The Docket

When Sharing Isn't Caring

While the 'sharing economy' provides inexpensive services, it also allows small businesses to skirt civil rights laws

By Lorelei Laird

National Pulse

Jamey Gump just wanted to get home.

Gump and his friend Manveen Chahal had met for drinks at a bar in the Bay Area suburb of Menlo Park, California, in May 2014. It was late and Gump was planning to travel the next day, so he decided to call a car through the ride-booking app Uber. But he and Chahal are blind and use service dogs, and when they tried to get into the car, the driver yelled "No dogs!"

Gump tried to explain that the dogs were allowed under the Americans with Disabilities Act, but the driver yelled insults and profanity. Then he drove away, hitting Chahal with an open passenger door and narrowly missing Gump's dog. They filed a police report after the incident.

That story, and several more like it, made it into a legal complaint about two years later. *National Federation of the Blind v. Uber Technologies* alleged that Uber was violating the ADA by failing to ensure equal access to blind riders.

Against a traditional taxi company, the case could have been easy. Taxis are considered to be in the "travel service" category, the suit says, which includes on-demand transportation. That might apply to Uber, as well. But the ADA doesn't define travel services, according to the suit. And Uber insists it's not a transportation company at all—it's a technology company that brings parties together for a transaction.

No court has tested that issue squarely yet; the *NFB* case ultimately settled. And the federation later settled a similar claim against Uber competitor Lyft without litigation. But if courts agree, users in the "sharing economy"—businesses that use technology to connect people who sell goods or services with customers—would have little recourse against discrimination.

But that hasn't stopped the complaints. A black man sued travel accommodations company Airbnb last year, alleging racial discrimination by a host. In Chicago, a disability rights group sued Uber for refusing to add wheelchair-accessible vehicles to its fleet. Twitter users have been sharing their discrimination stories under the hashtag #AirbnbWhileBlack. And academic studies have found racial discrimination involving Airbnb, Lyft, Uber and peer-to-peer lending site Prosper.

"It doesn't take a science degree to understand that [Airbnb has] a platform that allows for someone to directly discriminate," says Ikechukwu Emejuru of Emejuru & Nyombi, the Silver Spring, Maryland, law firm that represents the Airbnb plaintiff. "There are a lot of people out there who are being harmed."

TERMS OF SERVICE

It's illegal to discriminate in "public accommodations"—generally, businesses open to the public—on the basis of disability, race, color, religion or national origin under the ADA and the Civil Rights Act of 1964. Some states have laws that cover even more classes of people.

But in a law review article published last year, "The New Public Accommodations," University of Denver law professor Nancy Leong and law clerk Aaron Belzer argue that those laws might not be enough to fight discrimination encountered by clients of sharing-economy businesses. The authors think they can be used against such businesses. But the businesses disagree, and the question hasn't really been tested in court.

"There's basically no case law on sharing-economy platforms as public accommodations," says Leong, who teaches constitutional law, civil rights and criminal procedure at the Denver school's Sturm College of Law.

One reason for this is the companies are fairly young; another is early settlements. But a big reason, lawyers say, is that sharing-economy businesses often invoke arbitration clauses when they're sued. Users automatically agree to those arbitration clauses by signing up for accounts.

That's what happened in Emejuru's case that alleged racial discrimination by Airbnb. His client, Gregory Selden of Washington, D.C., was told by an Airbnb host that a room he'd requested was unavailable. But when Selden found the same place listed as available shortly afterward, he got suspicious and created two more accounts, using pictures of white men. When he inquired as white customers, the accommodations were suddenly available.

Selden complained to the host, who said Selden was "simply victimizing [himself]." When Selden brought the matter to Airbnb, he claims, it never responded. That's when he sued. But the matter never got aired in district court because Airbnb invoked its arbitration clause. Selden is appealing the arbitration order.

The situation is slightly better under the ADA because that law confers standing on people who are deterred from using a service because of known disability discrimination. That's one reason the *NFB* case was able to avoid being sent to arbitration, says Disability Rights Advocates staff attorney Julia Marks, who's based in Oakland, California, and was part of the case.

"But it is something that we always have to think of when we get phone calls from people complaining of discrimination [from] some of these companies," she says.

As a result, the majority of discrimination lawsuits against sharing-economy businesses have ended before they got to the question of platform versus accommodation. *NFB* might have gotten the furthest, but it still didn't address the question squarely. A judge found that the issue should be developed further and declined to dismiss the case.

Leong thinks the best way to show that anti-discrimination laws apply is to cite the design of the apps through which users of sharing-economy businesses reach sellers.

"They design the entire platform that makes the transaction possible, which means they determine what the parties to the transaction know about one another, when they know it, how that information is presented to the parties, and the norms of the platform," Leong says.

It's not clear whether anyone has made that argument. Selden's complaint uses a different strategy suggested by Leong and Belzer, seeking to hold Airbnb vicariously liable for the actions of its "employee"—the host who rejected his requests.

Perhaps more similar is *Access Living of Metropolitan Chicago v. Uber*, filed last October. Users of motorized wheelchairs require specially fitted vehicles with ramps and tie-downs—and Access Living alleges that no such vehicles are

ILLUSTRATION BY MONICA BURCIAGA/SHUTTERSTOCK

available through Uber in Chicago. Uber employees told Access Living it had no intention of providing equivalent service for wheelchair users, says Charles Petrof, Access Living senior staff attorney.

Petrof says he thinks Uber is clearly subject to the ADA (although he sees several categories it could fit into) because it has substantial control over its drivers' operations—pricing, dispatch, driver qualifications and other aspects of the experience. Much of that control explains why consumers might choose Uber, he says.

"The consumer is in no way negotiating with an individual driver in the process," he says. "This is all accepting a proposal that Uber is making to the consumer."

When contacted for this article, Uber said that its drivers are required to comply with the ADA, and that it's piloting different ways to add drivers with wheelchair-accessible vehicles. Petrof says wheelchair users in Chicago are typically directed to UberTaxi, which connects them to a traditional taxi dispatch service. Asked what Uber would have to do to add wheelchair-accessible vehicles to its core business, spokeswoman Sophie Schmidt maintains that Uber doesn't operate passenger vehicles but provides its software to "driver-partners."

Airbnb has addressed discrimination more actively. Spokesman Nick Papas said that last year it hired Laura Murphy, former director of the American Civil Liberties Union's Washington legislative office, to study discrimination at Airbnb.

Murphy's September report suggested several changes Airbnb already has adopted: anti-bias training, more instantaneous bookings that don't let hosts see the profile, and a requirement that users accept an anti-discrimination commitment. The company also hired former U.S. Attorney General Eric Holder to create its anti-discrimination policy and aired a Super Bowl commercial that touted the importance of diversity.

But customers might not be impressed. Those looking for an alternative to Airbnb now have options in two competitors: Noirbnb and Innclusive, both founded by African-Americans.

On Twitter, Innclusive has been using #AirbnbWhileBlack to promote itself. "If you booked on @innclusive, you wouldn't have to use a fake profile on Airbnb," the company tweeted in February. ■

Net Search and Seizure

Inaccurate leads from IP addresses prompt police to serve warrants on innocent people

By Jason Tashea

National Pulse

On the morning of March 30, 2016, David Robinson and his partner, Jan Bultmann, were starting their day when six Seattle police officers knocked on their door with a search warrant. The police thought Robinson was trafficking child pornography. Still in bed when police arrived at 6:15 a.m., Robinson got dressed as an officer stood in the bedroom.

According to Robinson, the police spent 90 minutes searching his apartment and electronic devices. They also interrogated him and his partner in separate police vans parked in front of their building in the Queen Anne neighborhood.

The Seattle Police Department was working off a tip from the National Center for Missing & Exploited Children that an IP address, the unique identifier produced by every computer or computer network, was tied to Robinson's name and physical address and was used in the upload and transfer of child pornography.

After finding no evidence of child pornography, the police left without making an arrest. The incident left Robinson feeling "afraid" and "furious." Seattle police declined to comment for this story.

DAMAGED PROTECTIONS

Over the past 20 years, the internet has altered every aspect of society, including the challenges of obtaining a warrant. While police departments work to keep abreast of a technological landscape in flux, advocates worry that technology is outstripping procedure—and damaging the warrant process and its protections.

Tor is software that legally allows people to privately surf the internet by being randomly routed through various computers around the world. (Its name comes from the Tor Project's original name, "The Onion Router.")

Tor is promoted by the Department of State to help dissidents get access to the internet in repressive societies, such as China, Egypt and Russia. It's also used by privacy advocates to browse the internet without corporate or government tracking and can be used to disseminate illegal material, such as child pornography.

In Robinson's case, someone transferring child pornography was randomly routed through his IP address, similar to an illicit package through a random post office. The exit node, which Robinson says he set up as a service to people online who want to browse privately, allows a person being routed through Tor to connect to the internet.

The advent of Tor, along with proxy servers and mobile access to the internet, has made IP addresses less reliable for law enforcement investigating online crimes. "It's gotten more challenging," says Chuck Cohen, a captain with the Indiana State Police. He served his first subpoena for IP logs, the list of users who visit a website, in 1995. He was investigating the online sale of knockoff sunglasses.

"Back then it was easy," Cohen says. He says an IP address

would lead him to the internet provider who would then release data about the customer tied to the address. This worked in the '90s because IP addresses were primarily static. Today, however, due largely to mobile access of the internet, Cohen says, IP logs are less useful.

CAUGHT UP IN THE SCENE

The combination of old tactics alongside new technology had led to innocent bystanders being caught up in criminal investigations. For more than a decade, MaxMind, an IP addressing company based in Waltham, Massachusetts, had been incorrectly and repeatedly leading law enforcement to a farm in Kansas in search of identity thieves, suicidal veterans and runaway children.

This happened because the farm's physical address was MaxMind's U.S. default location, a catchall for when the company knew an IP address was from the United States but could not get more specific. The family who moved to the farm in 2011 dealt with the IP addressing havoc for five years and filed a complaint last year.

This example informed the Electronic Frontier Foundation's September report that calls attention to the challenges that IP addresses create in criminal investigations.

"It's not just an education problem; it's also a constitutional problem," says Aaron Mackey, a legal fellow at the EFF and co-author of the paper. The education problem is that courts and law enforcement have to understand how IP addresses have changed, Mackey says. It is a constitutional issue because an IP address alone is often insufficient for a probable cause warrant, he says.

Both issues coalesce for Mackey in what he says is the incorrect use of certain analogies. He says it's misleading when police seek a warrant and try to equate IP addresses with physical locators, such as a street address or a vehicle license plate.

Mackey argues that an IP address is more analogous to an anonymous informant. "Anonymous tips can be right, but they can also be wrong," Mackey says. "In the same way, an IP address can sometimes identify an individual, but in a lot of circumstances they don't." Drawing out his preferred analogy, he says anonymous informants provide tips that require further police work to secure a warrant, and IP addresses should be no different.

The prevalence of this problem is hard to ascertain. For his research, Mackey says he examined several instances nationwide in which an IP address was used incorrectly to obtain a search warrant. However, he thinks this issue will become "more prevalent, as police are investigating more crimes online."

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>
> Aaron Mackey, Electronic Frontier Foundation

The inability to quantify this problem is a result of decentralized criminal justice data collection. Also, using an IP address to get a warrant is the exception rather than the rule, according to Cohen.

"On step one, we are going to see if [the IP address] is a Tor exit node," Cohen says. To help police differentiate between criminals and privacy activists such as Robinson, the Tor Project created the ExoneraTor service, which allows anyone to see whether an IP address was used as a Tor relay on the day in question. According to Robinson, the Seattle police knew he operated an exit relay.

Cohen says that if an IP address is shown to be a Tor exit node, then "that lead becomes a dead end" in the investigation.

He makes clear, however, "with 800,000 police officers [nationwide], it's not realistic for them to have that technical background." But, he says, this process and others are "widely known" among officers whom departments rely on to undertake these types of investigations.

'LUCKY' CRIMINALS

Offering a lawyer's perspective is Matthew Esworthy, a criminal defense and civil commercial litigator in Baltimore. Esworthy says he has seen Tor cases that involve child pornography in which criminals used computers to accomplish their crimes. But "that seems to be the exception to the rule," he says.

Also the co-chair of the ABA's cybercrime committee, Esworthy thinks online crime is so prolific that "law enforcement doesn't want to waste their time going after locations that aren't going to bear fruit."

From police officer Cohen's point of view, the challenge in using IP addresses to help obtain a warrant is about whether the address is collected at all. "There is no federal law on retention of IP records," he says.

Federal lawmakers failed to create a standard for retention in 1999 and 2009. By comparison, the European Union passed the Data Retention Directive in 2006, requiring data to be kept for a minimum of six months and a maximum of two years.

Domestically, service providers can retain IP address information for as long as they want, if at all. One major internet provider, for example, keeps its records for 72 hours before it erases them. To this end, Cohen says that if you are a "lucky" criminal with a provider that does not retain IP information, then "you don't get caught." ■

Bias Behind Closed Doors

Racially discriminating statements made in the privacy of jury rooms are subject to scrutiny

By Mark Walsh

Supreme Court Report

A case about racial bias in the jury room would seem to have all the makings of a provocative and headline-grabbing decision. However, *Peña-Rodriguez v. Colorado*, a case containing just such bias, hovered a bit below the radar, even during this relatively low-key U.S. Supreme Court term.

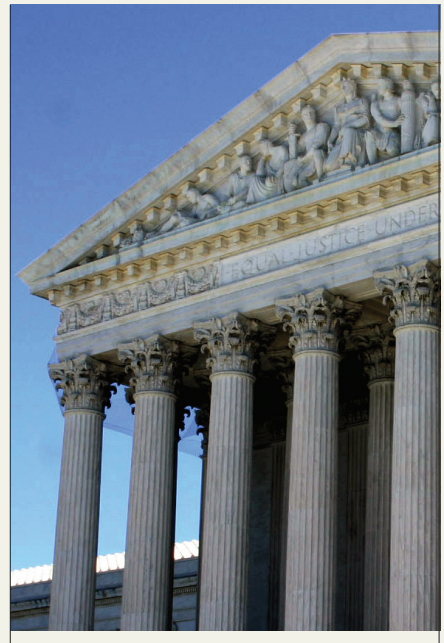
Justice Anthony M. Kennedy appeared to be doing what he could then, in his March 6 majority opinion in the case, to offer some soaring rhetoric in explaining why a longtime rule against calling jury deliberations into question after a verdict must give way to concerns about a single juror relying on racial animus to convict a criminal defendant.

"The jury, over the centuries, has been an inspired, trusted and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases," Kennedy said.

But "the nation must continue to make strides to overcome race-based discrimination," Kennedy said. "Blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule."

That rule, meaning jurors may not impeach their verdicts with later testimony about what went on in the jury room, is one aspect of the jury system that is itself centuries old, in Britain and the United States. The rule is meant to give finality to verdicts and ensure jurors that what they said during deliberations will usually not be called into question later.

In the 5-3 decision in *Peña-Rodriguez*, the court held that when a juror makes a clear statement indicating that he or she relied on racial stereotypes in voting to convict a criminal defendant, the Sixth Amendment



requires that the no-impeachment rule give way to allow the trial court to consider the evidence of the juror's statement.

Kennedy's "language was even more potent and uplifting than many would have expected," says John Paul Schnapper-Casteras, the special counsel for Supreme Court and appellate advocacy at the NAACP Legal Defense and Educational Fund, which filed an amicus brief in support of the defendant. "We thought it was powerfully written."

A JUROR'S VIEWS ON MEXICANS

The egregious facts are these: Miguel Angel Peña-Rodriguez was charged with sex crimes in relation to alleged contact with two teenage girls in a barn at a Colorado racetrack. The teens were the daughters of a jockey, while Peña-Rodriguez was a newly hired horsekeeper at the track.

The trial court followed standard voir dire procedures, and no one who ended up on the jury acknowledged any ethnic or racial bias. After a three-day trial, the jury found Peña-Rodriguez guilty of unlawful sexual contact and harassment, but it failed to reach a verdict on a charge of attempted sexual assault.

After the discharge of the jury, the defendant's lawyer entered the jury room to discuss the case. Two jurors informed the lawyer that during deliberations, one of their fellow jurors had expressed anti-Hispanic bias against the defendant and his alibi witness.

The two jurors gave affidavits in which they said a juror identified

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as "H.C." had told the other jurors that he believed the defendant was guilty because, in his experience as a former law enforcement officer, Mexican men had a bravado that caused them to believe they could have their way with women.

The jurors said H.C. had declared that in his experience, "nine times out of 10, Mexican men were guilty of being aggressive toward women and young girls." And the jurors recounted that H.C. said that he did not find Peña-Rodriguez's alibi witness credible because, among other things, the witness was "an illegal"—even though the alibi witness had testified that he was a legal U.S. resident.

The trial court reviewed the affidavits and acknowledged juror H.C.'s apparent bias. But the court rejected Peña-Rodriguez's motion for a new trial, noting that juror deliberations are shielded from inquiry under Colorado's rules of evidence. The Colorado Supreme Court affirmed the conviction, citing two U.S. Supreme Court decisions that had rejected challenges to the similar no-impeachment rule under the federal rules of evidence with respect to juror misconduct or bias.

Those cases are *Tanner v. United States*, a 1987 decision in which the court rejected a Sixth Amendment challenge to evidence that some jurors were under the influence of drugs and alcohol during the defendant's trial, and *Warger v. Shauers*, a 2014 ruling in which the justices rejected a challenge in a civil case where the losing party alleged that the jury forewoman had failed to disclose pro-defendant bias during jury selection.

HARKENING BACK

Justice Kennedy, in an opinion joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan, reached back to English common law in 1785, when Lord Mansfield rejected juror testimony that a jury had decided a case with a game of chance.

"The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations," Kennedy said.

American courts adopted the Mansfield rule, though there were less rigid variations in some states, including one called the "Iowa rule." In 1975, Congress adopted federal rules of evidence that included a broad no-impeachment rule.

Justice Kennedy balanced the no-impeachment rule with the court's long line of cases seeking to eliminate racial bias from the jury system. "Time and again, this court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system," he wrote.

"The court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee," Kennedy said.

Not every offhand comment indicating racial bias will trump the no-impeachment rule, he said. For a post-trial inquiry to proceed, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."

In the case before the court, the alleged biased comments were egregious, according to Kennedy.

"Not only did juror H.C. deploy a dangerous racial stereotype to conclude petitioner was guilty and his alibi witness should not be believed, but he also encouraged other jurors to join him in convicting on that basis," Kennedy said.

"What Justice Kennedy recognizes in his opinion is that the ordinary safeguards don't work to ferret out the kind of racism present here," says Lisa Kern Griffin, a law professor at Duke University who helped write an amicus brief for a group of law professors in support of Peña-Rodriguez. "He talks about the way racial bias performs an infective function. It corrupts."

PRYING OPEN THE DOOR

Justice Samuel A. Alito Jr., in a dissent joined by Chief Justice John G. Roberts Jr. and Justice Clarence Thomas, emphasized that jurors are "ordinary people" who, once in the jury room, "are expected to speak, debate, argue and make decisions the way ordinary people do in their daily lives."

To protect the jury trial right, "the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded," Alito said, but the majority "pries open the door."

Alito was dubious of Kennedy's view that the Constitution is less tolerant of racial bias than other forms of juror misconduct, saying the Sixth Amendment gives every defendant the right to be judged impartially.

"Today's decision—especially if it is expanded in the ways that seem likely—will invite the harms that no-impeachment rules were designed to prevent," Alito said.

Thomas, in a separate dissent for himself, wrote that "our common-law history does not establish that—in either 1791 (when the Sixth Amendment was ratified) or 1868 (when the 14th Amendment was ratified)—a defendant had the right to impeach a verdict with juror testimony of juror misconduct."

Michael B. Rappaport, a professor at the University of San Diego School of Law and the director of its Center for the Study of Constitutional Originalism, says he is not convinced that Thomas is correct about that common-law history. But Kennedy, he says, has "a methodology of chicken soup: a little bit of this, a little bit of that."

"Justice Kennedy is not big on imposing limits on himself," Rappaport says, "and his style of deciding cases leaves him free to do whatever he wants." ■