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THE INFLUENCE OF CIVIL RIGHTS AND ANTI-DISCRIMINATION LAWS ON SHAPING OUR TRANSPORTATION SYSTEM

Marc Brenman* and Thomas W. Sanchez†

Transportation is vital. The Supreme Court has recognized the right to travel as one of the fundamental rights guaranteed by the Fourteenth Amendment to the U.S. Constitution. Given this important role, it would be expected that policymakers would battle over transportation policy. Too often, however, those battles are fought over what specific projects will be funded and in which states or congressional districts, and scant attention is paid to larger social and economic effects.” (Sanchez and Brenman, 2007, p.1)

ABSTRACT

Regarding the title of this paper, “The Influence of Civil Rights and Anti-Discrimination Laws on Shaping Our Transportation System”, the reverse is also true—the transportation system has helped shape the civil rights laws in the U.S. The way bus lines in the South used to be segregated is one example, and fighting this helped shape the modern Civil Rights Movement. This influence goes back to include famous cases involving segregated train cars in the 1880s. In this article, we address the numerous ways in which civil rights and anti-discrimination laws shape our transportation system. We offer a suite of approaches for the nation to move toward transportation equity, broadly speaking.

BACKGROUND

The way bus lines in the South used to be segregated is an example of how fighting this helped influence the modern Civil Rights Movement. Another big influence of transportation is the existence of built infrastructure—such as freeways—that divided communities by race starting in the 1950s, helped destroy some African American neighborhoods, and still have a negative influence on lack of racial integration. These freeway projects point out the problem of sunk investment, literally of concrete, asphalt, and steel, and the difficulty of making changes and correcting past errors of discrimination and racism. The past errors create a greater burden on the present and create great challenges for what can be done today.

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LEGALITIES

There are a variety of federal and state laws that have affirmative civil rights requirements that impact the transportation field. Transportation is tied up with key elements of civil rights law, such as a method of proof. For example, in the *Sandoval* Supreme Court decision, which involved driver's license tests in languages other than English, the Court ruled that the disparate impact method of proof could not be used by a private plaintiff in federal court concerning Title VI of the Civil Rights Act of 1964.¹ That prohibition of the “private attorney general” approach to enforcing civil rights law is still bedeviling advocates and points to challenges faced by federal agencies because they can use disparate impact rather than only showing intent to discriminate. Federal regulations under Title VI prohibit recipients of federal funds from conducting activities that have a less favorable effect or disparate impact on members of one racial or ethnic group than on another.

HOW THE LAWS ARE ENFORCED

Civil rights laws are enforced through filing administrative complaints with federal agencies and lawsuits. Federal agencies differ in how they investigate and resolve these complaints. The ultimate tool to coerce compliance is to withhold federal funds from a guilty entity. However, this is rarely done. Federal agencies will almost always try to bring the recipient back into compliance with the law.

METHODS OF PROOF OF DISCRIMINATION

Disparate impact is discrimination that results from methods of program administration or facially neutral practices that, though uniformly applied to all persons, have the effect of disproportionately excluding or harming members of a protected class; denying them aid, benefit, or service; or providing them a lower level of service than others. Senator Corey Booker and (then) Senator Kamala Harris introduced a bill in the Senate to reverse *Sandoval* and enshrine the disparate impact method of proof in federal civil rights law. Unfortunately, the bill did not proceed and the issue is still unresolved. The Biden administration is making attempts to resuscitate the disparate impact method of proof.

MODAL INVESTMENT DISTRIBUTION

Assertions of inequitable modal investment distributions have long been voiced by transit users, labor unions, and transportation advocates. These issues are often litigated and highlight disparities in transit funding between systems predominantly used by relatively affluent, white, suburban users and the systems

¹ *Alexander v. Sandoval*, 532 U.S. 275 (2001)

predominantly used by relatively poor, urban users of color. Prohibited discrimination also includes denial of benefits or services, provision of inferior benefits or services, segregation, and any other treatment of an individual or a group differently and adversely because of race, color, or national origin. The federal courts have defined these criteria to include limited English proficiency and accent based on national origin or race.

Civil rights issues also arise in highway construction and displacement, where there may be allegations of replacement housing to whites but not to people of color who are displaced because of a highway project. A recent study also showed that houses occupied by Blacks are appraised at far lower amounts than houses occupied by whites, even in the same neighborhood.²

AFFIRMATIVE REQUIREMENTS

Note that in addition to some federal civil rights laws, such as those concerning people with disabilities, including affirmative requirements, and not just “thou shalt not” requirements. Disability nondiscrimination law generally requires lowering barriers to full participation, both physical and programmatic, providing reasonable accommodations to people’s disabilities, and providing full accessibility to information, including websites.

DRIVING WHILE BLACK

Other current transportation civil rights issues persist, such as driving while Black or Brown, which is when police officers stop African American and Hispanic drivers at a disproportionately high rate for false or extremely minor offenses. Part of the present debate about realigning police services is getting police out of the traffic stop business. There are experiments with this in places like Oakland, California.

A VARIETY OF LAWS

Other laws, executive orders, and directives affect what we do in transportation equity other than the Civil Rights Act of 1964. These include the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Environmental Justice Executive Order, the Limited English Proficiency Executive Order, the Native American Sacred Sites Executive Order, the Indian tribe consultation Executive Order, the National Environmental Policy Act, the Clean

² Debra Kamin; Black Homeowners Face Discrimination in Appraisals; New York Times; August 27, 2020; <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html>.

Air Act, the Clean Water Act, the National Historic Preservation Act, etc. Each has implications for civil rights.

Transportation can have negative effects on Native American sacred sites, both in destroying them, making them visible, and making them more accessible to the public. There are difficult cultural and legal issues regarding tribal unwillingness to disclose the location of many sacred sites. How does a transportation planner know where to avoid if she does not know the location of the sacred sites? This introduces great uncertainty into the planning process.

Another complicated situation is the ongoing litigation over pipelines and the alleged lack of sufficient and appropriate Indian tribe consultation. Tribal consultation is not the same as public involvement. Tribal governments must be formally notified of agency actions and proposals and should be given the same courtesies and opportunities for participation and review that are given to other governments. Another example is the efforts by some tribes to keep outsiders off their reservations during the pandemic. For example, the Cheyenne River Sioux Nation and the Oglala Sioux Nation cut off outsider road transportation onto their nations, and the Makah in the far western point of the continental U.S. have closed their nation to outsiders. The issue raises very complicated legal matters of tribes versus states versus the federal government, with treaty rights of limiting access, and issues of emergencies and how they may overcome other legislation and treaties. But the Constitution itself says that treaties are the supreme law of the land.

At least one governor has threatened to sue the tribe. But the relationship between federally recognized tribes and other governments is with the federal government. Some federal, state, and local transportation practitioners do not understand the requirements of a government-to-government relationship. There are issues of tribal sovereignty, treaty rights, and the intersection of Indian law with civil rights law and the right to travel. Indian tribal rights are a very difficult subset of civil rights law and need extreme caution when conflict occurs with a tribe's interests. For example, the confluence of pipelines, Indian law, and environmental law create wicked legal problems. The Dakota Access Pipeline is an example of this, where there were (and are) clashes among some tribes, some tribal members, environmentalists, states, law enforcement, pipeline and energy companies, and even the intrusion of White House interests. The courts end up having to parse out all the interests, especially about whether tribes have had sufficient opportunity to provide input, and whether environmental concerns were sufficiently considered.

Each operating administration of USDOT has issued its own civil rights guidance. The guidance from the Federal Transit Administration is the most detailed. Some modes of transportation, such as commercial air travel, have civil rights statutes, like the Air Carrier Access Act (ACAA), regarding disability access.

The Constitution protects religious rights, as well as specific laws like the Religious Freedom Restoration Act. On an international level, The Universal Declaration of Human Rights (Article 13), states that everyone has the right to freedom of movement and residence within the borders of each country. But not surprisingly, the U.S. pays little attention to such international declarations.

THE CENTRALITY OF TITLE VI

The key transportation equity mechanism is Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin by recipients of federal financial assistance. Except for transportation network companies (TNCs), taxi companies, airlines, and cruise ships, pretty much everyone in the transportation field in the U.S. is such a recipient. Even one dollar of such federal aid, whether in money or in-kind, creates jurisdiction by federal agencies. Recipient status is extremely important for civil rights law purposes. For example, in the 1970s, disability advocates tried to use Section 504 of the Rehabilitation Act of 1973 to enforce civil rights laws regarding commercial airlines. The courts found that airlines are not recipients. Consequently, Congress created the Air Carrier Access Act to fill this gap in the law.

ENVIRONMENTAL JUSTICE

The Environmental Justice Executive Order, USDOT Order, and orders and guidance by operating administrations are important, even growing in importance with the current emphasis on environmental issues and public health. Executive Order 12898 requires federal agencies to achieve environmental justice by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations. Environmental justice is the confluence of environmental and civil rights law. It concerns preventing and avoiding adverse environmental and health impacts on low-income persons and people of color. The adverse impacts the Executive Order speaks of include the denial of, reduction in, and significant delay in the receipt of benefits of DOT programs, policies, or activities. The duty to identify and address these adverse impacts falls not just on the federal agencies, but also their funding recipients.

ENVIRONMENTAL IMPACT STATEMENTS AND THEIR TROUBLES

Sometimes there are attempts to graft transportation onto environmental review requirements. These have not been notably successful. An example of this failure is the construction in 2004 of a graving yard for the construction of highway bridge parts on the site of a large Native American burial ground in Port Angeles, Washington. Although an extensive environmental impact statement was prepared by a contractor, it failed to notice the burial site. A huge controversy ensued, with a lot of embarrassment for the state highway department. The reliance on an

environmental impact statement to cover environmental justice and the interests and rights of protected classes can be treacherous. In this particular case, an archeological sub-contractor did not use subsurface scanning as it was required and did not bother to visit the local town library to look at maps of the area from the mid-1800s. This was a classic case of lack of due diligence. In that respect, civil rights law is not so different from other kinds of law—is anyone being harmed unduly, have proper procedures been followed, how do we protect the client from liability, and how do we minimize unavoidable harms? For example, in terms of procedures, USDOT’s environmental justice order requires an analysis to identify, early in the development of the program, policy, or activity, the risk of discrimination so that positive corrective action can be taken.

SCOPING AND THE PRECAUTIONARY PRINCIPLE

At the scoping stage in the National Environmental Policy Act process, there should be adequate consideration of Title VI and environmental justice. Minority and low-income populations should be identified early, and their concerns examined and addressed at the planning stage. Cumulative impacts need to be considered. The precautionary principle should be invoked. An example is that when land and housing are close to large transportation facilities, including freeways, they tend to be subject to air pollution, especially particulate matter. There have been serious concerns that communities with larger proportions of low-income people and people of color bear disproportionate burdens associated with transportation-related air pollution and noise, in part due to their proximity to projects like freeways, airports, and railroad yards. For that reason, it is particularly important to examine the effects of projects on air quality, noise, and other quality of life issues, including the ability to get from one side of the project to the other.

CUMULATIVE IMPACTS

In terms of cumulative impacts, neighborhoods may have been previously adversely affected by the introduction of physical barriers that eliminated or impeded access, the intrusion of undesirable physical elements, and a general erosion of community cohesion. As aging transportation facilities are slated for reconstruction and improvements, these communities will be affected once more. Too frequently, people of color and low-income neighborhoods bear the brunt of these cumulative impacts, raising environmental justice concerns. Other civil rights issues in planning include service and route changes in public transit. The possible negative impacts of the service or fare changes on people of color and/or low-income communities need to be examined and avoided or ameliorated.

There are only a few federal requirements that specifically protect the rights of low-income people. These include environmental justice and the Stafford Act about post-disaster aid.

WHAT WORKS

While there are certainly shortcomings in existing policy and regulation, there is one form of transportation in the U.S. that is working for lower-income people, and that is the private over-the-road intercity buses now common in many places. Their cost is about 1/5th or 1/6th the cost of a regional jet. For example, one of these buses between Brooklyn and Maryland is \$20 to \$40. The door-to-door time in transit is only a couple of hours more than air, given security delays, etc. at airports, and slightly more than rail, if Amtrak is working. These buses are unsubsidized and an elegant solution to a transportation problem. On the private corporate level, the so-called "Google buses" found in San Francisco are also a great solution since each bus takes about 48 cars off the road. Imagine if the various corporations worked together in contracting, routing, and networking their buses.

THE ODD SITUATION OF DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

One set of requirements that will not be discussed are those for disadvantaged business enterprises, sometimes called minority business enterprises, which involve set-asides for minority-owned and controlled small businesses. While these are often regarded as civil rights programs, they do not fit neatly under the civil rights statutes. They are more like racial preferences, which must meet tests of strict scrutiny, by showing a compelling governmental interest, a history of discrimination, and exhaustion of using less discriminatory measures to achieve the good end. USDOT guidelines have met Supreme Court rulings, and these programs are now well-established under law.

SOVEREIGN IMMUNITY

There are other nuanced situations like § 1983 of the Civil Rights Act of 1871 and the immunity of a state or state agency, or a state official acting in his or her official capacity, from § 1983 claims. Section 1983 does not create a cause of action in and of itself. A plaintiff must prove that he or she was deprived of a right secured by the United States Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law. A state or state agency is not a person under § 1983 and cannot be sued by a private party for monetary damages or injunctive relief under § 1983 in a federal or state court. Government officials who are sued may have absolute or qualified immunity for § 1983 claims. Government officials are immune from civil damages if their conduct did not violate an established constitutional or statutory right of which a reasonable person would have known. A municipality may be held liable in a § 1983 action when it is established that an official policy or custom of the municipality violates the Constitution or laws of the United States.

INTERSECTIONAL ISSUES

There are many intersectional issues, such as the impact of the pandemic on African Americans, Hispanics, Asian-Americans, and the elderly. Other intersectional issues include the overlap of the disabled and the elderly; Hispanics and limited English proficiency. The term “intersectionality” emphasizes that various marginalized identities of an individual or community more broadly intersect, compound, and interact, which ultimately increases the magnitude and severity of social inequities. Different modes of transportation affect different demographic groups in different ways. For example, African-Americans own cars at the lowest rate of any demographic group. This means, that an evacuation plan based on the use of private cars will inevitably adversely affect African-Americans.

NATIONAL SECURITY ISSUES

National security issues, especially under the Patriot Act, create legal problems in transportation, particularly with air travel. There continue to be allegations of improper and illegal profiling of airline passengers based on the Muslim religion, Arab ethnicity, Arab looking dress, and Islamic sounding names. This has sometimes resulted in the profiling of African Americans. Sikhs, who are neither Muslim nor Arab, are sometimes profiled because Sikh men wear turbans. The intersection of national security and civil rights considerations can be difficult, especially because national security determinations do not require public disclosure of decision factors. There are no-fly and watch lists, and how people get on them is classified. Sometimes people with disabilities get held up at security portals in airports because of the use of wheelchairs and other mobility devices, that are sometimes suspected of holding explosive devices. Medical treatment issues can present challenges, as when a person is receiving treatment with radioactive particles, which set off screening devices. People with metal parts of their bodies, such as plates in the skull, hips, and knees can also set off certain types of scanners. Colostomy and urine bags can also. These issues present balancing tests—how to ensure aircraft security while violating civil rights protections as little as possible.

THE IMPACT OF CLIMATE CHANGE

Due to climate change/global warming/rising ocean levels, an increasing number of geographic areas are under threat from natural disasters. These include hurricanes, tornados, flooding, wildfires, and earthquakes. Other threats include catastrophic failure of infrastructure such as dams and nuclear power plants, and terrorist attacks. Evacuation of vulnerable and marginalized people can be extremely difficult, due to factors including low car ownership, people with mobility impairments, and the elderly. Evacuation of nursing homes and congregate living facilities provide particular challenges. Difficulties include providing timely and effective warnings to people with cognitive disabilities and those who are

limited English proficient. Undocumented people can be particularly hard to reach. It should be noted that federal civil rights laws cover all people in the U.S., including non-citizens and undocumented people.

MORE EXAMPLES OF CIVIL RIGHTS ISSUES IN TRANSPORTATION

In Beavercreek, Ohio, a very large shopping mall wanted to keep African Americans away from the mall. They arrived from a nearby heavily African American town and college primarily by public transit bus. The mall management and the town officials created extremely onerous requirements for bus stops and shelters at the mall, including things like air conditioning, heating, and 16-inch concrete pads. The local bus company wanted to provide the service but could not meet those requirements. The bus company worked with local civil rights advocates to oppose the mall and the town, filing civil rights complaints and prevailed. In this case, the transit provider did the right thing but came into conflict with another form of infrastructure.

Another example is Uber's and Lyft's lack of accessible vehicles to people with disabilities. Some drivers went so far as to deny rides to the blind who used guide dogs. Federal and state officials were of no help in addressing the complaints of people with mobility impairments, the blind, etc. The matter was finally resolved through lawsuits.

A word of caution to public transportation entities who are planning on using TNCs to meet some of their public transit needs, like paratransit: federal civil rights law states that a covered entity cannot accomplish through contract what it is not allowed to accomplish itself because of civil rights issues. So, if you plan to contract out some of your responsibilities, make sure that your sub-recipients are in full compliance with federal civil rights law.

An example of a lack of consideration of a community's needs was the construction of the Bay Area Rapid Transit spur line to the Oakland Airport. It was proposed to pass right over a community of color, with no stops to serve that community. It would purely serve airline passengers, who are much whiter and higher income than the people in that community. A complaint was brought by Public Advocates, Inc under Title VI and the American Readjustment Act, and prevailed. But in a not-unusual turn of events, BART was able to build the spur anyway.

BREAKTHROUGHS

One of the breakthroughs of the transportation equity movement came when the Los Angeles Metropolitan Transportation Authority (LAMTA) and the Los Angeles Bus Riders Union negotiated a consent decree as part of a court settlement in 1996. In the case, the court was asked to find that LAMTA had provided inferior

services to Los Angeles's largely minority and low-income bus riders. Furthermore, LAMTA was directing resources to its commuter rail lines, which served a more affluent and primarily white population, at the expense of its bus users. Before the trial, the judge directed that the parties work to settle the case. This settlement included hundreds of millions of dollars for new buses, which are ridden primarily by people of color and low-income people.

TOLLING AND ECONOMIC REGRESSIVITY

An issue we can expect to see more of is the economically regressive nature of tolling of roads, lanes, bridges, and tunnels. As surface transportation funding issues continue to arise and become more difficult, the trend toward tolling everything in road transportation will most likely continue. Some of these tolls, especially with dynamic tolling, are very high. For example, the Verrazano-Narrows Bridge in New York City has a toll of \$19. Same for the Lincoln and Holland Tunnels. The minimum wage in New York City is \$15 an hour. That means for a minimum wage worker who needs to drive over the Bridge to get to work, she must pay over one hour's wage every day in bridge tolls. In New Jersey, the minimum wage is \$10 an hour; that minimum wage worker must pay almost two hours wages every day in bridge or tunnel tolls if she works in New Jersey.

There are some experiments to link tolling databases to others that provide proxy measures for low income, such as receipt of Section 8 housing vouchers, food stamps, social security disability income, home heating assistance, school lunch programs, Earned Income Tax Credit, and TANF. The technology exists and can be used. By linking such databases, waivers, exemptions, and discounts to high tolls can be provided.

An example of a transportation project that will inevitably have regressive effects on low-income people is California's High-Speed Rail. Chances are good that its fares, when and if it is ever put into service, will be as high as regional jets. Lower-income people simply will not be able to afford it. So, it will become yet another way to decrease social and physical mobility in the state, and force African-Americans, Hispanics, and lower-income people onto slower and less comfortable over-the-road intercity buses.

This argument bumps up against the argument that money talks, because there is a tradition of buying better transportation if one can afford it, like first-class airplane fares. Another example of economics coming into opposition with civil rights, opportunity, and equity is the inaccessibility of commercial airliners to some people with disabilities. Every square inch of an airliner is potential revenue to an airline and taking some of this space to accommodate people with disabilities is anathema to airline companies.

THE EFFECTS OF WEALTH INEQUALITY

The problems are getting worse and not better because of growing income and wealth inequality in the US. One example is the fact that the average Black family has less than one-tenth the wealth of the average white family. This certainly does not mean to imply that transportation entities should solve all of American society's problems. However, we should not make them worse, and not continue to make decisions simply because they have always been made that way.

TRANSPORTATION AS A TOOL TO RETARD DEMOCRACY, HEALTH, AND EQUITY

Transportation has been used as a means or tool for putting additional burdens on people of color and women. For example, some states have closed voting places and places to get abortions and made people travel further to obtain and take advantage of these essential services. Some cities have closed inner-city hospitals and made people travel further to obtain essential health services.

STOPPING PROBLEMS BEFORE THEY HAPPEN

An ongoing problem and major failure of civil rights laws is the lack of injunctive relief. In general, a potential complainant or plaintiff has to wait until there has been cognizable harm before seeking relief. This makes it very difficult to stop a project before it has caused harm to a protected class. It is easier to protect an endangered animal species under the Endangered Species Act than it is to protect endangered humans. A case several years ago involved a gasoline pipeline in Texas. The pipeline ran under an elementary school that was almost entirely Hispanic. Advocacy groups were not able to protect the children from the pipeline. However, environmental advocates were able to force the pipeline to route around an area that held endangered salamanders, at a cost of a million dollars a mile.

CONFLICTS AMONG GROUPS

There are often conflicting issues among different community groups. Civil rights violations range from the glaringly obvious, like a Black part of town receiving very poor roads, to microaggressions, like touching a Black person's hair without their permission. Civil rights issues extend from outside the organization, such as how it provides services to varied communities, to deep inside the organization, such as sexual harassment of employees.

SERVICE CHANGES

A common legal controversy arises when public transit entities propose to cut services, change routes, and raise fares. Do these levels of service and quality changes have a disproportionately adverse effect on communities of color? This is partly a factual determination. Recipients of federal funds may implement policies or take actions that have disparate impacts if the policies or actions have substantial

legitimate justification, if there are no comparably effective alternative practices that would result in less disparate impacts, and if the justification for the policy or action is not a pretext for discrimination. The term “adverse effects” means, in part, “the totality of significant individual or cumulative human health or environmental effects.” The phrase

[D]isproportionately high and adverse effect on minority and low-income populations means an adverse effect that:

- (1) is predominately borne by a minority population and/or a low-income population, or
- (2) will be suffered by the minority population and/or low-income population and is appreciably more severe or greater in magnitude than the adverse effect that will be suffered by the non-minority population and/or non-low-income population.³

UNSETTLED ISSUES IN TRANSPORTATION AND CIVIL RIGHTS

The governance structure of most metropolitan planning organizations (MPOs) is very white, even when much of the area served by the MPO has many people of color. MPO decisions on regional transportation plans tend to be biased toward cars, and as noted elsewhere, any transportation plan that emphasizes cars will have disproportionately adverse effects on groups with low car usage, such as African-Americans and people with disabilities. Jurisdictional boundaries in MPOs tend to favor suburban jurisdictions, which are usually much whiter than inner cities. As recipients of federal funding, MPOs must demonstrate compliance with Title VI and other guidance designed to mitigate adverse impacts on protected populations, including low-income people, people of color, and transit-dependent individuals, among others.

JURISDICTIONAL BOUNDARIES

Jurisdictional boundaries, and the fact that many public transit services follow them, create obstacles for the journey to work by people who need to take public transit, who are lower-income and more people of color than those who use cars. We would never permit freeways, for example, to stop at the edge of a city, and force people to move to a different road net to keep going. The jurisdictional boundary problem is also an example of how forms of infrastructure keep people separated. It is very difficult to overcome the vestiges of prior discriminatory systems, such as freeways that permitted white flight, redlining, and urban renewal.

³ U.S. Department of Transportation, Department of Transportation Order 5610.2(a), <https://www.transportation.gov/transportation-policy/environmental-justice/departments-transportation-order-56102a?msclkid=4d18f79acd4311eca693dd3f10a72922>

SPATIAL MISMATCH

There is a lot of evidence to document a “spatial mismatch” between Black workers and jobs in the U.S. The spatial mismatch hypothesis posits that Blacks in central cities experience inferior employment opportunities because of suburbanization and decentralization of jobs, lower rates of residential mobility, housing, and labor market discrimination, and lower accessibility due to location choice and mode availability. This is also an argument of MPOs to include airports in their planning, which many do not do, because airports tend to be job engines.

HOLES IN LEGAL COVERAGE

Other unsettled issues include federal civil rights jurisdiction over cruise ships that call at U.S. ports. In general, there is no such jurisdiction. However, cruise ships have become very accessible to passengers with disabilities, simply because their customer base skews older. Those in the transportation field should bear in mind, however, that when such ships call at U.S. ports, some jurisdiction is created because almost all ports are recipients of federal financial assistance.

Other gaping holes in civil rights coverage are created by statutes with exemptions and waivers due to legislative give and take and compromise. For example, the Americans with Disabilities Act permits NYC subway stations to be inaccessible. Even 57 years after Section 504 of the Rehabilitation Act of 1973 required such stations to be accessible, about three-quarters of them continue to be so.

UNINTENDED CONSEQUENCES

Some transportation civil rights issues seem attenuated until they are examined closely. For example, a program called “Vision Zero” aims to reduce or eliminate traffic fatalities. Despite their good intentions, the programs rely on police-led enforcement and may inadvertently direct additional resources to police. Is that a solution in the middle of discussions of realigning police resources and of institutional racism?

Transit managers have also deployed transit police who allegedly harass riders of color over fare evasion and make disproportionate arrests. Advocates have called this an example of racial profiling. For example, the DC area’s Metro and LAMTA’s use of police officers to enforce fare evasion laws have been the subject of civil rights complaints. As an odd solution to the problem, doing away with fares has been proposed: Los Angeles County Metropolitan Transportation Authority CEO Phil Washington is implementing a new internal task force to study options for a fare-free system. “If you have no fares, then it stands to reason that you’d get rid of those potential confrontations on fare enforcement, as well as the allegations of targeting people of color.” This would be a form of amnesty, or

decriminalization, akin to legalizing marijuana use and expunging marijuana arrest and conviction records. A criticism of free fares is that the homeless will make riding transit their home. So once again, transportation intersects with other forms of infrastructure, in this case, law creation and enforcement, and housing issues.

CONCLUSIONS

In dealing with civil rights/discrimination/racism/etc., there are issues of avoiding current and new legal problems, providing services as needed, complying narrowly with the law, meeting affirmative requirements, lowering barriers and not creating new ones, avoiding segregating people by race/ethnicity/disability, affirmatively trying to accomplish moral good (such as affirmative action and diversity programs), and remedying and providing make-whole remedies for past sins (such as reparations).

It is wise to remember that transportation interacts with other forms of infrastructure, such as housing, healthcare, education, employment, and recreation. These all work together to keep people separated, and transportation is the glue that holds them together. Another form of infrastructure transportation is part of its evacuation or separating people from their home environment.

There are opportunities to correct some of the problems and gaps previously mentioned and present themselves whenever the giant surface transportation act is discussed and re-authorized in Congress. The current financial crisis in transportation brought about by the pandemic and ensuing economic collapse creates many problems for those in the transportation field. How to spend the spare remaining funds and bring transportation back to life and service? Like any crisis, there are also opportunities. Post-pandemic transportation can be re-created more equitably, to serve vulnerable and marginalized communities better and more fully, to tear down barriers to full and equitable participation in all aspects of society. In today's current discussions of systemic and institutional racism, it is useful to ask what the role of transportation is, how extensive it is, and what can be done about it.

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