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ARTICLES

English-Only Policies: Advising Employers and Navigating Multilingual Waters

By Rita B. Trivedi

In recent years, the number of charges of national-origin-based discrimination under Title VII of the Civil Rights Act of 1965 has been steadily increasing. According to reports from the Equal Employment Opportunity Commission (EEOC), these cases have often involved evidence of an employer's reaction or rules concerning the language spoken by employees while at work or hiring practices implicating the linguistic abilities of an individual. While rules and employment actions taken on the alleged basis of an employee's accent or ability to speak a given language are not in themselves protected classifications under Title VII, courts as well as the EEOC have recognized that language may be a reflection of national origin, as it is language that provides one of the strongest distinguishing and connecting elements of a given national group.

EEOC Commissioner Stewart J. Ishimaru has recently made the investigation of language-based discrimination a priority of the agency's agenda, despite the fact that recent federal legislation has tried to divert some of the financial resources that the EEOC expected for such cases. *EEOC Commissioner Calls for Examination of English-Only Work Policies by Employers*, BNA Employment Discrimination Report, 11/17/10. According to the EEOC's regulations, rules that require employees to only speak in English while in the workplace are presumptively unlawful if they apply to all employees at all times. However, if the rules are more narrowly drawn, the employer has the opportunity to show that a business necessity—not discriminatory animus—is the reason for the rules in question. 29 C.F.R. 1606.7. State legislatures are also increasingly facing workplace language issues: The Governor of Tennessee signed a bill on June 23, 2010, authorizing employers to require English in the workplace if there is a business necessity (including safe and efficient operations) and if appropriate notice of the rule is given. *Tennessee Governor Signs New Legislation Requiring English in Workplace if Necessary*, BNA Employment Discrimination Report, 6/30/10.

Recent settlements of language claims demonstrate the increasing financial and administrative costs an employer may face. For example, in 2009, the EEOC entered into a \$450,000 settlement for an English-only lawsuit against an employer that maintained an English-only rule but allowed Tagalog to be spoken without adverse consequences while allegedly terminating an employee for speaking Spanish. *EEOC Settlement Reflects Rise in Challenges of English-Only Policies*, Society for Human Resource Management, Legal and Regulatory Issues, 4/21/09; *Skilled Nursing Firm to Pay \$450,000 To Resolve National Origin Bias Claims*, BNA Employment Discrimination Report, 5/6/09. When counseling and working with employers, attorneys should be particularly cognizant of the risks associated with English-only rules, but

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should also understand that the EEOC and existing case law does not entirely preclude the implementation of such policies in appropriate circumstances.

Lawful and Unlawful English-Only Rules

Existing EEOC regulations distinguish between English-only rules that apply at all times and those that apply only in certain times and places. Because the EEOC views language as closely tied to national origin, it has concluded that blanket English-only rules can result in “an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment.” 29 C.R.R. 1606.7 (a). A rule requiring employees to speak only English at all times in the workplace is deemed “a burdensome term and condition of employment” that could disadvantage an individual’s employment opportunities by prohibiting him or her from speaking the language spoken most comfortably—and is presumptively in violation of Title VII. In contrast, rules requiring employees to speak English only at certain times may be permissible provided that “the employer can show that the rule is justified by business necessity” and that employees were given advance notice of “the general circumstances when speaking only in English is required and of the consequences of violating the rule.” 29 C.F.R. 1606.7(b) and (c). Notably, failure to provide notice is considered evidence of discrimination if an employer ultimately takes adverse action against an employee for violating an English-only policy.

Unlawful English-only rules, or even “speak English” statements, may also expose an employer to charges of a hostile work environment. For example, a city’s English-only policy for all city employees potentially created a hostile environment for bilingual Spanish-speaking employees because it led to ethnic taunting by fellow employees and feelings of second-class citizenship in the workforce due to the additional language rules affecting those employees. In its decision, the Tenth Circuit noted that “the very fact that the city would forbid Hispanics from using their preferred language could reasonably be construed as an expression of hostility to Hispanics. At least that could be a reasonable inference if there was no apparent legitimate purpose for the restrictions.” In that case, there was no written record of communication, morale, or safety problems that would have prompted a legitimate English-only rule, city officials could give no anecdotal or informal examples of such issues, and the employer’s summary judgment motion was denied. *Maldonado v. City of Altus*, 433 F.3d 1294, 1305 (10th Cir. 2006).

Perhaps more than many other types of employment discrimination claims, language rules have been treated by the courts and the EEOC on a very fact-specific basis. However, certain patterns have emerged, and the requisite business necessity has been found in several common situations.

Public Communication

One such example is public communications needs, such as working at a reception desk, significant telephone work, patient care, or working directly with customers in a retail setting, necessitate the use of English-only or English proficiency for job-related matters. *Edward E.*



Sanchez, v. R. L. Brownlee, 2003 EEO PUB LEXIS 4171 (EEO PUB 2003) (citing *English Only Rule: Intentional Discrimination*, EEOC Compliance Manual, Section 13, at 15 (December 2, 2002)).

- A retail makeup company could properly require employees to speak only in English when on the store floor and/or when in the range of customers because of the company's need to present an atmosphere of accessibility and politeness as part of basic customer service. "When salespeople speak in a language customers do not understand, the effects on helpfulness, politeness and approachability are real and are not a matter of abstract preference. Furthermore, just as courts have upheld a business necessity for a rule mandating that bilingual employees speak English in the workplace to stem hostility between employees, promoting politeness to customers is a valid business necessity for requiring sales employees to speak English in their presence." *EEOC v. Sephora USA, LLC*, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005).
- A hospital properly asked a bilingual employee to speak in English when working with patients in furtherance of the hospital's policy of treating patients with respect; English-only communication would help the patients feel comfortable and avoid complaints from patients who believed that he was talking about them when he spoke Spanish. *Pacheco v. New York Presbyterian Hosp.*, 593 F. Supp. 2d 599 (S.D.N.Y. Jan. 9, 2009).

Communication among Staff

On the same note, English proficiency may be necessary to ensure accurate and efficient communication between employees and with their supervisors, and/or maintain workplace safety.

- A hospital's rule requiring the plaintiff (a Spanish-speaking housekeeper) and other employees to speak only English when in the operating rooms to maintain clear and quick communication between cleaning and medical staff for sanitary reasons was lawful; employees were free to speak other languages while not in operating rooms, on breaks, and/or when not discussing job-related matters. *Montes v. Vail Clinic*, 497 F.3d 1160 (10th Cir. 2007).
- A dispatch center handling calls from customers and communications to drivers with pickup information could require employees to speak English in the main office; it served a business necessity of making sure that communications were not misunderstood. *Gonzalo v. All Island Transp.*, 2007 U.S. Dist. LEXIS 13069, 6-7 (E.D.N.Y. Feb. 20, 2007).
- A court allowed testimony of a safety expert when the employer argued its English-only rule for warehouse employees was necessary for workplace safety; the testimony was relevant to helping a jury understand whether safety hazards were based on linguistic miscommunication justifying the rule, workplace organization, or material mishandling. *EEOC v. Beauty Enters.*, 361 F. Supp. 2d 11, 21 (D. Conn. 2005).

Positive Staff Relations

In some cases, communication in English is important in maintaining harmony among employees and avoiding allegations of exclusion or gossip.

- An instruction not to carry on extended conversations in Spanish in the presence of non-Spanish speakers was appropriate, particularly when speaking Spanish was not completely forbidden: “Defendants’ purported goals of avoiding or lessening interpersonal conflicts, preventing non-foreign language speaking individuals from feeling left out of conversations, and preventing non-foreign language speaking individuals from feeling that they are being talked about in a language they do not understand, are legitimate business reasons justifying its English-only rule.” *Roman v. Cornell Univ.*, 53 F. Supp. 2d 223, 237 (N.D.N.Y. 1999).
- When non-Spanish speaking employees at a bank complained that coworkers’ constant use of Spanish made them uncomfortable and raised fears that they were being talked about in the other language, an English-only rule during work time was appropriate. *Long v. First Union Corp.*, 894 F. Supp. 933, 942 (E.D. Va. 1995).

In other situations, courts have been reluctant to find the existence of a business necessity justifying the English-only rule. Some examples include employees who work in loading docks, factory lines, and other positions in which they do not have to communicate in English to perform the job. A warehouse boxing employee in the company’s bindery department who was terminated for minor errors and told that he had to “speak American” shortly before his termination could support a claim for national origin discrimination; a “speak English” comment could be circumstantial proof of discriminatory animus or pretext by the employer. *Avila v. Jostens, Inc.*, 316 Fed. Appx. 826 (10th Cir. Mar. 19, 2009).

In some cases, the rule is ignored to maintain worker harmony. When there was no evidence of employee discord prior to a blanket English-only rule, and no evidence that the policy promoted better relations, “workplace harmony” could not justify the rule. “Quite the opposite, the evidence shows that the policy served to create a disruption in the work place and feelings of alienation and inadequacy by Hispanic employees who had up to that time been proven performers for the company.” *EEOC v. Premier Operator Servs.*, 113 F. Supp. 2d 1066, 1070–71 (N.D. Tex. 2000).

Additionally, as stated by the EEOC on December 12, 2008, “English-only policies should not be imposed merely because of coworker or customer preference. For example, English-only policies should not be imposed merely because some non-Spanish-speaking employees dislike eating lunch in the same room with coworkers who engage in private conversations in Spanish.” “Statement of EEOC Legal Counsel Reed Russell on English-Only Policies to U.S. Civil Rights Commission,” December 12, 2008.



The rule should also not be put into place solely based on the employer's preference without other business explanation. As noted above, even otherwise legitimate English-only rules are more likely to be deemed unlawful if applied to all times and places, such as break rooms, during meal periods, or when performing "backroom" work.

Bilingual employees bring a somewhat different set of concerns to the analysis of an English-only rule. The EEOC's concern over the discriminatory aspect of English-only provisions stems in part from the risk to an individual's employment opportunities and advancement if he or she is forced to operate in a language other than the one spoken most comfortably. Yet bilingual employees are able to interact with equal ease in English as well as the "other language." In such cases, an employer may have more flexibility when requiring that employee to speak only in English. As one court put it, "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex, or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice." *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980). English-only rules involving bilingual employees often appear in the context of rules to maintain harmony and prevent allegations of gossip as discussed above.

Bilingual requirements for applicants have also raised concerns. The Fifth Circuit recently noted that "non-bilingual persons are not a protected class under Title VII." As a result, "a preference, or even requirement, that employees have bilingual ability does not give rise to a discrimination claim based on national origin or race." *Chhim v. Spring Branch Indep. Sch. Dist.*, 110 FEP Cases (BNA) 629, No. 10-20142 (5th Cir. Sept. 22, 2010). Despite the willingness to link language to national origin, the status of bilingual tests remains uncertain.

Health and Safety Concerns

Employers also have a duty to provide a safe workplace for all employees. A recent occupational safety and health memorandum to regional administrators explained:

In practical terms, this means that an employer must instruct its employees using both a language and vocabulary that the employees can understand. For example, if an employee does not speak or comprehend English, instruction must be provided in a language the employee can understand. Similarly, if the employee's vocabulary is limited, the training must account for that limitation. By the same token, if employees are not literate, telling them to read training materials will not satisfy the employer's training obligation. As a general matter, employers are expected to realize that if they customarily need to communicate work instructions or other workplace information to employees at a certain vocabulary level or in language other than English, they will also need to provide safety and health training to employees in the same



manner. [O]f course, employers may also provide instruction in learning the English language to non-English speaking employees. Over time this may lessen the [need] to provide OSH Act training in other languages.

April 28, 2010, [Memorandum for Regional Administrators](#), Subject: OSHA Training Standards Policy Statement(last visited April 6, 2011).

This policy suggests that, when advising employers, a distinction must be made between English-only rules during ordinary workplace operations and procedures when safety training or other instruction is being provided. Further complicating the analysis are cases in which workplace safety was found to be a legitimate business reason for English-only rules. Although there is no clear policy to follow, it may be wise to ensure that employees understand safety and training instructions in a language in which they are fluent, and obtaining written acknowledgment of their understanding.

The Ellerth-Faragher Affirmative Defense

One of the most powerful affirmative defenses against charges of discrimination is the Ellerth-Faragher defense, named after a pair of companion cases decided by the Supreme Court in 2006. The Ellerth-Faragher defense may be invoked if (1) there was no adverse employment action against the plaintiff employee, and (2) the employer exercised reasonable care to prevent and correct any sexual harassment (e.g., by a reasonable complaint procedure), but the plaintiff unreasonably failed to use that procedure. If successful, the Ellerth-Faragher doctrine provides a complete defense against charges of sexual harassment and retaliation. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The Ellerth-Faragher argument becomes potentially more complex in situations where the employees primarily speak a language other than English, and the employer issues its policies and complaint procedures only in English pursuant to an English-only policy (or even as a matter of simple business convenience). Employees are often required to sign an acknowledgment of policies included in the employee handbook or similar documents. The handbook often contains specific complaint procedures for harassment, retaliation, and discrimination, including the individual(s) the complaining employee should contact, steps that will be followed, and assurances against retaliation. In the ordinary case, evidence of an acknowledgment of these policies can usually go a significant way toward satisfying the second prong of the defense.

But what if the plaintiff argues that because she speaks Malay (and little or no English), her acknowledgment of the policies is essentially meaningless? The plaintiff may also argue that she never had a realistic opportunity to ask questions about the content of the employee handbook—a concept that is often included in the acknowledgment. From a practical standpoint, employers may understandably balk at the notion of issuing the employee handbook in each language spoken by the employee population. Yet if a particular language is especially widely represented,



it may be worthwhile to consider offering the handbook in that language to help preserve the Ellerth-Faragher defense. Even if the employer has a legitimate English-only policy in effect for certain employees in certain areas under the business necessity standard discussed above, this would not necessarily offer protection against charges of discrimination from workers who are unable to understand the company's internal complaint procedures.

The National Labor Relations Act

Protected Concerted Activity

Section 7 of the National Labor Relations Act (NLRA) protects the right of all employees (both unionized and non-unionized) to engage in protected concerted activity, which is generally read to include the right to discuss the terms and conditions of their employment with each other. 29 U.S.C. 157 (Section 7). This has been interpreted to mean that an employer cannot prohibit employees from engaging in such communications when all employees involved are off-duty and in non-working areas (e.g., the break room when two employees are on break). However, there may be limitations placed when one employee is on working time and the other is not, or when the communication is taking place in working areas even if both employees are off-duty.

The justification for this approach has been that the employer has some right to control potential disruptions to its business, but that it may not do so in a sweeping way that precludes the employees' exercise of their Section 7 rights. Usual disruptions that have been found sufficient to limit employee communications include littering of the work area when leaflets are distributed, disrupting patient care if conversations take place in patient areas, disrupting customers in retail settings, and distracting an employee who is on duty from the job that he or she has been hired to perform.

In many ways, the Section 7 analysis echoes the tests described above for a legitimate English-only rule in the workplace, i.e., what is the business necessity, risk, or disruption; can it be supported by evidence; and has the rule been sufficiently narrowly drawn and applied to the relevant employees in the permissible times and places? However, the English-only rules add an additional layer to the NLRA requirements insofar as, even if the NLRA requirements have been satisfied on their face, the effect of certain rules limiting the language used by employees might for all intents and purposes, still risk violating the NLRA. When advising employers, attorneys therefore should be careful to consider not only the terms and case precedent set by under the NLRA, but also the decisions of the courts under Title VII anti-discriminatory statutes, particularly as applied to national origin discrimination evidenced through rules on the use of languages other than English in the workplace.

Union Elections

If a union has petitioned to represent certain employees (i.e., a proposed unit), an election may be held to determine whether or not the employees wish to be represented by that union. The election is held under the supervision of the National Labor Relations Board, the federal agency



charged with administering and enforcing the NLRA. Prior to the election, both the union and the employer often engage in vigorous campaigns to sway employees to their point of view as to the benefit of naming the union as the representative of employees vis a vis management. At times, the union may rely on a showing that employees are interested in union membership based on the employees' signatures on printed cards distributed by the union during its organizing campaign. On the day of the election, employees in the proposed unit are given ballots and can vote for or against the union under a set secret ballot procedure, with certain neutral observers, as specified by the NLRA. The ballots are then processed pursuant to the procedures set forth by the board, and a ruling on representation is made.

However, both the ballots and the cards purportedly showing the employees' interest in union representation are almost always in English. If some of the employees in the proposed unit do not read or speak English with sufficient competency to understand the ballot and make an informed choice, this procedure could arguably violate their rights under the NLRA to choose to be represented by a union or not. On the other hand, the logistics of issuing ballots and/or cards in more than one language might be burdensome to all parties, including board overseers.

Union election notices and ballots may be requested in languages other than English. However, it is left to the discretion of board regional offices as to whether they will be provided in any given case. *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 916, 919 (N.L.R.B. 2001) ("The Board has made clear that it has no policy requiring the use of ballots in multiple languages."); *NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990).

If an employer conducts most of its operations in English (e.g., providing training manuals, hiring and employment paperwork, and other documents in English only), requires English-only communication in working areas, and does not use formal translators, it will be considerably harder to obtain election ballots and notices in languages other than English. Moreover, a challenge to election results on the basis that language obstacles interfered with employees' free choice under Section 7 of the NLRA may be tenuous. *Bally's Park Place, Inc.*, 2007 NLRB LEXIS 545, 50-56 (Oct. 18, 2007).

As a practical matter, an employer with an English-only rule (even one that is properly limited) may find that this hinders its ability to convincingly launch a campaign against a union. If it has barred the use of Russian during work time and in work areas, it may be hard for management to communicate with Russian-speaking workers while they are in the building to discuss the sometimes complex arguments involved in union representation. While management itself might try to use Russian, it may be that doing so would open the company up to a charge of discrimination on the basis of national origin (evidenced through language rules), i.e., using Russian when it suits the company, but barring it for the workers themselves. This is not to suggest that appropriate English-only rules cannot be squared with the union campaign and election process. Rather, it is another example of the importance of properly defining the



boundaries of the linguistic rules and allowing for reasonable time/place communication for the benefit of both the employees and the employer.

The answers to these kinds of questions are not yet clear. Nevertheless, they do illustrate the minefield of English-only rules and the multilingual workplace not just under the Title VII anti-discrimination statute but also under the NLRA.

Conclusion

An increasingly diverse workforce conversant in multiple languages makes it critical for an employer to establish clear and consistent language policies. While English-only policies carry legal risk, current legal interpretations of Title VII and other relevant statutes recognize an employer's business needs concerning customer interaction, employee relationships, and safety measures. When considering whether such a policy is appropriate, the scope, implementation, and documentation of the employer's business concerns prompting the policy will be essential in justifying the decision in case of a subsequent legal challenge.

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A Comparative Look at Discrimination in the Olympic Games

By Ayanna London

Every four years, the world comes together to celebrate sport in the Summer Olympic Games. For many, the mega event represents the promise of world unity and the potential for triumph over ongoing politics and strife. This sentiment is not by happenstance. The Olympic Charter from the International Olympic Committee (IOC) outlines the First Fundamental Principle of Olympism as a joining of sport, culture, and education for the purpose of furthering universal ethical principles. [Olympic Charter](#), at 12.

Athletes and residents alike use the Olympic moment to speak directly to the reality of an unharmonious existence. The Olympic Charter embraces such protests with fundamental principle number five: "Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement." *Id.*

For the host nation, winning a bid from the IOC carries incredible potential for great business investment, improvements in safety, new construction, new jobs, and of course, the prestige of presenting the country to a global audience. However, with each of these inspiring possibilities comes the potential for an alternative outcome. One standard for measuring the success of the games is how successful the host city is in achieving the best results for all its residents. By

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examining three stages of the games (anticipation, actualization, and the aftermath) of three different host cities (Los Angeles, California—1984, Atlanta, Georgia—1996, and the future host city of Rio De Janeiro, Brazil—2016), it is possible to examine how Olympic and government officials either succeeded or neglected to maximize the benefits of the event to include minorities.

Undoubtedly, the three cities are quite distinct and hold with different histories. However, race has played a palpable role in disqualifying protective measures for disadvantaged racial groups and legitimizing policies that disproportionately harmed them. Brazil is uniquely positioned as the first South American nation to host the Olympics. Knowledge@wharton, [Brazil's Gold: How Rio Won Its Olympic Bid](#).

However, ever-present in the excitement of this historic moment and Brazil's emergence into the international community as an economic power is the fear of violence associated with Rio's favelas, or slums. The favelas are seen as centers of drug violence and the "Achilles' heel" of Rio's Olympic image. Alexei Barrionuevo, [Violence in the Newest Olympic City Rattles Brazil](#), N.Y.T., Oct. 20, 2009. Just as policies in Los Angeles and Atlanta were justified based on the perception of the urban areas as locales of "blackness," emerging policies in Rio reflect a view that the inhabitants of the favelas are unworthy of the same consideration as the rest of Brazilian society. Some may argue that race and blackness in Brazil are not analogous to the concept of blackness in the United States. See Antonia Sérgio Alfredo Guimarães, *Measures to Combat Discrimination and Racial Inequality in Brazil*; Edward Telles, *Race in Another America: The Significance of Skin Color in Brazil*; Mala Htun, *From "Racial Democracy" to Affirmative Action: Changing State Policy on Race in Brazil*. However, the argument can also be made that the structure of white supremacy is highly instructive in both countries and similarly reflected in the anticipation, actualization, and aftermath of the Olympic Games.

Los Angeles

Anticipation

The IOC entertained bids for the 1984 games just five years after the terrorist attack at the Munich Games. Bill Shaikin, *Sports and Politics: The Olympics and the Los Angeles Games* 38 (Praeger Publishers 1988). The Olympic image of peaceful celebration and competition had been shaken to its core. Moreover, while the Montreal Games in 1976 saw no terror attacks, the event cost \$1.5 billion in expenditures and left a deficit of over \$1 billion. *Id.* at 38. Los Angeles emerged as the only city to even bid to host the 1984 Summer Games. *Id.* at 39.

Mayor Tom Bradley had a distinct vision for the games. He vowed to produce a "spartan" Olympics, devoid of over-expenditure. *Id.* at 40. Whereas previous games were financed largely through public funding, the Los Angeles Games would be financed exclusively via private enterprise. *Id.* at 39. The chair of the Los Angeles Olympic Organizing Committee (LAOOC),



Peter Ueberroth, vowed to raise revenue with commercial sponsorships, ticket sales, and the sale of television rights. [Los Angeles and the 1984 Olympic Games](#), at 8.

On the ground, measures would be taken to fortify security. Los Angeles Police Chief Daryl F. Gates and Olympic Planning Chief William Rathburn met with security officials from the Munich and Moscow Games. Evan Maxwell and Bill Farr, *Games May Cut Crime, Experts Say: Security Chiefs Believe Added Officers Could Lower Rate*, L.A. Times, Jan. 27, 1984, at A10. A Montreal security official advised Gates to meet with dissident groups to quell the potential for protests and disruptions, adding, “Of course we do not have as many dissident groups in our city as you do here.” Gates responded that such meetings were planned and noted, “But quite frankly, there are some groups in the City of Los Angeles who I am convinced will not listen to us, will not pay any attention to us.” *Id.*

In anticipation of the games, the Los Angeles Police Department began performing “hype sweeps.” Thirty horse-mounted police officers were added to the force and joined in surveying downtown and Skid Row. Kevin Roderick, *L.A. Polishing Its Image for Olympic Visitors: Horse Patrols Ride Herd on Transients*, L.A. Times, July 21, 1984, at B14. Deputy Police Chief Lew Ritter said, “We want to give the impression that we’re omnipresent.” He added, “We are going to strictly enforce the law. . . . Some of those who are borderline cases are going to be stopped more often.” Los Angeles Parks and Recreation Director Bill De La Garza remarked, “It’s like when you’re having company over—you clean the front room.” *Id.* City Council member Gilbert Lindsey had a stronger recommendation for “beautifying” the streets of Los Angeles for its international guests. He suggested that the homeless on Skid Row should be shipped out to farms for the duration of the Games. Judy Chu, *Freedom Could Be a Loser at the Olympics*, L.A. Times, Jan. 18, 1984, at C5.

Actualization

The 1984 Games were poised to make history for better or worse. Nevertheless, Mayor Bradley and the LAOOC were blazing a new trail with their private financing model.

The LAOOC introduced the “Youth Legacy Kilometers” fundraising program. Shaikin, at 45. For \$3,000, private individuals could purchase the opportunity to run with the Olympic torch for one kilometer. *Id.* The proceeds would be donated to expand athletic programs at organizations like the Boys’ Clubs of America, Girls’ Club of America, YMCA, and Special Olympics. *Id.* The program raised \$11 million. *Los Angeles and the 1984 Olympic Games*, at 16.

Another innovation came in the form of facilities construction. There was hardly any at the “no frills Games.” [International Olympic Committee](#); *Los Angeles and the 1984 Olympic Games*, *supra* at 1. Existing stadiums, fields, pools, and tracks were prepared for the games.

Corporate financial support came through. There were 29 official sponsors, each of whom paid \$4 million for the honor. Henry Eason, [*The unstated message of the 1984 Olympics; the Los Angeles games will show U.S. private enterprise at work*](#), Nation's Business, Mar. 1984. Strikingly, companies also provided many American athletes with jobs that paid them as full-time employees but allowed them to train for the games. *Id.*

However, not everyone experienced the benefits of the newly conceptualized games. For instance, many poor families that lived in motels because they could not afford the customary first month's rent and security deposit of a lease found that their nightly fees had increased dramatically. David Reyes, *Olympics Blamed: Family Flees to Shelter After Motel Rent Hike*, L.A. Times, July 26, 1984, at A7. For instance, one family found themselves out of a place to live when their Santa Ana motel raised their rent from \$10/ week to \$140/week.

The opening ceremonies aimed to be inspirational. Indeed, the moment where members of the audience flipped cards to reveal flags of the world around the coliseum was quite memorable. Shaikin, *supra* at 43. Critiques came nonetheless. Cuba's Rebel Youth reported that the ceremonies were a "gross falsification" of American history, ignoring the massacres of Indians, the stealing of land from Mexico, and the enslavement of Blacks." Sam Jameson, *Reaction: International Press Reviews Opening of L.A. Games*, L.A. Times, July 30, 1984, at H36. Also of note was a Brazilian news media's impression of the games, which focused strongly on the people of Los Angeles. Juan de Onis of the Journal do' Brasil observed:

The Anglo Angeleno you run into on the street is generally cordial. He smiles and says "Good Morning" or "How are you doing?" But if you try to get past that polished veneer, it can be frustrating. The Hispanic, whether he is a newcomer or not, is often not integrated and has difficulty with English. He seems to feel he is in a strange house. The Negroes, on the other hand, are much more affable than their counterparts in the Bronx or Harlem.

Aftermath

In the end, the 1984 Los Angeles games closed with a \$232.5 million surplus. Los Angeles and the 1984 Olympic Games, *supra* at 17. It was an extraordinary feat that would reshape the way officials thought about Olympic game management.

However, even today, we see that some promises were left unfulfilled. The Amateur Athletic Foundation of Los Angeles, an organization tasked with distributing \$90 million in surplus from the games to support youth sports program, largely overlooked South Central Los Angeles and other impoverished parts of the county. Chip Jacobs, [*Poor areas being overlooked at L.A. Olympic foundation*](#), L.A. Business J., June 8, 1992. While the organization's mandate is to focus on minority and lower-income beneficiaries, by 1989, only \$230,000 had been distributed to Los Angeles while \$2.3 million had been disbursed to other regions of Southern California. *Id.*

Atlanta

Anticipation

The next Summer Olympics to be held in the United States would be the 1996 Games in Atlanta, Georgia. Mayor Andrew Young would head the Atlanta Organizing Committee for the Olympic Games and cap off his efforts to make Atlanta an “international city.” James C. Cobb & William Stueck, *Globalization and the American South* 187, 199 (University of Georgia Press 2005). The logo for the games was aptly dubbed the “star on the rise.” *Id.* at 176.

Young saw in the Olympics an opportunity to reverse the image of the American South. The “redeemed interracial South” was to be the model of racial progression and integration. *Id.* at 202. Thus, much like the Los Angeles Games, the Atlanta Olympics welcomed the eyes of the world for its big moment. Atlanta also adopted the private funding scheme inaugurated in 1984. Center on Housing Rights and Evictions, *Atlanta’s Olympic Legacy* (2007) at 14.

But Atlanta’s intended image seemed far from the lived reality. At the time, Atlanta was the fourth most segregated city in the United States. *Id.* at 24. Unlike the Los Angeles Olympics, new construction was seen as integral to Atlanta’s preparations. Atlanta already carried a shameful history of removals and displacement of minorities under the banner of “urban renewal.” *Id.* at 23–24. By the late 1960s, the practice had caused so much devastation in minority communities that it was referred to as “Negro removal.” *Id.* Thus, officials vowed to give the housing consequences some consideration. In 1993, the Corporation for Olympic Development in Atlanta presented its plan for “‘revitalization’ which called for the demolition of 553 private residential units that still housed approximately 1,393 people who lived in these severely deteriorated and dilapidated units” *Id.* at 19–20.

Actualization

The Opening Ceremonies picked up on the theme of Southern nostalgia. The presentation was introduced as a history of one nation built out of many. After a cowboy montage, the black cultural montage made its appearance. Kay Schaffer and Sidonie Smith, *Olympics at the Millennium* 173 (Rutgers University Press 2000). Marching bands created a formation of the Southern steamboat, and a tribute to jazz followed. *Id.* The narrator announced that jazz “soon moved from the streets of New Orleans to the concert halls of New York.” *Id.* Thus, it appeared, the Opening Ceremonies were unconcerned with the story of what exactly needed to be redeemed about the “redeemed interracial South.”

Outside the official Olympic grounds, poor black residents of Atlanta were targets of Olympic imaging. Travelers’ Aid, a not-for-profit organization whose undertaking was to assist Atlanta’s visitors during the games, bought one-way bus tickets for many of the city’s homeless in an effort to sweep the streets. Center on Housing Rights and Evictions, *supra* at 32.

The police force also partook in its share of quick fixes. They mass-produced citations on which the following information was pre-printed: “African American, Male, Homeless.” *Id.* Local activists report that between 1995 and 1996, approximately 9,000 homeless persons were arrested without probable cause. *Id.* at 4.

Aftermath

Lawsuits against Atlanta regarding the criminalization of homeless people followed. *Id.* at 34. In addition, the city faced a federal cease and desist order in reaction to the arrests lacking probable cause. *Id.* at 4. However, there seems to have been little media attention placed on the criminalization of the poor during the games.

The Atlanta Olympic officials’ gesture towards addressing the housing problem seemed little more than that. Affordable housing units were developed by a few not-for profit groups. *Id.* at 12. However, families that wished to live there would have to be earning up to 80 percent of area median income to afford the space.” *Id.* As a result of the games, 68,000 people (22,000 households) were displaced. *Id.* at 8.

Rio de Janeiro

Race in Brazil

Before we can begin a conversation contrasting the treatment of poor blacks in the United States during the Olympics and the treatment of poor blacks in Brazil, we must first explore what is meant by blackness in Brazil, how the category is contested, and what those contestations might tell us.

Some scholars contest that the United States’ history is one rooted in segregation and clear racial lines while Brazil is characterized by a “racial democracy” in which mixture and miscegenation have been held up as the ideal, and various colors of people live side by side. *See* Telles, *supra*; *see also* Pierre Bourdieu and Loïc Wacquant, *On the Cunning of Imperialist Reason, Theory, Culture, Society* 1999 (SAGE, London, Thousand Oaks and New Dehli), Vol. 16(1): 41–58.

Theorists like Pierre Bourdieu and Loïc Wacquant argue that these differences essentially make cross-national comparisons foolhardy and downright harmful.

However, this position ignores the pervasive role of white supremacy in the racial structures found in both the United States and Brazil. In both countries, whiteness was constructed as the top and blackness as the bottom. This concept would be vital to shaping government policies and encouraging the social interactions that reified and entrenched racism in the societies. The presence of white supremacist ideology is somehow obscured by the level of miscegenation seen in Brazil. In the United States, laws prohibited miscegenation and justified the policy by expressly denying the human dignity of blacks. In Brazil, however, neo-Lamarckian ideology instructed that the “genetic deficiencies” of blacks could be overcome after a generation in

intermixing. Telles, *supra* at 28. During the period from 1872–1940, the Brazilian government adopted an affirmative plan to increase the number of European immigrants to whiten the population. *Id.* at 29–30. While one policy was to advocate miscegenation and the other was to advocate anti-miscegenation, the rationale remained the same: Whiteness was supreme, something to be protected diligently or something to aspire to for the redemption of a darker population.

Another argument against U.S./Brazil comparative studies on race is one that is also echoed in the debate on Affirmative-Action in Brazil. See Wendy Green, *Determining the (In)Determinable; Race in Brazil and the United States*, 14 Mich. J. Race & L. 143, (2009). 146–47. Building on the racial democracy myth, opponents of such comparative studies (and of affirmative-action based on race) assert that the color fluidity of Brazilians precludes the designation of blacks or Afro-Brazilians in the first place. Guimarães, *supra* at 144. They argue that the rule of hydrodescent seen in the United States is uninformative in Brazil, where most citizens can claim some African ancestry. Green, *supra* at 88.

However, when you look below the poverty line in Brazil, you find that race is very much correlated with poverty. Htun, *supra* at 62. Blacks compose about 45 percent of the population but 64 percent of people living below the poverty line. *Id.* at 63.

The stark racial disparities permeate all aspects of life in Brazil. During a two-week stay in Brazil, I posed the question of “who is black?” to many activists, lawyers, and students. I received the answer, “just ask the police” several times over. Interview with João George, president of Olodum, in Salvador, Brazil. (Mar. 26, 2010); interview with Vilma Reis, director of CEAFFRO, in Salvador, Brazil (Mar. 26, 2010); interview with Paulo Rogerio, member of Instituto de Mídia Étnica, in Salvador, Brazil (Mar. 26, 2010); interview with Conectas, in São Paulo, Brazil (Mar. 30, 2010).

The criminalization of blacks fosters a staunch police surveillance and lack of accountability in the favelas of Rio. João H. Costa Vargas, *When a Favela Dares to Become a Gated Condominium: The Politics of Race and Urban Space in Rio de Janeiro*, Latin American Perspectives, Vol. 33, No. 4, *Raceland Equality in Brazil: Cultural and Political Dimensions* (Jul., 2006), pp. 49–81, p. 56

The favelas are mostly poor and black. *Id.* at 56. They emerged in the hills of Rio after liberation of the slaves in Brazil in 1888 and now shape a distinctive image of Brazil as a whole. Interview with Renato Ferreira, director of UERJ Affirmative Action students/PPCOR, Rio de Janeiro (Mar. 24, 2010). While much attention has been paid to the existence of drug gangs in the favelas, there has been less attention on the amount of police misconduct and police killings. Vargas, *supra* at 56. Between January and August of 2003, over 70 percent of the 900 people killed by police lived in the favelas. *Id.* According to the census in 2000, Rio has more than six million people and has over 600 favelas. *Id.* at 59. About 1–2 million of Rio’s population lives in

these shantytowns. Interview with Theresa Williamson, founder of Catalytic Communities, (Apr. 30, 2010). These urban spaces of poverty represent an expression of the subordination of blacks in Brazil. Vargas, *supra* at 59. Thus, policies directed towards the favelas must be understood through the lens of who lives there and how they are being dominated.

Anticipation

Rio's selection as the 2016 host city for the games is certainly momentous. Organizers are eager to present "Brand Brazil" to the international community with precision and care.

Knowledge@wharton, *supra*. However, even at these early stages of preparation, signs point to possible missteps in advancing the economic and civil interests of Brazil's poor blacks. Much like the Los Angeles and Atlanta games, policies are being put into place that neglect the housing repercussions to the most vulnerable groups, criminalize the population, and take no care to ensure that all of Brazil will be arriving on the world stage together.

In a meeting with an attorney at Justiça Global, I asked what she thought of the Olympic Games coming to Rio. Interview with Renata Lira, attorney at Justiça Global, Rio de Janeiro, Brazil (Mar. 23, 2010). She noted that the human rights community anticipated displacement and police invasions of communities in the name of pacification.

Unidades de Polícia Pacificadora (Pacifying Police Units), or UPPs as they are better known, exert control over the most crime-ridden favelas in Rio. Marina Lemle, [Rio de Janeiro's UPPs: Peace or Authoritarianism?](#) *Comunidade Segura*, (Apr. 8, 2010). The UPP's presence is seen as a welcome change to some. See Seth Kugel, [Rio liberates favelas one by one](#), *The Global Post* (Mar. 15, 2010). The hope is that the police presence, missing for some decades in the communities, will alleviate the fear and isolation under which many inhabitants live.

However, worries entail. Placing the least experienced officers in the most "violent" favelas seems detrimental to the safety of both the officers and the residents. Moreover, the surveillance is targeted only to territories of poverty. Lemle, *supra*. Rio is going beyond the "sweeping" operations seen in Los Angeles and Atlanta and implementing para-military presence and force.

The threat of displacement has also shown itself to be a reality. In early 2010, the newspaper *O Globo* published a list of 199 favelas slated for removal. Sheila Jacob, [Demonstrators gather in front of Rio City Hall to protest threat of removals](#), *Núcleo Piratininga de Comunicação* (Feb. 10, 2010). The removal decisions had been made without any meetings or consultations with the favela residents and representatives. Williamson, *supra*. Only after a protest in front of City Hall in February 2010 did the Mayor Eduardo Paes agree to meet with community representatives from Vila Autódromo, Arroio Pavuna, Camorim, Canal do Anil, Taboinhas de Vargem Grande, Horto, Pau da Fome, and Pontal Recreio dos Bandeirantes. Jacob, *supra*. Vila Autódromo, the favela slated first for removal, has about 4,000 residents and is to be replaced by the Media Center and Olympic Training Center. Williamson, *supra*; Sheila Jacob, [In a meeting with the](#)



[*Mayor of Rio, Vila Autódromo reaffirms desire to stay*](#), (Mar. 5, 2010). Because it has not been marked by intense crime, its sustentation is seen as vital if other favelas are to survive the removal plans.

Rio's public works officials have also begun constructing walls around the favelas. Shasta Darlington, [*Eco-wall or segregation: Rio plan stirs debate*](#), (Dec. 9, 2009). The state began building around Santa Marta in March 2010 and plans to spend an estimated \$17 million constructing similar walls. Officials claim the walls are being constructed to prevent deforestation. However, many residents believe the walls are being constructed in anticipation of the 2016 Games in an effort to blockade them.

Articulation

Brazil hosted the Pan-American Games in 2007, and, while it was a smaller sports event, the operations may provide some valuable insights for the pending Olympics and the 2014 World Cup to be held in Salvador. The UPP was first used during the Pan-American Games. Lira, *supra*. Hundreds of soldiers entered favelas by foot and helicopter in what appeared to be a public relations effort to show the international community that Rio could manage the communities.

There is also some controversy over the difficult economic situations of many black Brazilian athletes who participated in the games. *Id.* Nilza Iraci, executive coordinator of Geledés, voiced concern about the small amount of government support the athletes received. Interview with Nilza Iraci, executive coordinator of Geledés: Instituto da Mulher Negra, São Paulo, Braz. (Apr. 1, 2010). She added that many black athletes were forced to hold labor-intensive jobs to both support themselves and find a way to train. It is reminiscent of the experiences of American athletes Jesse Owens and Joe Louis after they dazzled fans at the 1932 games. Donald McRae, *Heroes Without a Country: America's Betrayal of Joe Louis and Jesse Owens*, (Harper Collins, 2002). While they were heralded in the international limelight as American heroes, they would return to the United States to face lives of economic struggle.

The planning stage is most vital in preventing future discrimination. The games of Los Angeles and Atlanta give some insight into strategies that could reverse the trend and strategies that have proven to perpetuate discrimination.

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The NFL's Diversity Report Card

By Joseph M. Hanna and S. Philip Unwin

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The Institute for Diversity and Ethics in Sport [issues annual grades](#) for diversity hiring for the National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), Women's National Basketball Association (WNBA), Major League Soccer, and college sports. On September 29, 2010, the Institute issued its 2010 Racial and Gender Report Card (RGRC) for the NFL, scoring the league an A for its racial hiring practices and a C for its gender hiring practices, resulting in an [overall grade of B](#). The A was the NFL's highest grade ever received from the Institute for its hiring practices.

Richard Lapchick, director of the Institute, credited the Rooney Rule in part for the NFL's high grade. The Rooney Rule was adopted by the NFL in 2003 and [mandates](#) that teams must interview at least one minority candidate when hiring for a head coaching position. In 2009, the rule was expanded to include all senior football operations positions. The numbers prove the Rooney Rule has had an impact: In [2002](#), 65 percent of NFL players were African American, compared to just 6 percent of head coaches. In [2009](#), 67 percent of players were African American, but the number of African American head coaches had risen to 19 percent. Twenty-five percent of personnel in management positions in the league were minorities (i.e., 8.7 percent African American, 4.7 percent Latino, 9.4 percent Asian, 0.2 percent Native American, and 1.8 percent miscellaneous).

Lapchick also credited the fact that minority coaches have been quite successful in recent years. Three of the last four Super Bowls have featured an African American head coach, with the 2007 Super Bowl featuring both the Indianapolis Colts' Tony Dungy and the Chicago Bears' Lovie Smith. Furthermore, five of the league's 32 general managers are African American, including Jerry Reese, who was the architect of the 2008 Super Bowl Champion New York Giants. All in all, six of the last eight Super Bowl teams have had either an African American head coach or general manager.

The NFL's hiring of women in the league office has been [fairly constant](#) from 1996 onward, as has the number of majority owners and team executives. There has been [more variance](#) in the number of senior administrators, which rose from 12 percent in 1994, up to 34 percent in 1997, dropped to 19 percent in 1999, before climbing back up to 31 percent in 2003, and remaining steady between 28 percent and 34 percent thereafter. There are no female coaches or general managers in the NFL.

Because head coaches and general managers are typically the public faces of a franchise, the attention has been focused on those positions as opposed to administrative roles. The NFL's policy, either deliberately or coincidentally, reflects this, as the Rooney Rule only mandates that a team must interview a minority candidate for a head coach position or a senior football operations position. There is no such requirement that a minority be considered for an assistant coach or other organizational position, nor is there a requirement that a female be interviewed for an organizational position.



Despite its solid marks on the RGRC, the NFL still trails the [MLB](#) and [NBA](#) in the overall rankings. The MLB received an A for race and a B for gender for an overall 2010 grade of B+. The MLB features the most ethnically diverse player pool of the three sports: 61.7 percent Caucasian, 27 percent Hispanic, 9 percent African American and 2.3 percent Asian. At the beginning of the 2010 season, 30 percent of managers and 32 percent of the coaching staffs were minorities. Five general managers (16.7 percent) and six assistant general managers (20 percent) were minorities, as were over 17 percent of vice presidents, 16 percent of senior team administrators, and 15 of people holding professional positions. The MLB has one minority who is the primary owner of a team—Arturo Moreno of the Los Angeles Angels.

As with the NFL, there are no women managers or assistants, but the MLB has a significantly higher number of women in executive positions. Pam Gardner of the Houston Astros is the president of business operations for that team and is the only female CEO or team president in the MLB. *Id.* at 4. Twenty-one different MLB teams have at least one woman in a team vice president role, averaging over 19 percent overall. Nineteen percent of senior administrators and 31 percent of professional positions are occupied by women. *Id.* at 27–28.

Historically, the percentage of team professional administration roles filled by women has remained fairly stable, fluctuating from 32 percent in 2000 to 31 percent in 2009, only dipping below 25 percent twice during that period, with a low of 22 percent in 2001. The percentage of senior administrators has followed a fairly similar pattern, generally holding in the 20 percent range, with a low of 14 percent in 2004 and a high of 24 percent in both 2000 and 2001.

The percentage of MLB team vice presidents, however, has steadily risen from 5 percent in 2000 to over 19 percent in 2009. There has also been an increase in minorities in these roles, with the growth primarily occurring between 2008 and 2009, when the number of minority VPs rose from 10 percent to just over 17 percent. It is noteworthy, however, that the overall number of team vice presidents in the MLB nearly doubled in that same time frame (2000–2009) from 123 to 235. *Id.* at 26.

The [NBA](#) received an A for race and an A- for gender, for an overall grade of A.. The NBA has, by far, the highest percentage of minority players of any sports league: 82 percent, of which 77 percent are African American. Thirty percent of head coaches and 41 percent of assistant coaches are African American. Michael Jordan of the Charlotte Bobcats remains the only African American majority owner in pro sports, having succeeded Bob Johnson, the first African American majority owner in pro sports history. *Id.*

As of the beginning of the 2009–10 season, there were four African American team presidents in the NBA (representing 12 percent of total team presidents). Twenty-seven percent of team professional administrators were minorities, as were 21 percent of team senior administrative positions and 36 percent of the professional staff positions at the NBA League office. *Id.*



Once again, as in the NFL and MLB, there are no women coaches, but 44 percent of the professional positions in the NBA League office are held by women, and there are 34 women in vice president positions in the NBA League office. Women hold 39 percent of team professional administrative positions, and the NBA employs the only female referee in major professional sports. It is also noteworthy that six women have majority ownership of NBA franchises. Women occupy 18 percent of team vice president positions—a number that has held steady for the last three years after increasing steadily from 1993 to 2005.

To determine why the NFL trails behind the NBA and MLB in its overall score, we need to look at the diversity hiring initiatives for each league. As noted, the NFL's most prominent diversity hiring initiative is the Rooney Rule. Dan Rooney, the owner of the Pittsburgh Steelers, credits the rule for the hiring of the Steelers' head coach, Mike Tomlin. Rooney stated:

To be honest with you, before the interview, he was just another guy who was an assistant coach. Once we interviewed him the first time, he just came through and we thought it was great. We brought him back and talked to him on the phone and went through the process that we do, and he ended up winning the job.

Tomlin [stated](#) "I think it has given me an opportunity to present myself maybe in some situations that I wouldn't have had."

The Rooney Rule was a product of the NFL's Diversity Council, which was established in 2002 and was named after the Council's chairman, Dan Rooney. The Council's mission was to collaborate with the Commissioner and NFL executives on designing and implementing programs to build diversity awareness in the league and to foster an inclusive work environment. Among these programs, in 2003, the NFL introduced a formal mentoring program designed to support employee retention, career development, and advancement initiatives. It is a structured program in which experienced executives share their business insights and experiences with newer professionals. The league also has a number of other programs designed to enhance employee learning and development, including NFL Special Teams, which was created by the Diversity Council to provide a unique opportunity for NFL employees to build their skills and advance their careers; the Junior Rotational Program, which was designed to build a strong entry level pipeline for the league to attract top undergraduates to the NFL by allowing them to rotate through several business areas in a condensed period of time; an internship program for college seniors; an NFL talent review where the league executives identify and review top-performing employees at the director level and above who have the potential for creating responsibilities; and an executive training program.

The NBA conducts training regarding diversity and respect in the workplace for all league employees and mandates that it be completed by all new hires within their first three months of employment. Since 2006, the NBA has provided all league and team employees with access to



Globe Smart, a web-based tool that provides information on countries and people from around the world in an effort to increase individual awareness of different cultures. The NBA also has comprehensive anti-discrimination and anti-harassment procedures. In terms of recruiting, the NBA uses online job postings at a number of diversity websites and actively recruits at historically black colleges and universities, particularly for entry-level associate and intern programs. The NBA, in turn, uses these associate and intern programs as a feeder pool for diverse candidates: The 2009 associate class was 33 percent minority and 66 percent female, while the intern class was 23 percent minority and 42 percent female.

The MLB has, since 1995, aggressively addressed workplace diversity primarily through its human resources practices in both the Commissioner's Office and at the individual team level. The industry is staffed throughout by professional HR practitioners who contribute to the MLB's benchmark reports that profile all levels of employment within the baseball organizations. This serves as a management tool for a strategic planning and performance management. The MLB has also introduced the Diversity Economic Impact Engagement Initiative (DEIE), one of its newest initiatives to advance the level of MLB's current workforce and supplier diversity efforts as well as create methodologies for cultural assessments, diversity economic platforms, and industry-wide diversity training. The internal consultant model approach will be developed to the industries' central office, member clubs and, eventually, the minor leagues. Since 1999, the MLB has mandated that teams must interview a minority for any managerial opening.

All three leagues have a supplier diversity program in which they seek out opportunities with women and minority-owned businesses. Thus, on their face, each of these three major sports leagues has what appears to be an adequate program for diversity hiring in place. To discover the source of the discrepancy in their rankings, it is then necessary to consider the possibility that history has played a role in the development of each league's diversity hiring practices. It is here that the NBA and MLB have a significant advantage over the NFL. Jackie Robinson's breaking of baseball's color barrier in 1947 is one of the watershed events in sports history. However, only the most knowledgeable NFL fans are aware that the first African American player in the modern era was Kenny Washington of the L.A. Rams in 1946, a year before Robinson. The NBA was the last to break the color barrier in 1950, when the New York Knicks signed Sweetwater Clifton; but at that time, the NBA had only been in existence for five years, compared to much longer head starts for both the NFL and MLB. Indeed, the NBA was the first league to have an African American coach, Bill Russell, who coached (and starred for) the 1968-69 Boston Celtics. The MLB was not far behind when the Cleveland Indians hired Frank Robinson as manager in 1975. All of this was well before Art Shell finally broke through the NFL's head coaching color barrier when he was hired by the Oakland Raiders in 1989. Both the MLB and NBA had seen numerous minority coaches and managers by the time the Raiders hired Shell.

If one takes as a starting point the presumption that former players are often best positioned for coaching and managing jobs, then it further stands to reason that a diverse league should lead to



diverse coaching staffs. This has traditionally been the case in the NBA, which is the league with the highest percentage of minorities and also the highest percentage of minority coaches. However, the NFL is also a league with an extremely high percentage of minority players, yet has not traditionally had as much success in placing those former players into management roles.

If one accounts for nationality as a measure of diversity, the NFL is light years behind its counterparts. The NBA has had success that outstrips the NFL and MLB in terms of attracting players from outside the United States. Indeed, the NBA has players from each of the six populated continents on its rosters. The MLB has an extremely high number of players who were born outside the United States, primarily from the Caribbean, Central and South America, and East Asia. In the NFL, all but a small handful of players were born in the United States. The NFL has tried to market its brand overseas without great success—the failed attempt to make a league succeed in Europe being one such example.

Ultimately, the NFL has continued to improve its track record of diversity hiring, but the league still has far to go in many key areas and is not yet in a position to challenge the MLB or the NBA. However, progress should not be discounted, as change does not happen overnight. The NFL's first A for its racial hiring practices on the Institute for Diversity in Sport's 2010 Racial and Gender Report Card is a major sign of improvement and should hopefully lead to a higher overall score in the future.

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Societal Prejudices Against Muslim Americans: The Need for Legal Advocacy

By Navid Zarrinnal

It is an unfortunate reality that almost every minority group within the United States has been affected by discrimination at some point or another during our nation's relatively short history. As a minority group, Muslims often face discrimination not only based on their religion but also based upon perceived ethnic differences. After the tragic events of September 11, 2001, prejudice in America against Muslims reached a fever pitch that empowered both private and public actors to openly harass Muslims without fear of shame or reprisal. As a Muslim law student whose family immigrated to this country from Iran, I have personally experienced such discrimination. However, through my legal studies, I have also seen the power of the American legal system and its ability to slowly change societal attitudes and redress the wrongs of discrimination.

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It is tempting to view negative conceptions of the Islamic faith as a response to the acts of terrorism committed against the United States and its civilian population on September 11. However, negative concepts surrounding the Islamic faith and its adherents did not grow overnight as the result of the September 11 terrorist attacks. Ignorance of Islam and prejudice against Muslims in the United States is deep-rooted, going back to medieval Europe where many Europeans came to associate negative characteristics with the religion of Islam and Prophet Muhammad. *See* Carl Ernst, *Following Muhammad: Rethinking Islam in the Contemporary World*, 11–36, University of North Carolina Press (2003).

Like in medieval Europe, our society has conditioned many non-Muslim Americans to believe that ignorance of Islam and explicit prejudice against Muslims is acceptable. A good example of such reinforcement of prejudicial behavior is the entertainment industry's portrayal of Muslim characters in film. *See* Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. Islamic & Near E. L. 121 (2009) at 136. From 1896 to the present day, over 1,000 Hollywood movies made about Arabs and Muslims have portrayed them as "brutal, heartless, uncivilized religious fanatics" and "cultural others bent on terrorizing civilized Westerners, especially Christians and Jews." *See generally* Jack G. Shaheen, *Reel Bad Arabs: How Hollywood Vilifies a People* (Olive Branch Press 2009) (2001). These portrayals range from dehumanizing Muslims in movies like *Rules of Engagement*, where the killing of Muslim Yemeni civilians seems to be justified to an opening song in the Disney movie *Aladdin*, which identifies a fictional land where Arabs and Muslims reside as "barbaric."

After the end of the 20th century and following the tragic events of September 11, prejudice against Muslims greatly intensified. Since the September 11 aggressors were self-identified Muslims, many non-Muslim Americans fallaciously concluded that all Muslims must also be terrorists or must be sympathizing with the aggressors. In our current social and political climate, such simplistic thinking has sadly gained social acceptance, and, combined with a widespread ignorance of Islam, there is an overwhelming tendency to reduce the entire Muslim population to a handful of gross stereotypes, viewing them as the monolithic terrorist "other." However, this reductive approach is at odds with social realities since Muslim communities encompass nearly 1.57 billion people around the globe who live in diverse societies, speak many languages, and possess numerous and widely varying sets of cultural traditions. *See* Daniel W. Brown, *A New Introduction to Islam*, 5–9, Wiley-Blackwell (2009).

Widespread prejudice against Muslims is not merely an abstract idea or expression that circulates in American public discourse. The stigmatization of Muslims and widespread societal acceptance of this stigmatization has empowered both private and public actors to subject Muslims to physical and psychological harassment, not only abroad but also domestically. *See* Ibrahim at 142. Domestically, private actors have openly engaged in hate crimes amongst other violent and discriminatory acts against Muslims. Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Cal. L. Rev. 1259, 1261–62 (2005). In the days



immediately following September 11, private actors committed over 1,000 bias incidents against Muslims. *Id.* Many of these incidents also involved victims who were not in fact Muslim, but “looked” Muslim to the offender. *Id.* Some offenders mistook Sikhs who wore turbans, grew beards, and had brown skin with Muslims, despite the fact that these victims practice a distinct religion. These incidents, targeting both Muslims and those who “look” Muslim, included the murders of as many as 19 people and assaults on many others. These incidents were not merely an outburst of rage occurring in the days following September 11 and ending soon after. On the contrary, these attacks have continued. Most recently, in August of 2010, a man named Michael Enright stabbed a Bengali Muslim taxi driver in New York City after the driver told Enright that he was a Muslim. *See, e.g., [New York Taxi Driver Stabbed in Anti-Muslim Attack](#)*, Democracy Now!, (last visited April 7, 2011).

Public actors accompanied these private actions. Following September 11, the federal government developed a corpus of immigration law and law enforcement policy that by design or effect applied almost exclusively to Muslims. Muneer at 1268. During the first 11 months after September 11, approximately 762 non-citizens (almost all of whom were believed to be Muslim) were detained. *Id.* The FBI and Immigration and Naturalization Service (INS) made little attempt to distinguish between immigrants who had potential ties with terrorism and those who were merely swept up by chance in the course of the federal investigation. Moreover, INS failed to serve the detainees with timely notice of charges against them while the Department of Justice improperly detained many of the detainees even after immigration judges had ordered them removed. Many of the detainees were subjected to “unduly harsh” conditions of detention, which included a pattern of physical and verbal abuse. In each detention case, the government failed to allege one concrete terrorism connection. Most of these detainees were deported for minor immigration violations, but not one was charged with a terrorist activity.

This preceding example demonstrates that private actors were not alone in presuming that Muslims are terrorists who deserve to be killed or assaulted. Public actors, through actions such as immigration policies described above, also treated Muslims as being presumptively guilty of terrorism, which amounted to a systematic denial of their civil rights.

These incidents demonstrate that without any logical foundation, many non-Muslim Americans put all Muslims into one conceptual category—a category that considers men like Osama Bin Laden as representative of all Muslims, including Muslim Americans, despite the fact that most Muslims radically disagree with men like Osama Bin Laden on social, political, and religious matters.

Many incidents involving the physical and psychological harassment of Muslims were not reported. These unreported incidents do not occupy a place in an official report; rather they dwell only in the mind of the victim. I myself was subject to such harassment in high school. Ironically, at the time, I was not a fully practicing Muslim nor did I wear clothing that was



distinguishable from my classmates. Like most of my classmates, I wore T-shirts and jeans. However, the mere fact that I had emigrated from Iran was sufficient for some of my classmates to perceive me as the inferior, terrorist “other.” This perception was manifested in their words and actions, such as calling me a “terrorist,” and, in one instance, using actual physical force to put me on notice of their perceived notions that a Muslim student from Iran must be the inferior, terrorist “other” who cannot be part of the school community.

Interestingly, these events did not end once I began law school. Of course, since my law school colleagues are educated and sophisticated men and women, they do not manifest explicit hostility toward Islam and Muslims. Nevertheless, their ignorance of and suspicions toward Islam is manifested in subtle ways. Even though my law school colleagues make a sincere effort to understand the Islamic faith, it seems that the widespread societal ignorance and fear of Islam has left a mark on their psyche and how they view Islam. For instance, in my Islamic law seminar, I noticed that when we approached Islamic law, especially as it is supposed to be implemented in modern Muslim societies, my classmates often automatically and presumptively associated a number of negative characteristics with Muslim societies and Islamic law, such as violent behavior, desire to forcefully convert non-Muslims to Islam, and a fundamental disregard for human rights.

All these incidents, from reading reports on harassment of Muslims to my own experiences, had left me hopeless and worried about the future of Muslims in this country. This worry was especially troublesome because many Muslims have migrated to the United States to escape conflict and repressive regimes in their home countries. These Muslims have come to the United States to seek a better life—a life that has previously been denied to them because of socio-political challenges such as external aggression, internal strife, and lack of free expression under repressive regimes.

My worries, however, were ameliorated when I started to notice the power of law in the American society. As a law student, I became aware of the law’s potential to protect marginalized groups like Muslims. I realized that despite widespread social antagonism, legal and constitutional safeguards can protect Muslims from private and governmental mistreatment. The United States Constitution and the rich tradition of individual rights in this country can safeguard the rights and dignity of Muslims. However, for such legal protection to be effectively realized, it is important for lawyers and legal advocacy groups, especially those concerned with minority rights, to recognize that their professional position in the American society gives them both the moral duty and the ability to protect the civil rights of socially stigmatized groups. They should take this duty seriously and educate themselves about the challenges facing Muslims, who are arguably one of the most vulnerable minorities in America. Attorneys and legal advocacy groups should investigate various private and governmental actions that may have violated or continue to violate Muslims’ rights.



Once attorneys take upon themselves the task of protecting Muslims' rights, they should persist in their efforts. They should not be discouraged if immediate victories are not obtained. Courts have historically been slow in delegitimizing societal prejudices. In fact, courts have often used their judicial power to legitimize prevailing societal prejudices. For instance, the Supreme Court seems to have inserted societal prejudices of African Americans into the Constitution through its rulings in the *Dred Scott v. Sanford* and *Plessey v. Ferguson* cases. In *Dred Scott*, the Supreme Court found that all African Americans were beyond the scope of American citizenship and, therefore, had no right to bring suit in federal court under diversity jurisdiction. *Dred Scott v. Sanford*, 60 U.S. 393, 529 (1856). Chief Justice Roger Taney relied on social conceptions and prejudices that African Americans "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit." *Id.* at 408.

Similarly, in *Plessey v. Ferguson*, the Supreme Court held that a Louisiana law mandating "separate but equal" accommodations on intrastate railroads was constitutional. *Plessey v. Ferguson*, 163 U.S. 537, 552 (1896). Justice Brown, relying on the societal assumption that blacks are socially inferior to Caucasians, wrote: "If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane." *Id.* at 551-552. Justice Brown saw his interpretation of the Constitution to be entirely consistent with social subordination of African Americans.

These cases demonstrate that even though the rule of law has great potential in protecting marginalized groups, societal prejudices still operate within the realm of law. However, persistent advocacy has overcome societal prejudices. For instance, continued legal advocacy on behalf of African Americans who were suffering under the "separate but equal" laws finally ended in a victory. In *Brown v. Board of Education*, the Supreme Court overruled *Plessey v. Ferguson* and held that laws separating persons in public schools based on race are unconstitutional. *See Brown v. Board of Education*, 347 U.S. 483 (1954). Therefore, American legal history demonstrates that continued legal representation of socially stigmatized groups has resulted in substantial success. Inspired by this history, those interested in protecting the rights of minorities should persist in their efforts to represent and litigate on behalf of Muslims, even if immediate success is not obtained.

Attorneys and legal advocacy groups should not merely focus on litigation and the trial process. Their strategies should go beyond litigation to include the engagement of society on various levels. Such additional strategies may include lobbying and working toward legislative reforms. This would mean that attorneys and legal organizations should lobby for passage of bills that are conscious of the negative societal treatment of Muslims. For instance, they can lobby for



remedial legislation that remedies the abuses many Muslims faced following the tragic events of September 11.

Attorneys can also lessen the effects of societal prejudice on the rights of Muslims through humanizing Muslims and deconstructing the negative conceptions that have developed around the Islamic faith and the Muslim population, especially after September 11. Humanization of Muslims can take place through public presentations, speeches, and publications. By engaging the public, attorneys will not only bring attention to challenges Muslims face in a post-September 11 America, but can also potentially help alter the negative public perception of the Islamic faith.

The responsibility to use the law as an avenue for defending Muslim rights also extends to Muslims themselves. Muslim organizations and individuals should collaborate with legal organizations in matters pertaining to their rights, such as lobbying for legislation and securing effective legal representation. In addition to fighting for their legal rights, Muslims should also attempt to change public perception of their faith. They must help non-Muslims understand and appreciate the diversity of Muslims. In addition, they must help non-Muslims realize that one's simple religious identity (i.e., being Muslim) cannot render him or her instantly guilty of terrorism or inferiority.

Muslim Americans still have many challenges to overcome in the face of rampant discrimination in our society. However, my research has given me hope that these challenges can be conquered with persistent advocacy and trust in the ability of the American legal system to, over time, help right many of the wrongs that have been committed against Muslims out of fear and ignorance.

Navid Zarrinnal is a J.D./Ph.D. candidate at the University of Iowa, where he specializes in Islamic studies.

NEWS & DEVELOPMENTS

Highlights from the Section of Litigation Annual Conference

Minority Trial Committee members and committee events were highly visible during the recent Section of Litigation Annual Conference at the beautiful Fontainebleau Resort in sunny Miami, Florida.

The committee sponsored two very well-received and informative programs at the conference: "Updates in Foreign Corrupt Practices Act"; and "International Discovery in U.S. Courts: An Analysis of the Use of 28 U.S.C. § 1782." These two programs explored important new developments in international litigation.

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The committee also hosted some great networking activities, including a Dutch Treat dinner at Tap Tap Haitian Restaurant and the committee’s Networking Lunch. At the Dutch Treat dinner, committee members networked, exchanged practice tips, and had a great time at Tap Tap. During the conference itself, committee members from across the country joined together to have lunch and network. Participants shared ideas about business development and appreciated the presence of noted committee members Countess Price, assistant general counsel at Monsanto Company and Denise Zamore, associate general counsel at United Healthcare.

Finally, several committee members participated in some of the many educational seminars offered throughout the weekend. Committee cochair Julie Sneed moderated a panel on marketing strategies for women and minority litigators. The panel provided a blueprint for marketing efforts for associates and junior partners to use in building their practices. Committee cochair Anna Torres spoke on a panel discussing the top ten blunders to avoid in deposition. Anna and the panelists shared tips, lessons learned, and best practices for taking and defending depositions, including how to use depositions to fit the theory of your case and the purpose and goal of taking a particular deposition.

—*Brian Josias, Cotsirilos, Tighe & Streicker, Chicago, IL*

The Leadership Council on Legal Diversity Fellowship Program

The Leadership Council on Legal Diversity—a group comprising leaders from 100 law firms and 65 corporations—is set to launch a new mentorship program to identify promising young attorneys and put them in a position to learn from law firm managing partners and general counsel from major companies.

The hope is that the group’s Fellows Program will help diversify the legal profession by improving leadership and networking skills among young attorneys who are committed to promoting diversity within their firms and companies.

Among those planning on teaching for portions of the program are Coca-Cola Co. general counsel Geoffrey Kelley and Macy’s Inc. general counsel Dennis Broderick. The program will include three in-person conferences over the course of the year, with fellows also participating in virtual training sessions that cover such topics as the expectations that managing partners have for attorneys and how to pitch services to general counsel. Managing partners and general counsel will also talk to the fellows about personal experiences and setbacks, while fellows will be paired with a “coach” from the council to work on a project for the year.

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A new group of 100 fellows will be selected each year.

» [Read more](#)

—Denise Zamore, *United Healthcare Group*

Supreme Court Releases Important Decision in Arbitration Case

The Supreme Court, in a 5–3 ruling, reversed and remanded the Second Circuit Court of Appeal's ruling that an arbitral tribunal had not exceeded its powers in finding that an arbitration clause allowed for class arbitration. At issue was whether an arbitration provision in a standardized and specialized shipping contract allowed for class arbitration for a group of shipping customers, despite that the arbitration clause was silent as to class arbitration. The Court found that the arbitrators should have looked to controlling federal law rather than their own policy concerns, and that the law in this case did not allow for class arbitration, especially where the arbitration agreement was silent on the issue. Accordingly, the Court agreed with the Southern District of New York's ruling, which vacated the arbitral decision under Section 10(a)(4) of the Federal Arbitration Act. *Stolt-Nielsen S.A., et al. v. Animalfeeds Int'l Corp.*, No. 08-1198.

—Charlie Whorton, *Esq.*, *Rivero Mestre LLP, Miami, FL*

ASK A MENTOR

How Should You Respond to Client Directives That Contradict Your Advice as Counsel?

Dear Ask a Mentor,

In response to the question in the Winter 2011 issue of *Minority Trial Lawyer* about billable hours driven litigation and settlement issues, I also have a question about settlement; however, the conflict is with my own client and not opposing counsel. I am litigation counsel to a business client in New York that has expressly directed me to settle whenever possible and as early as possible. The feelings of management are so strongly averse to litigation that, in my experience, this company will take a substantial loss rather than litigate even when they are clearly in the right. How do I reconcile my duty to represent my client's interests to the best of my ability with client directives that contradict my advice?

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—Settling For Less

Dear Settling For Less:

You appear to be troubled by your client’s directive to settle wherever possible and as early as possible even when doing so results in substantial loss to your client. Your concerns highlight the long recognized tension between a client’s right to make substantive decisions and the exercise of a lawyer’s professional judgment regarding strategy and procedure. You should rest assured that under the Code of Professional Responsibility, a lawyer is obligated “to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules.” DR 7-101(a)(1). The duty of zealous advocacy has been called the “fundamental principle of the law of lawyering.” Monroe Freedman, *The Errant Fax*, Legal Times 26 (Jan. 23, 1995) (quoting Geoffrey C. Hazard, *The Law of Lawyering*). EC 7-7 provides that “the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer.”

A lawyer should “exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations.” EC 7-8. So long as you are advising your client of your concerns, it would appear that your client’s directive to settle does not fall outside of any legal objective and is a perfectly acceptable course of action, even if you do not agree with it. However, if you feel that your client’s desire to settle at all costs renders it unreasonably difficult for you to carry out employment effectively, then you should share your concerns with your client. Indeed, you may consider substitution of counsel, or you can seek permission from the court to withdraw as attorney of record. DR 2-110(c)(1)(d). All of your concerns must be part of your conversation with your client. If you seek to withdraw, then permission from the court is required. This cannot be accomplished if there is any material adverse effect on the interests of your client. DR 2-110c.

[Dennis P. Glascott](#) is a partner with Goldberg Segalla in Buffalo, New York, and is a judge for the Angola Village Court in Erie County, New York.

ABA Section of Litigation Minority Trial Lawyer
<http://apps.americanbar.org/litigation/committees/minority>