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Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion

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PUBLIC ACCOMMODATIONS IN NEW MEXICO: THE RIGHT TO REFUSE SERVICE FOR REASONS OTHER THAN RACE OR RELIGION

A recent influx of many persons non-conforming in dress, manners, and basic values—often referred to as "hippies"—may well raise a question of first impression for New Mexico: is access to public accommodations a recognized right? An answer to the posed question will be drawn from common law cases arising from other states, and a discussion of federal and state "civil rights" legislation. Questions of racial discrimination in public accommodations are largely beyond the scope of this comment because they concern specific statutory exceptions to the general common law rule, and because they are of sufficient magnitude to require a separate text for an adequate discussion.

As a general rule the owner or agent of a public accommodation in the absence of a statute to the contrary, may refuse admission or service to anyone for any reason: indeed, he may refuse service without any reason. This is true even though the undesired customer has an implied license to enter, and has already entered, since the proprietor is at liberty to revoke the license at whim, and may forcibly eject such a person if he refuses to leave. If the undesired customer has paid an admission price and is asked to leave, his only remedy is for breach of contract with damages limited to the admission price.

The rule has been used to exclude unescorted women from theaters, servicemen from dance halls, persons non-conforming in dress from a baseball park, drama critics from theaters, persons having purchased tickets through ticketbrokers from ball parks and theaters, and others the proprietor believed would be objectionable to his patrons.

There are two exceptions to the common law rule. Unlike restaurant owners and owners of other places of public accommodation, innkeepers and public carriers are deemed to follow a "public calling" and are generally required to take all who offer to pay the asked price. The innkeeper's obligation is subject to many qualifications.
and exceptions which appear to apply as often as the obligation itself. The innkeeper's duty to accommodate those seeking lodging developed at a time when roads were poor and towns and inns were scarce. Because this is no longer true one writer has suggested that the reasons underlying the innkeeper's obligation no longer exist. However, the same writer has questioned the validity of a state statute abolishing the innkeeper's obligation on constitutional grounds. This later position is dubious.

8. Id. at 127.
9. Id. at 117-26.
10. The writer's position is based upon an observation that either the enactment or the enforcement of the Florida Statute--Fla. Stat. § 509.092 (1961) --abolishing the innkeepers common law obligation would be "state action" within the meaning of the "Civil Rights Cases." 109 U.S. 3 (1883). A passage is quoted from that case holding that the 14th amendment prohibited all state action which (1) "impairs the privileges and immunities of citizens of the United States," or (2) "which injures them in life, liberty, or property without due process of the law" (emphasis added), or (3) "which denies to any of them the equal protection of the law." 15 U. Fla. L. Rev. 109, 120 (1962). It is then asserted (without citation of authority) that "it can be said that the Florida statute 'impairs' the privileges and immunities of citizens and 'affects' their rights and privileges." supra at 120-21: more about this later. The note conceded that the statute does not deny equal protection of the laws; but it is asserted, in reliance on Truax v. Corrigan, 257 U.S. 312 (1921), that the statute deprives one of "life, liberty, or property without due process of law."

This later position appears as dubious as the first. Truax concerned an Arizona statute removing the common law remedy for picketing. Any resemblance between Truax and the removal of the common law remedy for being refused service at an inn is wholly superficial. Truax relied on prior holdings that the right to conduct a lawful business is a property right, and found that free access to the business for employees, the owners, or customers was an incident of that property right which is constitutionally protected against state statutes which would injure that right without due process. Moreover, the Arizona statute was found "arbitrary and capricious" and therefore lacking in due process. However, it must be doubted that the right to be served at an inn would likewise be found to be an incident of a property right. A property right to inn accommodations in the customer rather than the owner would be most curious. It is also unlikely that the Florida statute would be found arbitrary, capricious, or in violation of due process in light of the author's observation that the reasons for creating the innkeepers obligation no longer exist.

However, Truax is not without a possible theoretical application to public accommodations, at least with regard to businesses other than inns or motor carriers and to statutes abolishing the common law right of such other businesses to refuse service without liability. It is far more likely that the right to refuse service would be found an incident of the property right of doing business and therefore as constitutionally protected as the common law remedy in Truax. However, statutes abolishing the common law right to refuse service have been upheld as valid exercises of the state's police powers, (see Annot. supra note 2).

As for the unsupported statement that "it can be said that the Florida statute 'impairs' the privileges and immunities of citizens . . . " it must be understood that that clause refers to state impairment of the privileges and immunities of national citizenship. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). The question is not whether the right to accommodations in inns was a privilege or immunity of citizenship in Florida, as it clearly was under the common law. The question is whether the right to be accommodated was a right of national citizenship, and no case so holds.

Clearly national citizenship does carry with it an immunity from state action predicated on race or color (The Civil Rights Cases), or state action enforcing private discrimination because of race (State v. Brown, 195 A.2d 379 (Del. 1963), see also Shelley v. Kraemer, 334
New Mexico has no case law binding the judiciary to recognize an obligation on the part of innkeepers to receive anyone seeking accommodations, and it may well be that such an obligation will never be recognized absent those conditions originally responsible for the creation of the innkeeper's obligation. Because it is clear that innkeepers are prohibited from discriminating because of "race, religion, color, national origin or ancestry," it may be doubted whether New Mexico courts would find any pressing need to create such an obligation on the part of innkeepers.

Other businesses—falling under the general rule rather than the innkeepers' exception—can undoubtedly refuse service to anyone not protected by federal or state statutory provisions. The Civil Rights Act of 1875 was the first federal effort to create a right to equal enjoyment of public accommodations. It contained broad language seemingly susceptible of an interpretation which rather than simply prohibiting particular types of discrimination, would create a right to service or accommodations for everyone, subject only to exceptions which were both to be established by law and applicable alike to all races:

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

However, the language received a narrower construction. The Supreme Court, in the Civil Rights Cases, interpreted the language as not creating a broad right to public accommodations, but as only prohibiting discrimination on the basis of race or color.

The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public convey-

U.S. 1 (1948), but it does not necessarily follow that the common law rules regarding accommodations in inns are vested in national citizenship. Privileges and immunities protected by the 14th amendment are those arising under the Constitution or laws of the United States as contrasted with those that arise under other sources. Hamilton v. Regents of the University of California, 293 U.S. 245 (1934). The common law of the various states is one such other source.

14. Id. § 1, 18 Stat. 335, 336.
15. 109 U.S. 3 (1883)
ances, and theaters; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude.\textsuperscript{16}

The court held that the statute was unauthorized by the 14th amendment—which only prohibited "State action"\textsuperscript{17}—and was unauthorized by the 13th amendment—which prohibited slavery, not acts of private discrimination\textsuperscript{18}—and therefore was unconstitutional. But, the Court expressly did not rule on the question of whether the regulation of public accommodations, when within the scope of interstate commerce, could be sustained.\textsuperscript{19} The 1875 statute was not felt to raise such a question, but clearly the Court felt such regulation permissible.\textsuperscript{20}

The historical expansion of the concept of interstate commerce provided a basis for the second federal effort to regulate public accommodations. The Civil Rights Act of 1964 differed from its 1875 predecessor in that it was clearly drafted to be a regulation of interstate commerce which contained as well a prohibition of racial discrimination supported by state action,\textsuperscript{21} and the statute has been upheld on that basis.\textsuperscript{22}

However, the public accommodations section of the 1964 Act only prohibits discrimination on the basis of "race, color, religion, or national origin"\textsuperscript{23} rather than creating a broad right of access to such accommodations. Clearly the Act does not abolish the common law rule generally allowing a business to refuse service to anyone, but rather creates specific exceptions to the rule for certain types of discrimination.\textsuperscript{24} For example, while the Act does prohibit either racial or religious discrimination in public accommodations involved with interstate commerce, it does not prohibit discrimination based on sex.\textsuperscript{25} So long as the business refuses service for reasons other than "race, color, religion, or national origin," the federal law is not applicable.

State statutes regulating access to public accommodations are of essentially two kinds. One, such as California's statute,\textsuperscript{26} provides a

\begin{itemize}
\item \textsuperscript{16} Id. at 9-10.
\item \textsuperscript{17} Id. at 10-19.
\item \textsuperscript{18} Id. at 20-25.
\item \textsuperscript{19} Id. at 19.
\item \textsuperscript{20} Id. at 18.
\item \textsuperscript{21} 42 U.S.C. § 2000(a) (1964).
\item \textsuperscript{22} Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
\item \textsuperscript{23} 42 U.S.C. § 1000(a) (a) (1964).
\item \textsuperscript{24} Comment, supra, note 12.
\item \textsuperscript{25} DeCrow v. Hotel Syracuse Corp., 288 F. Supp. 530 (N.D.N.Y. 1968).
\item \textsuperscript{26} Cal. Civ. Code § § 51-54 (West 1954); see Stoumen v. Reilly, 37 Cal. 2d 713, 234, P.2d 969 (1951).
\end{itemize}
broad right of enjoyment of public accommodations applicable to all persons. The other only prohibits particular kinds of discrimination, e.g., New Mexico's Human Rights Act.27

It should be noted that like the federal statute the kinds of discrimination prohibited in New Mexico vary somewhat with the type of activity being regulated. For example, it is unlawful for an employer, except upon a bona fide occupational qualification, to discriminate because of either age or sex,28 while a labor organization may discriminate on the basis of age but not sex,29 and a public accommodation is not prohibited from discriminating on either basis.30

The New Mexico Human Rights Act only prohibits its discrimination in public accommodations because of "race, religion, color, national origin or ancestry."31 "Public accommodation" is broadly defined as "any establishment that provides or offers its service, facilities, accommodations, or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private."32 Indeed, the definition appears sufficiently broad to cover the "residence or sleeping place of any individual” and “land rented or leased for the use, parking, or storage of house trailers” which are included respectively in the definitions of “Housing accommodation”33 and “Real property.”34

Conceivably the overlapping definitions could pose problems: Is a motel room "the residence or sleeping place of any individual” and thus a “housing accommodation” or is it a “service, facility, or accommodation” and thus a “public accommodation?” Fortunately the question is rendered academic by the fact that the statutory provision governing “housing accommodation” and “real property” prohibits exactly the same kinds of discrimination prohibited by the provision governing “public accommodations.”35

Unlike the New Mexico Civil Rights Act of 1955,36 the Human Rights Act, which repealed it contains no language that could be interpreted as prohibiting discrimination because of long hair, shabby dress, or outrageous costume. The prior Act prohibited discrimina-

28. Id. § 4-33-7 (A)
29. Id. § 4-33-7 (B)
30. Id. § 4-33-7 (F)
31. Id. § 4-33-7 (F)
32. Id. § 4-33-2 (G)
33. Id. § 4-33-2 (H)
34. Id. § 4-33-2 (I)
35. Id. § 4-33-7 (G) to (H)
tion for reasons of "race, color, religion, ancestry or national origin" but it also contained language which could possibly be interpreted as creating a broad civil right to public accommodations:

49-8-2. Declaration of civil right—All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort, or amusement within the state of New Mexico subject only to the conditions and limitations established by law and applicable alike to all persons. This right is recognized and declared to be a civil right.

Curiously, the above "Declaration of civil right" differs completely from the Act's "Declaration of policy" which was narrowly stated as to "prohibit discrimination in places of accommodation, resort or amusement due to race, religion, ancestry or national origin." The discrepancy between the "Declaration of civil right" and the "Declaration of policy" was never resolved in court and perhaps the confusion was in part responsible for the hesitancy of many attorneys to advise their clients that they may refuse service for any reason other than "race, color, religion, ancestry or national origin." Since the present act, while prohibiting discrimination because of "race, religion, color, national origin or ancestry," omits the confusing "declaration of a civil right" that hesitancy need not continue.

While the previous discussion shows that state and federal law allows private discrimination for reasons other than race or religion, there remains one question: is the result acceptable? The question is not purely academic. Shelley v. Kraemer recognized a dichotomy between state created rights and permissible state remedies. The state sanctioned right—a racially restrictive covenant—was not rendered invalid, but merely unenforceable in state courts, upon a finding that the property agreement embodied a pattern of racial discrimination which would have been in violation of the equal protection clause had the pattern been dictated by the state itself. The reasoning was that state judicial action is state action, and therefore state enforcement, as well as state creation of patterns of discrimination impermissible under the equal protection clause is prohibited. Thus the Shelley v. Kraemer approach to refusing service to "hippies" would turn on whether such exclusion would be a violation of equal protection if dictated by the state. If such is the case, service could be

37. Id. ch. 192, § 1.
38. Id. ch. 192, § 2; see also Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969 (1951).
refused, but the proprietor could not rely on the police or the courts to eject the person if such ejection became necessary.\(^4\) 

*The Shelley v. Kraemer* approach was presented as an illustration of how the social desirability of allowing private persons to discriminate on the basis of appearance could take on legal significance. This approach will not be further pursued for a number of reasons. 

First, the possibility of such an approach actually taking on legal significance is somewhat remote. Undoubtedly a proprietor can effectively discriminate against "hippies" without resorting to state action, since rarely would he be forced to use the public or courts to eject the undesired person.

Second, the approach is much too narrow. Whether such discrimination would deny equal protection if enforced by state action depends upon the rationality or irrationality of the distinctions relied upon.\(^2\) Whether the distinctions relied upon in discrimination because of appearance are reasonable or not is but a part of the broader question of the desirability of allowing discrimination by private persons for reasons other than race or religion.

Thirdly, since the willingness of the Supreme Court to engraph its indignation upon the fourteenth amendment can no longer be doubted, it is necessary to take the broader view to ascertain whether any reason for indignation exists.

What is involved when a merchant refuses service to a "hippy"? Is it just an unthinking emotional reaction to a totality of unconventional dress and mannerisms, or is it a calculated or perhaps instinctive guess that the undesired "customer" will be offensive to other patrons or otherwise a detriment to the business?

It seems clear that when someone resembling a "hippy" enters a place of public accommodation the proprietor does not first seek to classify him as a "hippy" or a "non-hippy" with an eye toward excluding him if he fits the classification and serving him if he does not. The classification is not relevant. The merchant's reaction is a *sanction* against whatever public display of non-conforming dress, manners, or speech offended him in that particular individual, just as it must be recognized that the appearance of the "hippy" is probably a *sanction* against somewhat more nebulous objects: the "establishment," society, or whatever. If this observation is fair, then the question of allowing private discrimination for reasons other than race or religion is essentially a question of private sanctions.

Private sanctions would appear to be an unclassified area of the

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law—or non-law—occasionally overlapping torts, criminal law, labor law, property law, contracts, etc., but generally an area where the law leaves people to their own devices, at least so long as the sanctions imposed do not overlap one of the recognized classifications of law. This delightful area is the happy home of the sophisticated insult, the common snub, the wisecrack, the deliberate social blunder, the withdrawn invitation, the inappropriate costume, the long neglected bath, the upstage, the obscene gesture (unless criminally obscene), the unflattering comparison of one's mother to the female dog, and any other device by which people express their contempt or disapproval without crossing into the forbidden area of the personal tort or the criminal misdemeanor or felony.

A natural reaction to such devices is retaliation with some other sanction, including the termination of whatever voluntary relations existed or were anticipated between the persons. Thus all of the mentioned devices have probably resulted in an employee indignately quitting, an employee fired, a refusal to renew a contract or to continue to do business, and a refusal to accept or to offer services or accommodations.

Admittedly the common law imposed limits on what sanctions were permissible by creating actions for personal torts and by recognizing common law crimes. Admittedly new limits have been imposed on the permissible sanctions in some areas. For example, New Mexico prohibits blacklisting of ex-employees.\(^4\) And admittedly arguments can be made that all persons should be guaranteed service at public accommodations regardless of how offensive their appearance is to other customers. Not only is such a policy conceivable, it is the law in California.\(^4\) However, to consider it only constitutionally permissible policy is to become unreasonably indignant over a private sanction which is at least as valid as the sanction of society (and the merchant) implicit in the long hair, shabby dress, and outrageous costume to which the merchant is reacting.

Indeed, judicial indignation would be understandable where the sanction (i.e., a refusal of service) was imposed for race or some other reason over which the undesired customer has no control. Here the discrimination is because of offensive dress or manicure which is readily altered. There is a matter of conviction; of strongly not wanting to cut one's hair, but it seems at least matched by the conviction of strongly not wishing to be near or to serve someone whom you feel offensive.

There are undoubtedly those who consider it an outrage that one must cut his hair, bathe, and wear conventional dress as a condition of service in some public accommodation upon which the person conceivably may be temporarily dependent for necessities of food or lodging. But undoubtedly the merchant, and many who sympathize with him, would consider it an outrage that he must serve “hippies” as a condition of continuing in a business upon which he is definitely dependent for his necessities of life. It is clear that a choice must be thrust upon either the “hippy” or the merchant: if the choice remains upon the “hippy” he must choose between his preference for his appearance and his preference for assured access to services and accommodations; if the choice is shifted to the merchant, he must choose between his preference for selecting his customers and his desire to remain in business. It is doubtful that conforming in appearance can be more distasteful to the “hippy” than losing the right to select his customers would be to the merchant, and it is certain that the merchant’s loss of his livelihood is a greater burden than the refusal of services to a “hippy”.

It seems that the better view is that refusal to provide service or accommodations properly belongs in the area of private sanctions for which there is no remedy, as simply a refusal to enter into a strictly voluntary relationship. A contrary policy is arguable, but certainly should not be regarded as a constitutional necessity.

Federal law prohibits discrimination in public accommodations within the scope of interstate commerce for reasons of “race, color, religion, or national origin,” and state law prohibits discrimination in public accommodations for reasons of “race, religion, color, national origin or ancestry.” Because the kinds of discrimination prohibited by the two statutes are essentially the same, it is not necessary to determine whether a particular business is involved in interstate commerce before determining whether any discrimination being practiced is lawful. Both statutes alter the common law rule generally allowing discrimination for any reason or without reason only to the extent of prohibiting racial or religious discrimination. All other types of discrimination remain lawful in New Mexico.

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