsel Hogan & Hartson, the Department of Justice, and the Saperstein firm engaged in settlement discussions that resulted in a record-setting combined $ 45.7 million settlement of the nationwide and California class actions against Denny's. [117] The settlement also placed Denny's under an extensive five to seven-year court order to provide non-discrimination training to all of its employees, to fund civil rights testers to check for discrimination, to increase the representation of minorities in its advertisements, and to appoint a Civil Rights Monitor to police compliance. [118]

The settlement was the largest ever in a public accommodations case [119] and elicited 170,000 settlement claims from mistreated African-American Denny's customers, which were then processed by the Committee. [120] The Assistant Attorney General for Civil Rights, Deval Patrick, said at the time: "The settlement demonstrates the great good that can come from cooperation between federal authorities, private civil rights attorneys, and an American corporation, that in this case was willing … to do the right thing ...." [121] Under the settlement, the company's pledge to do so was posted in all Denny's restaurants along with a 1-800 discrimination complaint number. [122] This vast corporation, with 1,700 restaurants, became the face of committed and purposeful public accommodations desegregation.

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F. Rooting out Blatant Discrimination in Consumer Retail Transactions through the 90's

Recalcitrant businesses did not put refusal to serve policies on hold while the Committee and legal community devoted their energies to these high-profile mega-civil rights efforts in the taxicab, health club, and restaurant industries. So the Committee managed to continue to find strong private law firms willing to help wage the fight against "resistant" blatant discriminatory business strategies through the 1990's and into the 2000's. Several of the Committee's cases in this time period involved unequal treatment of consumer transactions in retail stores. In Byrd v. Sharper Image, for example, a white customer was readily permitted to exchange a pair of sunglasses without a receipt immediately after an identical request by her African-American friend was declined by the same store manager. [123] The lawsuit brought against Sharper Image by the Committee and the firm of Shaw, Pittman, Potts & Trowbridge in federal court in Washington, D.C., resulted in a 1995 settlement for $ 150,000 and an agreement to put in place anti-discrimination policies and employee training. [124]

The Committee and Shaw Pittman prevailed as well in a Maryland federal court case against Footlocker for a store clerk's refusal to let two African-Americans pay by check while allowing a white customer to make the identical

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116 Wash. Law. Comm., Making a Difference: Reflections on Equal Justice 17-19 (1998).

117 Wash. Law. Comm., Update, Summer 1994, at 1, 3.

118 Id.

119 Stephen Labaton, Denny's Restaurants to Pay $ 54 Million in Race Bias Suits, N.Y. Times (May 25, 1994), https://www.nytimes.com/1994/05/25/us/denny-s-restaurants-to-pay-54-million-in-race-bias-suits.html.

120 See Wash. Law. Comm., supra note 117 (reporting that payouts were made on 130,000 meritorious claims.); see also Wash. Law. Comm., Update, Spring 1996, at 11.

121 See Wash. Law. Comm., supra note 117.

122 Wash. Law. Comm., Annual Report, 1997, at 10 (1997).

123 Wash. Law. Comm., Update, Spring 1996, at 11.

124 Id.

purchase with a check; Footlocker settled the matter in 1993 for $ 100,000 and an agreement to train its employees. [125] The Committee also pursued an ultimately unsuccessful suit against KB Toys in 1999 for its refusal to accept checks at only store locations in primarily African-American neighborhoods in the Washington-Baltimore metropolitan area. [126] The Equal Rights Center confirmed that KB Toys refused to accept checks at stores with primarily African-American clientele, but accepted checks at stores where customers were primarily white. [127] Years later, in 2003, the Committee took on the representation of an African-American man whose out-of-state check was refused at a Staples store in Winchester, Virginia. [128] When he later learned that white colleagues had made **[*95]** purchases there using out-of-state checks, the Equal Rights Center sent testers to the store and confirmed that it accepted out-of-state checks only from the white testers, and the Committee sued on his behalf. [129] In a published unanimous opinion, the Fourth Circuit overturned a district court grant of summary judgment in favor of Staples, [130] and the case was settled shortly thereafter. [131]

But the Committee also found that there were still blatant "throw-back" refusal to serve situations demanding a response even as late as the mid-1990's, unfortunately. The Committee successfully pursued a claim on behalf of Shirley Roman, a Navy Lieutenant-Commander, who was refused service at a Host-Marriott concession stand at Dulles Airport in 1995, for example. [132] She received $ 15,000 plus damages and fees in a settlement that also called for anti-discrimination training for the Host-Marriot's employees. [133]

Additionally, in May of 1995, an Avis Rent-A-Car franchisee in Wilmington, North Carolina, New Hanover Rent-A-Car, refused to rent to an African-American from southern Virginia the three mini-vans she had reserved in advance for use on a family trip to Disney World. [134] When she called an Avis 1-800 number to complain because she suspected the action had been taken due to her race, she learned that Avis had received a number of complaints of racial discrimination about New Hanover. [135] The Committee, Crowell & Moring and the North Carolina firm of Parker, Poe, Adams and Bernstein took on the case, filing a complaint against Avis in the U.S. District Court for the Eastern District of North Carolina in May 1996. [136] As additional evidence of discrimination was gathered in discovery from former New Hanover employees, and an Avis customer representative told of Avis' failure to act despite knowing of the franchisee's policies, the named plaintiffs sought certification of a class of similarly mistreated patrons and prospective patrons. [137] The case, captioned Pugh v. Avis Rent-A-Car Systems, Inc. (E.D.N.C. 96-CV-9-F [2]), was settled in 1998 for $ 5.4 million, to be distributed to African-Americans who had

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125 Jackson v. Kinney Shoe Corporation; Wash. Law. Comm., Annual Report, 1994, at 42 (1994).

126 *Buchanan v. Consol. Stores Corp., 125 F. Supp. 2d 730, 730 (D. Md. 2001).*

127 *Id. at 733.*

128 Williams v. Staples, Inc., No. CIV.A.502CV00054, 2003 WL 1873937, at 1 (W.D. Va. Apr. 8, 2003).

129 Id. at 2.

130 *Williams v. Staples, Inc., 372 F.3d 662, 665 (4th Cir. 2004).*

131 E-mail from Reed Colfax, Partner, Relman, Dane & Colfax, to Robert B. Duncan, Partner, Hogan Lovell (Oct. 26, 2017) (on file with author).

132 Wash. Law. Comm., Annual Report, 1996, at 33 (1996).

133 Id.

134 Wash. Law. Comm., Update, Fall 1997, at 9-10.

135 Wash. Law. Comm., Update, Spring 1998, at 1, 8.

136 Id.

137 Wash. Law. Comm., supra note 134.

[*96] tried to rent from New Hanover. [138] Avis paid $ 3.8 million, and the franchisee paid $ 2.1 million and agreed to a consent injunction requiring five years of monitoring and training at its five locations in North and South Carolina. [139] This highly visible case helped persuade the New York legislature to consider legislation to prevent discrimination in car rental operations. [140]

G. Policing Persistent Unequal Treatment of Consumers as the 21st Century Dawned

On December 5, 2000, the Committee and two other firms negotiated the resolution of what might have been the first case of consumer racism involving the Internet. [141] Kozmo.com, an early "dot com" company which billed itself as the "Internet 7-11," promised to deliver video rentals, CDs, books, and snack food to customers' homes within an hour. [142] When two African-American residents of Southeast and Southwest Washington telephoned Kozmo to arrange deliveries, they were told that the company did not serve their zip codes; or in fact any others in which the population happened to be predominantly African-American. [143] With Cohen, Milstein, Hausfeld & Toll and Crowell & Moring, the Committee filed a class action lawsuit on behalf of the disappointed Northeast and Southeast D.C. "on-line" consumers, charging the internet retailer with racially redlining the African-American neighborhoods it did not serve, some of which were much closer to Kozmo's warehouse than the predominantly white neighborhoods it did serve. [144] The suit alleged violations of the Civil Rights Acts of 1866 and 1964, and the District of Columbia's Human Rights Act. [145] Pursuant to the settlement agreement, Kozmo expanded its service areas in several cities, including into predominantly Black areas of Washington, D.C. [146] Perhaps more interestingly, and more significantly given the subsequent demise of the company, the Committee also obtained $ 125,000 from Kozmo to help **[*97]** the Equal Rights Center and others bridge the digital divide in and around the nation's capital. [147]

In mid-2005, the Committee and the law firm of Relman, Dane & Colfax filed a lawsuit against a Washington, D.C. area automotive giant, Jim Koons Automotive Companies, on behalf of an African-American army veteran who purchased a car from the company. [148] The case, Lloyd v. Jim Koons Automotive Companies, alleged that Koons secretly and exorbitantly marked up loan rates available through the manufacturer's financing arm to Black customers when it did not do so for whites, and that the dealership engaged in deceptive and unfair trade practices, in violation of federal and Maryland state civil rights and consumer protection laws. [149] While lawsuits accusing major auto manufacturers' financing arms of discrimination against African-American borrowers for allowing dealers

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138 Wash. Law. Comm., supra note 135.

139 Id.

140 Wash. Law. Comm., Update, Fall 1998, at 3.

141 Id.

142 Wash. Law. Comm., Annual Report, 2000, at 9 (2000).

143 Id.

144 Id.

145 Kate Marquess, Redline May Be Going Online: Dot-com Delivery Service Faces Same Complaints as Brick-and-Mortar Peers, ABA J., Aug. 2000, at 80.

146 Wash. Law. Comm, supra note 142.

147 J. Sellers 7/19/17; Keith Regan, Kozmo.com Cuts Staff, Exits Market, E-Com. Times (Jan. 9, 2001), https://www.ecommercetimes.com/story/6568.html.

148 Wash. Law. Comm., Update, Fall 2005, at 5, 19.

149 Id.

to add points subjectively to interest rates had been pursued, this apparently was the first case seeking to hold a dealer responsible for such behavior. [150]

H. Renewing the Battle in the Ongoing War against Discrimination in the Taxi-Cab Industry

Even as the civil rights law prohibiting discrimination in public accommodations marked its 35th year, and the Committee's first cases challenging taxi-cab discrimination came up on their 10-year anniversaries, the Committee found itself fighting once again for equal treatment in the cab industry in D.C. Ready to head home from work at a Georgetown restaurant, and after watching several cabs pass by his Black housemate and fellow bartender, a white bartender flagged down a Presidential Cab on Wisconsin Avenue. [151] He waved his Black friend over to join him as he started to get into the car. [152] Upon seeing the African-American rider approaching, the cab driver pulled away so suddenly that the white rider's foot was still outside the car. [153] The driver then stopped and declared that he would take the white **[*98]** customer but not his Black housemate. [154] The Committee and Crowell & Moring brought suit in federal district court alleging violations of both federal and D.C. antidiscrimination laws by the "independent contractor" driver and the cab company in Bolden v. J&R Inc. Taxicab Co. (Presidential Cab Co.) (D.D.C. No. 1:99cv01255). [155] A jury found against both defendants, and awarded the housemates $ 120,000, including over $ 100,000 in punitive damages. [156] The verdict was upheld by the D.C. Circuit in 2002. [157]

A telephone tester-based study conducted by the Equal Rights Center found that residents of northwest Washington were 14 times more likely to receive taxi service than callers for cab service from locations in Southeast, a predominantly African-American neighborhood across the Anacostia River. [158] The disparities between Diamond Cab's responses to calls from the two areas were so great that the Committee and Crowell & Moring filed suit on behalf of two residents of Southeast against the company in 2000. [159] The case, Mitchell v. DCX, Inc. (Diamond Cab), alleging both race and place of residence discrimination under the D.C. Human Rights Act and section 1981 based on the civil rights tester evidence of redlining, survived summary judgment in 2003. [160] Judge Roberts of the district court for D.C. held that plaintiffs had proved - and defendants could not materially dispute - that the cab company's actions had a disparate impact on Black residents of Southeast D.C. [161] The case

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[150] Id.; see Lloyd v. Jim Koons Auto. Cos., No. 8:05-cv-02403-AW (D. Md. Apr. 21, 2006) (ruling that the plaintiff must take his claims to arbitration due to language in the signed financing contract).

[151] Wash. Law. Comm., supra note 142.

[152] Id.

[153] Id.

[154] Id.

[155] Bolden v. J & R Inc., No. CIV.A. 99-1255, 2001 WL 1910561, at 1 (D.D.C. Mar. 1, 2001).

[156] Id.

[157] Id.

[158] Reverend James G. Macdonell & Veralee Liban, Equal Rights Center, Service Denied: Responding to taxi Cab Discrimination in the District of Columbia, 23 (2003). The Equal Right Center's "core strategy for identifying unlawful and unfair discrimination is civil rights testing. When the ERC identifies discrimination, it seeks to eliminate it through the use of testing data to educate the public and business community, support policy advocacy, conduct compliance testing and training, and, if necessary, take enforcement action." About Us, Strategic Priorities, Equal Rights Center, *https://equalrightscenter.org/about-us/* (last visited Sept. 14, 2018).

[159] Wash. Law. Comm., supra note 142.

[160] *Mitchell v. DCX, Inc., 274 F. Supp. 2d 33, 37 (D.D.C. 2003).*

[161] *Id. at 47.*

was settled before trial in 2004, with the cab company agreeing to require its officers, employees and agents to abide by all applicable federal and District of Columbia laws prohibiting discrimination in taxicab service; to require its operators, dispatchers and drivers to provide taxicab service to all on an equal basis within the taxicab service areas **[*99]** regulated by the DC Taxicab Commission; to provide training sessions for its officers and employees; to post complaint procedures and sanctions for violating pertinent laws and procedures; to keep written records concerning complaints of discrimination; and to set up a progressive disciplinary program for drivers, dispatchers or operators found to have discriminated within the service area. [162]

The Committee also filed several cases in federal court in D.C. in 2001 on behalf of African-Americans who were either passed over by cab drivers or were asked to leave cabs upon stating their destination in a predominantly African-American neighborhood. [163] In one case, the law firm of Bach, Robinson & Lewis joined with the Committee to sue District Cab Company on behalf of a Black woman heading home from a late night shift at Georgetown University Hospital. [164] After asking where she was heading and allowing her to enter the cab, the driver spotted five white people waiting for a taxi nearby. [165] After telling his Black rider to "get out," the driver pulled up and picked up the white passengers, leaving his ejected rider to take a bus home. [166] Captioned Snead v. District Cab Co. (D.D.C. No. 01CV00632), the case was settled on favorable terms in December of 2001. [167]

In another 2001 case, the Committee and Hogan & Hartson represented a Black official in the Fair Housing Section of the Department of Housing and Urban Development, who - with the assistance of a doorman at the Loews L'Enfant Plaza Hotel - attempted to enter a Your Way cab that had just discharged a white passenger at the hotel. [168] When the driver saw his prospective Black passenger, he pulled away leaving the doorman and the would-be rider standing agape. [169] The case, Greene v. Amritsar (Your Way Taxicab), alleging violations of 42 U.S. § 1981, the D.C. Human Rights Act and various common laws, was filed in 2001. [170] The company settled in 2003, agreeing to pay an undisclosed sum in damages and to broad injunctive remedies, **[*100]** including the Denny's-like posting of notices in each company cab alerting customers of its commitment to antidiscrimination laws and providing information on how to file complaints of driver discrimination. [171]

In a third case, the Committee and Clifford, Chance, Rogers & Wells represented an African-American woman who, upon entering a Standard Cab, asked to be taken to her home at 17th Street and Benning Road in Northeast D.C. [172] After driving a short distance, the driver pulled over, told her he would not take her to that address, and

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[162] Wash. Law. Comm., Update, Fall 2004, at 5, 17.

[163] Martin Di Caro, Discrimination Complaints Trickle In About D.C. Cabs, WAMU (Sept. 11, 2014), *https://wamu.org/story/14/09/11/discrimination* complaints about dc cabs trickle in/.

[164] Wash. Law. Comm., Annual Report, 2001, at 8, 28 (2001).

[165] Id.

[166] Id.

[167] Reverend James G. Macdonell & Veralee Liban, Equal Rights Center, Service Denied: Responding to taxi Cab Discrimination in the District of Columbia, 2 n.9 (2003).

[168] Wash. Law. Comm., supra note 164.

[169] Id.

[170] *Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 5 (D.D.C. 2002).*

[171] *Equal Rights Center, supra* note 167, at 67.

[172] Wash. Law. Comm. supra note 164, at 9, 27.

demanded $ 5 for the trip up to that point. [173] As the Committee's client got into a second cab, she observed the Standard Cab pick up a white woman who had hailed it just a few yards from where she had been told to get out of the car. [174] A suit, captioned Jones v. Standard Taxicab Company (D.D.C. No. 01CV2568), that was filed in D.C. federal court in 2001, settled for damages and injunctive relief that included complaint procedure and training. [175]

Driving a taxicab is not an easy way to earn a living, and it is one which, for the most part, involves the provision of a public accommodation in a fairly unique "private" transaction between two or more persons. Because it is such a "one-to-one" type of interaction, it is ripe to be impacted by personal biases and fears. While there are many well-meaning taxi drivers in D.C., the issue of discriminatory incidents in the business has been long-standing and significant. [176] Though the problem clearly has not been completely resolved, the Committee's persistent efforts - involving the careful researching and testing of the issue, the mobilization of significant resources, the involvement of multiple plaintiffs, the insistence on improving avenues for complaints, and the willingness to keep returning as the problem reappeared - have made a difference over the years for Black cab riders in the District.

[*101]

I. Compelling Other National Chains to Take Responsibility for Ensuring Equal Inclusion

Five young African-American men, former undergraduate classmates at Georgetown University, gathered at the Cincinnati-Northern Kentucky International Airport before the wedding of one of the men in June of 1998. [177] Before leaving the airport, they decided to have lunch together at the Cheers Restaurant operated by Marriott. [178] The groom and his friends, the only African-Americans in the restaurant, sat down and ordered lunch. [179] As they waited, meals were brought and served to other customers. [180] Although other customers were not required to pay before receiving their food, the waitress insisted that the group of African-American men pay before she would deliver their orders. [181] Recognizing the Denny's-like appearance of discrimination, the Committee filed a lawsuit, captioned Claremont v. Host Marriot Services Corporation (D. Md. No. MJG-99-CV-1665), in June 1999. [182] The case, which was filed in federal court in Maryland where Host Marriot's corporate offices were located, quickly came to the attention of the company's general counsel. [183] The general counsel expressed dismay at the humiliating treatment the men had received, and quickly settled the case, agreeing to a period of ongoing civil rights monitoring. [184]

When several minority guests, including two undercover African-American police officers, were subjected to discriminatory room rental, assignment, maintenance and pricing practices at a Florida Motel 6, the Committee

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173 Id.

174 Id.

175 *Equal Rights Center, supra* note 167, at 5-6.

176 See generally id.

177 Wash. Law. Comm., Annual Report, 1999, at 10 (1999).

178 Id.

179 Id.

180 Id.

181 Id.

182 Wash. Law. Comm., Annual Report, 2000, at 28 (2000).

183 Id.

184 Id.; J. Relman 7/17/17, supra note 43.

joined with Hogan & Hartson and several Florida firms to pursue their claims in Jackson, et al. v. Motel 6, Inc. [185] Based on the experiences of the plaintiffs, the court authorized the Committee to publish notice of the lawsuit nationwide and to establish a 1-800 discrimination complaint line. [186] When the Middle District of Florida's initial certification of a class [187] on the basis of the **[*102]** numerous additional complaints received through this process was overturned by the 11th Circuit, [188] the case was settled on confidential terms. [189] In January 2003, the Committee and Holland & Knight filed a complaint against Red Roof Inn in Tallahassee, Florida alleging racial discrimination in violation of the Civil Rights Act of 1866. [190] A prospective patron of the hotel was refused a room, initially under the guise that the Inn would not accept a check - even though the hotel had a policy of accepting checks from company-approved patrons such as she was and later when they rejected her offer to pay in cash. [191] She agreed to a settlement with the company later in the fall of 2003. [192]

In 2001, the Committee joined with the Ferguson Stein Law Offices of Charlotte, North Carolina and the Law Office of Ted J. Williams in D.C., to sue Waffle House, Inc., a local Charlotte Waffle House franchisee, and a security guard company in the Western District of North Carolina on behalf of five African-American residents of the D.C. area. [193] The men had traveled to North Carolina as part of a gospel singing group tour. [194] When they tried to sit and order a meal at the Waffle House in Charlotte, the restaurant security guard evicted them so that white customers who had arrived later could be seated. [195] As a result of publicity generated by the filing of this action and two others that followed shortly thereafter, many African-Americans contacted the Committee to allege similar discriminatory treatment in Waffle House restaurants around the country. [196] The initial cases [197] were settled confidentially following mediation in 2002, [198] but thirteen additional complaints were filed on behalf of individual plaintiffs against the company and franchises in the fall of 2003. [199]

In 2004 and 2005, after media coverage of those filings prompted still more complaints, the Committee and co-counsel expanded this **[*103]** national civil rights initiative against Waffle House, Inc. [200] This was done through the filing of additional complaints in the Southeast, where Waffle House restaurants dot the landscape, as well as through the filing of complaints in the South and Southwest, where it appeared the pattern and practice of

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185 Wash. Law. Comm., Annual Report, 1997, at 10, 27 (1997); see also *Jackson v. Motel 6 Multipurposes, Inc., 172 F.R.D. 462 (M.D. Fla. 1997).*

186 *Jackson, 172 F.R.D. at 464.*

187 *Jackson v. Motel 6 Multipurposes, Inc., 175 F.R.D. 337, 339 (M.D. Fla. 1997).*

188 *Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1008 (11th Cir. 1997).*

189 Wash. Law. Comm., Anniversary Report 1968-1998, at 30 (1998).

190 Wash. Law. Comm., Update, Spring 2003, at 6.

191 Wash. Law. Comm., Update, Fall 2003, at 6.

192 Id.

193 Wash. Law. Comm., Annual Report, 2001, at 9, 28 (2001).

194 Id.

195 Id.

196 Id.

197 Complaint at 1, Gordon v. Hillcrest Foods, Inc., No. 3:01cv281-mo (W.D.N.C. May 22, 2001).

198 Wash. Law. Comm., supra note 191, at 5.

199 Wash. Law. Comm., Update, Fall 2004, at 5, 18.

discrimination was being repeated. [201] The firms working on these cases included Drinker Biddle & Reath, Ferguson Stein Chambers Adkins Gresham & Sumter, Terris Pravlick & Millian, Foley & Lardner, Vinson & Elkins, Covington & Burling, Alderman & Devorsetz and Wiley Rein & Fielding. Aspects of all four initial cases filed in Georgia, North Carolina, and South Carolina survived summary judgment. [202] The decision in Eddy v. Waffle House was particularly emphatic, finding that utterance of the epithet "nigger" alone provided direct evidence of a denial of service in the public accommodations context. [203]

In August of 2005, four cases, which had been brought against the largest Waffle House franchise in the country, Northlake Foods, Inc., by the Committee and the firms of Ross, Dixon & Bell, Kirkland & Ellis, Reed Smith and Pillsbury Winthrop Shaw Pittman, were settled. [204] The lawsuits, filed in the Eastern District of Virginia, had alleged that nine African-Americans, one Hispanic and two Asian Americans were denied service or subjected to discriminatory treatment at Northlake's Waffle House restaurants in Hopewell, Fredericksburg and Chesapeake, Virginia. [205] Northlake agreed to corporate-wide systemic change across its 149 restaurants in Florida, Georgia and Virginia. [206] The company was required to clarify its nondiscrimination policy, hire a training consultant to design training for its management and hourly workforce on customer discrimination issues, appoint a compliance officer to develop an improved policy to investigate and respond to future customer complaints, and report periodically to the Committee on its maintenance of state-of-the-art policies and procedures on customer treatment. [207]

[*104] Meanwhile, the Committee joined with lawyers from Covington & Burling and a coalition of more than ten other firms around the country to bring cases in four states on behalf of the NAACP and 100 African-Americans alleging discrimination when they attempted to patronize various Cracker Barrel restaurants nationwide. [208] The suits alleged a pattern and practice of preferential treatment for whites by Cracker Barrel that included providing white customers preferential seating, segregating Blacks in the smoking section, forcing Blacks to endure unreasonably long waits for seating and service, and otherwise providing noticeably substandard service to African-American customers. [209]

The Committee and the coalition firms also played an important role in assisting the Department of Justice in investigating Cracker Barrel and convincing the Justice Department to file suit; which it did in 2004 in federal court in Georgia simultaneously with the entry of a consent decree against the company. [210] The government's complaint alleged that Cracker Barrel engaged in a pattern and practice of discrimination against African-Americans

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[200] Id. at 5.

[201] Id. at 5.

[202] *Eddy v. Waffle House, Inc., 335 F. Supp. 2d 693, 701 (D.S.C. 2004); Solomon v. Waffle House, Inc., 365 F. Supp. 2d 1312, 1329 (N.D. Ga. 2004); Lloyd v. Waffle House, Inc., 347 F. Supp. 2d 249, 256 (W.D.N.C. 2004); Slocumb v. Waffle House, Inc., 365 F. Supp. 2d 1332, 1341 (N.D. Ga. 2005).*

[203] *Eddy, 335 F. Supp. 2d at 700.*

[204] Wash. Law. Comm., Update, Fall 2005, at 5, 19.

[205] Id. at 5.

[206] Id.

[207] Id.

[208] Wash. Law. Comm., Update, Spring 2004, at 1, 11.

[209] Id.; Wash. Law. Comm., supra note 191.

[210] Wash. Law. Comm., supra note 191.

in violation of Title II in at least 30% of its restaurants in seven specific states, as well as elsewhere. [211] Additionally, the complaint alleged Cracker Barrel managers directed, participated or acquiesced in the discrimination. [212] The consent decree required that Cracker Barrel hire an outside auditor to oversee the implementation of effective nondiscrimination policies and procedures, the development of new training programs to assure compliance with the policies and procedures, and the creation of an enhanced system to investigate and resolve customer complaints of discrimination, including severe disciplinary actions against employees as necessary. [213] The private-party cases were settled on favorable terms shortly thereafter. [214]

In this set of cases, the Committee built on and demonstrated its proven ability to parlay numerous individual incidents of racial humiliation into momentous and focused corporate-wide attention on civil rights and a realignment of racially-sensitive policies and practices at some of the largest providers of public accommodations in the nation. **[*105]** Utilizing the resources of the most prestigious law firms in the country; teaming with the DOJ and civil rights organizations; identifying great numbers of similarly treated "victims;" coordinating numerous plaintiffs, cases and proceedings; grabbing the attention of the most senior company officials; obtaining damage awards sufficient to discourage future discriminatory behavior; and demanding injunctive relief designed to both encourage company-wide attitudinal change and maintain corporate focus for an extended period, the Committee's work helped change corporate culture at these companies, and the awareness of their employees. [215]

J. Calling Out Discriminatory Corporate Responses to Large African-American Gatherings

African-American college students and alumni attending the 1999 Black College Reunion gathering in Daytona Beach, Florida were shocked by the unwelcoming service they received at the purportedly luxury Adams Mark Hotel. [216] Hotel guests were forced to wear orange identification wrist bands to use hotel facilities, were required to prepay hotel bills, were subjected to hostile security measures, and received drastically reduced levels of hotel service. [217] Upon establishing that Daytona Beach visitors visiting the Adams Mark Hotel during the predominantly white Spring Break Weekend shortly before had faced no such indignities, [218] the Committee filed a class action lawsuit in the Middle District of Florida asserting Title II and section 1981 claims on behalf of these hotel "guests" and visitors who had experienced discrimination at the Adams Mark Hotel. [219] The state of Florida later joined the case, captioned Gilliam v. HBE Corp. (M.D. Fla. No. 99-596-CIV-ORL-22C), to assert unfair and deceptive business practices claims for damages, and the U.S. Department of Justice filed a companion suit alleging a nationwide pattern of race discrimination by the hotel chain. [220]

Aided by the pressure on the company imposed by the three-pronged, private, state and federal attack, the Justice Department and the parties settled the matter in late 2001. [221] Negotiations were extensive, **[*106]** and the judge

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[211] Id.

[212] Id.

[213] Id.

[214] Wash. Law. Comm., Update, supra note 199, at 1, 16.

[215] Id.

[216] Wash. Law. Comm., Annual Report, 1999, at 10 (1999).

[217] Wash. Law. Comm., Annual Report, 2000, at 2829 (2000).

[218] J. Relman 7/17/17, supra note 43.

[219] *Gilliam v. HBE Corp., 204 F.R.D. 493, 494 (M.D. Fla. 2000).*

[220] Wash. Law. Comm., supra note 217.

[221] Wash. Law. Comm., Annual Report, 2001, at 8, 27 (2001).

pressured the parties to settle on terms he would feel comfortable approving. [222] Ultimately, the hotel agreed to pay $ 1.1 million in damages. [223] Some of that amount was distributed as compensation among the plaintiffs and others impacted by the hotel's discriminatory conduct. [224] A portion, however, was distributed to four historically Black colleges in Florida. [225] Having worked successfully to alter corporate-wide discriminatory attitudes in cases such as Cracker Barrel, Waffle House and Host Marriot, the Adam Mark case marked the Committee's first foray into countering stereotyping and discrimination prompted by feelings of intimidation in the presence of large groups of African-Americans. [226] Similar discriminatory reactions have been observed at events such as the Essence Festival in New Orleans, Louisiana, the Orange Festival in Savannah, Georgia, and during Black Bike Week in Myrtle Beach, South Carolina. [227]

K. Reminding South Carolina's Myrtle Beach to Respect Black Bike Week Attendees

In 2003 and 2004, the Committee and six law firms filed complaints alleging widespread race discrimination by restaurants, a hotel, and the police department [228] during the annual Black Bike Week in Myrtle Beach, South Carolina, which is attended primarily by African-Americans. [229] Black Bike Week is one of two large motorcycle rallies **[*107]** held in the Myrtle Beach area each year in May. [230] Hundreds of thousands of predominantly white riders come to the area for the "Harley Davison Spring Bike Rally" in mid-May. [231] The Yachtsman Hotel, one of the largest hotels in the city, required Black Bike Week guests to agree in writing to follow a unique set of rules that were not in place for the Harley event the week before or at any other time of the year. [232] Patton Boggs and the Committee brought class action claims in federal court in South Carolina challenging the Yachtsman Hotel's uniquely restrictive approach to its guests during Black Bike Week. [233] In addition to charging its highest rental rates during the week, the hotel required Black bikers to sign a contract with 34 special rules and to pay for their entire stay at least 30 days prior to their arrival. [234] The hotel required no such contract, imposed no extensive set of rules, and did not demand prepayment at any other time of the year. [235] The hotel settled in 2004, paying $ 1.2 million to be distributed to guests who stayed there during Black Bike Week in 2000, 2001, and 2002. [236] The

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[222] Wash. Law. Comm., supra note 217.

[223] Wash. Law. Comm., supra note 221.

[224] Id.

[225] Id.

[226] Id.

[227] Telephone Interview with Richard J. Ritter, Senior Counsel, Washington Lawyers' Committee (June 11, 2017) [hereinafter R Ritter 7/11/17]; Telephone Interview with Anson Asaka, Assistant General Counsel, NAACP (June 17, 2017) [hereinafter A. Asaka 7/17/17].

[228] WLC Update, (Wash. Law. Comm., Wash., D.C.), Spring 2003, at 1. Although not a public accommodation issue per se, Steptoe & Johnson, the South Carolina law firm of Derfner, Altman & Wilborn, and the Committee also brought a case against the Myrtle Beach Police in May of 2003 alleging that restrictive traffic patterns adopted during Black Bike Week, and not Harley Week, violated the Black bikers' rights under the Equal Protection Clause of the U.S. Constitution. Id. at 11. The U.S. District Court for the District of South Carolina granted a preliminary injunction against the city in May 2005, ruling that the one-way, limited access traffic plan that was imposed by the police for just this time period was designed to discourage Black bikers from attending the event. Wash. Law. Comm., Update, Spring 2006, at 4, 5; Nat'l Ass'n for Advancement of Colored People v. City of Myrtle Beach, No. 4:03-1732-25 TLW, 2006 WL 2038257 (D.S.C. July 20, 2006). In early 2006, the court approved a settlement of the case that required the city to use the same traffic plan during the peak hours of both special event weeks, and to provide training to all law enforcement personnel deployed during Black Bike Week on both uniform standards for policing crowds and cultural sensitivity. Id.

[229] Wash. Law. Comm., Update, Spring 2003, at 1,6, 11.

[230] Id.

Yachtsman also consented to broad injunctive relief to insure there would be no recurrence of the challenged practices. [237]

In April 2005, the Committee and Hogan & Hartson obtained a consent order against J. Edward Fleming, the owner of several large restaurants in Myrtle Beach, which since at least 1999 he had closed to avoid serving patrons attending Black Bike Week. [238] The order required that the restaurants stay open during normal business hours during Black Bike Weeks and called for monetary compensation to eight African-American plaintiffs, who would have eaten at a Fleming's restaurant had they been open during the previous event week, and to the Conway Branch of the NAACP, which was also a plaintiff in the case. [239]

After the Committee, Hogan & Hartson and the South Carolina firm of Derfner, Alman & Wilborn sued Greg Norman's Australian Grille on behalf of the NAACP, alleging that its closure during Black Bike Week in 2003 was racially motivated, the restaurant remained **[*108]** open for Black Bike Week in 2004, and stayed open for Black Bike Weeks in subsequent years. [240] In early 2006, with this positive change in behavior established, the plaintiffs accepted Greg Norman's Offer of Judgment in the amount of $ 100,000, plus costs and attorney's fees, to resolve the matter. [241]

The Committee, Hogan & Hartson and Derfner, Alman & Wilborn also resolved a lawsuit against the national restaurant chain Damon's Grill for its discriminatory closing of its two Myrtle Beach outlets during Black Bike Week but not Harley week. [242] Both restaurants were open for Black Bike Week in 2005, after the suit was filed, and remained open for subsequent Black Bike Weeks. [243] Under the consent decree entered in 2006, Damon's committed to serving all customers without regard to race at all times of the year, including Black Bike Week, and to training all managerial staff and employees on the requirements and methods of complying with federal and South Carolina state laws prohibiting race discrimination in places of public accommodation. [244] Damon's also paid $ 125,000 in damages, plus costs and attorney's fees. [245]

The NAACP has sent teams to investigate and monitor both rally weeks in Myrtle Beach since first learning about the widespread problem as a result of complaints to the organization. Working with local branches of the NAACP, volunteer attorneys from the private sector, local college students recruited through state NAACP conferences, the

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231 Id.

232 Wash. Law. Comm., supra note 191, at 1, 6.

233 Id. at 11.

234 Id.

235 Id.; *A. Asaka 7/17/17, supra* note 227.

236 Wash. Law. Comm., Update, Spring 2005, at 11.

237 Id.

238 Id.

239 Id.

240 Wash. Law. Comm., Update, Spring 2006, at 4-5.

241 Id. at 5.

242 Wash. Law. Comm., Update, Fall 2006, at 5.

243 Id.

244 Id.

245 Id.

NAACP Field Department and others, on-site civil rights monitoring has continued for years. [246] Press conferences are held prior to Black Bike Week each year to make clear that monitoring is ongoing, to advertise a hotline number for complaints, and to emphasize that complaints of civil rights violations will be pursued through legal action as appropriate. [247] Eleven lawsuits have been filed since 2003. [248]

Thirty additional complaints have been made to the South Carolina Human Affairs Commission. [249] The Committee filed complaints **[*109]** with the South Carolina Human Affairs Commission against restaurants in Myrtle Beach based on their practices during Black Bike Week in 2006. [250] In 2008, The Pantry, Inc., which owns and operates a chain of gas stations and convenience stores under the name Kangaroo Express in the Myrtle Beach area, settled a Human Affairs Commission complaint filed by the Committee and Relman, Dane & Colfax alleging that its facilities provided different terms and conditions of service during Black Bike Week in 2007 than it had for Harley week or at any other time of the year. [251] The settlement provided that the Pantry locations would ensure equal treatment of future Black Bike Week visitors, provide antidiscrimination training to its employees and independent contractors and establish procedures for receiving and investigation complaints, and that the company would pay monetary compensation to the plaintiffs. [252]

The Ocean Boulevard Friendly's restaurant in Myrtle Beach closed down during Black Bike Weeks from 2000 to 2006, offering barbeque in the parking lot instead of the full usual menu for the only time all year. [253] The Committee and Relman, Dane & Colfax instigated a putative class action lawsuit in 2007 to challenge the inequitable conduct on behalf of the NAACP, an individual biker and a class of African-Americans. [254] In November of 2008, the Committee, Covington & Burling, Patton Boggs, Crowell & Moring, Relman, Dane & Colfax and the South Carolina firm Derfner, Altman & Wilborn filed three more discrimination claims with the South Carolina Human Affairs Commission on behalf of the NAACP and individual Black Bike Week attendees. [255] The charges alleged that the Sea Horn Motel and Hamburger Joe's restaurant both closed during Black Bike Week 2008, and that the Landmark Hotel raised its rates, closed several of its facilities and imposed other discriminatory terms on its guests. [256] All three claims were resolved by settlement in 2010 and 2011. [257]

The Molly Darcy restaurant in Myrtle Beach closed for the duration of Black Bike Week in 2010, as it had for several prior years, and the Myrtle Beach Pan American Pancake and Omelet House refused **[*110]** to serve African-American customers during the 2010 rally. [258] The law firms of Covington & Burling and Derfner, Altman & Wilborn

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246 *A. Asaka 7/17/17, supra* note 227. Telephonic testing was less successful because white business owners would not be forthcoming over the phone. R. Ritter 7/12/17.

247 *A. Asaka 7/17/17, supra* note 227.

248 R. Ritter 7/12/17, supra note 227.

249 R. Ritter 7/12/17, supra note 227.

250 Wash. Law. Comm., Update, Spring 2008, at 5.

251 Id. at 5, 11.

252 Id. at 11.

253 Id.

254 Id.

255 Wash. Law. Comm., Update, Spring 2009, at 7.

256 Id.

257 Wash. Law. Comm., Update, Fall 2012, at 11.

258 Wash. Law. Comm., Update, Spring 2012, at 9.

again assisted the Committee in filing lawsuits against these two popular restaurants on behalf of the NAACP and individual plaintiffs in May 2011. [259] Pan American settled the claims in 2012. [260] The suit against Molly Darcy survived a motion to dismiss in 2012, [261] and settled shortly thereafter. [262]

The coordinated and continuing monitoring and enforcement activities of the NAACP, the Committee, and cooperating law firms has made a difference for Black Bike Week patrons. Hotline call activity, which is monitored carefully, shows a noticeable positive change in the experience for visitors during the rally over time, and the "overwhelming majority of businesses have been open during Black Bike Weeks." [263] "Welcome Biker" signs are now up during both event weeks each year. [264]

L. Insisting that Popular D.C. Nightclubs Welcome Patrons of any Race or National Origin

In January 2006, the Committee and the law firm of Katten Muchin Rosenman filed a national origin discrimination complaint in the U.S. District Court for the District of Columbia on behalf of a recent immigrant of Arab descent who was forcibly ejected from the FUR Nightclub in Washington, D.C. [265] The nightclub, the D.C. Police Department and Government, and certain known and unknown police officers were all named as defendants in the lawsuit, Mazloum v. D.C. Police Department, [266] which alleged that the plaintiff had been accosted and punched in the nose by a bouncer, and then arrested, ejected, beaten and subjected to race-based taunts by off-duty plain clothes police who were patrons of the nightclub, all without cause and based on his national origin. [267] The plaintiff obtained a jury verdict against the bouncer and the nightclub for battery, and against one **[*111]** of the officers under section 1983; damages of $ 35,000 were awarded; and plaintiff's attorneys obtained an award of $ 334,000 in 2009. [268] The matter was finally resolved in a settlement under which the District of Columbia paid $ 340,000. [269]

In early 2008, the Committee and Kirkland & Ellis settled race and ethnic discrimination claims brought on behalf of a social networking group of Persian/Iranian-American professionals who were told by the popular Blue Gin nightclub in the Georgetown section of D.C. that they should stop using the club for social events because the owners were looking for a "whiter crowd." [270] Discussions with the club owner about federal and local civil rights laws led to an agreement that included a public apology, an enhanced diversity training program that included independent event planners, and monetary compensation to the group. [271] Hopefully, D.C. nightclubs have gotten

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[259] Id.

[260] See id.

[261] Nat'l Ass'n for the Advancement of Colored People, Inc. v. Molly Darcy, Inc., No. 4:11- CV-01293, 2012 WL 4473138, at 1 (D.S.C. Sept. 26, 2012).

[262] Id.; Order Approving Consent Decree, (Nov. 2, 2012).

[263] *A. Asaka 7/17/17, supra* note 227.

[264] Id.

[265] Wash. Law. Comm., Update, Spring 2006, at 5.

[266] *Mazloum v. D.C. Metro. Police Dep't, 576 F. Supp. 2d 25, 29 (D.D.C. 2008).*

[267] Wash. Law. Comm., Update, Spring 2008, at 5, 11.

[268] Wash. Law. Comm., Update, Fall 2009, at 12.

[269] Wash. Law. Comm., Update, Fall 2010, at 11.

[270] Wash. Law. Comm., supra note 267, at 5, 10.

[271] Id. at 11.

the message that efforts to manage the racial or ethnic make-up of their customer-base will not be tolerated by the Committee.

III. PRACTICAL, LEGAL AND SOCIETAL FACTORS LIKELY TO PRESENT CHALLENGES TO CIVIL RIGHTS IN PLACES OF PUBLIC ACCOMMODATION AS THE 21ST CENTURY UNFOLDS

While substantial progress has obviously been made since the 1960's, it cannot be said that civil rights in the area of public accommodations is a done deal. First, the disturbing resilience of stereotyping and bias in nightclub "image" creation, in large social event settings, in tradition-laden corporate policies, and in passenger selection by cab drivers despite many years of legal and societal disapproval demonstrates the importance of vigilance, particularly as forms of, and means of access to, places of public accommodation are transformed in the innovative 21st century economy. Second, the effectiveness of laws put in place fifty years ago in addressing the civil rights questions of today and tomorrow is unclear, particularly as new developments pose challenges to adequate enforcement, standards of proof, scope of coverage, and applicability to gender and sexual orientation discrimination. Finally, the 2016 presidential election campaign and the resulting presidency, and societal phenomenon, of Donald **[*112]** Trump raises anew concerns long thought by many to have been resolved regarding how we treat one another in this country and how we respect, and protect, those who are different.

A. Safeguarding Civil Rights in 21st Century Classes of Public Accommodation

The dawn of the 21st century has already transformed many aspects of our culture. Ready availability of computers, ease of mobility, and now 24-hour access to smartphones, has brought with it new ways of marketing, finding, arranging for, and accessing public accommodations. While the above cases demonstrating the persistence of racism affecting the traditional provision of public accommodations and services into the late 1990's and 2000's serve as a warning that stereotyping and bias remain even now, rapidly evolving technology and the speed of change in our society will surely offer new and different ways for biases, bigotry and stereotyping to manifest themselves.

Big data may make monitoring and policing violations of civil rights laws in the public accommodations industries easier in some ways, but privacy expectations and on-line anonymity will likely make them simpler to execute, and to hide, as well. The extraordinary pace of change we are likely to see over the next several decades will almost certainly bring types of public accommodations and issues relating to access to them that are unimaginable today. Concerns regarding equality of access to a few new "breeds" of public accommodation offerings have already received some media attention, however. [272]

Perhaps the most obvious example of the new genre of companies navigating this rapidly-evolving and complex terrain is the now not-so-new Airbnb, Inc., a privately held online marketplace for hospitality services. [273] Airbnb acts as a broker connecting owners of rental properties and rooms, hostel beds and hotel rooms with prospective short-term "guest" renters. [274] The company makes money from commissions paid in conjunction with bookings. [275] The Airbnb operation obviously bears some features common to hotels (and hotel **[*113]** websites) in that it offers its users access to a place to stay. It also resembles taxicabs in that the actual transaction is largely an (albeit virtual) one-on-one arrangement made between private individuals. Airbnb's "user profiles," to which both hosts and

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[272] Id.

[273] See Jonathon Shieber, How Airbnb Went from Renting Air Beds for $ 10 to a $ 30 Billion Hospitality Behemoth (Aug. 12, 2018), https://techcrunch.com/2018/08/12/how-airbnb-went-from-renting-air-beds-for-10-to-a-30-billion-hospitality-behemoth/.

[274] About Us, AirBnB, https://press.atairbnb.com/about-us/ (last visited Sept. 9, 2018).

[275] What Are AirBnB Service Fees, AirBnB, https://www.airbnb.com/help/article/1857/what-are-airbnb-service-fees?topic=250 (last visited Sept. 9, 2018).

guests are privy in order to ease safety/trust concerns, provide photographs and other identifying information on users that could be misused. [276]

Like other on-line "sharing culture" enterprises, Airbnb has taken the position that because it is a provider of an exchange platform, and not a provider of a public accommodation - a room, which is provided by the private "host" - their operations are not subject to Title II scrutiny. [277] But it is not hard to imagine that the same prejudices and stereotypes still seen in more traditional contexts clearly could manifest themselves in Airbnb transactions as well. In fact, a 2015 study by Harvard Business School found widespread discrimination by Airbnb hosts against guests whose names suggested that they were Black. [278] Arbitration clauses have inhibited litigation, [279] but company officials have recently referred to user discrimination as "the greatest challenge" the company faces. [280]

In 2016, the company initiated an internal bias and discrimination review of its entire platform, led by the former head of the American Civil Liberties Union's legislative office. [281] In June of that year, Airbnb removed a host from the platform after he sent racial epithets to a Nigerian woman who was trying to reserve lodging. [282] And in July, in response to the rising tide of concern and still more complaints of racism, the company engaged former Attorney General Eric Holder to work alongside former Committee lawyer, John Relman - **[*114]** who helped lead the case against Denny's described above and now leads a private law firm focused on discrimination matters - to develop an anti-discrimination policy for Airbnb. [283]

To resolve a complaint filed against it by the California Department of Fair Employment and Housing (DFEH), Airbnb agreed in April 2017 to permit the state to conduct testing of certain multi-listing hosts who have been the subject of discrimination complaints in the past. [284] DFEH's complaint alleged that the company had failed to prevent discrimination and should be held liable. [285] Like the testing the Committee and the Equal Rights Center used in the fair housing context and to develop several of the public accommodations cases described above, Black and white applicants with otherwise identical backgrounds would attempt to book lodgings. [286] Then, in August of 2017, upon concluding that the company's services were being used by white nationalists looking to arrange

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[276] See Seth Porges, Dear Would-Be Airbnb Guests: Here's Why Hosts Keep Turning You Down (Jan. 18, 2016, 9:00 AM), *https://www.forbes.com/sites/sethporges/2016/01/18/dear-would-be-airbnb-guests-heres-why-hosts-keep-turning-you-down/#6149e6481e59*.

[277] See Aaron Belzer & Nancy Leong, The New Public Accommodations: Race Discrimination in the Platform Economy, *105 Geo. L.J. 1271, 1299-1300 (2017).*

[278] See Benjamin Edelman, Michael Luca, & Dan Svirsky, Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment, 9 Am. Econ. J. 1, 1 (2017), http://www .benedelman.org/publications/airbnb-guest-discrimination-2016-09-16.pdf.

[279] Selden v. Airbnb, Inc., No. 16- CV-00933, 2016 WL 6476934, at 1 (D.D.C. Nov. 1, 2016), appeal denied, No. 16- CV-933, 2016 WL 7373776 (D.D.C. Dec. 19, 2016), appeal dismissed, 681 F. App. 1 (D.C. Cir. 2017), cert. denied, No. 17-79, 2017 WL 3036756 (U.S. Oct. 2, 2017).

[280] Diversity, AirBnB, *https://www.airbnb.com/diversity* (Last visited on Sept. 15, 2018).

[281] Emily Badger, Airbnb Says It Plans to Take Action to Crack Down on Racial Discrimination on Its Site, Wash. Post (June 2, 2016), *https://www.washingtonpost.com/news/wonk/wp/2016/06/02/airbnb-says-it-wants-to-take-action-to-crack-down-on-racial-discrimination-on-its-site/?utm* term=.6eee84bb0838.

[282] Id.

[283] See Abha Bhattarai, Airbnb Hires Eric Holder To Help Company Fight Discrimination, Wash. Post (July 22, 2016), *https://www.washingtonpost.com/news/business/wp/2016/07/20/eric-holder-joins-airbnb-to-help-company-fight-discrimination/?utm* term=.3f5f9d621229.

[284] See Sam Levin, Airbnb Gives in to Regulator's Demand To Test For Racial Discrimination By Hosts, The Guardian (Apr. 27, 2017), *https://www.theguardian.com/technology/2017/apr/27/airbnb-government-housing-test-black-discrimination*.

lodging for a visit to attend a high-profile and now infamous racist rally scheduled for Charlottesville Virginia, Airbnb deactivated accounts it suspected were being used by prospective attendees. [287]

In addition to responding to discrimination complaints and legal action, boycotts and lawsuits against the company have now been threatened by those forced off the service. [288] And the prevailing view among legal scholars is that antidiscrimination laws likely do not reach many of the smaller landlords using Airbnb. [289] Airbnb is clearly operating in a legal and culturally fraught grey area. The societal, business **[*115]** and legal pressures on the company are great, and questions relating to the practicalities and law concerning its responsibility for, and success in controlling, discriminatory conduct by its hosts will be the subject of ongoing monitoring and potentially legal action.

Ride-sharing companies such as Uber and Lyft face similarly unresolved uncertainties and risks of legal responsibility for discriminatory actions taken by drivers engaged through their online platforms. A tester-based study of drivers in Seattle and Boston, for example, found that prospective riders with African-American sounding names had to wait significantly longer for rides, and were much more likely to have their rides cancelled, compared to similarly situated white testers. [290] Can it be that Uber and Lyft drivers will be allowed to discriminate while their competition - taxicab companies and drivers - are held to a higher standard of equal service? Can there be any doubt that Airbnb, Uber and Lyft are not the last of the new sharing economy and other "breeds" of public accommodations providers (or platforms) we will see develop going forward? The evidence suggests that their appearance and progression will bring new, unique and untested challenges to the policing of discrimination and racism. [291]

B. Guaranteeing the Adequacy of Today's Public Accommodations Civil Rights Law

The cases of Airbnb, Uber and Lyft also highlight unresolved questions regarding the adequacy of current public accommodations civil rights laws to address unequal treatment going forward. For example, does Title II require that a defendant have a physical "place" at which it mistreats consumers? In Welsh v. Boy Scouts of America, [292] the Northern District of Illinois found the Boy Scouts "...not to be a place of public accommodation within the scope

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[285] Id.

[286] Id.

[287] Kyle Swenson, Airbnb Boots White Nationalists Headed To 'Unite the Right' Rally in Charlottesville, Wash. Post, (Aug. 8, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/08/airbnb-boots-white-nationalists-headed-to-unite-the-right-rally-in-charlottes ville/?utm term=.8670001e6c97.

[288] See Jonah Engel Bromwich, Airbnb Cancels Accounts Linked to White Nationalist Rally in Charlottesville, N.Y. Times (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/us/airbnb-white-nationalists-supremacists.html (stating that white supremacist leader Jason Kessler was "considering ways to strike back at Airbnb after the event, including by starting a boycott or a class-action lawsuit").

[289] Aaron Belzer & Nancy Leong, The New Public Accommodations: Race Discrimination in the Platform Economy, 105 Geo. L.J. 1271, 1318 (2017); Michael Todisco, Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy, 67 Stan. L. Rev. 121, 122 (Mar. 2015).

[290] Mark Scott, Study Finds Some Uber and Lyft Drivers Racially Discriminate, N.Y. Times (Oct. 31, 2016), https://www.nytimes.com/2016/11/01/technology/uber-lyft-racial-discrimination .html.

[291] Yanbo Ge, et al., Racial and Gender Discrimination in Transportation Network Companies, 20 (Nat'l Bureau of Econ. Research, Working paper No. 22776, 2016), http://www.nber.org/papers/w22776.pdf.

[292] See generally Welsh v. Boy Scouts of Am., 742 F. Supp. 1413 (N.D. Ill. 1990).

of Title II because it did not 'operate from or avail [its] members of access to a particular facility or location.'" [293] Is there a logical basis for excluding from the reach of Title II organizations which do not operate a unitary, definite "place" of business, but which of necessity participate **[*116]** in the making of public accommodations (albeit at multiple and shifting locations) available to the public? Similarly, should Airbnb "hosts" be relieved of nondiscrimination obligations - in spite of their use of the service - merely because, as the Welsh court noted, "Congress has expressly declared that a private residence in which the homeowner dwells does not become a public accommodation simply because the owner opens it to the public." [294]

As was discussed briefly above, Title II also provides only for injunctive relief. [295] The focus on simply stopping discriminatory conduct may have made sense in the context of the statute's enactment, where the goal was to empower the federal government to forcibly desegregate openly resistant merchants. [296] But as segregation has become increasingly sophisticated, disguised and/or hidden, the cost of rooting out and forcing change has become enormous. At best, the costs will drastically limit the DOJ's ability to take on more than the most egregious of cases. Additionally, the Department's inability to recover any of its investigative and prosecutorial costs given the lack of a damages provision in Title II will render even that level of governmental action prohibitively expensive from cost/benefit and prioritization perspectives. [297] The lack of a damages provision for civil litigants virtually assures they will take up little of the slack. Perhaps, even more importantly, it impacts the violator's analysis of the cost of resisting claims and refusing to settle. [298] In contrast, the Fair Housing Act provides for damages, [299] making it a much more attractive mechanism from the perspective of aggrieved house-hunter and their representatives, and a much more effective tool for encouraging discriminating property owners to back down. Is this a limitation that can and should be fixed?

Title II also does not by its language prohibit gender or sexual orientation discrimination in the provision of public accommodations. Discrimination in places of public accommodation is prohibited only on the basis of race, religion or national origin. [300] The statute also excludes private clubs from the reach of its antidiscrimination mandate. [301] **[*117]** Unequal treatment based on gender and by private clubs was purposely excluded at the time of enactment out of political necessity: While Congress was prepared in 1964 to outlaw racism, sexism was still largely ignored and even accepted as the natural order of things (particularly by men), and race and gender limited private clubs were seen as off-limits to government intervention. [302] Consensus could not be reached on eliminating these, then-accepted, aspects of our culture. [303] Whether amendments in these areas would be possible today is not clear,

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293 *Welsh v. Boy Scouts of Am., 787 F. Supp. 1511, 1541 (N.D. Ill. 1992).*

294 *Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1274 (7th Cir. 1993).*

295 J. Relman 7/17/17, supra note 43.

296 Id.

297 Id.

298 Personal Conversation with Paul Hancock, (July 11, 2017).

299 *42 U.S.C.§§3601*-3619, 3631 (1996).

300 *42 U.S.C. § 2000a*(a) (1964).

301 Id. § 2000a(e).

302 See Note, Public Accommodations Laws and the Private Club, 54 Geo. L.J. 915, 918 (1966). In addition, the right to freedom of association under the First Amendment could be implicated, or at least according to some views. See id.; see also Margaret E. Koppen, The Private Club Exemption from Civil Rights Legislation-Sanctioned Discrimination or Justified Protection of Right to Associate, 20 Pepp. L. Rev. 643, 652 (1993).

303 To prove this point, Title II gave rise to the longest filibuster in Senate history at the time. See Brian K. Landsberg, Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?, ***36 Hamline J. Pub. L. & Pol'y 1, 1 (2015).***

and in any event might well cause unexpected repercussions, such as ending "ladies nights" at bars and women-only health clubs. [304]

Although the Civil Rights Act of 1964 does not prohibit public accommodations discrimination based on gender, Title VI of the same act prohibits employment discrimination based on "race, color, religion, sex, or national origin." [305] The addition of sex as a protected class has allowed women to more fully participate in the workplace over the past decades. [306] Furthermore, in recent years, "sex" has been read to include gender identity and sexual orientation, providing protection for LBGT employees who have faced discrimination. [307] A strong majority (76 percent) of the public supports these sorts of safeguards in the employment space - as well as in the field of housing, with 74 percent of Americans supporting anti-discrimination laws that would protect **[*118]** LGBT individuals. [308] Despite this broad public support, the current political climate would seem to indicate that any amendment of Title II to include sex, sexual orientation, or gender identity as protected classes is far off. [309]

Another unresolved question regarding Title II relates to the standard of proof required of a plaintiff suing under the statute. In Hardie v. NCAA, for example, the NCAA was sued over the disparate impact of its refusal to allow convicted felons to coach in an NCAA sponsored high school basketball tournament. [310] The complaint, which was brought under Title II because the coaches were looking to participate in a public tournament, asserted that the disparate impact of the rule on African-Americans could have been avoided by a more individualized analysis focusing on the non-discriminatory "safety" objectives it was claimed to serve. [311] The NCAA argued that the case should be dismissed because the rule - which it acknowledged might well impact African-Americans disproportionately - was not intended for the purpose of discrimination. [312] The district court granted summary judgment for the NCAA, stating that disparate impact claims are not cognizable under Title II, and on appeal, the Ninth Circuit affirmed the lower court's ruling but explicitly refused to rule on whether or not Title II encompassed

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[304] See Jessica E. Rank, Is Ladies' Night Really Sex Discrimination: Public Accommodation Laws, De Minimis Exceptions, and Stigmatic Injury, *36 Seton Hall L. Rev. 223, 247 (2005);* see also Joyce L. McClements & Cheryl J. Thomas, Public Accommodations Statutes: Is Ladies' Night Out?, 37 Mercer L. Rev. 1605, 1623 (1986); Michael R. Evans, Comment, The Case for All-Female Health Clubs: Creating a Compensatory Purpose Exception to State Public Accommodation Laws, *11 Yale J.L. & Feminism 307, 308 (1999).*

[305] ***42 U.S.C. § 2000e-2*** (1964).

[306] The percentage of women in the U.S. labor force increased by nearly 15% since Title VII was passed. See Women in the Labor Force, United States Department of Labor, *https://www.dol.gov/wb/stats/NEWSTATS/facts/women* lf.htm#one (last visited Sept. 9, 2018).

[307] See Macy v. Holder, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding that intentional discrimination against a transgender individual is discrimination based on sex and therefore violates Title VII); see also Baldwin v. Dep't of Transportation, EEOC DOC 0120133080 (July 15, 2015) (holding that discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII).

[308] Henry J. Kaiser Family Found., Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation 8 (2001), https://kaiserfamilyfoundation.files.wordpress.com/2013/01/new-surveys-on-experiences-of-lesbians-gays-and-bisexuals-and-the-public-s-views-related-to-sexual-orientation-chart-pack.pdf.; see also Betsy Cooper, et al., Beyond Same-sex Marriage: Attitudes on LGBT Nondiscrimination Laws and Religious Exemptions from the 2015 American Values Atlas, Public Religion Research Institute (Feb. 18, 2016), *https://www.prri.org/research/poll-same-sex-gay-marriage-lgbt-nondiscrimination-religious-liberty/* (indicating that 71% of Americans support laws that would protect LGBT persons from employment discrimination).

disparate-impact claims. [313] Instead, the panel held that even if disparate impact claims were recognizable under Title II, the plaintiff had failed to meet one of the elements. [314]

[*119] As the Hardie case illustrates, case law remains undecided on whether Title II plaintiffs can use a disparate impact theory to prove discrimination, or whether they must prove that intentional discrimination took place. The former approach would be similar to the standard that is applied in employment discrimination cases brought under Title VII of the 1964 Civil Rights Act. [315] Title II claims alleging disparate impact have been recognized in some jurisdictions. [316] Other courts, however, have insisted that litigants demonstrate that the defendant purposefully treated individuals dissimilarly because of their race, religion, or national origin. [317] How this question is resolved will determine whether Title II will remain a valuable tool to combat activities that have discriminatory effect, or whether such discriminatory effect, and the damaging societal consequences, will be permitted to continue as long as there is no proof of discriminatory intent.

Similarly, while it has been established that proof of intentional discrimination is a required element of a § 1981 claim, there is conflict in the case law regarding what discriminatory treatment is actionable. In 2000, in Callwood v. Dave & Buster's, the Sixth Circuit established what has come to be known as the "markedly hostile" test for actionability. [318] The court held that discriminatory treatment in the delivery of services constituted a violation of Section 1981, even if the service was grudgingly provided. [319] In these cases, plaintiffs may not have been prevented from "making or enforceing a contract" in the language of the statute, but the "terms and conditions" of the contract - the provision of services - were different. [320] In other words, the mistreatment alone, even without an outright refusal to contract, could serve as a basis for a Section 1981 claim. [321]

[*120] While a number of courts have adopted this test since Callwood, [322] others have not. In these cases, courts have held that a "complete denial" of services must take place in order for a section 1981 violation to occur.

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[309] See, e.g., Daniel Wiessner, U.S. Justice Department Says Anti-bias Law Does Not Protect Gay Workers, Reuters (Jul. 27, 2017, 10:53 AM), https://www.reuters.com/article/us-usa-court-lgbt-idUSKBN1AC2DZ (discussing the Tromp Administration's DOJ reversal of the Obama Administration's position on Title VII and sexual orientation); see also*Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256 (11th Cir. 2017)* (ruling that "sex" in Title VII does not encompass discrimination based on sexual orientation).

[310] *Hardie v. NCAA, 97 F. Supp. 3d 1163, 1164 (S.D. Cal. 2015).*

[311] *Id. at 1166.*

[312] *Id. at 1165.*

[313] *Id. at 1169; Hardie v. NCAA, 861 F.3d 875, 887 (9th Cir. 2017).*

[314] *Hardie v. NCAA, 861 F.3d 875, 886 (9th Cir. 2017).*

[315] See generally *Griggs v. Duke Power Co., 401 U.S. 424 (1971).*

[316] See generally *Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Robinson v. Power Pizza, Inc., 993 F. Supp. 1462 (M.D. Fla. 1998); O'Neill v. Gourmet Sys. of Minn., Inc., 219 F.R.D. 445 (W.D. Wis. 2002); Coward v. Town & Vill. of Harrison, 665 F. Supp. 2d 281 (S.D.N.Y. 2009)* (allowing the possibility of disparate impact claims).

[317] *Akiyama v. United States Judo Inc., 181 F. Supp. 2d 1179, 1187 (W.D. Wash. 2002); LaRoche v. Denny's, Inc., 62 F. Supp. 2d 1366, 1370 (S.D. Fla. 1999)* (requiring intentional discrimination).

[323] As we have seen from the discussion above, the enactment and enforcement of civil rights laws since 1964 has gradually eliminated most blatant refusal of serve incidents or has made discriminators more devious in the implementation of exclusionary efforts. If a showing of "complete denial" is the threshold, the very belittling impact President Kennedy sought to halt will be allowed to continue, through slow service, additional security scrutiny, varied payment policies, etc. This too is a civil rights battle that remains to be won. [324]

C. Countering the "Trump Effect" on Attitudes toward Equality in Public Accommodations

Finally, it is not possible at this moment in our nation's history to fail to note that the election and early stages of the presidency of Donald Trump raises, at the very least, additional and new-found concerns regarding the direction of civil rights over the next several years. From his own insensitive (if not outright racist) comments and attitudes toward people of different races, sexes, nationalities and even disabilities during his campaign and as President, to his policy announcements and administrative actions, Trump appears to have sanctioned racism, misogyny, nationalism, name-calling, homophobia, and even insulting the disabled. He has lent legitimacy to blatant extremists and haters, and failed to stand up for those subjected to their vitriol and violence or to laud the progress this country has made on civil rights over many years. [325]

[*121] Whether President Trump's personal failures of moral leadership embolden his fanatical supporters or offer other-wise responsible people permission to act on sublimated fears and prejudices in the public accommodations arena, there is already plenty of evidence that he has incited racial, ethnic, sex and disability-based distrust, conflict and harassment. Given predictable human nature, it seems implausible that the effects of this less demanding environment will not manifest themselves in increased bias and discrimination in places of public accommodations. [326] Moreover, it is increasingly evident that the Department of Justice under Trump and Attorney General Sessions is likely to do little to enforce civil rights laws. In fact, it appears this Administration will actively roll-back long-established civil rights protections.

IV. THE WASHINGTON LAWYERS COMMITTEE AND OTHER PRIVATE COUNSEL WILL REMAIN KEY TO PROTECTING CIVIL RIGHTS IN PLACES OF PUBLIC ACCOMMODATION

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[318] *Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 707 (D. Md. 2000).*

[319] *Id. at 710.*

[320] J. Relman 7/17/17, supra note 43.

[321] J. Relman 7/17/17, supra note 43.

[322] *Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 871 (6th Cir. 2001); Brooks v. Collis Foods, Inc., 365 F. Supp. 2d 1342, 1356 (N.D. Ga. 2005); Dobson v. Central Carolina Bank & Trust Co., 240 F. Supp. 2d 516, 520 (M.D.N.C. 2003).*

[323] See, e.g., *Lizardo v. Denny's, Inc., 270 F.3d 94, 102 (2d Cir. 2001); Williams v. Staples, Inc., 372 F.3d 662, 667 (4th Cir. 2004).* See generally Anne-Marie G. Harris, Shopping While Black: Applying ***42 U.S.C. § 1981*** to Cases of Consumer Racial Profiling, *23 B.C. Third World L.J. 1, 56 (2003).*

[324] Although the "complete denial" is hard to prove, plaintiffs may have other avenues of redress. See, e.g., David Stout, 3 Blacks Win $ 1 Million in Bauer Store Incident, N.Y. Times, (Oct. 10, 1997), *https://www.nytimes.com/1997/10/10/us/3-blacks-win-1-million-in-bauer-store-incident* .html (discussing that Eddie Bauer is liable for negligent supervision of employees and defamation of character, but not for civil rights claims).

[325] Jake Johnson, Endorsing 'Violence and Extremism Among His Base,' Trump Pardons Oregon Ranchers Who Inspired Right-Wing Militia's Armed Takeover of Public Lands, Common Dreams (July 10, 2018), *https://www.commondreams.org/news/2018/07/10/endorsing-violence-and-extremism-among-his-base-trump-pardons-oregon-ranchers-who*.

[326] Related or not, an uptick in public accommodations discrimination at Black Bike week in South Carolina has seemingly been detected. R Ritter 7/11/17, supra note 43.

Augmented by section 1981, and with the support of the Department of Justice and organizations like the Lawyers' Committee, the impact of the Civil Rights Act of 1964 on American society, since its enactment, has been nothing short of transformational. [327] Instances of refusals to serve customers equally in restaurants, stores and other places of public accommodation are now rare. Many national companies offering public accommodations have established extensive training and compliance procedures to prevent discrimination, most businesses have recognized the marketing benefits of equal treatment, and examples of markedly hostile mistreatment have been declining. [328] The Civil Rights Division pursued only six cases of public accommodations discrimination in the decade running from 2005-2015, compared to fifteen cases between 1995 and 2005, and roughly twice that many between 1964 and 1975. [329] Since the last of the Myrtle **[*122]** Beach Black Bike week cases, the Committee's limited public accommodations docket too reflects this progress.

But the antics and ineptitudes of the Trump administration, and the recent resurgence of racist and nationalist organizations invigorated by it, serve as stark reminders that this progress is neither complete nor uninterruptable. Widespread equality in access to public accommodations has not eliminated bigotry and prejudice from our American culture. Nor does it provide any assurance of permanence, or that new 21st century breeds of public accommodations providers will necessarily follow this path, or that civil rights laws will not be weakened and narrowed when they need to be strengthened and broadened to deal with the issues of today and tomorrow. Indeed, the Committee's work continues to provide an important reminder of the need to keep up the fight. In 2016, through the efforts of the Committee and Relman, Dane & Colfax, a jury held a D.C. sports bar accountable for race discrimination after hearing testimony that the bar brazenly used a "fake guest list" to exclude African-Americans and the bar's owner unabashedly told management that he only wanted to hire blondes. [330] Public interest advocacy organizations and the private bars must continue to be vigilant and creative in championing integration in places of public accommodations going forward.

The Committee is well-positioned to play a leading role in this effort. It has proven over the years its ability to employ innovative strategies, like testing in the taxi cases, and monitoring in Myrtle Beach, [331] to root out discrimination in places of public accommodation. In cases like those against Denny's restaurants and Holiday Spas, it has demonstrated its ability to coordinate with the Department of Justice to better pursue and remedy violations of civil rights laws. The Committee has handled single plaintiff and small defendant matters against retail stores and others, such as the Blue Gin Nightclub, as well as large nationwide matters with thousands of victims against major national corporations like Cracker Barrel. It has convinced companies from D.C. taxicab owners, the New Hanover Rent- **[*123]** A-Car franchisee and the Northlake Foods Waffle House franchise, to the national Denny's restaurant and Host Marriott chains, to establish state-of-the-art antidiscrimination training programs, highlight complaint procedures, and accept ongoing monitoring. Kozmo Inc. agreed to help bring internet to disadvantaged neighborhoods. Adams Mark made contributions to historically Black colleges, and Bally initiated affirmative advertising to attract diverse health club members.

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[327] Id.

[328] Discriminatory conduct reminiscent of the Jim Crowe era still rears its ugly head occasionally, however. See, e.g., Sue Anne Pressley, Jim Crow Lives On in Florida's Bar's Back Room, Wash. Post (Apr. 1, 2001), http://articles.latimes.com/2001/apr/01/news/mn-45213 (discussing that Black patrons were served only in the back of a package store in Perry, Florida).

[329] See Housing and Civil Enforcement Section Cases, Public Accommodations Cases, U.S. Dep't of Just. https://www.justice.gov/crt/housing-and-civil-enforcement-section-cases-1#pa (last visited Sept. 10, 2018).

[330] Courtland Milloy, Black Bartenders Firing Serves as a Reminder That Blatant Discrimination Still Happens, Wash. Post (Feb. 2, 2016), https://www.washingtonpost.com/local/black-bartenders-firing-serves-as-a-reminder-that-blatant-discrimination-still-happens/2016/02/02/2cf69 6f0-c9bd-11e5-a7b2-5a2f824b02c9 story.html?utm term=.be55c18e2f85; Benjamin Freed, Redline Sports Bar Discriminated Against Former Bartender, Jury Says, Washingtonian (Jan. 26, 2016), https://www.washingtonian.com/2016/01/26/redline-sports-bar-discriminated-against-form er-bartender-jury-says/.

[331] *A. Asaka 7/17/17, supra* note 227.

The Committee's high profile and sterling reputation has established the Committee as a trusted conduit for complaints about discrimination experienced by consumers of public accommodations facilities and services. It has worked closely and effectively with public interest and watchdog organizations such as the NAACP, in Myrtle Beach and against Cracker Barrel restaurants, and the Equal Rights Center in taxi cases and others, to strengthen their well-established civil rights initiatives. Finally, but perhaps most importantly of all, the Committee has successfully marshaled and coordinated the massive resources of too many prestigious well-resourced private law firms in Washington, D.C. and beyond to count, in order to construct effective and powerful teams to fight discrimination in places of public accommodation.

CONCLUSION

The 50th Anniversary of the Washington Lawyers' Committee for Civil Rights and Urban Affairs offers an opportunity to consider the significant progress that has been made-and the critical role the Committee has played in creating the "single society and … single American identity" that President Kennedy envisioned would make it "possible for American consumers of any color to receive equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores." [332] It is also a fitting moment to recognize the integral role the Committee has played in achieving all that has been accomplished, and to acknowledge how critical the Committee's extraordinary work, creativity, persistence and involvement has been in moving us closer to Kennedy's goal of racial equality. But this is also an appropriate occasion to reflect on the work that remains to be done to achieve Kennedy's stated aim: "to increase communication across racial lines to destroy stereotypes, to halt polarization, end distrust and hostility, and create common ground for efforts toward public **[*124]** order and social justice." [333] As we move into the 21st century economy, and struggle under the yoke of the current administration's regressive policies and attitudes, the Committee is well-placed to help spearhead the work that will be required to resist backsliding and to continue to advance the objective of assuring equal access to public accommodations for the next generation.

332 *Civil Rights Address, supra* note 5.

333 Wash. Law. Comm., supra note 1.