

# THE RECORD



OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Benjamin A.  
Cardozo Lecture

RUTH BADER  
GINSBURG

**Affirmative  
Action: An  
International  
Human  
Rights  
Dialogue**

ALSO  
**The Warsaw  
Convention  
Revisited**

**Employment  
Law  
Training for  
Arbitrators**

MAY/JUNE 1999

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# THE RECORD

MAY/JUNE 1999

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## Contents

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OF NOTE	271
THE BENJAMIN N. CARDOZO LECTURE: AFFIRMATIVE ACTION: AN INTERNATIONAL HUMAN RIGHTS DIALOGUE <i>by Ruth Bader Ginsburg</i>	275
REPORT AND RECOMMENDATIONS ON SECOND CIRCUIT CERTIFICATION OF DETERMINATIVE STATE LAW ISSUES TO THE NEW YORK COURT OF APPEALS <i>by the Council on Judicial Administration and the Committee on Federal Courts</i>	310
THE WARSAW CONVENTION REVISITED: AN UPDATE ON LIABILITY LIMITATIONS FOR THE TWENTY-FIRST CENTURY <i>by the Committee on Aeronautics</i>	318
EMPLOYMENT LAW TRAINING FOR ARBITRATORS <i>by the Committee on Labor and Employment Law</i>	330
FORMAL OPINION 1999-03: RESTRICTIVE PRACTICE AGREEMENTS; SETTLEMENT AGREEMENTS <i>by the Committee on Professional and Judicial Ethics</i>	363
NEW MEMBERS	368
ATTORNEY-CLIENT PRIVILEGE: A SELECTIVE BIBLIOGRAPHY <i>by Ronald I. Mirvis and Eva S. Wolf</i>	379

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# Of Note

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THE 1999 BOTEIN AWARDS WERE PRESENTED BY HON. BETTY WEINBERG ELLERIN, Acting Presiding Justice, Appellate Division, First Department, at the Association on March 29, 1999.

The Awards, dedicated to the memory of Bernard Botein, former President of the Association, have been presented annually since 1976 to pay tribute to court personnel in the First Department who have made outstanding contributions to the administration of the courts.

The awards are sponsored by the Special Committee on the Botein Awards.

This year's recipients are: Hector Diaz, County Clerk in Bronx County; Mary Ellen Keller, Deputy Chief Clerk of the Family Court of the City of New York; Michael McAllister, Mediator/Settlement Coordinator in the Civil Branch of New York County Supreme Court; John E. Murray, Deputy Chief Clerk in the Criminal Branch of Bronx County Supreme Court; and David Spokony, Deputy Clerk of the Court in the Appellate Division, First Department.

\*

AN AMICUS BRIEF WAS FILED BY THE ASSOCIATION IN THE SUPREME Court of the United States in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*. Prepared by the Committee on Federal Legislation (Louis Craco, Jr., Chair) the brief urged the Court to uphold the Patent Remedy Act against a challenge that it is an impermissible exercise of federal power over the states. The brief argued that for the following reasons, the Patent Remedy Act is an appropriate exercise of Congressional power. First, the Act does not impose duties or liabilities on the states beyond those it imposes on private citizens who engage in similar commercial conduct. Second, there is no doubt that Congress expressed its intention to subject the States to the remedies of the Act and stated that it did so to protect the property rights on patent holders. Under Section 5 of the Fourteenth Amendment Congress is empowered to

protect the patent rights of persons and corporations against infringements by the States. Finally, the Act vindicates a significant federal interest, the protection of patents and the uniformity of patent law, by providing for congruent proportionate relief against States that infringe. In the present case the Petitioner, in infringing on the Respondent's patent, is acting no differently from any other commercial actor, private or State. Because the Patent Remedy Act simply imposes upon the States the same obligations as private citizens or others who allegedly infringe on patents, and subjects them to the same remedies, it is within Congress' power and must be upheld.

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THE FOLLOWING NEW COMMITTEE CHAIRS AND DELEGATES HAVE RECENTLY BEEN APPOINTED FOR TERMS BEGINNING SEPTEMBER 1, 1999:

Robert James Anello (Professional Responsibility); Steven Lloyd Barrett (Legal Referral Service); Andrea J. Berger (Lawyers Orchestra); Jeffrey R. Brecker (Tort Litigation); William J. Burke and Lucia D. Swanson (Talent Outreach Project); Maura M. Caliendo (Insurance Law); Nancy Ann Connery (Delegation to the New York State Bar Association House of Delegates); Mary Sembrot Croly (Legal Problems of the Aging); Leo T. Crowley (Health Law); William M. Dallas, Jr. (Council on Judicial Administration); Julie A. Domonkos (Task Force on Domestic Violence); Arthur F. Engoron (New York City Civil Court); Hyman Frankel (Project on the Homeless); William Geller (Young Lawyers); Stanley M. Grossman (Special Committee on the Future of CUNY); Christopher Patrick Hall (State Courts of Superior Jurisdiction); Gregory L. Harris (Federal Legislation); Peter M. Hosinski (Foreign and Comparative Law); Richard D. Katcher (Mergers, Acquisitions and Corporate Control Contests); Bruce R. Kelly (Product Liability); Susan J. Kohlmann (Women in the Profession); David K. Lakhdhir (International Law); Jonathan J. Lerner (Professional and Judicial Ethics); George T. Lowy (Corporation Law); Christopher L. Mann (Project Finance); Thomas F. McInerny (Books at the Bar); Richard G. Menaker (Legal History); Edwina G. Richardson Thomas (Children and the Law); Stephen J. Shapiro (Military Affairs and Justice); Pamela M. Sloan (Matrimonial Law); and D. Evan van Hook (Environmental Law).

# Recent Committee Reports

## **African Affairs**

Letter to Head of State of the Republic of Nigeria Regarding His Recent Initiatives Towards Democracy in Nigeria

## **Banking Law**

Comments on the Proposed “Know Your Customer” Regulations

## **Criminal Advocacy**

Letter Commenting on Amendments to the Sentencing Guidelines

## **Criminal Law**

Sexual Assault Reform Act of 1999

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Memorandum on Tax Aspects of the Draft New York Principal and Income Act

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Letter Regarding Assembly Bill A.3969 Which Would Establish Maximum Speed Limits as Low as 15 MPH

*Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at [lyuen@abcny.org](mailto:lyuen@abcny.org).*

Benjamin N. Cardozo Lecture

# Affirmative Action: An International Human Rights Dialogue

*On February 11, 1999, Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court, delivered the 51st Benjamin N. Cardozo Lecture.*

**MICHAEL A. COOPER**

It gives me great pleasure to welcome you to the most significant event of the year at this Association: the Benjamin N. Cardozo Lecture. This is the fifty-first Cardozo Lecture, and it will be given by one of our own, a member of the Association for 38 years, United States Supreme Court Justice Ruth Bader Ginsburg.

If you challenge or question my description of this evening as the most significant of the year, I can respond by naming for you some of the past lecturers, for they are surely inhabitants of the pantheon of the law in the United States in this century: six justices of the United States Supreme Court, in chronological sequence, Justices Jackson, Frankfurter, Douglas, Harlan, Warren and Brennan; five judges of the New York Court of Appeals, Judges Lehman, Breitel, Jones, our current Chief Judge Judith Kaye and Judge Joseph Bellacosa (both of whom we are delighted to have with us this evening); and other luminaries of the law, including Lon Fuller, Henry Friendly and Erwin Griswold.

In March 1940, the Association's Special Committee on Post-Admission Legal Education reported a series of recommendations, the first of which was to establish an annual lecture "to be known as the Benjamin

N. Cardozo Lecture, dealing with a subject of general legal interest to the Bar.” The Lecture, according to the Committee, was to remind us of Judge (and Justice) Cardozo and “ ‘that spiritual harvest which comes from the example of an unblemished character’... that radiated goodness, that was inspired by a love for the law, a passion for justice and a sympathy for humanity.” In asking Justice Ginsburg to deliver the fifty-first Cardozo Lecture, we have surely hewed to the original charge by that Committee. I do hope, however, that the Committee would excuse us for failing to honor its specification that the lecture be “given some time in May or the beginning of October” and its further specification that the lecture be “published, but without involving the Association in any financial obligation.” I cannot help wondering whom the Committee expected to bear that financial burden? Was it to be the lecturer?

I have presumed to call Justice Ginsburg one of our own, for she is: in addition to being an Association member for 38 years, she is a former member of the Executive Committee, presided at the final round argument of the National Moot Court competition in 1995, and was a celebrant of the Association’s 125th anniversary at Lincoln Center in September 1995.

Justice Ginsburg served on the Association’s Executive Committee for four years from 1974 to 1978. The minutes of the Executive Committee record that at its meeting on November 6, 1974 “Ms. Ginsburg”—we were enlightened even then—“urged that it be Association policy that Committees do not schedule dinner meetings at clubs which do not admit women.” The minutes further record that “[a]fter discussion, it was the sense of the meeting that the Chairman”—well, perhaps we were not fully enlightened—“send a letter to all Committee Chairmen with regard to the scheduling of dinner meetings at clubs which practice any form of discrimination....” We have searched for but regrettably cannot find a copy of that letter. However, the yearbook reprints among selected resolutions of the executive committee the April 8, 1981 resolution, as amended on March 3, 1988, that “it is hereby resolved to be the policy of the Association that none of its meetings and no meetings of its officers, committees or staff be held at clubs whose admissions policies are known, or are publicly acknowledged, to be discriminatory on the basis of sex, color, race, religion or national origin, disability, age, marital status or sexual preference.”

Justice Ginsburg’s *curriculum vitae* is so well known to this assembly that I need only touch on some of its high—and two low—points. Ruth Bader was born in Brooklyn and after attending James Madison High School and Cornell, spent the first two years of her law school education at Harvard and the last at Columbia. She was a member of the law review

at both schools. I know of no other law school graduate over whom two schools have fought so hard, albeit genteelly, in claiming her as an alumna. She was recommended by Professor Sacks at Harvard Law School to Justice Frankfurter, but he was not prepared to hire a woman clerk, much less one who was married and had a small child. As incredible as it may seem today, nearly forty years later, Ruth Bader Ginsburg received not one offer of employment from a New York law firm.

Justice Ginsburg clerked for Judge Edmund Palmieri on the United States District Court for the Southern District of New York and then joined the faculty of Rutgers University School of Law and nine years later became the first tenured woman on the faculty of Columbia Law School.

While at Columbia she founded the Women's Rights Project at the American Civil Liberties Union and during the seventies argued or submitted amicus briefs in six cases involving gender discrimination before the United States Supreme Court, winning five of them. You will have noticed that I referred to those cases as involving gender discrimination, not women's rights, for her choice of plaintiffs and her arguments were intended to challenge sexual stereotypes. Why, she asked, should a woman be able to purchase 3.2 percent beer in Oklahoma at age 18 when a man had to wait till the age of 21? Why should a woman be entitled to claim social security benefits when a man, widowed and the primary caretaker of a child, could not claim equivalent benefits? And why should women be exempt from jury service on request or excluded from jury service unless they affirmatively stated a willingness to serve when men were not so treated? There were no satisfactory answers to those questions, and Justice Ginsburg must have known that when she argued those cases. Justice Ginsburg has been called, quite aptly I believe, the "Thurgood Marshall of gender equality law."

Much has been written of Justice Ginsburg's preference for the particular over the generalization and her respect for the details of cases and their procedural settings. I could attempt to capture in a sentence or two her judicial philosophy, but I am not that foolish, nor will I postpone any longer your opportunity to hear from her, not me. So I will close with a compliment paid to Justice Ginsburg that I envy. "A conversation with her," an acquaintance has said, "is a special pleasure because there are no words that are not preceded by thoughts."

Justice Ginsburg's topic this evening is "Affirmative Action: An International Human Rights Dialogue." We eagerly await her exposition of that subject. Please join me in welcoming the Honorable Ruth Bader Ginsburg.

Benjamin N. Cardozo Lecture

# Affirmative Action: An International Human Rights Dialogue

*Ruth Bader Ginsburg\**  
*and Deborah Jones Merritt\*\**

**D**ecember 10, 1998 marked the fiftieth anniversary of the United Nations Universal Declaration of Human Rights. I thought it appropriate, in recognition of that anniversary, to select for this lecture a subject that touches and concerns main themes of the Universal Declaration. My topic is affirmative action, as anchored in the Universal Declaration, as the idea unfolded in the United States, and as the concept is employed elsewhere in the world.

This Association's members, in the 1990s, have renewed endeavors to act affirmatively, as counseled by the Committee to Enhance Diversity in

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\* Associate Justice, Supreme Court of the United States.

\*\* John D. Drinko-Baker & Hostetler Chair, The Ohio State University College of Law. The authors acknowledge with appreciation the thoughtful review and assistance of Justice Ginsburg's 1998 Term law clerk, William Savitt.



**Hon. Ruth Bader Ginsburg**

the Profession and affiliated committees. The Association's ongoing efforts are trained on trying issues—the retention and promotion, by law firms and corporate legal departments, of minority and female lawyers.<sup>1</sup> Affirmative action is currently among the more vigorously de-

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1. In addition to monitoring the progress of minority and female attorneys, and setting goals for that progress, the Association has commissioned significant scholarship in this field. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291 (1995) (report to the Committee on Women in the Profession, The Association of the Bar of the City of New York); *Responses to Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 65 *FORDHAM L. REV.* 561 (1996) (collection of essays responding to Epstein's report); see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *Fordham L. Rev.* 281, 288-89 (1995) (lecture published as companion to Epstein's report, noting that President Clinton's "highly affirmative action" in appointing women to the federal bench was "not the result of any quota system" but of a concentrated search for qualified candidates; those "appointees achieved higher ABA ratings on average than the less diverse appointees of the three previous administrations").

bated human rights issues, and this Association's efforts may be closely watched by critics and skeptics as well as participants and their supporters.

The Universal Declaration of Human Rights encompasses both civil or political rights and economic or social rights. Affirmative action stands at the intersection of these two complementary categories. Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health. Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind.<sup>2</sup>

I will begin with a few notes on terminology or definition. I will use primarily the United States expression "affirmative action," but I will also refer to the "reservations" of India and the "positive action" of Europe. Under the heading affirmative action, I would include any program that takes positive steps to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life. The steps may be small and encounter little resistance—for example, advertising job openings in newspapers serving minority communities. Or they may be more radical, costly, and controversial, for example, subsidizing childcare for infants and pre-school children and providing paid parental leave for the weeks immediately after childbirth. Also in the af-

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2. Two covenants, both adopted by the United Nations in 1966, are designed to implement the Declaration: the Covenant on Civil and Political Rights, which follows the first twenty-one articles of the Declaration, and the Covenant on Economic, Social, and Cultural Rights, which centers on social and economic prescriptions of the Declaration. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966); Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in *INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS* 1, 6-9, 14-16 (Rudolf Bernhardt & John A. Jolowicz eds., 1985). The United States is a party to the Covenant on Civil and Political Rights, but has not joined the Covenant on Economic, Social, and Cultural Rights. For a discussion of the evolution of economic and social rights after the Declaration, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 256-264, 267-268 (1996).

firmative action arsenal are the goals, preferences, and quotas that have provoked powerful opposition.

### I. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

I turn first to the foundation document for contemporary human rights discourse, the 1948 Universal Declaration of Human Rights. That document does not mention affirmative action, for at mid-century, the term was not yet in vogue. But the Declaration does contain two intellectual anchors for affirmative action.

First, the Declaration repeatedly endorses the principle of equality. The preamble speaks of “the equal and inalienable rights of all members of the human family,” and of “the equal rights of men and women.”<sup>3</sup> Article 1 declares that “[a]ll human beings are born free and equal in dignity and rights”;<sup>4</sup> Article 2 instructs that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”<sup>5</sup> Reiterating the nondiscrimination principle, Article 7 states that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>6</sup>

The Declaration aims to ensure that proclamations of equality and other civil rights become more than aspirational. Article 8 states that “[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights” accorded him or her by the adhering nation’s constitution or laws.<sup>7</sup> An “effective remedy,” in the context of centuries of discrimination, it has been forcibly argued, must include at least some modes of positive governmental action. U.S. President Lyndon Johnson so indicated when he famously declared: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘You are free to compete with all the others.’”<sup>8</sup>

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3. Universal Declaration of Human Rights, preamble, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter cited as UDHR].

4. *Id.* at 1.

5. *Id.* at 2.

6. *Id.* at 7.

7. *Id.* art. 8. While Article 8 mandates remedies for violations of a nation’s constitution or laws, the Declaration no doubt anticipates incorporation of the equality principle into those sources of law.

8. Lyndon B. Johnson, *To Fulfill These Rights*, in *THE AFFIRMATIVE ACTION DEBATE* 16, 17 (George E. Curry ed., 1996).

The Universal Declaration might be read to touch as well on the major objection to affirmative action, the concern that it promotes one person's equality at the expense of another's right to the same treatment. Article 29 states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others."<sup>9</sup> If not a clarion statement, this formulation can be read to suggest a place for accommodation, to prevent continued suppression of people whose rights were once denied, dishonored, or ignored.

In addition to the Universal Declaration's commitment to the ideal of equality, the document provides (as I just indicated) a second support for affirmative action, one rooted in social and economic prescriptions. Article 23 declares that everyone has the right to work, including "free choice of employment," "just and favourable conditions of work," "protection against unemployment," and "equal pay for equal work."<sup>10</sup> Article 25 pledges an adequate standard of living, encompassing "food, clothing, housing and medical care and necessary social services."<sup>11</sup> And Article 26 affirms that "[e]veryone has the right to education," provided "free, at least in the elementary and fundamental stages."<sup>12</sup>

These articles suggest that all members of the human community should have the wherewithal to reap the fruits of that community. The provisions do not command that all will share equally, but they do imply that there are minimum levels of employment, education, and subsistence all should have. If a nation finds that citizens of one race—or sex or religion—endure a markedly inadequate standard of living, then Article 25

9. UDHR, *supra* note 3, art. 29(2).

10. *Id.* art. 23(1); *id.* art. 23(2).

11. *Id.* art. 25(1). The article also declares the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [the individual's] control." *Id.*

12. *Id.* art. 26(1). The article also directs that "[t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit." *Id.* The reference to "merit" in relation to higher education might be read to exclude affirmative action in admission policies. The next section of Article 26, however, suggests that "merit" in the context of higher education might include, among other factors, pursuit of a diverse student population. That section calls for education to "promote understanding, tolerance and friendship among all nations, racial or religious groups." *Id.* art. 26(2); see also *infra* note 58 and accompanying text (noting this portion of Article 26 in connection with the U.S. Supreme Court's *Bakke* decision).

suggests an obligation to uncover the cause of, and respond to, that endurance. Similarly, if women or members of minority races suffer higher unemployment rates than do members of the dominant group, Article 23 suggests an obligation to ask why that is so, in order to address, and not ignore, the imbalance.

Consider, for example, this statistical picture of the United States. A 1995 United Nations report estimated that white Americans, if ranked as a separate nation, would lead the world in well-being, a measure that combines life expectancy, educational achievement, and income.<sup>13</sup> African Americans, in contrast, would rank a depressing twenty-seventh worldwide, while Hispanic-Americans would rank even lower at thirty-second.<sup>14</sup> After noting these discrepancies, the authors of the U.N. report observed: “full equality still is a distant prospect in the United States, despite affirmative action policies and market opportunities.”<sup>15</sup>

Worldwide comparisons between the status of women and that of men are similarly telling. Women shoulder more than half the world’s workload, including the lion’s share of unpaid housework and childcare.<sup>16</sup> Yet their wages lag behind those of men in every country, and they hold only fourteen percent of administrative and managerial jobs worldwide.<sup>17</sup> More than seventy percent of our planet’s poor are women; women suffer more unemployment than men in every world region; and women outnumber men two-to-one among the 900 million who are illiterate.<sup>18</sup>

If we take seriously the promises of employment, education, and sustenance made in the Universal Declaration of Human Rights, these discrepancies demand affirmative government attention. It seems implausible that such marked differences would occur with no discrimination lurking in the background. (Science has now assured us, for example, that the female is not, as was once widely believed, an imperfect or unfinished male. Women today excel in fields once thought beyond their natu-

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13. See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 22 (1995). When all U.S. populations are combined, the United States ranks second worldwide—after Canada—on the U.N. well-being scale. *Id.* at 18.

14. See *id.* at 22.

15. *Id.*

16. See *id.* at 87-98.

17. See *id.* at 36-37.

18. See *id.* at 36, 34; see also Remarks by First Lady Hillary Rodham Clinton in Commemoration of the 50th Anniversary of the United Nations General Assembly Adoption and Proclamation of the Universal Declaration of Human Rights (Dec. 10, 1997) <<http://www2.whitehouse.gov>>.

ral talents. Yet another long-held notion fell last summer when Hungarian Judit Polnar defeated world chess champion Anatoly Karpov in match play.<sup>19</sup>) And even without hard proof of discrimination, as I just noted, the Declaration's economic and social prescriptions suggest an affirmative obligation to address marked degrees of disadvantage.

In addition to the two anchors for affirmative action—ending equality deprivations and advancing economic well-being—the 1948 Declaration contains a provision some might describe as an affirmative action clause. Article 25, which proclaims the right to an adequate standard of living, also declares that “[m]otherhood and childhood are entitled to special care and assistance.”<sup>20</sup> Viewed through one lens, this provision compassionately encourages states to develop special policies protecting the physical and emotional health of mothers and their children.

In my view and experience, however, the language of the provision raises a troubling concern. Patriarchal rules long sequestered women at home in the name of “motherhood,” rather than allowing them to integrate parenthood with paid labor. It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid work and parenting, from laws that operate to confine women to their traditional subordinate status, and to relieve men of their fair share of responsibility for childraising.<sup>21</sup> Article 25 of the Universal Declaration evokes this tension, which runs throughout discussions of affirmative action for women, without in any way resolving it.<sup>22</sup>

19. Malcolm Pein, *Chess: Polgar Speeds Past Karpov*, DAILY TELEGRAPH, June 15, 1998, at 22. Polgar is one of three champion chess-playing sisters tutored by their father, Laszlo Polgar. Underscoring the relationship between societal expectations and individual achievement, the senior Polgar refused to allow his daughters to play in women-only tournaments because he believed the lower expectations would hinder their development. *Id.*

20. UDHR, *supra* note 3, art. 25(2).

21. For an earlier discussion of this problem, see Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 *Conn. L. Rev.* 813 (1978). See also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion) (“Traditionally, . . . discrimination [on the basis of sex] was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”); *Sail’er Inn, Inc. v. Kirby*, 485 P.2d 529, 541 (Cal. 1971) (en banc) (“The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.”). For discussions of the same tension in other legal systems, see, for example, Deirdre A. Grossman, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 *Comp. Lab. L. J.* 185 (1993); Carol Daugherty Rasnic, *Austria’s Affirmative Action for Women Workers Versus Protective Legislation for the “Weaker Sex”: Incongruous Concepts?*, 46 *Labor L.J.* 749 (1995).

22. The problem is especially acute in the English language version of the Declaration, which

Of more recent vintage, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,<sup>23</sup> one of several conventions stemming from the Universal Declaration, asserts the state's obligation to protect both parenting *and* women's full workplace participation. Article 5 of that convention first directs states to "take all appropriate measures" to eliminate prejudices underlying the assignment of men and women to stereotyped roles.<sup>24</sup> The same article then calls for education to achieve "recognition of the common responsibility of men and women in the upbringing and development of their children."<sup>25</sup>

Article 11 of the convention prohibits dismissal of pregnant workers and those on maternity leave.<sup>26</sup> The article also directs states to introduce paid maternity leaves; to encourage social services, especially childcare facilities that permit parents to combine work and family life; and to protect pregnant women from harmful working conditions.<sup>27</sup> Somewhat ambivalently, Article 11 accords women a right "to protection of health and to safety in working conditions," including "safeguard[s]" of their reproductive functions.<sup>28</sup> It is not altogether clear that this provision calls upon employers to make the workplace safe rather than to protect a woman's pregnancy or fertility by barring her from well-paid occupations.<sup>29</sup> The

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uses the masculine pronoun "he" for universal references. In that version, section one of Article 25 guarantees "[e]veryone . . . the right to a standard of living adequate for the health and well-being of himself and of his family," while section two offers "[m]otherhood and childhood . . . special care and assistance." UDHR, *supra* note 3, art. 25 (emphasis added). The gendered pronouns reinforce the notion that men support their families, while women devote their lives to motherhood. The French text avoids this dichotomy: "Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille. . . . La maternité et l'enfance ont droit à une aide et à une assistance spéciales."

23. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter cited as CEDAW]. The United States is the only western democracy that has not ratified the Convention. See Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 50 (1997).

24. CEDAW, *supra* note 23, art. 5(a).

25. *Id.* art. 5(b). This section also requires education to develop "a proper understanding of maternity as a social function." *Id.*

26. See *id.* art. 11(2)(a); see also *infra* notes 88, 129 (describing United States and European Union cases on pregnancy leaves and dismissals).

27. See CEDAW *supra* note 23, art. 11(2)(b); 11(2)(c); 11(2)(d).

28. *Id.* art. 11(1)(f).

29. The United States Supreme Court has interpreted Title VII of the Civil Rights Act, 42

article also falls short, in my judgment, in failing to recognize that after the weeks surrounding childbirth, leave for childraising is most neutrally typed parental leave, not maternity leave.

In other provisions, the Convention on the Elimination of All Forms of Discrimination Against Women broadly condemns sex discrimination and directs nations to take positive steps to counter that bias.<sup>30</sup> And Article 4 expressly shields affirmative action programs of the controversial kind; it states that “[a]doption . . . of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the . . . Convention.”<sup>31</sup> The same article also provides that “special measures . . . aimed at protecting maternity shall not be considered discriminatory.”<sup>32</sup>

Preceding the convention on elimination of discrimination against women by fourteen years, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination<sup>33</sup> similarly endorses affirmative action as a means of advancing racial equality. Article 1 declares that “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups . . . shall not be deemed

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U.S.C. § 2000e-2(a) (1994), which bars employment discrimination on the basis of “sex,” to prohibit sex-specific fetal protection policies. See *International Union, United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991). As the Court recognized there: “Concern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities. . . . It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role.” *Id.*

30. For example, Article 2 “condemn[s] discrimination against women in all its forms,” and establishes seven undertakings to end that discrimination. CEDAW, *supra* note 23, art. 2. Article 3 instructs states to “take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” *Id.* art. 3.

31. *Id.* art. 4(1). The article stresses the temporary nature of these distinctions: the measures “shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.” *Id.*

32. *Id.* art. 4(2). This prescription is not limited temporally as are other special measures. See *supra* note 31.

33. G.A. Res. 2106A, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965) [hereinafter cited as ICRD]. The United States ratified this convention in 1994. See U.S. DEP’T OF STATE, TREATIES IN FORCE 422-23 (1996) (entered into force for the United States on November 20, 1994).

racial discrimination.”<sup>34</sup> Notably, this caveat appears in the convention’s very first article, even before the document’s direct prohibitions of race discrimination.

The race convention also obligates states to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”<sup>35</sup> The convention thus positively instructs affirmative action to eliminate racial discrimination, “when the circumstances so warrant.”<sup>36</sup>

To recapitulate, the Universal Declaration of Human Rights, read together with two of its associated conventions (the one outlawing racial discrimination, and the one proscribing discrimination against women), indicates that affirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being. I turn next to three legal systems that have endeavored to advance equality and economic security through affirmative action measures.

## II. AFFIRMATIVE ACTION IN THE UNITED STATES

Concentrating on the legal system I know best, I will describe first the origin and current situation of affirmative action in the United States. Courts sporadically used the term “affirmative action” in the late nineteenth and early twentieth centuries to describe various remedial steps imposed upon a defendant.<sup>37</sup> The words entered the legal lexicon with

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34. ICERD, *supra* note 33, art. 1(4). Like the protection for gender-based affirmative action, this authority is limited to temporary measures: Racial distinctions are permissible “provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.” *Id.*

35. *Id.* art. 2(2). This prescription includes a proviso similar to the one in Article 1. The “measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.” *Id.*; see also *supra* note 31.

36. ICERD, *supra* note 33, art. 2(2).

37. See, e.g., *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 375 (1872) (extradition treaty with a foreign nation “might require prompt affirmative action” by the government in yielding a fugitive); *City of Galena v. Amy*, 72 U.S. (5 Wall.) 705, 708 (1866) (city’s powers had to “be

their contemporary connotation in 1961. That year, President John F. Kennedy, building on an earlier Second World War prescription, signed an executive order requiring government contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”<sup>38</sup> The order also bound executive departments and agencies to recommend “positive measures for the elimination of any discrimination, direct or indirect, which now exists.”<sup>39</sup>

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exercised in favor of affirmative action” to collect sufficient revenue to pay interest promised bondholders); see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941) (concerning NLRB’s statutory authority to take “affirmative action” to “effectuate the policies” of the NLRA). For a more recent recognition of affirmative action as an equitable remedy, see, for example, *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777-78 (1976).

38. Exec. Order No. 10925, § 301, 3 C.F.R. 448, 450 (1959-1963); see also *id.* § 302(d), 3 C.F.R. at 451 (authorizing the President’s Committee on Equal Employment Opportunity to obtain pledges of nondiscrimination and “affirmative[] cooperat[ion]” from labor unions associated with government contract work).

Kennedy’s order built upon a nondiscrimination order issued by President Franklin Roosevelt during World War II. See Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943). Roosevelt’s order prohibited “discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin” and directed agencies involved with defense production vocational and training programs to “take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin.” *Id.* Broad language in the order’s preamble, proclaiming “the duty of employers and labor organizations . . . to provide for the full and equitable participation of all workers in defense industries,” *id.*, hinted at efforts in the direction of affirmative action but embraced neither those words nor the full concept. For discussion of Roosevelt’s order as a source of modern affirmative action, see James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*, 59 *CHI.-KENT L. REV.* 67, 70-71 (1982).

39. Exec. Order No. 10925, § 202, 3 C.F.R. 448, 449 (1959-1963). For other language creating positive duties to address discrimination see, for example, *id.* preamble, 3 C.F.R. at 448 (“it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts”); *id.* (“a review and analysis of existing Executive orders, practices, and government agency procedures . . . reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity”); *id.* § 103, 3 C.F.R. at 449 (annual reports by Committee on Equal Employment Opportunity “shall include specific references to the actions taken and results achieved by each department and agency”); *id.* § 201, 3 C.F.R. at 449 (Committee shall “consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination”); *id.* § 304, 3 C.F.R. at 451 (“The Committee shall use its best efforts, directly and through contracting agencies, contractors, state and local officials

During most of the 1960s, this vigorous language was not pressed heavily into service. Kennedy's Committee on Equal Employment Opportunity attempted to "jawbone" government contractors into hiring more minority workers,<sup>40</sup> and President Johnson added sex to the list of protected classes in 1967,<sup>41</sup> but muscular implementation postdated the Kennedy-Johnson years.

It bears remembrance that affirmative action was shifted into high gear in the United States by Republican officeholders—President Richard Nixon; his Secretary of Labor George Shultz and Assistant Secretary Arthur Fletcher; and then Labor Solicitor Laurence Silberman.<sup>42</sup> In 1969, Nixon's Labor Department issued its Revised Philadelphia Plan, requiring government contractors in that city to set goals and timetables for hiring minority workers in six construction trades.<sup>43</sup> Contractors who failed to comply risked loss of their valuable contracts. The plan served as a model for imposing affirmative action requirements on other government contractors; subsequent orders also included goals to expand the employment of women.

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and public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting agency or other representative of workers who is or may be engaged in work under Government contracts to cooperate with, and to comply in the implementation of, the purposes of this order."); *id.* § 307, 3 C.F.R. at 452 (contracting agencies must appoint compliance officers).

40. See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 *IOWA L. REV.* 901, 909 (1985).

41. See Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970). Johnson previously had issued an order superseding Kennedy's original order. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965). This order incorporated the substantive parts of Kennedy's order but changed the organizational structure for administering the program. Executive Order 11,246, with the addition of sex as a protected class through Executive Order 11,375, has remained the basis of federal affirmative action programs.

42. Indicative of change over time and experience in perspectives on the legitimacy of affirmative action, Silberman, now a judge on the United States Court of Appeals for the District of Columbia Circuit, recently authored an opinion striking down Federal Communications Commission regulations that required radio stations to take steps aimed at correcting statistical "underrepresentation" of minorities and women on their payrolls. See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

43. See *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971) (upholding constitutionality of plan). For discussion of the plan, its history, and its implications, see, for example, HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 278-97 (1990); Arthur A. Fletcher, *A Personal Footnote in History*, in *THE AFFIRMATIVE ACTION DEBATE* 25 (George E. Curry ed., 1996); Jones, *supra* note 40, at 910-14; Robert P. Schuwerk, *Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 *U. CHI. L. REV.* 723 (1972).

Nixon's decision to require goals and timetables to break away from historic practices, including trade union nepotism, generated controversy.<sup>44</sup> The program survived both public criticism and legal challenges in the 1970s, I believe, for two reasons. First, the plan did not impose rigid quotas on government contractors. Instead, it required contractors to set their own goals by examining the availability of minority workers in the local workforce. Contractors then pledged to make good faith efforts to meet these goals. The plan was government-monitored, but it left considerable discretion to individual employers.<sup>45</sup>

Second, although Nixon's Philadelphia Plan cited no international covenants, it rested on the twin supports of remedial justice and economic equity. Despite the passage of major civil rights legislation governing the private sector in 1964, overt discrimination still marked workplaces in the United States in 1969. More subtle forms of bias, such as old-boy networks and word-of-mouth hiring among white male workers, further restricted the opportunities of women and minorities. The Labor Department used the government's billion dollar purse to combat these inequities.<sup>46</sup>

The Philadelphia Plan was propelled by more than government benevolence. It responded to a crisis in the economic well-being of minority Americans. The 1969 plan followed several years of urban unrest, which a blue ribbon investigatory commission attributed in part to economic deprivation.<sup>47</sup> Arthur Fletcher, the Assistant Secretary of Labor who issued the plan, recalls that President Nixon first directed him to fashion a welfare grant program to address this urban poverty. Fletcher persuaded Nixon to raise the standard of living for minority Americans by expanding job opportunities instead.<sup>48</sup> Nixon himself later observed that the goals and timetables devised by his Labor Department were "necessary and right" because, in his words, "[a] good job is as basic and important a civil right as a good education."<sup>49</sup>

During the 1970s, affirmative action expanded modestly throughout

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44. See, e.g., *Schuerk*, *supra* note 43, at 747-49.

45. See *id.* at 741.

46. See, e.g., *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 173 (3d Cir. 1971); *Fletcher*, *supra* note 43, at 27.

47. See KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91 (1968); *Jones*, *supra* note 40, at 910-11.

48. See *Fletcher*, *supra* note 43, at 25-26.

49. RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 437 (1978).

the United States. Government agencies, universities, and private employers, prompted by executive orders and civil rights laws, adopted a variety of plans. These efforts never lacked concerted opposition, including charges that the very idea is at odds with the Constitution. The United States Constitution, framed at the end of the eighteenth century and amended most relevantly in 1865-1870 regarding race, and in 1920 to enfranchise women, enumerates some civil and political rights. Unlike the Universal Declaration, however, the U.S. Constitution details no economic and social goals. And it does not expressly contemplate affirmative action; it simply gives Congress authority to “enforce . . . by appropriate legislation” the fundamental instrument’s equality guarantee.<sup>50</sup> The constitutionality of affirmative action in the United States, therefore, depends in large measure upon judicial interpretation of the Constitution’s promise of “equal protection of the laws.”<sup>51</sup>

The U.S. Supreme Court first ruled on the constitutionality of a race-based affirmative action plan in 1978, in *Regents of the University of California v. Bakke*.<sup>52</sup> The case produced six opinions from nine Justices, with the views of a single Justice, Lewis F. Powell, Jr., controlling the outcome. Justice Powell disapproved a state-run medical school’s affirmative action program, which set aside about one-sixth of the school’s seats for minority students, but he wrote that public universities could consider race as one factor, among several, when admitting students.

Like the designers of the Philadelphia Plan, Justice Powell resisted fixed quotas. Schools could consider minority race as a factor favoring admission, but could not designate a set number of seats for minority students. Powell was willing to countenance softer forms of affirmative action that “treat[] each applicant as an individual in the admissions process”; in his words, “[t]he applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.”<sup>53</sup> The concern that affirmative action plans not trench heavily on settled expectations has been salient in U.S. affirmative action jurisprudence.

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50. U.S. Const. amend. XIV, § 5; see also *id.* amends. XVIII, §2; XV, §2; XIX.

51. U.S. Const. amend. XIV, § 1.

52. 438 U.S. 265 (1978). An earlier contest, concerning a state law school’s affirmative action program for admissions, was dismissed as moot. See *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

53. 438 U.S. at 318 (opinion of Powell, J., announcing the judgment of the Court).

Thus preferences permissible for hiring have been rejected when laying off workers is the issue; for layoffs, strict seniority systems prevail.<sup>54</sup>

Justice Powell's *Bakke* opinion rejected most of the justifications urged by the government in support of affirmative action. He dismissed entirely the state's remediation rationale, maintaining that a single medical school could not attempt to redress societal discrimination.<sup>55</sup> And he was unpersuaded by the school's claim that affirmative action in medical student admissions would enhance medical service in minority communities.<sup>56</sup>

The sole justification Justice Powell accepted for affirmative action in medical school admissions is in line with a social welfare theme placed in the Universal Declaration of Human Rights. A racially diverse student body, Powell concluded, would enrich the educational experience for all students.<sup>57</sup> The Universal Declaration's prescription, contained in Article 26, states that public education "shall be directed" to "promot[ing] understanding, tolerance and friendship among all nations, racial or religious groups."<sup>58</sup> Affirmative action so directed might break down more barriers than it raises by enabling members of diverse groups to share in the everyday business of living, working, and learning together.<sup>59</sup>

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54. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

55. See 438 U.S. at 309. Powell would have allowed the school to remedy "the disabling effects of identified discrimination" in its own past or practices. *Id.* at 307. The four Justices who would have upheld the challenged set-aside system accepted remediation of societal discrimination as a permissible justification for affirmative action programs. See *id.* at 362-73 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

56. On this claim, Powell concluded that the school had introduced insufficient evidence of need and that more precise inquiries could identify students, both white and nonwhite, interested in serving minority communities. See *id.* at 310-11 (opinion of Powell, J., announcing the judgment of the Court).

57. See *id.* at 312.

58. UDHR, *supra* note 3, art. 26(2). The article identifies two further ends for education: "the full development of the human personality" and "further[ing] the activities of the United Nations for the maintenance of peace." *Id.*

59. Cf. Malcolm Gladwell, *Six Degrees of Lois Weisberg*, *THE NEW YORKER*, January 11, 1999 at 52, 62 ("[W]hat matters in getting ahead is not the quality of your relationships, but the quantity—not how close you are to those you know, but, paradoxically, how many people you know whom you aren't particularly close to. . . . Minority-admissions programs work not because they give black students access to the same superior educational resources as white students, or access to the same rich cultural environment as white students, or any other formal or grandiose vision of engineered equality. They work by giving black students access to the same white students as white students—by allowing them to make acquaintances outside their own social world and so shortening the chain lengths between them and the best jobs.").

The U.S. Supreme Court's next encounter with a constitutional challenge to race-based affirmative action again produced sharp divisions among the Justices, and no opinion to which a majority subscribed. In that 1980 decision, *Fullilove v. Klutznick*,<sup>60</sup> the Court upheld, uneasily, a congressional statute reserving to minority-controlled businesses ten percent of federal funds spent on local public works. Chief Justice Burger's plurality opinion rested on "an amalgam of [Congress's] specifically delegated powers,"<sup>61</sup> including its power to spend public funds for the "general Welfare,"<sup>62</sup> its power to regulate commerce,<sup>63</sup> and its power to "enforce" the Constitution's equal protection clause.<sup>64</sup> In view of that authority, the Court thought it permissible for the National Legislature to target a modest slice of federal funds for minority businesses as a way of compensating for "the present effects of past discrimination."<sup>65</sup>

During the last two decades, however, the Court has become increasingly skeptical of race-based affirmative action practiced or ordered by government actors. A Court majority now exposes such programs to close inspection, which will not be passed absent demonstration of a compelling need for the program and an action plan tightly tied to that need.<sup>66</sup> State and local attempts to remedy "societal discrimination" have not survived Court scrutiny,<sup>67</sup> despite empirical evidence documenting persistent racial discrimination in education, employment, housing, and consumer transactions.<sup>68</sup> The ten percent federal set-asides upheld in the *Fullilove*

60. 448 U.S. 448 (1980).

61. *Id.* at 473.

62. U.S. CONST. art. I, § 8, cl. 1.

63. *Id.* cl. 3.

64. *Id.* amend. XIV, § 5.

65. 448 U.S. at 487. The Court also stressed the government's flexibility in administering the program, including provision for a waiver when compliance with the 10% requirement was not feasible. *Id.* at 468-72, 481-82, 487-89.

66. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

67. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989) (plurality opinion).

68. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273-74 (1995) (Ginsburg, J., dissenting) (citing studies); GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT §§ 4.1-4.3 (1995) (*same*); BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 19-43 (1998). See also Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, §6 (Magazine), at 36 (surveying affirmative action policy and results post-Bakke, concluding that affirmative action has helped bridge the nation's racial gap).

case might fail under the Court's current standard,<sup>69</sup> although the Court itself has specifically reserved decision on that issue.<sup>70</sup> And some lower courts have forecast that today's Court would reject the diversity rationale advanced by Justice Powell in the *Bakke* case.<sup>71</sup>

On the other hand, the Clinton Administration comprehends the Court's dispositions as allowing Congress some leeway to remedy societal discrimination through carefully crafted race-conscious preferences.<sup>72</sup> It was and remains the law that an enterprise, private or public, may be required to act affirmatively to remedy its own proven discrimination.<sup>73</sup> Congress has so far rejected proposals to bar colleges and universities from using affirmative action in admissions policies if they receive federal funds.<sup>74</sup> The Supreme Court, to date, has not revisited Justice Powell's diversity justification for affirmative action in university admissions,<sup>75</sup> and consid-

69. Recent commentary has observed that *Fullilove* represented a high-water mark for tolerance of benign racial classifications, and that the ideal of the "colorblind constitution"—with its attendant hostility to race-conscious regulation—has reemerged in the years since. See T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1971). See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

70. See *Adarand Constructors, Inc.*, 515 U.S. at 235.

71. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 518 U.S. 1033 (1996); *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1570 (D. Colo. 1997) (on remand). But cf. *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., joined by Souter, J., concurring in denial of certiorari) (noting that the Court "reviews judgments, not opinions," and that no "final judgment on a program genuinely in controversy" remained live in the *Hopwood* litigation when the petition for review was denied (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984))).

72. Statement by the Executive Office of the President, *Procurement Reforms: SDB Certification and the Price Evaluation Adjustment Program 2* (June 24, 1998) (on file with the authors). Relying upon this understanding, the Administration has released new guidelines giving minority-owned businesses a small advantage when they bid for government contracts in certain industries. The guidelines target only industries in which minority-owned businesses remain underrepresented. See *Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement*, 63 Fed. Reg. 35,714 (1998).

73. See *United States v. Paradise*, 480 U.S. 149, 185-86 (1987); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 482 (1986) (plurality opinion); *id.* at 483 (Powell, J., concurring in part and concurring in the judgment).

74. In May 1998, for example, the House of Representatives voted down two proposed amendments to the Higher Education Reauthorization Act that would have restricted the use of preferences in federally funded institutions of higher learning. See 144 CONG. REC. H2914, H2917 (daily ed. May 6, 1998).

75. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("although its precise contours are uncertain, a state

erable scholarly research may inform the Court's next encounter with the issue.<sup>76</sup> It is fair to say, in sum, that the channel of constitutionally permissible race-based affirmative action in the United States today is narrow, but not closed.<sup>77</sup>

I move now to the state of things regarding gender-based affirmative action. I would distinguish laws and programs defended as legitimately preferential to or for women from race-based programs in this key respect. Recall that traditional forms of sex discrimination, unlike obviously odious race-based classifications, were once regarded or rationalized as benignly favoring or protecting the second sex—laws that prohibited women from working at night, tending bar, carrying heavy weights, working overtime, for example. Eventually, many women came to see these laws as protecting not women but men's jobs from women's competition.<sup>78</sup> Evaluators of gender-based affirmative action, therefore, must be alert to the difference between measures that genuinely ameliorate the continuing effects of women's historic subordination, and those that perpetuate myths

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interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest"). See also Ronald Dworkin, *Is Affirmative Action Doomed?*, N.Y. REV. OF BOOKS, Nov. 5, 1998, at 56, 60 (educational diversity is a compelling interest); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. L.R.-C.L. REV. 381, 429 (1998) (concluding that diversity rationale satisfies strict scrutiny). But see Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 471-72 (1997) (maintaining that the true purpose of affirmative action is not to achieve diversity but rather to bring more minorities into the nation's institutions).

76. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997); Symposium, *Twenty Years After Bakke: The Law and Science of Affirmative Action in Higher Education*, 59 Ohio St. L.J. 663 (1998).

77. See also Steven A. Holmes, *Administration Cuts Affirmative Action While Defending It*, N.Y. TIMES, Mar. 16, 1998, at A17 (noting that Clinton Administration has ended or modified some affirmative action programs, while defending the constitutionality of others).

This lecture trains on constitutional challenges to government-run affirmative action programs. The Court has been more tolerant of voluntary affirmative action programs instituted by private parties, although here too the Court scrutinizes programs closely for compliance with statutory bars on discrimination. See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (upholding voluntary race-based program); see also *Johnson v. Transportation Agency*, 480 U.S. 616, 640-42 (1987) (upholding gender-based program instituted by public agency; claim litigated under Title VII rather than the Constitution).

78. See, e.g., Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 454-55 (1978).

or stereotypes inhibiting women's achievement of their full human potential.

I continue to view with suspicion endeavors to bundle the U.S. Supreme Court's equal protection decisions into neat packages under the headings "strict scrutiny," "intermediate" inspection, relaxed or "rational relationship" review. Nevertheless, I think it is accurate to describe the Supreme Court's current approach to gender-based classifications as more flexible than its current approach to racial classifications. Under the formulation now favored, gender-based linedrawing by lawmakers will fail unless the state advances "an 'exceedingly persuasive justification,'"<sup>79</sup> and does not rely on "generalizations about [to borrow the title of a Mozart opera, *Così fan tutti*] 'the way women are.'"<sup>80</sup> Ironically, the less rigid standard for sex classifications has led some decision makers to conclude that efforts to assist women through affirmative action are less vulnerable to constitutional attack than efforts to aid historically disadvantaged racial minorities.<sup>81</sup> That, I think, is a most troublesome notion.

In gender cases, the Supreme Court's footing was at first insecure. In *Kahn v. Shevin*,<sup>82</sup> a 1974 case I argued from the advocate's side of the Supreme Court's bench and lost, the Court accepted as a permissible preference a nineteenth century Florida law granting widows a slender real property tax exemption. The State of Florida gave widows that small dispensation along with the blind and the totally disabled. The Court upheld the exemption as a fair means of compensating widows for the disadvantages they faced in the marketplace. In my view, the Court overlooked the provision's roots in women's role as subservient spouse. The Court regarded the law as redressing, albeit in minute measure, workplace discrimination against women. But if that were in fact the design, then why, a careful examiner might ask, didn't the exemption apply to divorced women or single heads of households—the very women who might have suffered most from a lifetime of workplace discrimination?<sup>83</sup>

79. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

80. *Id.* at 550.

81. For an instance in which a federal appellate court upheld a city's preference for women-owned businesses but not for minority-owned businesses, see *Associated Gen. Contractors v. City of San Francisco*, 813 F.2d 922, 931-32, 941-42, 944 (9th Cir. 1987).

82. 416 U.S. 351 (1974).

83. See Ginsburg, *supra* note 21, at 816-17. The Court missed the mark again in *Schlesinger*

The following year, however, the Court emphasized that compensatory rationales for sex-based differentials would not be accepted as a matter of course. In 1975, and again in 1977, the Court struck down gender distinctions in social security laws, lump classifications based on breadwinning male/dependent female stereotypes.<sup>84</sup> In these cases, the Court required the Legislature to accord childcare benefits to widowed fathers as well as widowed mothers, and held that female wage earners must be accorded the same social insurance for their families as male workers received. Then in 1977, a year before the *Bakke* decision on race-based affirmative action, the Court upheld a preferential measure plausibly justified as slightly ameliorating the workplace discrimination women experienced.

In *Califano v. Webster*,<sup>85</sup> the Court rejected a male worker's challenge to a social security provision that, for benefit calculation purposes, allowed women to exclude more low-earning years than men could exclude. The Court's opinion upholding the provision referred generally to a need "to remedy discrimination against women in the job market"<sup>86</sup> and "to compensate for particular economic disabilities suffered by women."<sup>87</sup> In

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v. *Ballard*, 419 U.S. 498 (1975), when it upheld a Navy regulation that placed male officers under a strict "up or out" promotion system, but allowed women a longer time before mandatory discharge for failure to advance. Although the Court viewed the differential as compensating women for disadvantages they faced, the regulation's effect was not so clear. In many cases, the regulation operated to women's disadvantage by denying female officers who resigned from service severance pay that male officers could obtain. The regulation, moreover, did nothing to alter the web of rules favoring the advancement of men over women in the military. See Ginsburg, *supra* note 21, at 817-18.

Just last year, the Court confronted a once-pervasive gender-based categorization. The case, *Miller v. Albright*, 118 S. Ct. 1428 (1998), involved a claim to U.S. citizenship pursued by the daughter of a male U.S. citizen. The complainant contended that restrictions on U.S. citizen fathers' ability to pass their citizenship to their children, not applicable to U.S. citizen mothers, violated equal protection. Although the Court denied the daughter relief, five Justices recognized that the statute in question was based on overbroad, and therefore unconstitutional, generalizations about the relationship mothers and fathers bear to their children. See *id.* at 1445-46 (O'Connor, J., joined by Kennedy, J., concurring in judgment); 1449-50 (Ginsburg, J., joined by Souter, J., and Breyer, J., dissenting); 1460-63 (Breyer J., joined by Souter, J., and Ginsburg, J., dissenting).

84. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-39 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977). These decisions followed a path earlier marked in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

85. 430 U.S. 313 (1977).

86. *Id.* at 319.

87. *Id.* at 320.

short, in this relatively noncontroversial gender-classification case, the Court endorsed a societal discrimination rationale resembling the remedial justification it was not willing to embrace, the next year, in the more divisive setting of race and medical school admissions.<sup>88</sup>

In harmony with the Universal Declaration, one can find in U.S. affirmative action rulings both a social welfare strain and a remediation of historic discrimination theme. It is safe to say the governing law is still evolving and variously interpreted.

My account would be inadequate, however, if I did not at least mention the reaction to affirmative action in the U.S. in the media, in lower courts, and on political hustings. Last spring, for example, a *Washington Post* columnist described the case of a white applicant to the University of Washington Law School turned down, the complaint alleged, because of her color, although she had overcome poverty and worked at low-wage jobs throughout her education.<sup>89</sup> This past November, Washington followed California as the second state to curtail by popular initiative state-supported affirmative action measures.<sup>90</sup> Due to a federal appellate court

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88. Cf. Ginsburg, *supra* note 21, at 823-24 (suggesting that *Califano v. Webster* might have informed the Court's *Bakke* decision).

The Court has also recognized that legislatures may take into account women's unique childbearing capacity, but only when the legislative distinction furthers women's employment opportunities. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289-90 (1987) (upholding California statute that required employers to provide leave and reinstatement to employees disabled by pregnancy but extended no similar protection to workers suffering from other disabilities; statute was held consistent with Title VII's prohibitions against employment discrimination based on sex, pregnancy, or childbirth); cf. *Case C-394/96, Brown v. Rentokil Ltd.*, 1998 E.C.R. I-4185 (1998) (European Union equal treatment directive precludes dismissal of female workers throughout their pregnancy for absences due to pregnancy-related illness). Protective actions that limit women's workplace participation violate federal prohibitions against sex discrimination. *International Union, United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991); see also *supra* note 29 and accompanying text.

89. See Nat Hentoff, 'The Cost of Checking 'White,' WASH. POST, May 9, 1998, at A15; see also Laura L. Hirschfeld, Colleges Try to Explain Why Top Grades, Test Scores Don't Matter, DET. NEWS, April 26, 1998, at 5B (affirmative action permits "universities . . . to discriminate against individual white males en masse"). More generally, affirmative action has become a lightning rod for broader issues of social policy and relations between the races. See, e.g., Michael Kinsley, The Spoils of Victimhood, THE NEW YORKER, March 27, 1995, at 62, 69 ("Affirmative action has become a scapegoat for the anxieties of the white middle class" even though its "actual role . . . in denying opportunities to white people is small compared with its role in the public imagination and the public debate.").

90. See Sam Howe Verhovek, From Same-Sex Marriages to Gambling, Voters Speak, N.Y. Times, Nov. 5, 1998, at B1, B10.

ruling controlling in Texas and the California ballot initiative, two of our top universities have been required to end race-based preferences and, instead, admit students on a colorblind basis.<sup>91</sup> And the Court of Appeals for the First Circuit recently decided that racial preferences are impermissible in public high school admissions as well.<sup>92</sup> These decisions and their immediate impact have caused even some long-time opponents of affirmative action to reconsider their opposition.<sup>93</sup> The reaction has also

91. See *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir.), cert. denied, 518 U.S. 1033 (1996); California Proposition 209, codified as Cal. Const. art. 1, § 31; cf. *Podberesky v. Kirwan*, 38 F.3d 147, 161-62 (4th Cir. 1994) (invalidating the University of Maryland's Banneker scholarship program for African American students).

92. See *Weissman v. Gittens*, 160 F. 3d 790 (1st Cir. 1998); see also *Latin Lesson*, *The New Republic*, Dec. 14, 1998, at 7, 8 (concluding that the Weissman decision demonstrates "just how flimsy" Bakke's diversity rationale has become).

93. See, e.g., Nathan Glazer, *In Defense of Preference*, *NEW REPUBLIC*, Apr. 6, 1998, at 18. In 1997, the entering class at the University of Texas's law school included only four African Americans and twenty-six Mexican Americans. The previous year, when the school considered race as a "plus" factor in admissions, thirty-one African Americans and forty-two Mexican Americans enrolled. See Janet Elliott, *Hopwood Appeal Focuses on Future Without Racial Preferences*, *TEX. LAW.*, May 25, 1998, at 8. The University of California at Berkeley enrolled just one African American law student in 1997, although revised admissions standards somewhat increased offers to African American and Latino law students for 1998. See John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, *AM. LAW.*, Nov. 1997, at 4; Jenna Ward, *Boalt Boosts Minority Enrollment by Downplaying Grades, Scores*, *Nat'l L.J.*, May 18, 1998, at A16. Sharp declines marked undergraduate minority admissions at Berkeley's campus in the spring of 1998, the first year that the college implemented colorblind admissions. See Frank Bruni, *Blacks at Berkeley Are Offering No Welcome Mat*, *N.Y. TIMES*, May 2, 1998, at A1.

Although these declines are dramatic, they remain a phenomenon of elite universities. Less selective campuses of the University of California experienced smaller declines in minority admissions last year—or even some increase. *Id.* at A8. A nationwide study of college admissions suggests that race-based affirmative action affects admission decisions only at the selective schools attended by one-fifth of all students. "[A]t the less exclusive institutions that 80 percent of 4-year college students attend, race plays little if any role in admissions decisions." Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 *Ohio St. L.J.* 971, 972 (1998).

The elimination of preferences has also spurred lawmakers and educators to consider other strategies to promote diversity in the student body. Under Texas's recently adopted "10 percent plan," students in the top 10 percent of their high school class are automatically admitted to the state's most selective public colleges, irrespective of their S.A.T. scores. One result has been an increase in the number of qualified minority students accepted to these schools. The policy has also increased opportunity for white high school graduates from parts of rural Texas, whose performance on standardized tests also lags. See Lani Guinier, *An Equal Chance*, *N. Y. TIMES*, April 23, 1998, at A25. In the same vein, the incoming governor of California has proposed to guarantee students in the top four percent of their high school class

prompted empirical studies reporting the effects of affirmative action in both classrooms and workplaces.<sup>94</sup> What we are witnessing now, in conclusion, may show the sagacity of the comment that the true symbol of the United States is not the bald eagle, but the pendulum.

### III. INDIA

For comparative sideglances, I turn first to India's affirmative action in regard to disfavored castes, a set of initiatives both older and more extensive than any program ventured in the United States. In view of time constraints, I will mention only the caste-based programs, although India is also engaged in endeavors to elevate the status and welfare of women.<sup>95</sup>

India boldly announced a commitment to affirmative action in its 1950 Constitution, which reserves seats for members of India's lowest social castes in both the House of the People and the state legislative assemblies.<sup>96</sup> The constitution also permits the government to "reserv[e]" public "ap-

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a place in the University of California system. See *In Search of the Golden Mean*, *THE ECONOMIST*, Jan. 9, 1999 at 27, 28. Educational institutions unable to rely on racial preferences might also attempt to assure racial diversity by race-neutral means such as geographical or socioeconomic preferences. See Kathleen M. Sullivan, *After Affirmative Action*, 59 *OHIO ST. L.J.* 1039 (1998) (arguing that such race-neutral preferences should be held constitutionally permissible); see also Samuel Issacharoff, *Can Affirmative Action Be Defended*, 59 *OHIO ST. L.J.* 669 (1998) (concluding that modest affirmative action efforts are indispensable to the mission of U. S higher education).

94. See, e.g., *BOWEN & BOK*, *supra* note 76; *RESKIN*, *supra* note 68; Maureen Hallinan, *Diversity Effects on Student Outcomes: Social Scientific Evidence*, 59 *OHIO ST. L.J.* 733 (1998).

95. I note, however, that India's constitution, like the Universal Declaration, is ambiguous with respect to gender-based programs. Article 15 of India's constitution, which bans discrimination based on sex and other grounds, declares that: "Nothing in this article shall prevent the State from making any special provision for women and children." *INDIA CONST.* art. 15(3); see also *id.* art. 42 (nonjusticiable provision instructing state to "make provision for securing just and humane conditions of work and for maternity relief"). Indian courts have invoked Article 15 to uphold some affirmative action measures benefiting women. See, e.g., *Dattatraya v. State of Bombay*, 1953 A.I.R. 40 (Bom.) 311 (approving reservation of seats for women on elected municipal council). Legislators basing programs on India's constitutional language may of course endeavor to "provi[de] for women and children" in a way that furthers India's constitutional commitment to equality. See, e.g., *INDIA CONST.* art. 39 (nonjusticiable provision advising state to "direct its policy towards securing—(a) that the citizen, men and women equally, have the right to an adequate means of livelihood; . . . [and] (d) that there is equal pay for equal work for both men and women").

96. See *INDIA CONST.* art. 330; *id.* art. 332. The constitution reserves these seats for members of "Scheduled Castes" and "Scheduled Tribes." The "Scheduled Castes" are India's untouch-

pointments or posts” for members of “any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”<sup>97</sup> This permission expressly qualifies a clause otherwise prohibiting discrimination in government employment.<sup>98</sup>

Furthermore, India’s constitution imposes a duty on the state to “promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the [most disadvantaged castes].”<sup>99</sup> Although this language appears in a portion of the constitution that is not judicially enforceable, it enunciates a positive governmental responsibility to assist disadvantaged classes. India’s constitution thus unambiguously authorizes affirmative action and affirmatively encourages it.

Indeed, a desire to ensure the legitimacy of affirmative action prompted the first amendment to India’s Constitution in 1951. In April that year, the Supreme Court of India struck down a “reservation” or quota for students from disadvantaged classes at a state-run medical school, noting

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ables, citizens at the bottom of the traditional Hindu class system. See Marc Galanter, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 122 (1984). The “Scheduled Tribes” are “groups distinguished by ‘tribal characteristics’ and by their spatial and cultural isolation from the bulk of the population.” *Id.* at 147. Members of scheduled castes make up about 15.8% of India’s population, while the scheduled tribes constitute about 7.8%. See E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 *CASE W. RES. J. INT’L L.* 63, 67 nn.18-19 (1996).

97. *INDIA CONST.* art. 16(4). A 1995 amendment added a similar proviso for promotions within the public service, although the latter protection applies only to members of “the Scheduled Castes and the Scheduled Tribes.” *Id.* art. 16(4A).

The category “backward classes” in Article 16(4), as well as in the articles mentioned below, includes the scheduled castes, the scheduled tribes, and other castes suffering from disadvantage. As decisions of the Indian Supreme Court show, the proper definition of “backward classes” under these constitutional provisions is not self-evident. See, e.g., *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649 (caste may constitute one criterion for determining backwardness, but the state must look to other factors as well); *Chitralokha v. State of Mysore*, A.I.R. 1964 S.C. 1823 (consideration of caste in determining backwardness is permissible but not mandatory); *P. Rajendran v. State of Madras*, A.I.R. 1968 S.C. 1012 (state may determine that entire caste is backward and then use caste to designate backwardness); *Vasanth Kumar v. State of Karnataka*, A.I.R. 1985 S.C. 1495 (affirming use of caste as unit for identifying backward classes); *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (stating standards to determine backwardness).

98. See *INDIA CONST.* art.16(2); see also *id.* art. 16(1) (guaranteeing “equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”).

99. *Id.* art. 46. The final portion of the article directs special attention to the “Scheduled Castes and the Scheduled Tribes,” but the initial clause appears to include other “weaker sections of the people” as well. *Id.*

that the constitution allowed such reservations only in allocating legislative seats or government employment.<sup>100</sup> Within two months, India altered its constitution to permit affirmative action in education and other contexts. Article 15(4) now expressly provides that “[n]othing in [the constitution’s anti-discrimination articles] shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens.”<sup>101</sup>

Some of India’s states have maintained affirmative action or “reservation” programs at least since the nation’s independence.<sup>102</sup> These programs reserve public university seats or government positions for members of India’s disadvantaged castes.<sup>103</sup> In a series of decisions dating back to 1963, India’s Supreme Court has upheld the core constitutionality of these programs, although the court has imposed some constraints on their administration. Notably, the court placed a 50 percent ceiling on the number of positions that can be reserved for disadvantaged citizens.<sup>104</sup> A limit so high may appear startling to observers from legal systems more skeptical of affirmative action.

Since 1970, India’s affirmative action programs have expanded in both geographic scope (more states have adopted programs) and magnitude (more classes have been catalogued as disadvantaged). The central government was slower than some states to support preferences.<sup>105</sup> In 1990,

100. See *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226.

101. INDIA CONST. art. 15(4). Paralleling other constitutional references to the most disadvantaged castes, the provision adds: “or for the Scheduled Castes and the Scheduled Tribes.” *Id.*

102. Some of the programs continue systems imposed under British rule, which heightens the controversy surrounding them. See *Prior*, *supra* note 96, at 72-73.

103. See, e.g., *Galanter*, *supra* note 96, at 87; SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* 159-64 (1997).

104. See *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649; see also *Devadasan v. Union of India*, A.I.R. 1964 S.C. 179 (limiting carry forward of unfilled reserved positions); *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (affirming 50% rule). For other Indian Supreme Court decisions during the 1960s and 1970s, see cases cited *supra* note 97; *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490 (state could give members of the scheduled castes or scheduled tribes a two-year grace period to pass promotion exam; constitution permits means other than reservations to advance the interests of backward classes).

105. The central government appointed its first Backward Classes Commission in 1953 and received that Commission’s report two years later. Parliament, however, rejected the report and the Commission’s recommendations were never implemented. See *Prior*, *supra* note 96, at 80-81. The government did not appoint a second commission until 1978, when the commission led by B.P. Mandal began work. The Mandal Commission submitted its report and

however, Prime Minister V.P. Singh announced that he would carry out the expansive recommendations of the ten-year-old Mandal Commission Report.<sup>106</sup> Three years later, India's Supreme Court upheld the constitutionality of most of those recommendations and the central government began to implement them.<sup>107</sup>

Affirmative action (sometimes called "compensatory discrimination") has provoked its share of controversy, including violent resistance, in India. A 1968 survey showed that high caste and highly educated citizens strongly opposed reservations in government employment.<sup>108</sup> In 1990, when Prime Minister Singh first announced implementation of the Mandal Commission Report, riots erupted across India, and the protests contributed to the fall of Singh's government.<sup>109</sup> More isolated episodes of violence occurred after India's Supreme Court, in 1993, upheld the constitutionality of the Commission's approach.<sup>110</sup> The judicial ruling, however, may have tempered opposition to some degree.<sup>111</sup>

Few citizens of India deny either a long history of overt discrimination against disfavored castes or the persistence of deep-seated bias against those groups. Perhaps that public recognition explains, in part, why "reservations" beyond any set-asides tolerable in the United States have survived in India. A 1964 opinion of the Mysore High Court stated the case this way:

"[T]here can be neither stability nor real progress if predominant sections of an awakened Nation live in primitive conditions, confined to unremunerative occupations and having no share in the good things of life, while power and wealth [are] confined in the hands of only a few . . . . [The] Nation's interest will be best served—taking a long range view—if the backward classes are helped to march forward and take their place in a line with the advanced sections of the people."<sup>112</sup>

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recommendations at the end of 1980. For a decade, nothing was done to implement them. *Id.* at 69, 81-86.

106. See *id.* at 63-69.

107. See *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477; *Prior*, *supra* note 96, at 70, 90-94.

108. See *GALANTER*, *supra* note 96, at 76.

109. See *Prior*, *supra* note 96, at 63-66, 69.

110. See *id.* at 69-70.

111. See *PARIKH*, *supra* note 103, at 190.

112. *D.G. Viswanath v. Government of Mysore*, 1964 A.I.R. 51 (Mys.) 132, 136.

#### IV. EUROPEAN UNION

Positive action in the European Union is less complex than in India, where thousands of castes or classes qualify as “backward.” The quest for equality within the Union has centered on nationality and on the status of men and women,<sup>113</sup> although the Amsterdam Treaty will permit the Union to address other forms of discrimination as well, including discrimination based on race, religion, disability, age, and sexual orientation.<sup>114</sup>

Affirmative action or “positive discrimination” has so far come before the European Court of Justice only in the context of equal treatment for men and women. At the Community’s 1957 birth, the Treaty of Rome required equal pay for male and female workers for work of equal value.<sup>115</sup> This rather early commitment to equal wages did not stem from a lofty desire to promote sex equality and human rights. Instead, the treaty provision reflected a more prosaic concern, the fear that cheap female labor in some countries would undercut the price of goods in other nations.<sup>116</sup> But the equality principle, rudimentary as it was at the start, had growth potential.

In 1976, the European Union’s Council issued a directive designed to promote “the principle of equal treatment for men and women as regards access to employment, including promotion.”<sup>117</sup> Article Two of the direc-

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113. See Treaty Establishing the European Community, effective Nov. 1, 1993, art. 6, 4 EUR. UNION L. REP. (OCH) ¶ 25,400, at 10,221-4 (prohibiting “any discrimination on grounds of nationality”); *id.* art. 48(2) (prohibiting nationality discrimination in “employment, remuneration and other conditions of work and employment”); *id.* art. 119 (requiring “equal pay for equal work” by men and women); see also Treaty on European Union, Feb. 7, 1992, art. F(2), 4 EUR. UNION L. REP. (OCH) ¶ 25,300, at 10,056 (requiring “respect [for] fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”).

114. Treaty of Amsterdam, Oct. 2, 1997, art. 2(7), 4 EUR. UNION L. REP. (OCH) ¶ 25,500, at 10,517 (inserting Article 6A, to be renumbered as Article 14) (empowering the Union’s “Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament,” to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”).

115. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 119, 298 U.N.T.S. 11, 62.

116. See Kent Källström, Article 23, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 357, 370 (Asbjørn Eide et al. eds., 1992).

117. Council Directive No. 76/207, art.1(1), 1976 O.J. (L 39) 40. The directive also governs vocational training and working conditions.

tive instructs that “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex.”<sup>118</sup> Shortly after that nondiscrimination prescription, however, Article Two adds: “This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities . . . .”<sup>119</sup>

Reconciling this caveat with the more general prohibition against discrimination is the daunting challenge. The European Court of Justice has twice dealt with the matter. In its first encounter, in 1995, the Court rejected a German (Bremen) local law designed to help women gain civil service appointments and promotions.<sup>120</sup> Bremen, one of the German *länder*, had adopted a measure making gender a tie-breaker for some positions. If women constituted less than half the employees in the salary bracket to which the appointment or promotion was sought, and if a man and woman with equal qualifications pursued the position, the Bremen prescription required selection of the woman.

A male worker who lost out on a promotion challenged the local law as incompatible with the EU equal treatment directive, and the German labor court referred the question to the European Court of Justice. That court held the local law incompatible with the EU directive. “National rules which guarantee women absolute and unconditional priority for appointment or promotion,” the Court instructed, “go beyond promoting equal opportunities.”<sup>121</sup> Following the lead of the Advocate General, the court condemned the Bremen prescription because it sought to achieve “equal representation” rather than the “equality of opportunity” contemplated by the equal treatment directive.<sup>122</sup>

Some two years later, in 1997, the Court of Justice took a second look. In *Marschall v. Land Nordrhein-Westfalen*,<sup>123</sup> the Court took up, on reference from a German administrative court, another local law making gender the tie-breaker in civil service promotions. This time, however, the local provision permitted a male applicant to prevail, despite the tie-

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118. *Id.* art. 2(1).

119. *Id.* art. 2(4).

120. See Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051 (1995).

121. *Id.* at I-3078.

122. *Id.* For discussion of *Kalanke*, see Dagnar Schiek, *Positive Action in Community Law*, 25 *INDUS. L.J.* 239 (1996).

123. Case C-409/95, [1998] 1 C.M.L.R. 547 (1997).

breaker, if “reasons specific to [his situation] tilt[ed] the balance in his favour.”<sup>124</sup> The European Court of Justice, *against* the recommendation of the Advocate General, held that this clause saved the preference.<sup>125</sup>

The judgment in the *Marschall* case bears more than a little kinship to Justice Powell’s controlling opinion in the *Bakke* case. Both opinions stress the need for individualized decision making and the infirmity of automatic preferences. Under *Bakke* and *Marschall*, race and sex may constitute plus factors favoring employment, promotion, or admission to an educational institution, but the preference may not be absolute and unyielding.

The decision in *Marschall* is perhaps most notable for its sensitivity to sometimes unconscious bias. “[T]hat a male candidate and a female candidate are equally qualified does not mean that they have the same chances,” the Court of Justice observed.<sup>126</sup> Traditional habits of thought may lead to the selection of males in preference to females, because employers fear women will be distracted from their work by “household and family duties,” the European Court said.<sup>127</sup> In other words, a tie-breaker preference for women may do no more than ensure actual adherence to the nondiscrimination principle. Without such positive action by government, unconscious or half-conscious discrimination might continue unchecked.<sup>128</sup>

124. *Id.* at 566 (quoting the Land Nordrhein-Westfalen law).

125. See *id.* at 570–71.

126. *Id.* at 570.

127. *Id.*

128. See *id.* at 566, 569–70. I noted the existence of unconscious bias in a 1978 comment and suggested as illustrative a case in which white male managers decided on promotions under a “total person concept.” Ginsburg, *supra* note 21, at 825 (citing *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973)). The results were predictable: “White men . . . consistently chose white men for the job or promotion.” Unconscious bias has not yet vanished from the scene. See Nicholas deB. Katzenbach and Burke Marshall, *Not Color Blind: Just Blind*, *N. Y. Times*, Feb. 22, 1998, §6 (Magazine), at 42, 44 (“The natural inclination of predominantly white male middle managers is to hire and promote one of their own. Most of the time the decision honestly reflects their judgment as to the best candidate without conscious appreciation of how much that judgment may have been conditioned by experience in the largely segregated society we still live in. To hire or promote an African-American is often viewed as risky.”); RESKIN, *supra* note 68, at 24–25 (“[D]iscrimination is not simply the result of deliberate attempts to discriminate”; often organizations discriminate “simply by doing business as usual.”); cf. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 *COLUM. L. REV.* 199 (1997) (discussing possible presence of unconscious bias in law faculty hiring as well as role of affirmative action in overcoming that bias).

In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a case decided under Title VII of

The approach most recently taken by the Court of Justice runs little risk of confusing preferences designed to aid women with paternalism effective to constrain them. With fidelity to the 1976 directive on equal treatment, the *Marschall* judgment trains carefully on the EU's undertaking to "promote equal opportunity . . . by removing existing inequalities which affect women's opportunities."<sup>129</sup>

While debate continues over the *efficacy* of affirmative action in the form of preferences, the *legitimacy* of affirmative action has been confirmed in the 1997 Treaty of Amsterdam. Article 119, a bare equal pay

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the Civil Rights Act, the United States Supreme Court upheld a county affirmative action plan that allowed supervisors to consider sex as one factor in promoting employees to positions in which women were significantly underrepresented. The county had adopted the plan, in part, because it believed that "the selection and appointment processes are areas where hidden discrimination frequently occurs." *Id.* at 653 (O'Connor, J., concurring in the judgment) (quoting the county's plan). Indeed, the job history of the woman who secured a promotion with the plan's help confirms that she might have suffered from "hidden discrimination" absent a conscious commitment to affirmative action. *Id.* at 624 n.5 (opinion of the Court) (recounting that one of three panel members who rated applicants for the promotion had earlier refused to issue the female applicant coveralls given to male workers on the same job, while another panel member had referred to the female applicant as "a 'rebel-rousing, skirt-wearing person'"). The Court did not focus as explicitly as the European Court of Justice did on this rationale for affirmative action measures, but Johnson strikes some of the same chords as *Marschall*. See *Johnson*, 480 U.S. at 641 n.17 ("Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.") (quoting Brief for the American Society for Personnel Administration as Amicus Curiae)

129. Council Directive, *supra* note 117, art. 2(4). The Union has been equally sensitive to some instances of pregnancy discrimination. See, e.g., Council Directive 92/85, art. 10, 1992 O.J. (L 348) (prohibiting dismissal of workers from beginning of pregnancy through end of maternity leave). In *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, 1990 E.C.R. I-3941 (1990), the Court of Justice recognized that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex." *Id.* at I-3973. Just last summer, the same court ruled that the EU's equal treatment directive precludes dismissal of workers for absences stemming from pregnancy-related illnesses. *Brown v. Rentokil, Ltd.*, 1998 E.C.R. I-4185 (1998). The court again stressed that pregnancy affects only women, so that such dismissals constitute sex discrimination.

The U.S. Supreme Court did not reason as clearly when it confronted similar questions during the 1970s. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976) (disability plan excluding pregnancy-related disabilities does not violate Title VII's prohibition against sex discrimination); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (similar plan does not violate constitutional guarantee of equal protection); *id.* at 496 n.20 ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons.").

provision in the 1957 Rome Treaty, now includes a commitment to “ensuring full equality *in practice* between men and women in working life.”<sup>130</sup> The amended article further provides that “the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”<sup>131</sup> Antidiscrimination laws in the United States contain no similarly explicit provision.

## V. CONCLUSION

Time and the limits of my own information counsel me to attempt no further comparative sideglances. I will add just a few closing remarks.

Affirmative action sends both inspiring and disturbing messages.<sup>132</sup> It has potential, I have tried to emphasize, both to redress deprivations of equality as a civil right, and to promote economic and social well-being. But it also and inevitably generates opposition as an unfair turn of the tables, reverse discrimination against individuals not responsible for society’s past discrimination.

Experience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives. India’s Supreme Court, for example, has considered United States precedents when judging the constitutionality of affirmative action measures.<sup>133</sup> Defenders of Germany’s tie-breaker preferences invoked several international covenants before the European Court of Justice.<sup>134</sup>

130. Treaty of Amsterdam, Oct. 2, 1997, art. 2(22), 4 EUR. UNION L. REP. (CCH) ¶ 25,500, at 10,527 (amending Article 119 of the EC Treaty) (emphasis added). The provision will become Article 141 in the consolidated treaty. *Id.* at 10,568; see also *id.* art. 2(2), 4 EUR. UNION L. REP. (CCH) at 10,515 (amending Article 2 of the EC Treaty) (“The Community shall . . . promote . . . equality between men and women.”); *id.* art. 2(3), 4 EUR. UNION L. REP. (CCH) at 10,516 (amending Article 3 of the EC Treaty) (“In all the activities referred to in this article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.”).

131. *Id.* art. 2(22), 4 EUR. UNION L. REP. (CCH) at 10,527 (amending Article 119 of the EC Treaty) (to become Article 141 in the new consolidated treaty).

132. See Robert Gordon, *What It Does and What It Says: Equity, Expressive Harm, and Race-Based Affirmative Action* 50 (unpublished manuscript, on file with the authors).

133. See, e.g., *Indira Sawhney v. Union of India*, A.I.R. 1993 S.C. 477, 529–36.

134. See Case C-409/95, *Marschall v. Land Nordrhein-Westfalen*, [1998] 1 C.M.L.R. 547, 564–65 (1997) (opinion of Advocate General Jacobs).

Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that “affirmative action seems to be [in] a state of crisis in its country of origin.”<sup>135</sup>

The same readiness to look beyond one’s own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision.<sup>136</sup> The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall.<sup>137</sup> Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented,<sup>138</sup> the majority responded: “We think such comparative analysis inappropriate to the task of interpreting a constitution.”<sup>139</sup>

In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

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135. Case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesouro); see also Gabriel A. Moens, *Equal Opportunities Not Equal Results: “Equal Opportunity” in European Law After Kalanke* [sic], 23 *J. Legis.* 43, 55 (1997) (asking “Is the Rehnquist Court to ‘Blame’ for Kalanke [sic]?”).

136. See *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting); *Zemel v. Rusk*, 381 U.S. 1, 14 n.13 (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963); *International Ass’n of Machinists v. Street*, 367 U.S. 740, 776–77 (1961) (Douglas, J., concurring); *American Fed’n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring). Although the Declaration was adopted simply as a resolution of the United Nations General Assembly, and is not binding law, courts in other nations have recognized its importance as a fundamental statement of human rights. See UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, *THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995*, at 27 (1995).

137. See *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting).

138. See *Printz v. United States*, 117 S. Ct. 2365, 2404–05 (1997) (Breyer, J., dissenting).

139. *Id.* at 2377 n.11 (majority opinion).

# Report and Recommendations on Second Circuit Certifica- tion of Determinative State Law Issues to the New York Court of Appeals

*The Council on Judicial Administration  
and the Committee on Federal Courts*

**T**he certification procedure “allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.” *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1073 (1997). Forty-three states, the District of Columbia and Puerto Rico have adopted certification procedures.<sup>1</sup> New York State established a certification procedure by a constitutional amendment adopted in the November 5, 1985 general elections. The constitutional amendment provides:

The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New

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1. Schneider, “But Answer Came There None”: The Michigan Supreme Court and The Certified Question of State Law, 41 Wayne L. Rev. 273, 275-277 (Winter 1995).

York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

N.Y. Const. art. VI, §3(b)(9). The procedure for certifying a question of law to the New York Court of Appeals is governed in the certifying court by Second Circuit Rule 0.27 (“Certification of Questions of State Law”) and in the answering court by New York Court of Appeals Rule 500.17 (“Discretionary Proceedings to Review Certified Questions from Federal Courts and Other Courts of Last Resort”).

Certification is discretionary for both the Second Circuit and the New York Court of Appeals. The Second Circuit, *sua sponte* or on motion of a party, “may certify” to the New York Court of Appeals “an unsettled and significant question of state law that will control the outcome of a case” pending before the Second Circuit. 2d Cir. R. 0.27. New York Court of Appeals Rule 500.17 provides that, “[w]henver it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive question of law to the [New York] Court of Appeals.” N.Y. Ct. App. R. 500.17(a). The New York Court of Appeals “on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits.” N.Y. Ct. App. R. 500.17(d). By confining certification to the appellate level, the Second Circuit rule controls the absolute number of questions certified to the New York Court of Appeals and assures that the questions are presented on a fully developed factual record.

There has been considerable debate about the relative merits of certification, with proponents arguing for more frequent certification while critics have emphasized the procedure’s limits. The United States Supreme Court has encouraged the use of certification, which “in the long run save[s] time, energy, and resources and help[s] build a cooperative judicial federalism.” *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). Although the Second Circuit has acknowledged that certification is a “valuable device for cooperation among the federal and states courts” and “for secur-

ing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit," *Kidney v. Kolmar Laboratories, Inc.*, 808 F.2d 955, 956-57 (2d Cir. 1987),<sup>2</sup> the procedure was infrequently used in New York before 1993. See *McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting) ("[I]n 1992, [the Second Circuit] had certified only five issues over the preceding six-year period.").

In the past five years, the Second Circuit has certified state law questions to the New York Court of Appeals with increasing frequency. Unsettled state law questions in twenty-two cases were certified by the Second Circuit to the New York Court of Appeals from 1993 through December 1, 1998.<sup>3</sup> In the eleven months preceding December 1, 1998, the Second Circuit used New York's certification procedure in eight cases, reflecting an apparent willingness on the Court's part to certify more frequently. The time required for Second Circuit certification to the New York Court of Appeals during 1993-1998 ranged from two to thirteen months.

There are no written guidelines specifying when certification may be appropriate. Analysis of the Second Circuit and New York Court of Appeals decisions addressing the issue suggests that certification of outcome-determinative state law questions is proper in the following circumstances:

- I. The New York Court of Appeals has not yet spoken on an issue and the State's intermediate appellate courts have reached conflicting results.
- II. The New York Court of Appeals has cast doubt on the scope or continued validity of an earlier decision by the Court.
- III. The certified issue is important, has broad general significance, and is likely to recur with some frequency.
- IV. The certified issue directly implicates a strong public policy interest of New York.
- V. The certified issue involves the constitutionality, construction or novel application of a New York statute.

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2. *Kidney* represented "the inaugural use" of Second Circuit certification to the New York Court of Appeals. 808 F.2d at 956.

3. The cases in which the Second Circuit certified state law issues to the New York Court of Appeals from 1993 through December 1, 1998 are identified on the Chart attached to this Report.

VI. The certified issue presents a complex question of New York common law for which no New York authority can be found.

The judicious use of the certification procedure in these types of cases promotes comity, relieves the federal court of time-consuming speculation about state law, protects the state from having its law misinterpreted or misapplied, and “does in the long run save time, energy and resources.” *Lehman Brothers*, 416 U.S. at 391.

The certification process and judges’ attitudes toward it have been the subject of three empirical studies published in 1983, 1988 and 1995 respectively.<sup>4</sup> Participating judges in each study were asked a series of questions about the benefits of, and problems with, certification. All three studies found broad judicial support for, and satisfaction with, certification. The benefits gained from the certification process included (1) promoting federalism and comity; (2) affording state courts the right to define their own substantive law; (3) avoiding potentially erroneous federal precedent on important state law and policy issues; (4) producing a definitive explication of state law that is a reliable, controlling precedent; (5) promoting long-term efficiency by providing uniform and consistent results; (6) deterring forum shopping; and (7) sparing litigants the cost and delay caused by abstention.

Although the studies acknowledged that certification will impose additional time and expense on the litigants, “the burden proved to be much less important than commentators had initially anticipated when measured against the benefits of certification.” Corr and Robbins, *supra* at 457. The additional time required for certification was “outweighed by the procedure’s advantages, specifically that an accurate answer from the appropriate tribunal avoids further litigation and that relations between state and federal courts are improved.” Seron, *supra* at (v). The most recent study, which was published in 1995, concluded:

With respect to the cost and delay issue, it should be noted that there will always be additional cost and delay in litigating the meaning of an unclear point of state law, whether the arguments are made in a federal court or in a state supreme court upon certification .... The benefits, however, in terms of the

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4. See Goldschmidt, *Certification of Questions of Law: Federalism in Practice* (American Judicature Society 1995); Corr and Robbins, *Interjurisdictional Certification and Choice of Law*, 41 *Vand. L. Rev.* 411 (1998); Seron, *Certifying Questions of State Law: Experience of Federal Judges* (Federal Judicial Center 1983).

savings in costs and time to future litigants who will not have to litigate the same issue through all the levels of a state court judiciary greatly outweigh these additional costs of briefs and travel incurred by litigants in a single certification case.

Goldschmidt, *supra* at 109.<sup>5</sup>

Practitioners who have had recent experience with certification in the Second Circuit have expressed the need for written procedural rules implementing the process. Without written rules, attorneys must determine the practice for themselves, compounding the delay and costs associated with certification. The following proposed procedural rules are intended to mitigate the burden on litigants that certification may cause.

VII. Second Circuit Rule 0.27 provides that “certification may be made by [the Second Circuit] sua sponte or on motion of a party filed with the clerk of [the] Court.” The Second Circuit should adopt a rule to implement the certification procedure by motion of a party. Within ten (10) days after the service and filing of Second Circuit Forms C and D, a party should serve and file written notice of an intention to move for certification on specified issues. Except as otherwise provided by order of the Court, a motion for certification should be included in the moving party’s brief on the merits of the appeal.

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5. In February 1987, The Committee on Federal Courts of the Association of the Bar of the City of New York published a report entitled “Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law.” 42 Rec. Ass’n B. City N.Y. 101 (1987). The Committee Report was published only one year after the New York Court of Appeals’ certification procedure became effective on January 1, 1986, and the Report had the benefit of only two cases in which certification to the New York Court of Appeals had been an issue. *Id.* at 108-09. Based on the limited experience with certification in New York as of February 1987, the Committee Report concluded that the procedure “would in most cases merely add to the time and expense of resolving disputes and frustrate litigants who are properly before federal courts”, and it consequently recommended Second Circuit certification only in a “rare case.” *Id.* at 125. In the eleven years since the Committee Report was published, certification procedures have become widespread, the United States Supreme Court has praised the substantial efficiencies that certification provides in resolving unsettled state law questions, and empirical studies have established that the benefits gained from certification outweigh the additional delay and costs incurred by individual litigants in a single certification case. See, e.g., Sorrentino and Brody, Certified Questions of Law by the Second Circuit to the New York Court of Appeals, 65 N.Y. St. B. J. 8, 13 (March/April 1993) (certification “offers an excellent mechanism for authoritative resolution of significant issues of state law”).

VIII. The general practice in the Second Circuit is to require the parties to file letter briefs after they have received an answer to a certified question from the New York Court of Appeals. A formal rule implementing that practice should be adopted.

IX. The general practice in the New York Court of Appeals has been to give notice of its decision to accept or reject a certified question within sixty days of certification. That practice should be incorporated in a formal rule.

X. The New York Court of Appeals should adopt a formal rule clarifying the appellant-appellee designations on certified questions to the Court. The formal rule should implement the current practice of retaining the same appellant-appellee designations used in the Second Circuit.

XI. There should be a mechanism for affording exigent treatment to certified questions that are urgent or require a decision by a certain date. The New York Court of Appeals should expedite review of certified questions designated for exigent treatment by the Second Circuit or upon motion of a party for good cause shown.

XII. The New York Court of Appeals, “on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits.” N.Y. Ct. App. R. 500.17(d). Thereafter, the New York Court of Appeals “shall instruct the Clerk to request any additional papers which it requires for its review.” N.Y. Ct. App. R. 500.17(e). In practice, the New York Court of Appeals has generally required the parties to serve and file new briefs on the certified question. Practitioners have commented that rebriefing the issues often needlessly compounds the cost and delay. Whenever practicable, the New York Court of Appeals should answer the certified question on the basis of the record and briefs filed in the Second Circuit. Supplemental briefing may not be necessary in cases where a party has made a motion for certification. However, the litigants should be afforded the opportunity to brief the certified question in (1) cases involving questions certified by the Second Circuit on its own motion; (2) cases in which there has been a substantive development in the law on

the certified question after the Second Circuit briefs were filed; and (3) cases in which the Second Circuit has expressly permitted the New York Court of Appeals to reformulate or clarify the certified question and the altered question was not previously briefed by the parties.

The adoption of the procedural rules suggested above will avoid the uncertainty and speculation that currently surrounds the certification process. The proposed rules have the added advantage of mitigating the delay and costs associated with certification. The certification procedure can continue to be refined and improved through informal communications between the Second Circuit and the New York Court of Appeals at state-federal judicial councils. Although the burden that certification can impose on litigants and the court system cautions against indiscriminate use of the procedure, the Second Circuit should not be reluctant to use certification in appropriate cases where the Court finds itself uncertain about a significant issue of state law that is essential to a correct disposition of the case before it. Nor should the New York Court of Appeals be reluctant to accept certified questions. In cases where the New York Court of Appeals rejects a certified question, a brief statement of the reasons for doing so should be given by that Court.

*December 1998*

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# The Warsaw Convention Revisited: An Update on Liability Limitations for the Twenty-First Century

*The Committee on Aeronautics*

## INTRODUCTION

The development of international aviation claims litigation has been a slow, arduous process involving compromise between several diverse governmental and economic interests. The original Warsaw Convention sought to limit liability for fledgling carriers to facilitate growth of the international air transportation industry. However, with the development and growth of the industry, liability limits for aviation accidents were not raised to be commensurate with the ability of the industry and its insurers to pay. This situation has been partially rectified by the recent institution of the International Air Transport Association ("IATA") Intercarrier Agreements. This untested agreement, however, leaves the future of international aviation accident law uncertain in several respects. This article discusses the recent airline waivers to the Warsaw/Montreal liability limitations pursuant to the IATA Agreements, as those waivers may impact on aviation law practitioners at the threshold of the new millennium.

**THE WARSAW CONVENTION<sup>1</sup>**

The Warsaw Convention (the “Convention”) is an international treaty which was intended to provide uniform treatment for international air transportation litigation in the courts of the signatory countries. The Convention was created in Paris in 1925, as a result of multinational conferences on the subjects of airline liability and passenger rights in Paris in 1925, and was adopted in Warsaw in 1929. While the United States was not a party to these conferences, the United States adopted the Convention on June 27, 1934, and it came into effect in this country on October 29, 1934. As a treaty of the United States, the Convention preempts contrary state law governing airline tort liability to passengers and shippers.

The provisions of the Convention create a trade-off between airline liability and passenger recovery. There is a presumption of liability on the part of the airline for death or personal injury of the passenger if the accident occurred on the aircraft or during the embarkation or disembarkation of passengers.<sup>2</sup> The airline is also liable under the Convention for damage or loss of baggage or cargo, and delays in the contracted for transportation.<sup>3</sup> The passenger has access to several judicial, and possibly arbitral, fora for redress under the Convention: (1) the domicile of the carrier, (2) the principal place of business of the carrier, (3) the place where the transportation contract was made, or (4) the destination shown on the contract of transportation.<sup>4</sup>

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11. The full text of the Warsaw Convention in its original French and an English translation of the Convention, the Hague Protocol, and the Montreal Agreement are available in LEE S. KREINDLER, AVIATION ACCIDENT LAW (MB Supp. 1998). The purpose of this article is not to explore the intricacies of the Warsaw Convention or the Montreal Agreement, or to analyze those compacts in any way. Definitive analysis of these agreements has been accomplished by several authors, including 1 LEE S. KREINDLER, AVIATION ACCIDENT LAW §§ 10.01-10.11 (MB 1998) [hereinafter KREINDLER], and Andreas F. Lowenfeld & Allan I. Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967). This article also does not address the International Civil Aviation Organization (ICAO) Draft Convention, which attempts to amend the Warsaw Convention by adding provisions from the Hague Protocol, Montreal Protocols 3 & 4, the Guatemala City Protocol, and the Guadalajara Supplementary Convention, none of which were ratified by the United States when first proposed. See Thomas J. Whalen, Update on the IATA Intercarrier Agreement, 13 THE AIR AND SPACE LAWYER 2 (1998).

2. Warsaw Convention, Article 17. See also *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3rd Cir. 1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975).

3. Warsaw Convention, Articles 18, 19.

4. Warsaw Convention, Article 28.

In exchange for this presumption of liability, the liability of the airlines in an accident occurring during international transportation was limited to 125,000 francs (65.5 milligrams of gold or approximately \$10,000 U.S. dollars) for death or personal injury, and 125 francs per kilogram of checked baggage or cargo.<sup>5</sup> While it is permissible for an airline and a passenger to contract for higher liability limits than those provided by the Convention, limitations on liability lower than those of the Convention are void.<sup>6</sup>

There are some situations, provided for in the Convention, which alter the presumption of carrier liability as well as the limited liability for damages. Under Article 20, a carrier is not liable if it took "all necessary measures" to avoid the damage suffered. Also, under Article 21, if the law of the chosen forum provides for contributory or comparative negligence, those principles may be applied to reduce liability. However, an airline may lose its limited liability status if the passenger can show that the airline engaged in "willful misconduct," or if the carrier fails to prove the delivery of the transportation contract in the form of a ticket or a baggage check to the passenger.<sup>7</sup>

#### THE HAGUE PROTOCOL

The Hague Protocol of 1955 (the "Protocol") is a treaty which was signed by twenty-six countries, including the United States, which became effective on August 1, 1963.<sup>8</sup> However, since the Protocol was never ratified by the United States, mainly due to the perceived inadequacy of the increase in the liability limitation from \$9,000 U.S. dollars under the Convention to \$16,584 U.S. dollars, it did not become the law of the United States, and the Convention still controlled international aviation litigation in this country. For international transportation between a country which had adhered to the Protocol and a country which had only adopted the Convention, the provisions of the Convention alone applied.

The Protocol modified the Convention in several important ways. The requirements under the Convention to inform passengers of the carriers' limited liability for injury, death, and baggage loss or damage now required actual notice rather than just "publication" on travel documents.

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5. Warsaw Convention, Articles 22, 23.

6. Warsaw Convention, Articles 22, 23.

7. Warsaw Convention, Articles 25, 3, 4.

8. See 1 KREINDLER §§ 11.01-11.03, *supra* note 1, at 11-1-11-10.

The Protocol also raised limitations on liability for personal injury or death to 250,000 Poincare francs or \$16,584 U.S. dollars.

In addition, the Protocol added Article 25A<sup>9</sup> to the Convention, formally extending the liability limitations to the servants and agents of carriers.<sup>10</sup> The Protocol also amended the “willful misconduct” language of Article 25 of the Convention which had been the subject of many contentious interpretations. The amendment was more specific about what a plaintiff must show to escape the liability limitations: “The limits of liability specified in Article XXI shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage probably would result....”<sup>11</sup>

#### THE MONTREAL AGREEMENT

The United States was dissatisfied with the monetary limitations of the Convention, and its subsequent amendment by the Protocol, principally because the liability limitations in both reduced the amount of damages recoverable in the event of an accident<sup>12</sup>, and because no provision was included in these treaty documents which required large print notices of the damage limitations to passengers. United States representatives met with representatives of international air carriers from other countries in Montreal, Canada, in May 1966 to consider possible U.S. withdrawal from the Convention. The United States and the air carriers’ representatives reached an agreement, known as the Montreal Intercarrier Agreement<sup>13</sup> (the “Montreal Agreement”), which supplemented the Convention to apply only to international passengers whose travel begins, ends, or stops in the United States. The basis of this intercarrier agreement lies in Article 22 of the Convention which allows a carrier to contract for higher liability limits.<sup>14</sup>

9. Hague Protocol, Article XIV.

10. This extension of the Convention to servants and agents of carriers is strictly limited to the liability provisions of Article 22, and does not include any of the other defenses available to carriers under the Convention. 1 KREINDLER § 11.02[6], *supra* note 1, at 11-7.

11. Hague Protocol, Article XIII.

12. 1 KREINDLER § 12.01, *supra* note 1, at 12-2.

13. 49 U.S.C. § 1502

14. Andrea L. Buff, Note, Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?, 20 FORDHAM INT’L L.J. 1768, 1785 (1997).

The Montreal Agreement supplemented the liability and limitation on damages of the Warsaw Convention in three important respects. First, under Montreal airlines accepted strict liability for aviation accidents, and the "all necessary measures" defense was abolished. Second, the limitation on damages was raised to 75,000 U.S. dollars. Finally, the Montreal Agreement required that passengers receive notice of the limited liability provisions with their airline tickets. Since airline operation within the United States required compliance with the Montreal Agreement, all American and most major foreign air carriers adopted the Montreal Agreement.

#### THE JAPANESE INITIATIVE

On November 20, 1992, Japan Airlines Company, Ltd. (JAL), became the first among ten Japanese carriers to agree to waive the liability limits established by Article 22 of the Convention and the Convention as modified by the Protocol up to 100,000 SDRs.<sup>15</sup> JAL effected the waiver by filing a tariff with the United States Department of Transportation, effective May 21, 1993. The tariff provided that the carrier "shall not... avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol up to the sum of 100,000 SDRs exclusive of the costs of the action including lawyers' fees which the court finds reasonable."<sup>16</sup> The figure of 100,000 SDRs refers to Special Drawing Rights<sup>17</sup> as defined by the International Monetary Fund; this amount is approximately \$138,000 U.S. dollars as of December 1, 1998.

The decision to waive the Convention's liability limits was a reaction to the 1985 JAL Boeing 747 crash in which 500 people were killed.<sup>18</sup> Passenger recoveries for death or injury due to the crash highlighted the inconsistencies between recovery in a domestic accident, which was not limited by the Convention, and recovery for those holding international

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15. *Id.* at 1789.

16. *International Passenger Rules and Tariff*, No. JL-1, 2nd revised, page JL-51.

17. Special Drawing Rights (SDRs) are a type of currency used to maintain balance in international exchanges and are based upon the world's main currencies of France, Britain, Japan, Germany, and the United States. Buff, *supra* note 14, at 1770 n.14, 1788 (1997) (citing JOHN DOWNES & JORDAN ELLIOT GOODMAN, *FINANCE & INVESTMENT HANDBOOK* 487 (3rd ed. 1990)).

18. Buff, *supra* note 14, at 1790; see also Stacy Shapiro, *Debate rages on airline liability caps*, *BUS. INS.*, March 15, 1993.

tickets which was limited by the Convention.<sup>19</sup>

JAL was far ahead of other international carriers in waiving the Convention liability limits. In fact, it was another four years before a similar waiver was proposed by either IATA or the Air Transport Association of America ("ATA"). It is acknowledged by the aviation community that the impetus for the Montreal Agreement was United States dissatisfaction with the low death and personal injury liability limitations. Thus it is surprising that the United States was not the forerunner in the movement to waive the liability limitations, given that representatives from the United States historically were among the most vocal in their denunciation of the low liability limits provided by Warsaw/Montreal.

#### **DISSATISFACTION WITH THE LIABILITY LIMITS SET BY THE WARSAW CONVENTION**

While the uniformity of international treatment of aviation accident litigation under the Convention is a desirable objective, the damage limits which the Convention and the Montreal Agreement placed on passengers' recovery for death or injury have been criticized since inception. It was argued soon after the adoption of Warsaw that awards for personal injury in developed countries, such as the United States, Great Britain, and France, far exceeded the Convention limits, and that liability insurance was available to the carriers for a lower cost than anticipated by the Convention's draftsmen.<sup>20</sup> Even the Comité International Technique d'Experts Juridique Aériens, which drafted the Convention, began suggesting revision of the Convention in 1935.<sup>21</sup> In addition, the Provisional International Civil Aviation Organization ("PICA") and the International Civil Aviation Organization ("ICAO") also discussed revision of the Convention, and conferences on a proposal to increase the liability limits were held in Cairo in 1946, Madrid in 1951, Paris in 1952, and Rio de Janeiro in 1953.<sup>22</sup>

The judiciary has in many cases circumvented the limits of Warsaw by strict interpretation of the provisions of the Convention and scrutiny

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19. Buff, *supra* note 14, at 1790. Some passengers on this aircraft were international travelers, and their recovery was limited by Warsaw; this does not address the issue of fault.

20. Lowenfeld, *supra* note 1, at 504.

21. *Id.* at 502.

22. *Id.* at 502-503.

of the facts in each case.<sup>23</sup> There are several cases<sup>24</sup> which analyze the terms “accident,”<sup>25</sup> “passenger,”<sup>26</sup> “embarkation” and “disembarkation,”<sup>27</sup> and “notice”<sup>28</sup> as defined by the Convention, some of which stretch to find that the facts do not fall within those definitions, and thus the liability limits of the Convention are inapplicable. Perhaps the judicial dissatisfaction with the Convention will ease in the wake of the new carrier waivers of limited liability. As one court recently observed:

Over the past several decades, international air transportation has transformed from a fragile, fledgling industry into one that is well established and financially secure. In recognition of the increasing strength of the airline industry, the balance has properly shifted away from protecting the carrier and toward protecting the passenger, evidenced by the recent intercarrier agreement abandoning the Convention’s liability cap.<sup>29</sup>

23. Ray B. Jeffrey, Note, *The Growth of American Judicial Hostility Towards the Liability Limitations of the Warsaw Convention*, 48 J. AIR L. & COM. 805 (1983).

24. See Buff, *supra* note 14, at 1795-1802, for a discussion of the cases cited below in notes 25, 26, 27 and 28, and for more cases on these subjects.

25. See *Air France v. Saks*, 470 U.S. 392 (1985); *Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992); *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), cert. granted, 118 S. Ct. 1793 (1998) (finding that an airline security search of a passenger was not an “accident”); *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997), cert. denied, 118 S. Ct. 1042 (1998) (crew’s failure to divert after passenger suffered heart attack was not an “accident”).

26. See *Adams v. American Airlines, Inc.*, 433 N.Y.S.2d 366 (N.Y. Sup. Ct. 1980), aff’d, 449 N.Y.S.2d 487 (N.Y. App. Div. 1st Dep’t), rev’d on other grounds, 457 N.Y.S.2d 771 (N.Y. 1982), cert. denied, 463 U.S. 1209 (1983); *Sulewski v. Federal Express Corp.*, 933 F.2d 180 (2d Cir. 1991).

27. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976).

28. See *Mertens v. Flying Tiger, Inc.*, 341 F.2d 851 (2d Cir. 1965), cert. denied, 382 U.S. 816 (1965). *Mertens* was a truly unique controversy. The accident involved a Flying Tiger Lines military charter flight transporting military equipment from San Francisco to Tokyo, Japan. The decedent, an air force lieutenant, had orders to safeguard the equipment during flight. At trial the evidence showed that Lt. Mertens’ ticket was delivered after he had boarded the aircraft. Under the circumstances the Second Circuit held that the last minute delivery did not, as a matter of law, constitute “delivery of a ticket” under Article 3(2), since the circumstances prevented the decedent from any efforts at self help.

Although legibility of the Warsaw limits was mentioned in passing in the opinion, it was simply dictum. For a discussion of type size in the context of notice, see *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989).

29. *Tseng*, *supra* note 25, 122 F.3d at 107.

**AGREEMENT BY CARRIERS TO WAIVE WARSAW LIABILITY LIMITS**

On February 7, 1997, the United States Department of Transportation announced that several domestic and international carriers had agreed to waive the death and personal injury liability limits for aviation accidents by the Convention as modified by the Montreal Agreement. The new “agreement” was actually a collection of three agreements (collectively, the “IATA Agreements”) which were drawn up by IATA and ATA. The centerpiece of these agreements was the IATA Inter-carrier Agreement (“IIA”), in which the airlines agreed to waive the limitation on liability for death or serious injury provided by Article 22(1) of the Convention, “so that recoverable compensatory damages *may* be determined and awarded by reference to the law of the domicile of the passenger.”<sup>30</sup> IIA also permits carriers to waive any defense provided by the Convention, including the waiver of a defense only up to a specified monetary limit, and reserves to carriers “their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any suits paid by the carrier.”<sup>31</sup>

IATA also drafted the Agreement on Measures to Implement the IATA Inter-carrier Agreement (“MIA”), which is an enabling device intended to standardize the language of carriers’ tariffs. Among the mandatory provisions of the MIA are the waiver of the Convention’s Article 22(1) limits on liability and a provision which adopts strict liability for airlines up to \$139,000 U.S. dollars for compensatory damages: “Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs.”<sup>32</sup>

The MIA also contains optional language for the carriers’ tariffs. One provision mirrors the “may” language in the IIA, paragraph 1, *supra*. “At the option of the carrier, its conditions and tariffs also may include the following provisions: 1. Carrier agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.”<sup>33</sup> Thus, while a carrier may choose to include this provision, allowing the passenger the choice of using the law of his or her domicile, the provision is not mandatory. In its October 3, 1996 Order to Show Cause,<sup>34</sup> the Department of Transportation expressed disappointment with

30. IIA, paragraph 1 (emphasis added).

31. IIA, paragraphs 2, 3.

32. MIA, paragraphs 1, 2.

33. MIA, Section II, paragraph 1.

34. The order was to show cause why the Department of Transportation “should not issue an

the optional nature of this MIA provision in particular.

Finally, the third agreement, the ATA Provisions Implementing the IATA Inter-carrier Agreement ("IPA"), was created by ATA to implement the agreement more specifically through the language in the carriers' tariff. The IPA provides for the waiver by the ATA carriers of Article 22(1) liability limitation, the waiver of the Article 20(1) defense of non-negligence up to 100,000 SDRs, and the reservation of other carrier defenses, and the rights of recourse, contribution, and indemnity. In addition, the IPA also allows carriers to agree to use the law of the passenger's domicile in accident litigation, but does not make this provision mandatory.<sup>35</sup>

Among the organizations which submitted comments to the Department of Transportation in response to the proposed agreements were IATA, ATA, the Association of Trial Lawyers of America ("ATLA"), the Aerospace Industries Association ("AIA"), and the Victims Families' Associations.<sup>36</sup> On the positive side, the commentators applauded the waiver of the Convention's limits without the imposition of an overly complex system or surcharges on fares, and the retention of the worldwide uniformity of the aviation litigation system created by the Convention. IATA noted that this agreement would put an end to the "willful misconduct" litigation under Warsaw/Montreal which had frequently been employed to circumvent the \$75,000 cap on compensatory damages.

A criticism of the IATA Agreements, voiced by the Victims Families' Association, ATLA, and the Department of Transportation, is the absence of a provision establishing a fifth jurisdictional forum based on the passenger's domicile. In the October 3, 1996 Order to Show Cause, the Department of Transportation stated:

We are disappointed in the absence of a consensus for carrier submission to the fifth jurisdiction. Since the IATA Agreements

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order making final our tentative findings and conclusions, and, subject to the conditions set forth in this order, approving and granting antitrust immunity with respect to the IA, MIA, and IPA Agreements." DEP'T OF TRANSP., ORDER TO SHOW CAUSE; INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION; AIR TRANSPORT ASSOCIATION OF AMERICA: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION, Docket Nos. OST-95-232, OST-96-1607 (Oct. 3, 1996) available in 1 KREINDLER § 10.11, *supra* note 1, at 10-131 [hereinafter Order to Show Cause].

35. Order to Show Cause, 1 KREINDLER § 10.11, *supra* note 1, at 10-121.

36. The Victims Families' Associations are composed of relatives of the victims of the air crash disasters on Korean Air Lines Flight 007, Pan-Am 103 in Lockerbie, Scotland, and TWA 800 in Long Island, New York. *Buff*, *supra* note 14, at 1820 n.396.

are contemplated to have world-wide application, and would be widely adhered to, inclusion of the fifth jurisdiction would have gone a long way towards meeting the Department's guidelines to the extent that protection of U.S. citizens and permanent residents would apply wherever the ticket was purchased, or wherever the flight took place.<sup>37</sup>

In addition to this criticism, the Victims Families' Association contends that the application of the law of the passenger's domicile should be mandatory, and that if a monetary limit is to be set on the waiver of the carrier defense of non-negligence, it should be at least 250,000 SDRs.<sup>38</sup> Families of victims have also expressed concern that since protracted "willful misconduct" litigation will likely be abolished as a result of the IATA Agreements, the specifics of the carrier's negligence will not be known and families will "have a harder time learning what went wrong on doomed flights."<sup>39</sup>

There are other questions which have surfaced that were not raised in the Department's Order to Show Cause. Some commentators believe that the agreements have, in essence, committed the signatory carriers to unlimited liability.<sup>40</sup> Under the IATA Agreements, the carriers have agreed to absolute liability up to 100,000 SDR's, and after that amount they may invoke the defense of showing proof that the airline took all necessary measures to avoid the damage pursuant to Article 20(1) of the Convention.<sup>41</sup> However, in practice, there are limited circumstances when a carrier might invoke this defense. "The only situation that we know of where an airline can possibly show that it 'took all necessary measures to prevent the damage'" is the missile theory which surfaced in the TWA 800 accident inves-

37. *Id.* at 10-128; see also Stacy Shapiro, DOT Conditionally Approves Passenger Liability Standards, *EUS. INS.*, October 14, 1996. Although the DOT lobbied for the fifth jurisdiction provision, it approved the agreements without such a provision on November 12, 1996. *Buff, supra* note 14, at 1814 (citing DEP'T OF TRANSP., ORDER APPROVING INTERNATIONAL AIR TRANSPORT ASSOCIATION: AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION; AIR TRANSPORT ASSOCIATION OF AMERICA: AGREEMENT RELATING TO THE LIABILITY LIMITATIONS OF THE WARSAW CONVENTION, Order No. 96-11-6 (Nov. 12, 1996)).

38. Order to Show Cause, 1 KREINDLER § 10.11, *supra* note 1, at 10-124.

39. Karen Schwartz, Eight U.S. airlines lift liability limits on international crashes, *THE ASSOCIATED PRESS*, Feb. 6, 1997. This would appear to be an unfounded concern because the families are invited to the NISB public hearings and have access to the Board's factual report and probable cause findings.

40. Lee S. Kreindler, Goodbye to Liability Limitations, *N.Y.L.J.*, Feb. 20, 1997.

41. MIA, paragraph 2.

tigation.<sup>42</sup> Therefore the defenses available to carriers for damages above 100,000 SDRs may not be substantive in practice, and thus the agreements may actually be an institution of absolute liability for the signatory carriers.<sup>43</sup> While some writers have speculated that the unlimited liability of the agreements will lead to trials where the quantum of damages is the only issue left for resolution,<sup>44</sup> disputes over liability would be waged in litigation between carriers and manufacturers.

Another perceived weakness of the IATA Agreements is their contractual nature. Since the waivers are not treaties, and thus do not have the force of law, it is feared that a carrier's claims for indemnification against other tortfeasors—such as engine or airframe manufacturers—may be compromised.<sup>45</sup> For example, in many jurisdictions compromise by one tortfeasor extinguishes indemnity claims by the settling defendant. Thus, a familiar practice in preserving such a claim is to enter into a consent judgment rather than a contract-based settlement agreement. It is currently unclear how such rights of indemnification can be preserved in the waiver context.

## CONCLUSION

Figures as of July 1998 show that 107 airlines have signed IIA, 68 have signed MIA, and approximately a dozen Chinese airlines are expected to sign the IATA Agreements. However, only 50 carriers have actually filed tariffs making the waivers effective,<sup>46</sup> making another possible frontier for litigation concerning the agreement, that is whether a carrier has clearly implemented the IATA Agreements and has agreed to be bound by its terms.<sup>47</sup> The strength of the carriers' commitment to the agreements is already being put to the test,<sup>48</sup> and only time will tell how the IATA agreements are actually implemented.

*January 1999*

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42. Kreindler, *supra* note 40. Neither the FBI nor the NISB subscribes to this theory.

43. *Id.*

44. Whalen, *supra* note 1.

45. Kreindler, *supra* note 40.

46. US may not agree to new Warsaw, *AVIATION, INSURANCE & LAW*, vol. 17, issue 7, July 1998.

47. Whalen, *supra* note 1.

48. Swissair flight 111 crashed on September 2, 1998; Swissair and Delta, both parties to the litigation, are signatories to the IATA Agreement. Swissair billion-dollar legal battle, *AVIATION, INSURANCE & LAW*, vol. 17, issue 10, Oct. 1998.

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# Employment Law Training for Arbitrators

## *The Committee on Labor and Employment Law*

### INTRODUCTION

#### A. Overview

As a result of legislative enactments and judicial decisions affording employees expanded rights and imposing on employers increased responsibilities in the workplace, federal and state courts have experienced a dramatic increase in employment cases over the past several years. For example, statistics from annual Judicial Conference Reports indicate that employment disputes account for 25 percent to 30 percent of all cases pending on United States district court dockets. Coincidentally, legislation such as the Age Discrimination in Employment Act of 1990 and the 1991 Civil Rights Act expressly encourage the use of alternate dispute resolution ("ADR") "where appropriate and to the extent authorized by the law."<sup>1</sup> The courts, too, have endorsed the use of arbitration in resolving statutory claims; for example, in *Mitsubishi*, the Supreme Court stated that a party, by agreeing to arbitrate a statutory claim, "...does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>2</sup> Similarly, in *Gilmer*, the Supreme Court upheld a pre-dispute agreement to arbitrate a claim under the Age Discrimination in Employment Act ("ADEA").<sup>3</sup>

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1. See, for example, the Civil Rights Act of 1991, 42 U.S.C. §§1981, 1981A; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.

2. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,627 (1985).

3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

The public policy debate has now shifted from whether ADR is appropriate for resolving employment claims to what forms of ADR are appropriate; for example, whether the arbitration of statutory claims can or should be mandated. Another focus of debate is the necessity of procedural safeguards to ensure that employees who agree to arbitrate statutory claims are not foregoing any substantive legal rights.<sup>4</sup> To address these issues, this Committee promulgated "Model Rules for the Arbitration of Statutory Claims" in 1996. Other measures include "The Due Process Protocol for Mediation and Arbitration of Statutory Claims Arising out of the Employment Relationship," initiated in 1996 by the President of the National Academy of Arbitrators, later endorsed by service providers such as the American Arbitration Association, JAMS-Endispute, and the Federal Mediation and Conciliation Service, and recently endorsed by the American Bar Association.<sup>5</sup>

As the use of ADR to resolve employment disputes expands, there is a growing concern that the current pool of arbitrators and mediators, as well as the attorneys who may be called upon to represent clients in these alternative forums, may lack the necessary subject matter expertise in the applicable law. As the Due Process Protocol and Model Rules tell us, such knowledge and understanding is particularly important in instances where arbitration is an alternative to, or a substitute for, the courts. Training of neutrals is now conducted under the auspices of many different groups, and there is a concern that the content of training programs may be inadvertently "slanted" or "biased" depending on the source of training.

This outline presents a general but comprehensive and neutral overview of employment laws, endorsed by the Committee's membership and reflecting the broad spectrum of perspectives represented on the Committee. The outline is *not* to be viewed as a definitive statement of any specific

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4 See, for example, Jay S. Siegel, "Changing Public Policy: Private Arbitration to Resolve Statutory Employment Disputes," 13 *The Labor Lawyer* 87 (1997); Samuel S. Estreicher, "Pre-Dispute Agreement to Arbitrate Statutory Employment Claims," Proceedings of NYU 49th Conference on Labor (Kluwer Law International, 1997); Joseph D. Garrison, "Pro: Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights," and Martin Oppenheimer and Cameron Johnson, "Con: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation," *Dispute Resolution Journal* (Fall, 1977).

5. ABA House of Delegates Resolution No. 112 passed February 4, 1997. Due process protections cited in the Protocol include the right of the parties to select from among a pool of qualified and diverse arbitrators; discovery; the right to representation; arbitrator compensation; and the authority of the arbitrator to grant all remedies available under the applicable law.

area of the law, which is rapidly changing, or the status of the law in a given jurisdiction to be relied on in any given case. Nor does the outline cover evidentiary issues that any training program would necessarily address, such as the quantum and quality of proof. Rather, the outline presents the framework of the applicable law for use in training, or to alert the neutral in a particular case to the legal issues that may require further research or briefs by the parties.

### **B. United States Employment Law is Premised On The Doctrine of Employment-At-Will**

1. Every state recognizes the doctrine that an employment relationship having no specific term is presumptively at will, terminable with or without cause by either party. However, the employment-at-will doctrine is not absolute, since almost every state recognizes various legislative and judicially defined exceptions to its application. Additionally, certain common-law claims are recognized which, in some circumstances, supplement the employment-at-will doctrine and give rise to claims of wrongful discharge.

2. Most exceptions fall into one or more of the following categories:

a) Common law exceptions

- 1) an express or implied contract to discharge only for cause;
- 2) a judicially recognized public policy prohibiting discharge in particular circumstances; and
- 3) an implied covenant of good faith and fair dealing.

b) Statutory exceptions

## **II. FEDERAL DISCRIMINATION STATUTES**

### **A. Title VII of the Civil Rights Act of 1964 ("Title VII") and Amendments**

1. Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. § 2000e *et seq.*, applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies, but not to *bona fide* private membership clubs exempt from taxation under Title 26, Section 501(c). 42 U.S.C. § 2000e(b) (term “employer” does not include *bona fide* private membership clubs.)

2. Title VII prohibits an employer from discriminating against an individual on the basis of race, color, sex, national origin or religion with respect to hiring, discharge, compensation, promotion, classification, training, apprenticeship, referral for employment, or other terms, conditions, and privileges of employment.

3. Title VII also prohibits an employer from harassing an employee on the basis of race, color, sex, national origin or religion. This includes hostile environment and pervasive and systematic patterns of harassing behavior, such as negative comments and conduct, premised upon one of the aforementioned protected characteristics.

4. The Civil Rights Act of 1991 (“CRA”), Pub. L. 102-66, amended Title VII, Section 1981, the Rehabilitation Act, the Americans with Disabilities Act (“ADA”), and the ADEA. The CRA allowed for compensatory and punitive damages (with a cap) as well as jury trials under Title VII and the ADA; overturned seven Supreme Court decisions; and established a glass ceiling commission. The CRA also amended Title VII and the ADA to provide that both laws apply to United States citizens working abroad for American-owned or controlled companies.

#### 5. Specific Discrimination Prohibited by Title VII

a) *Race*: Title VII prohibits discrimination on the basis of race.

b) *Color*: Often combined with race, color can refer to a light-skinned or dark-skinned individual.

c) *Sex*

1) *Gender*. Title VII prohibits discrimination based on an individual's gender.

2) *Sex Harassment*

a) Title VII prohibits sexual harassment, which includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that:

i) alters the terms and conditions of employment;

ii) constitutes the basis for employment decisions affecting the individual; or

iii) unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.

b) Two types of sexual harassment

*i) quid pro quo* harassment generally involves a demand for sexual favors accompanied by

(a) a promise of benefits upon acquiescence, *e.g.*, a promotion or raise; or

(b) the threat of reprisal upon non- acquiescence, *e.g.*, termination.

*ii) hostile work environment* involves sexual conduct, not involving requests for sexual favors, that is sufficiently pervasive to alter the conditions of a victim's employment and create an abusive working environment. Offensive conduct may involve sexual jokes, graffiti, suggestive remarks, cartoons, etc. To constitute harassment, more than one isolated incident of offensive conduct is necessary.

c) Sexual harassment can take many forms

- i) classic—male supervisor harasses female subordinate;
- ii) female supervisor harasses male subordinate;
- iii) supervisor harasses subordinate of same sex; and
- iv) coworkers of either sex harass coworkers.

3) *Pregnancy Discrimination*

a) The 1978 amendments to Title VII (the “Pregnancy Discrimination Act” or “PDA”), 42 U.S.C. §2000e(k), specifically provide that sex discrimination includes discrimination on the basis of pregnancy.

b) The PDA requires an employer to treat a pregnant employee the same as any other employee, and when a female employee becomes unable to work due to pregnancy, childbirth, or related medical conditions, her disability is to be treated on the same basis as other disabilities.

d) *National Origin*. National origin has been broadly interpreted to mean the country from which an applicant or employee, or his forebears, came.

e) *Religion*

1) Title VII prohibits employment discrimination because of an individual’s religious beliefs.

a) Does not apply to people working for religious orders.

2) Employers must make reasonable accommodation to the religious practices of employees and applicants. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605; *EEOC Guidelines on Discrimination Because of Religion*. Examples of reasonable accommodation include a job reassignment or transfer,

restructuring of job duties, allowing reasonable time off for religious practices, flexibility in dress and appearance standards, and allowing voluntarily exchanges of work schedules.

6) Remedies Under Title VII

a) Title VII provides for “make whole” remedies. This means that a prevailing plaintiff will be entitled to full “back pay,” meaning all earnings and other benefits that the employee would have received absent the unlawful employment practice. A terminated employee may also be reinstated to his former position (or promoted to a position he would have attained but for the discharge), if that is feasible. If reinstatement is inappropriate, an award of “front pay”—a monetary award that compensates a plaintiff for lost employment until he or she finds a comparable new position—may also be made. Additionally, a successful plaintiff can recover other out-of-pocket costs, *e.g.*, job search expenses.

b) The court may issue an injunction against the employer prohibiting future acts of discrimination.

c) With the enactment of the CRA, “compensatory” and “punitive” damages are now available under Title VII in disparate treatment cases where an employer is found to have intentionally discriminated against an employee. Compensatory damages are statutorily defined to include “future pecuniary losses, emotional pain, suffering, inconveniences, mental anguish, loss of enjoyment of life and other non-pecuniary losses.” 42 U.S.C. § 1982 (A) (b) (3). Punitive damages will be warranted only if the plaintiff can establish that the employer acted “with malice or a reckless indifference to the [employee’s] federally protected rights.” 42 U.S.C. §1981A(b)(1). However, the combined compensatory and punitive damages that may be awarded to any one individual under Title VII are subject to the following statutory limitations:

<b>No. of Employees</b>	<b>Limit on Damages</b>
15-100	\$50,000
101-200	\$100,000

201-500	\$200,000
501 or more	\$300,000

d) Significantly, the CRA also allows for jury trials in Title VII cases where there is a claim for compensatory or punitive damages. Further, if a jury trial is demanded, the court is specifically directed not to inform the jury of the damage limits in the law. Because compensatory and punitive damages may not be sought in disparate impact cases, jury trials are not available in such cases under Title VII.

e) Finally, reasonable attorneys' fees, costs and expert witness fees may also be awarded to a Title VII plaintiff. Attorneys' fees must generally be awarded to a prevailing plaintiff in the absence of special circumstances that would make such an award unjust. The amount of attorneys' fees awarded in a particular case will be the "lodestar" figure, which considers the number of hours reasonably worked multiplied by a reasonable hourly rate, the result obtained, and other factors.

#### 7. Statute of limitations

a) Charge must be filed with Equal Employment Opportunity Commission ("EEOC") within 300 days of discriminatory act.

b) To bring suit in federal court, action must be filed within 90 days of receipt of Notice of Right to Sue from EEOC.

c) States have their own statutes of limitation for filing charges with state fair employment agencies and/or filing suits directly in state courts.

### B. Age Discrimination in Employment Act of 1967 ("ADEA")

1. The ADEA, 29 U.S.C. § 621 *et seq.*, prohibits discrimination on the basis of age against employees or job applicants who are aged 40 or older. With regard to hiring, discharge, compensation, or other terms of employment, there is no

upper age limit for the ADEA. Moreover, the ADEA prohibits discrimination between two persons who are both in the protected age group, *e.g.*, where a 55-year-old is replaced by a 42-year-old.

2. The ADEA applies to all employers with 20 or more employees, as well as to labor organizations, employment agencies, and apprenticeship and training programs.

3. Like Title VII, the ADEA also applies to United States citizens working abroad for American-owned or controlled companies.

4. The ADEA provides a narrow exception for persons who were highly paid executives or policy-makers for two consecutive years prior to retirement. These employees may be retired at age 65, so long as they are immediately eligible to receive at least \$44,000 in annual retirement income. 29 U.S.C. § 631(C) (1).

5. Older Workers Benefit Protection Act ("OWBPA")

a) The OWBPA, 29 U.S.C. § 626(f), amended the ADEA to expressly prohibit discrimination against older workers with respect to all employee benefits, except where age-based reductions in employee benefit plans are justified by significant cost considerations.

b) An employer who has age-based benefits is only in compliance with the ADEA if the actual amount of payment or cost incurred for a particular benefit on behalf of an older worker is not less than the amount paid or incurred for a younger worker.

c) Title II of the OWBPA sets forth the elements that must be included in a release for it to be valid under the ADEA. Waivers must now include, at a minimum, the following seven elements:

1) the waiver must be a part of a written agreement be-

tween the employee and employer that is written in a clear, understandable manner;

2) the waiver must specifically refer to claims arising under the ADEA;

3) the employee may not waive the right to claims which may arise after the date on which the waiver is signed;

4) the employee must be given consideration (something of value) in addition to that to which the employee is already entitled in exchange for the waiver of age discrimination claims;

5) the employee must be advised in writing to consult an attorney prior to signing the waiver;

6) generally, the employee must be given at least 21 days in which to consider the proposed waiver. However:

a) if the release is offered as part of a program, the individual must be given 45 days to consider the release, plus specific information regarding the classifications and ages of other employees who are offered or not offered the benefits.

b) if the release is offered as part of the resolution of an ADEA claim pending before the EEOC or a court, the individual must be given a "reasonable period of time" to consider the release.

7) finally, the employee must be given 7 days after signing the waiver in which to revoke it.

If these requirements are not followed, the employee may sue the employer for age discrimination, notwithstanding his or her signing of a release, *and* may be able to keep the consideration that was given to induce him or her to enter into the release.

## 6. Remedies Under the ADEA

a) Like Title VII, the ADEA provides for “make whole” remedies, which can include reinstatement, back-pay and lost benefits.

b) Under the ADEA, a successful plaintiff who proves a “willful violation” of the statute may be awarded liquidated damages, which are calculated by doubling the amount awarded to a successful ADEA plaintiff (minus any offsets). In order to establish a willful violation, there must be a knowing or reckless disregard on the employer’s part as to whether its actions violated the ADEA. As such, an employer who mistakenly thinks its actions are legal cannot be held liable for liquidated damages.

c) The court may issue an injunction against the employer prohibiting future acts of discrimination.

d) Reasonable attorneys’ fees and costs are also available.

e) Compensatory (other than back pay) and punitive damages are not recoverable under the ADEA.

#### 7. Statute of Limitations

a) Statute of limitations under ADEA is the same as that under Title VII.

### C. The Americans with Disabilities Act (“ADA”)

1. Title I of the ADA , 42 U.S.C. § 12101 *et seq.*, prohibits both public and private employers from discriminating in employment against persons with physical and mental disabilities.

2. The ADA applies to all employers that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. The ADA also applies to United States citizens working abroad.

3. The ADA is similar to the Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794, which only covers federal contractors.

4. To be protected under the ADA, the plaintiff must be a “qualified individual with a disability,” which is defined as a person with a *disability* who, with or without *reasonable accommodation*, can perform the *essential functions* of the job in question.

a) For the purposes of the ADA, an individual with a disability is a person who has:

- 1) a physical or mental impairment that substantially limits one or more major life activities;
- 2) a record of such an impairment; or
- 3) is perceived as having such an impairment.

Additionally, the ADA prohibits discrimination against individuals who, although not disabled themselves, are associated or have a relationship with a disabled person.

b) Major life activities include working, breathing, walking, seeing, hearing, and speaking. The EEOC’s recent guidelines on mental disabilities have expanded the list of major life activities to include thinking, concentrating, sleeping, and interacting with others.

c) Congress also included a list of conditions or practices that are *excluded* from the definition of disability. These include: homosexuality, bisexuality, transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs. Environmental, cultural, and economic disadvantages are also not in themselves covered, nor are temporary disabling conditions such as pregnancy and the flu.

d) Reasonable Accommodation

- 1) Under the ADA, an employer must reasonably accom-

modate a qualified individual with a disability. Reasonable accommodation, according to the ADA, means any accommodation that the employer can adopt without undue hardship. It may include any of the following:

- a) making existing facilities used by employees or applicants readily accessible to and usable by individuals with disabilities;
- b) job restructuring;
- c) part-time or modified work schedules;
- d) reassigning a disabled individual to a vacant position;
- e) acquiring or modifying equipment or devices;
- f) appropriately adjusting or modifying examinations, training materials, or policies;
- g) providing qualified readers or interpreters; and
- h) other similar accommodations for qualified individuals with disabilities.

2) Undue hardship is judged within the context of the employer's size, number of employees, profits, etc., and thus may vary from employer to employer.

e) Essential Functions

1) The essential functions of a job are defined as the fundamental job duties of the employment position. A job function is essential if the job exists to perform that function.

2) The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job.

5. Mental Disabilities

a) Covered mental impairments include, but are not limited to, bipolar disorder, panic or anxiety disorders, schizophrenia and obsessive-compulsive disorders.

b) Individuals who have a “mental impairment” will be protected by the ADA, unless:

1) the mental impairment is expressly excluded by the terms of the ADA;

2) the mental impairment is a psychological “condition” rather than a psychological “disorder”; or

3) the mental impairment is “behavior” or a “trait.”

c) As with physical disabilities, to be covered, a disability/mental impairment must:

1) prevent the individual from performing a major life activity, which does not have to be limited to working; or

2) restrict the condition, manner or duration under which the individual can perform a major life activity as compared to the average person in the general population.

d) The EEOC currently believes the limitation is still a covered impairment even if it can be controlled by drugs. Some courts disagree with this position.

6. Remedies Under the ADA

a) Remedies under the ADA are the same as those under Title VII.

7. Statute of Limitations

a) Statute of limitations under the ADA is the same as that under Title VII.

**D. The Civil Rights Act of 1866 (“Section 1981”)**

1. The Civil Rights Act of 1866, 42 U.S.C. §1981, was adopted following the Civil War to help effectuate the purposes of the Thirteenth Amendment to the Constitution.

2. In accordance with this purpose, Section 1981 provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens. The CRA clarified that Section 1981 applies to all aspects of contractual relationships, including “the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” 42 U.S.C. § 1981(b).

3. The courts have interpreted Section 1981 as prohibiting discrimination in employment on the basis of race, color or national origin.

4. Remedies Under Section 1981

a) Remedies under Section 1981 are the same as those under Title VII, except compensatory and punitive damages are uncapped.

5. Statute of Limitations

a) Section 1981 contains no federal statute of limitations. Instead, courts look to applicable state law statutes of limitation for general personal injuries.

**E. Retaliation**

1. Title VII, the ADEA, the ADA and many state employment discrimination laws prohibit employers from retaliating against employees for filing employment discrimination charges or assisting others in filing them, and for opposing unlawful employment practices.

2. In order to prevail in a lawsuit alleging retaliation, an employee must establish:

- a) protected conduct by the employee, such as complaining of discriminatory treatment or the filing of a charge of discrimination;
  - b) a negative personnel action by the employer directed against the person engaging in the protected conduct, such as a demotion or a termination; and
  - c) a cause-and-effect connection between the first two elements.
3. Even when the underlying claim of discrimination is unsubstantiated, retaliation is forbidden if the employee sincerely believed the allegations to be supportable.

### III. TYPES OF DISCRIMINATION AND BURDENS OF PROOF

#### A. Types of Discrimination

1. Disparate Treatment
2. Disparate Impact
3. Mixed Motive

#### B. Burdens of Proof

1. Burdens of proof depend upon the type of discrimination claim
  - a) Disparate Treatment
    - 1) Plaintiff must first make out *prima facie* case
      - a) member of protected group;
      - b) qualified for position;
      - c) suffered adverse employment action; and
      - d) the adverse action occurred in circumstances giving rise to an inference of discrimination (*e.g.* promotion given to someone outside protected group).
    - 2) Burden of production shifts to employer to articulate

legitimate, non-discriminatory business reason for action

3) Burden then shifts back to plaintiff, who has the ultimate burden of proving case by

a) presenting proof of actual discrimination; or

b) showing that employer's proffered business reason was but a pretext for discrimination.

b) Disparate Impact

1) Plaintiff must first establish that the employer has a neutral policy or practice that nevertheless has a harsher or more adverse impact on members of a protected group.

2) Burden of proof and persuasion shifts to employer to articulate legitimate, non-discriminatory business reason for policy or practice.

3) If employer meets its burden, then burden returns to plaintiff, who must show that an alternative and effective business practice exists which would have a less discriminatory effect *and* that the employer refused to implement the alternative.

c) Mixed Motive

1) Plaintiff must establish that race, sex, etc. was a motivating factor in the employment decision.

2) Burden shifts to employer to establish that it would have taken the action in the absence of a discriminatory motive.

3) If employer can establish that it would have taken the action anyway for legitimate, non-discriminatory reasons, the plaintiff's remedies are limited to declaratory or injunctive relief, and attorneys fees and costs.

Courts are precluded from awarding damages or requiring reinstatement.

#### IV. OTHER FEDERAL STATUTES

##### A. Fair Labor Standards Act ("FLSA")

1. The FLSA, 29 U.S.C. § 201 *et seq.*, establishes a minimum wage and a 40-hour overtime standard for all non-exempt employees. Non-exempt employees who work more than 40 hours a week are generally entitled to payment of one and a half times the employee's regular hourly rate for each extra hour of work. 29 U.S.C. § 207(a)(1).

2. The most common exemption from the FLSA is for white-collar employees. Such an employee will be considered exempt if:

a) the employee performs work that is of a managerial, professional, or administrative nature;

1) the managerial exemption applies to persons in charge of a recognized division of the business, who are responsible for the selection, evaluation, payment and discipline of employees, and the customary direction of two or more employees.

2) the professional exemption applies to persons with advanced knowledge in a field of science or learning, whose work involves the exercise of creative talent and independent judgment.

3) the administrative exemption applies to persons who perform non-manual work that is related directly to the management policies or general operation of the business, which requires the exercise of independent discretion and judgment.

b) such exempt work comprises the employee's primary duty; and

c) the employee receives a salary or a fee of not less than \$250 per week (except for outside salespersons, for whom there is no minimum salary requirement).

3. Numerous other exemptions from the FLSA's minimum wage and/or overtime obligations exist. Some of these exemptions cover:

- seasonal workers (minimum wage and overtime);
- commission—paid retail/service employees (overtime);
- seamen (overtime);
- taxi cab drivers (overtime); and
- residential domestic employees (overtime).

4. Employers must also determine whether a particular employee is exempt under state law, which is often more restrictive than federal law.

5. Statute of Limitations

a) The FLSA bars any action not commenced within two years after the cause of action accrues, except that suits for “willful” violations may be commenced up to three years after the cause of action accrues. 29 U.S.C. §255(a).

## B. The Equal Pay Act

1. The Equal Pay Act, 29 U.S.C. § 621 *et seq.*, requires that employees be paid equal wages for substantially equal jobs, without regard to the employee's sex. Differentiation is permitted with respect to seniority and merit systems, with respect to systems which measure pay by the quality or quantity of production, and with respect to any factor other than sex.

2. Burdens of Proof

a) The plaintiff bears the initial burden of proving a *prima facie* case by a preponderance of the evidence that an employer pays an employee of one sex more than an employee

of the other sex, which includes demonstrating the substantial equality of the jobs based on skill, effort and responsibility, and that the work was performed under similar working conditions.

b) If the plaintiff sustains this burden, the burden shifts to the defendant, who bears the burden of proving that the difference is justified by one of the Act's four defenses:

1) a seniority system;

2) a merit system;

3) a system that measures earnings by quality or quantity of output; or

4) a differential based on any other factor other than sex. 29 U.S.C. §206(d)(1).

c) If a defendant establishes that the pay differential is due to a factor "other than sex", some courts permit the plaintiff to rebut this with evidence that the claim is a pretext for discrimination.

### 3. Statute of Limitations

a) Since the Equal Pay Act is contained within the FLSA, the statute of limitations for Equal Pay Act suits is the same as that for FLSA suits. 29 U.S.C. § 255 (a).

### 4. Liquidated Damages

a) Plaintiff will be entitled to liquidated damages if she can show that the employer willfully denied her equal pay. Willfulness is demonstrated by showing that the employer knew or acted with reckless disregard of the fact that its conduct was prohibited by law.

## C. The Family and Medical Leave Act ("FMLA")

1. The stated purpose of the Family and Medical Leave Act,

29 U.S.C. § 2601 *et seq.*, is “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.” 29 U.S.C. § 2601(b); 29 C.F.R. § 825.101(a).

a) To this end, the FMLA provides eligible employees with the right to an unpaid leave of absence to bond with a new child, to care for a family member with a serious health condition, or to obtain treatment and otherwise recover from an employee’s own serious health condition.

b) Employees taking FMLA leave are entitled to continued health insurance coverage and a guarantee, in most circumstances, of reinstatement to the same or an equivalent position upon return from an approved leave.

## 2. Covered Employers

a) The FMLA covers private employers employing 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.105.

b) Although the legal entity which employs the employee is normally the employer for purposes of determining coverage, the regulations do contemplate the treatment of two or more entities as “joint” or “integrated” employers. 29 C.F.R. §§ 825.104, 825.106. Thus, an employer employing 10 employees may be found to be a “joint” employer with another entity employing 100 employees, in which case both entities would be covered under the FMLA. 29 C.F.R. § 825.106(c).

c) The regulations state that any employee whose name appears on an employer’s payroll will be considered employed each working day of the calendar week and must be counted, whether or not any compensation is received for the week. 29 C.F.R. § 825.105(b). Additionally, employees who are on paid or unpaid leave or disciplinary suspension and the like are counted if the employer has a reasonable expectation that the employee will return to

actual employment. 29 C.F.R. § 825.105(c). Employees on temporary, long-term, or indefinite layoff are not counted. *Id.*

3. Eligible Employees

a) To be eligible for family and medical leave, an employee must have worked for the employer for at least 12 months (the months need not be continuous), and for at least 1,250 hours in the prior 12 months. 29 U.S.C. § 2611(A) and (B).

b) There must be 50 or more employees employed at or within 75 miles (measured by surface road miles) of the employee's work site. 29 C.F.R. § 825.110.

4. The FMLA guarantees covered employees the following benefits:

a) Up to 12 weeks of unpaid leave in a 12-month period for the following reasons:

1) the birth of child;

2) the placement of a child with the employee for adoption or foster care;

3) to provide care for the employee's son, daughter, spouse, or parent who has a serious health condition; or

4) to attend to a serious health condition of the employee, which condition prevents the employee from working. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

b) Reinstatement at conclusion of leave; and

c) Continued medical benefits during leave.

5. The FMLA allows for several different types of leaves, including:

a) One continuous 12-week leave in a 12 month period;

b) Several shorter leaves during a 12-month period totaling 12 weeks or less;

c) Intermittent leaves, *e.g.*, time to allow an employee to

attend appointments with health care providers; and/or

d) Reduced care leave, *e.g.*, a work schedule that reduces an employee's hours of work while that person is recovering from a serious health condition.

6. A qualified individual who is denied FMLA leave or benefits has an individual cause of action.

7. Statute of Limitations

a) A suit alleging violation of the FMLA must be filed within 2 years of the last event constituting a violation, unless the violation is alleged to be a "willful" violation, in which case the statute of limitations is three years.

**D. Employee Retirement Income Security Act of 1974 ("ERISA")**

1. ERISA, 29 U.S.C. § 1001 *et seq.*, governs qualified pension and welfare plans.

2. While ERISA is a complicated statute, as a general matter it provides the following protections to employee "participants" and, in some cases, to the dependents of employees ("beneficiaries") who are entitled to benefits under a covered plan:

a) Employer sponsors of qualified plans must provide employees with, *inter alia*, summary plan descriptions of the plans in which they participate. 29 U.S.C. § 1021(a) (1).

b) Employees and their dependents have standing to sue (after exhausting administrative remedies) for the alleged wrongful denial of a benefit under a covered plan, or for clarification of future rights under a plan. 29 U.S.C. § 1132(a) (1). The courts are vested with discretion to award attorneys' fees in these cases. 29 U.S.C. § 1132(g).

c) Section 510 of ERISA, 29 U.S.C. § 1140, prohibits an employer from discharging or otherwise discriminating against an employee for exercising his or her rights under a plan or under the statute itself. For example, an employer may not discharge or otherwise retaliate against an employee who makes a claim for benefits under an ERISA plan.

Section 510 also prohibits interference with the right of an employee to obtain benefits to which he or she may be entitled in the *future*. Thus, for example, an employer cannot discharge or otherwise discriminate against an employee for the purpose of preventing the employee from vesting under a pension plan.

d) Section 510 is similar in terms of proof requirements and available remedies to traditional anti-discrimination statutes (e.g., Title VII). In addition to traditional make-whole remedies, a prevailing employee in an action under Section 510 may be awarded reasonable attorneys' fees and costs. 29 U.S.C. §§ 1132 (a) (1), 1132 (g) (1).

#### **E. Uniformed Services Employment and Reemployment Rights Act ("USERRA")**

1. In 1994, USERRA, 38 U.S.C. § 4301 *et seq.*, replaced the Veterans Re-Employment Rights Act. In so doing, it clarified an employee's military-leave rights, and expanded an employee's reinstatement rights.

2. In general, USERRA imposes affirmative obligations on public and private employers to provide employees with leave to serve in the military. USERRA requires employers to reinstate employees returning from military leave and to train or otherwise qualify returning employees. It also guarantees employees a continuation of health benefits for the first 18 months of military leave and protects an employee's pension benefits once he or she returns from leave. Finally, the Act requires that employers not discriminate against an employee because of past, present, or future military obligations.

#### **F. Polygraph Protection Act**

1. The Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009, imposes severe restrictions on the use of lie detector tests, effectively eliminating the use of polygraph testing as a pre-employment screening mechanism.

2. The Act bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant

submit to a polygraph or lie detector test, and from using or accepting the results of such tests. The Act further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- a) for refusing to take a lie detector test;
- b) based on the results of such a test; or
- c) for taking any actions to preserve employee rights under the Act.

3. The Act only prohibits mechanical or electrical devices, not paper-and-pencil tests, chemical testing, or other non-mechanical or non-electrical means that purport to measure an individual's honesty.

4. There are several limited exceptions to the general ban on polygraph testing. Specifically, the Act permits the testing of:

- a) prospective employees of security guard firms if the employer's primary business consists of providing armored car personnel, personnel to design, install, and maintain security alarm systems, or other uniformed or plainclothes security personnel;
- b) employees who manufacture, distribute, or dispense controlled substances;
- c) current employees who are reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business.

5. In the case of an employer who is engaged in an ongoing investigation involving economic loss or injury to its business, only those employees who had access to the property in question, and about whom the employer has a reasonable suspicion that they were involved, may be tested.

#### **G. Worker Adjustment Retraining Notification Act ("WARN")**

1. In general, WARN, 29 U.S.C. §§ 2101-2109, requires employers with 100 or more employees to give 60 days notice

prior to laying off or terminating 50 or more employees as part of a plant closing or a mass layoff.

2. Failure to abide by the WARN's requirements may subject employers to serious penalties, including 60 days' back pay plus benefits for all affected employees, \$500 a day to the local government where the reduction in force occurred, and attorney's fees in litigation.

3. WARN applies to any business enterprise employing:

- a) 100 or more full-time employees; or
- b) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week exclusive of overtime.

4. Public, quasi-public, and nonprofit entities may be considered business enterprises subject to WARN under certain circumstances. Moreover, independent contractors and subsidiaries may be treated as separate employers or as part of the parent company, depending upon the degree of their independence from the parent.

5. A plant closing is the permanent or temporary shutdown of a single site of employment, or one or more operating units within the site, during a 30-day period that results in an employment loss of 50 or more full-time employees. It is important to note that an employer need not close its entire business, or even an entire site, in order to constitute a plant closing. Closure of one or more facilities or operating units within a site is sufficient.

6. A mass layoff is defined as a reduction in an employer's workforce that is not the result of a plant closing but which produces an employment loss at a single site of employment during any 30-day period involving:

- a) 50 or more full-time employees, provided those affected constitute at least 33% of the full-time workforce at the site; or
- b) at least 500 full-time employees, regardless of what percent-

age of the workforce the affected employees constitute.

In contrast to a plant closing, a mass layoff may occur regardless of whether a facility or operating unit is shut down at a site. However, a layoff of 50 to 499 employees will trigger the notice provisions only if the number of affected employees constitutes at least one-third of the employer's full-time workforce.

#### 7. Statute of Limitations

a) The WARN Act does not contain a statute of limitations. Accordingly, the Supreme Court has held in *Martin Star Steel Co. v. Thomas* that the most analogous state law statute of limitations should be borrowed. 115 S. Ct. 1927 (1995). Courts, however, are divided as to which state statute of limitations should be applied, with some borrowing the limitations period for contract claims, and others utilizing the limitations period for tort claims.

#### H. Consolidated Omnibus Budget Reconciliation Act ("COBRA")

1. Under COBRA, 26 U.S.C. § 4980B, 29 U.S.C. § 1163, employers with 20 or more employees must allow employees who lose their jobs the right to continue their employer-provided medical coverage for up to 18 months (29 months for disabled persons).

2. COBRA continuation rights for up to 36 months are also provided to surviving spouses, divorced spouses, spouses of Medicare-entitled employees, and certain dependent children.

3. The cost of continued health plan coverage is paid by the person selecting it, that is, the former employee or other beneficiary. Employers are limited, however, in the amount that they can charge COBRA participants to the employer's cost plus a 2% administrative fee.

#### I. The Immigration and Naturalization Reform Act ("IRCA")

1. The principal purpose of IRCA, 8 U.S.C. § 1324A, is to stem the tide of illegal immigration. Employers are required to verify that all persons hired after 1986 have a legal right to work in the United States.

2. A concern arose that employers would react to the threat of penalties by refusing to hire all noncitizens or generally discriminating against foreign-looking individuals. Consequently, IRCA makes it an unfair immigration-related practice for an employer to discriminate against any individual (other than an unauthorized alien) because of such individual's national origin, or in the case of a citizen or an intending citizen, because of such individual's citizenship status.

3. IRCA was amended in November 1990 to address the concerns of civil rights groups which feared that employers were not hiring foreign-looking individuals, thereby discriminating against them on the basis of their race or national origin. The amendments bolster IRCA by increasing the monetary penalties for violations and extending coverage to agricultural workers. IRCA also specifies two new offenses: (a) discrimination retaliation against those who bring charges, and (b) documentation abuse by employers who request applicants to provide additional documentation or refuse to honor documents that reasonably appear to be genuine.

4. IRCA's non-discrimination provisions cover all employers of three or more employees, but exempts from coverage claims that would otherwise be covered by Title VII.

5. Statute of Limitations

a) An aggrieved party must file a charge of discrimination within 180 days of the occurrence. 8 U.S.C. § 1324(d) (3). To bring suit, a claimant must file a complaint with an Administrative Law Judge within 90 days of receipt of a Notice of Right to Sue from either the EEOC or the Justice Department's Special Counsel. 8 U.S.C. §§ 1324 (d) (2) and (3).

## **V. STATE, CITY, COUNTY AND MUNICIPAL STATUTES**

### **A. Discrimination Statutes**

1. Although most state statutes cover the same categories as Title VII, ADEA and ADA, they often provide employees with additional rights or remedies, such as a longer statute of limitations, individual liability or uncapped damages (*e.g.*, the New York State Human Rights Law provides for uncapped

compensatory damages, and the New York City Human Rights Law provides for uncapped punitive damages).

2. Many state and local anti-discrimination statutes protect employees and applicants against other types of discrimination in addition to those covered by federal law (e.g., arrest record, marital status, citizenship, credit history or sexual orientation).

### **B. Employee-Protective Statutes**

1. Like discrimination statutes, employee-protective statutes vary by state and municipality.

2. Examples of employee-protective statutes

a) Workers' Compensation statutes

b) State disability statutes

c) Whistleblower statutes

d) State labor laws—New York examples:

1) Employers cannot discriminate against an employee or applicant on the basis of his or her outside activities.

2) Employers must give an employee written notice of termination of employment, including date(s) of termination and benefits, within 5 days of termination.

3) Employers cannot make deductions from an employee's pay except for specific enumerated purposes for benefit of employee, e.g., tax withholding or credit union.

e) Family leave statutes

1) State statutes often offer greater protection than the FMLA.

2) New Jersey guarantees employees 12 weeks of leave in a 24-month period to care for a family member. Depending on an individual employee's circumstances, this can be used in addition to FMLA leave.

3) California guarantees pregnant employees unpaid disability leave up to four months, and reinstatement

to job previously held, unless it is no longer available due to business necessity.

f) Mini-COBRA statutes can apply to small employers not covered by COBRA.

g) Unemployment insurance statutes

h) Plant-closing statutes

i) Jury-duty statutes which forbid employers from terminating or otherwise treating an employee adversely because he or she served on jury duty.

## **VI. COMMON LAW TORT CLAIMS**

### **A. General**

1. Courts in each state recognize different employment-related torts

2. Each tort has a different statute of limitations, elements that need to be proven, and damages.

### **B. Commonly pled employment-related torts:**

1. Invasion of privacy

a) Most states recognize four types of invasion of privacy claims:

1) public disclosure of private facts.

2) overly invasive investigations or surveillance.

3) intrusion upon sphere of seclusion where the plaintiff had a reasonable expectation of privacy.

4) substantial publication of information which puts plaintiff in a false light.

2. Defamation

a) The release of inaccurate, misleading, or occasionally even truthful information about an employee or former employee may lead an employer to be sued for defamation.

b) Under New York law, to maintain a cause of action for defamation, a plaintiff must prove:

- 1) false statement of fact regarding the plaintiff;
- 2) statement was published to a third party by the defendant; and
- 3) injury was sustained by the plaintiff.

3. Intentional or negligent infliction of emotional distress

a) The tort of “outrage” is frequently asserted in wrongful discharge suits.

b) Such a claim requires that:

- 1) the employer intended to inflict emotional distress or recklessly disregarded whether its acts would result in the infliction of emotional distress;
- 2) the acts caused severe emotional distress; and
- 3) the acts constituted outrageous conduct.

4. Interference with Prospective Economic Advantage and Related Claims

a) A former employer (and perhaps its managers and/or supervisors) may be found liable for “interference with prospective economic advantage” or related interference claims. Such claims may arise when a company does not hire an applicant because of statements or acts by a former employer.

b) Generally, this cause of action requires:

- 1) a reasonable business expectancy between the plaintiff and a third person;
- 2) knowledge of the potential relationship or expectancy on the part of the former employer;
- 3) intentional interference, inducing or causing a breach or termination of the potential relationship or expectancy; and

4) resultant damage.

5. Assault and Battery

a) Assault and battery are separate torts and are typically charged in cases of sexual harassment or where there has been some other alleged physical contact between the employee and the employer (or a co-employee). Battery is defined as intentional and harmful or offensive contact by one person with the person of another. The intent required refers only to the intent to make physical contact; the defendant need not intend that his contact be offensive or harmful. Restatement (Second) of Torts §16(1).

b) To successfully prove the tort of assault, a plaintiff must demonstrate:

1) intent to cause a harmful or offensive contact with the other person by the defendant; and

2) apprehension of such injury by the plaintiff.

6. Fraud, Deceit and Misrepresentation

a) A typical cause of action for fraud, deceit, or misrepresentation arises in the wrongful termination context where the discharged employee accuses the employer of having made false promises regarding the terms and conditions of his or her employment.

b) To prevail, an employee must prove:

1) the employer misrepresented or concealed a material fact;

2) knowing of the falsity of the misrepresentation;

3) intent to induce the employee's reliance;

4) the employee justifiably relied on the misrepresentation; and

5) he or she was damaged as a result.

*January 1999*

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The Committee acknowledges the assistance of Committee student intern Cheryl Hager in the preparation of this report.

\*Principal authors

Formal Opinion 1999-03

# Restrictive Practice Agreements; Settlement Agreements

*Committee on Professional and Judicial Ethics*

**TOPIC:** Restrictive Practice Agreements; Settlement Agreements.

**DIGEST:** A lawyer may not enter into a settlement agreement that restricts her own or another lawyer's ability to represent one or more clients, even if such an agreement may be enforceable as a matter of law.

**CODE:** DR 2-108(B).

## **QUESTION**

May a lawyer offer or agree to enter into an agreement, in connection with the settlement of a dispute, which provides that a lawyer shall not represent the same client, or different clients, in disputes against the same opposing party?

## **OPINION**

In a 1997 decision, the Appellate Division, First Department, N.Y., disqualified plaintiff's counsel because their representation violated the settlement agreement in a prior action, which provided as follows:

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T H E R E C O R D

[Neither the settling plaintiff's law] firm, nor any of its employees, agents, or representatives will assist or cooperate with any other parties or attorneys in any . . . action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants . . . nor shall they encourage any other parties or attorneys to commence such action or proceeding.

*See Feldman v. Minars*, 230 A.D.2d 356, 357, 658 N.Y.S.2d 614, 615 (1st Dept. 1997). This decision reversed the decision of the New York State Supreme Court, New York County (Herman Cahn, J.), which had denied the disqualification motion, holding that the prior settlement agreement was unenforceable as against public policy, based on the provisions of DR 2-108(B).

The Appellate Division held that the initial settlement agreement was not against the public policy of the State of New York. As part of the justification for its holding, the court noted that it "would appear unseemly" to permit the "offending attorneys [to use] their own ethical violations as a basis for avoiding obligations undertaken by them." *Feldman*, 230 A.D.2d at 359, 658 N.Y.S.2d at 616. *Cf. Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 551 N.Y.S.2d 157 (1989) (invalidating, as violative of DR 2-108(A), provision of law firm partnership agreement which imposed financial disincentive on withdrawn partner who competed with former firm).

The Appellate Division's decision in *Feldman* that the settlement agreement was enforceable involves a matter of law, which is beyond the purview of this Committee. However, the *Feldman* court stated that "a strong case can be made" that such an agreement violates DR 2-108(B), and left such decision to the "appropriate disciplinary authorities." In that context, we believe it is appropriate for this Committee to express our view concerning the ethical propriety of such agreements.

**DR 2-108(B)**

DR 2-108(B) provides as follows:

In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law.

We believe that this rule is unambiguous in its application to agree-

ments not to represent present or future clients in litigation against a settling defendant. We therefore join numerous other bar committees in concluding that such agreements are improper. *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993) (reaching same conclusion with regard to Model Rule 5.6(b)); Ala. State Bar Disciplinary Comm'n, Op. 92-01 (same); CA Eth. Op. 1988-104 (1988) (reaching same conclusion with regard to California DR 2-109(A)); Colo. Bar Ass'n Ethics Comm., Formal Op. 92 (applying Model Rule); Dist. of Columbia Bar Assoc., Op. 130 (1983) (applying Model Code); Maryland St. Bar. Op. 82-53 (1982) (same); N.C. Sate Bar Assoc., Op. 179 (same); N. Mex. State Bar Advisory Opinions Comm., Op. 1985-5 (same); Ore. Eth. Op. 1991-47 (1991) (same); Phila. Eth. Op. 95-13 (1995) (applying Model Rule).

This understanding of DR 2-108(B) is supported by the history of the provision. As adopted by the ABA House of Delegates in August 1969, DR 2-108(B) of the Model Code of Professional Responsibility provided:

[i]n connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that *broadly* restricts his right to practice law, *but he may enter into an agreement not to accept any other representation arising out of a transaction or event embraced in the subject matter of the controversy or suit thus settled.* (Emphasis added.)

The model disciplinary rule was revised in 1970 to delete the underlined provisions. The Chair of the ABA Committee on Ethics and Professional Responsibility, Walter P. Armstrong, Jr., explained the basis for deleting these provisions as follows:

a covenant of that type would, in effect, restrict . . . a lawyer's ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients. Secondly, we [the Committee] felt that a covenant of that type would inevitably involve a conflict of interests.

*See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-371 (1993).

We also conclude that DR 2-108(B) is directed to lawyers on both sides of the restrictive agreement. Because the rule prohibits a lawyer from entering into an agreement that restricts "the right of a lawyer to practice

law,” it applies regardless of whether the lawyer entering the agreement is restricting her own right to practice law or that of another. In this respect, the Code is broader than Model Rule 5.6(b), which provides that “[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on *the* lawyer’s right to practice is part of the settlement of a controversy between private parties.” Rule 5.6(b) (Restrictions on Right to Practice) of the Model Rules of Professional Conduct (emphasis added).<sup>1</sup>

**Possible Revision of DR 2-108(B)**

The Committee notes that the *Feldman* court questioned whether there is a persuasive rationale for DR 2-108(B). *Feldman*, 230 A.2d at 360, 658 N.Y.S.2d at 616. Other commentary regarding DR 2-108(b) and its Model Rule counterpart, Rule 5.6(b), is split. Compare Stephen Gillers, *A Rule Without A Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, A.B.A.J., Oct. 1993, at 118 (describing DR 2-108(b) and Rule 5.6(b) as “anachronisms”); with Mary Lindgren Cohen, *A Threat to the Profession?*, 54-MAR Or. St. B. Bull. 36 (1994) (praising continuing need to enforce DR-2-108(b)). See also Cynthia Cotts, *May a Lawyer Deal Away Right to Practice?*, Nat’l L. J., at A1 (Mar. 30, 1998) (citing opposing commentary on continuing validity of DR 2-108(b)); Mary C. Daly, *Are Restrictive Practice Agreements Fair Game after Feldman?*, NYPRR 5 (June 1998).

The Committee takes no position as to whether DR 2-108(B) should be revised or eliminated. However, the rule’s clear command must be followed so long as it remains part of the Code.

**CONCLUSION**

For the foregoing reasons, the Committee concludes that settlement agreements that restrict the right of a lawyer to represent other plaintiffs violate DR 2-108(B).

*March 1999*

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1. This opinion does not address the permissibility of restrictions entered into in connection with the settlement of a claim against a lawyer, such as for improper use of a former client’s confidences or secrets.

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