CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—THE RIGHT TO JURY TRIAL IS NOT CONFERRED BY THE NEW JERSEY CONSTITUTION TO CLAIMS ARISING UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION—*Shaner v. Horizon Bancorp*, 116 N.J. 433, 561 A.2d 1130 (1989).

Throughout the development of civil procedure in the United States, the right to trial by jury has spurred inconsistent public opinion ranging from great praise[1] to scorn[2]. Discussion about the right has been more passionate among modern legal scholars.[3] While the debate between legal theorists and practitioners endures as to the relative merits of trial by jury,[4] judicial opinions continue to address the issue as new statutory causes of action are litigated in New Jersey courts.[5]

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[1] *See* 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-83 (P. Bradley ed. 1984).

In his seminal critique of America, De Tocqueville voiced a tremendous admiration for the right to a jury trial. He viewed the right as one of the great attributes of the sovereign power of the people. More specifically, De Toqueville asserted:

> He who punishes the criminal is therefore the real master of society. Now, the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invest the people or that class of citizens, with the direction of society.

Id.

[2] *See* M. TWAIN, ROUGHIN' IT 247 (1872). Mark Twain ridiculed the institution of the jury trial: "The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago." *Id.* (emphasis in original).

[3] *See generally* L. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 157-82 (1973) (brief discussion of arguments for and against the right to jury trial); J. FRANK, COURTS ON TRIAL 132 (1949) ("[T]he jury is the worst possible enemy of that ideal of the 'supremacy of law'. For jury made law is par excellence, capricious and arbitrary, yielding to maximum in way of lack of uniformity, and unknowability.").

[4] *See generally* Rashkow, *Abolition of the Civil Jury: Proposed Alternatives*, 15 DE PAUL L. REV. 417 (1965) (judicial reformists contend that courts presumably have experienced frustration with juries that simply delay proceedings through an expensive means resulting in an inefficient end); Terry, *Eliminating the Plaintiff's Attorneys in Equal Employment Litigation: A Shakespearean Tragedy*, 5 Lab. Law. 63 (1989) (plaintiffs' attorneys contend that reform has led to the detriment of protections for present victims of civil rights violations and disincentive for future victims to ensure their civil rights).

[5] *See* Shaner v. Horizon Bancorp, 116 N.J. 433, 448, 561 A.2d 1130, 1137-38 (1989). For recent cases challenging New Jersey statutes for the right to jury trial, see McMillian v. Lincoln Federal Sav. & Loan Ass'n, 678 F. Supp. 89 (D.N.J 1988) (right to jury trial under LAD in federal court); New Jersey Sports & Exposition Auth. v. Del Tufo, 210 N.J. Super. 664, 509 A.2d 329 (Law Div. 1986), *aff'd*, 230 N.J. Super. 616, 554 A.2d 878 (App. Div. 1989) (no right to jury trial to appraise

The New Jersey Constitution provides that "[t]he right of trial by jury shall remain inviolate."[6] As the state constitution developed from 1776 to its present form, only nominal changes were made to the trial by jury provision.[7] Accordingly, the right to trial by jury is preserved today for any cause of action that enjoyed the right as of the adoption of the New Jersey Constitution in 1776.[8] Absent express provision by the legislature, New Jersey courts have been reluctant to extend the protection to newly created statutory causes of action.[9]

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fair value of shares in stockholders' action); Manetti v. Prudential Property & Casualty Ins. Co., 196 N.J. Super. 317, 482 A.2d 520 (App. Div. 1984) (no right to jury trial for statutorily created "PIP" benefits); State v. Tenriero, 183 N.J. Super. 519, 444 A.2d 623 (Law Div. 1981) (no right to jury trial for gambling offenses under statute granting jurisdiction to superior court); Van Dissel v. Jersey Cent. Power & Light Co., 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981), *certif. denied*, 89 N.J. 409, 446 A.2d 142 (1982), *vacated on other grounds*, 465 U.S. 1001, on remand, 194 N.J. Super. 108, 476 A.2d 310 (App. Div.), *certif. denied*, 99 N.J. 186, 491 A.2d 689 (1984) (no right to jury trial for inverse condemnation action); Peterson v. Albano, 158 N.J. Super. 503, 386 A.2d 873 (App. Div. 1978), *certif. denied*, 78 N.J. 337, 395 A.2d 206 (1978) (no right to jury trial in summary dispossess action); Quinchia v. Waddington, 166 N.J. Super. 247, 399 A.2d 679 (Law Div. 1979) (no right to jury trial to recover from Unsatisfied Claim and Judgment Fund); Kugler v. Banner Pontiac-Buick, Opel, Inc., 120 N.J. Super. 572, 295 A.2d 385 (Ch. Div. 1972) (no right to jury trial for prosecution under Consumer Fraud Act).

[6] N.J. CONST. art. I, para. 9. The provision states in full:

> The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in any civil cause, a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

Id.

[7] *See* J. Boyd, FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY (1973). The New Jersey Constitution has been amended twice since 1776. The amendments occurred in 1844 and 1947. The 1776 New Jersey Constitution article I, paragraph 22, states in pertinent part: "the inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony without Repeal for ever." *Id.* at 162. The 1844 New Jersey Constitution article I, paragraph 7, states in full: "The right of trial by jury shall remain inviolate: but the Legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men." *Id.* at 195.

[8] *See* Montclair v. Stanoyevich, 6 N.J. 479, 485, 79 A.2d 288, 291 (1951); James, *The Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963). *See also infra* notes 71-81 and accompanying text.

[9] *See, e.g.*, State v. Tenriero, 183 N.J. Super. 519, 444 A.2d 519 (Law Div. 1981). The Legislature has consistently conferred the right to jury trial through express provision. *See, e.g.*, N.J. STAT. ANN. § 2A:15-56 (West 1979) (labor dispute injunctions); N.J. STAT. ANN. § 2A:62-18 (West 1979) (quiet-title actions); N.J. STAT. ANN. § 2A:62-21 (West 1979) (questions as to the validity of contractual clauses in deeds of real estate); N.J. STAT. ANN. § 2A:62-24 (West 1979) (determining title to riparian lands and lands under water); N.J. STAT. ANN. § 3B:12-24 (West 1979) (civil

New Jersey's Constitution reflects a strong public policy against discrimination.[10] The prevention of discrimination is also an inherent exercise of the state's police power.[11] New Jersey supplemented the goals set forth in its constitution and led the way in society's war against discrimination with the enactment of the Law Against Discrimination (LAD) in 1945.[12] Although the LAD offers an array of equitable remedies to prevent future discriminatory behavior, it never expressly provided for a right to jury trial in its initial statutory form, or in its subsequent amendments.[13] Recently, in *Shaner v. Horizon Bancorp*,[14] the

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proceedings to determine mental competency); N.J. STAT. ANN. § 40:189-3 (West 1979) (abatement of nuisances); N.J. STAT. ANN. § 45:14B-42 (West 1979) (regarding confidentiality of patient information by psychologists).

10 *See* N.J. CONST. art. I, para. 5, which provides: "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." *Id.*

11 *See* N.J. STAT. ANN. § 10:5-3 (West Supp. 1989). The statute provides in pertinent part:

> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, marital status, liability for service in the Armed Forces of the United States, or nationality, are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by Federal law or otherwise necessary to promote the national interest.
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> The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of race, creed, color, national origin, ancestry, age, sex, marital status, liability for service in the Armed Forces of the United States, or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

Id.

12 *See* 17 Op. Att'y Gen. 20 (1949). *See, e.g.*, N.Y. CIV. RIGHTS LAW § 40-c (McKinney 1989) (originally enacted in 1941); CAL. CIV. CODE § 51 (West 1989) (originally enacted in 1909).

13 *See* N.J. STAT. ANN. § 10:5-13 (West Supp. 1989). The 1979 amendment to N.J. STAT. ANN. § 10:5-13, which outlines the specific remedies available to a complainant, allows for prosecution of a civil suit in Superior Court. *Id.* Originally § 10:5-13 only provided for an administrative proceeding to be filed with the Division on Civil Rights. The amendment provides in pertinent part:

> Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal

New Jersey Supreme Court clarified its interpretation of the LAD and the constitutional provision that warrants protection of the right to jury trial.[15] Recognizing that discrimination actions were not analogous to any common law action providing for a right to trial by jury,[16] the *Shaner* court held that jury trials are not available for claims arising under the LAD, because the statute neither expressly nor impliedly conferred the right.[17]

After working approximately eight years as a banking executive for the defendant, Horizon Bancorp (Horizon),[18] Mahlon R. Shaner was discharged at the age of fifty-three.[19] Shaner alleged that Horizon dismissed him from employment because of his age, and filed claims against Horizon asserting wrongful discharge on statutory grounds under the Federal Age Discrimination in Employment Act of 1967 (ADEA) and the New Jersey LAD.[20] Shaner also asserted a claim based on a violation of a clear mandate of state public policy[21] and sued for compensatory damages, in-

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office. Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

Id.

14 116 N.J. 433, 561 A.2d 1130 (1989).

15 *Id.*

16 *Id.* at 455, 561 A.2d at 1141.

17 *Id* at 446, 561 A.2d at 1137.

18 *Id.* at 434, 561 A.2d at 1130. The plaintiff, occupied the title of Chief Financial Officer of Bancshares of New Jersey, a holding company for the bank of New Jersey (corporate predecessor of Horizon Bancorp). Brief for Appellant at 4-5, Shaner v. Horizon Bancorp, 116 N.J. 433, 561 A.2d at 1130 (1989) (No. 28,324).

19 *See Shaner* 116 N.J. at 434, 561 A.2d at 1130.

20 *Id.* at 434-35, 561 A.2d at 1130.

21 *Id.* The third claim stemmed from the public policy of maintaining employment stability. *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). In *Pierce*, the plaintiff, a physician, alleged wrongful discharge for refusing to perform research on a controversial drug she considered medically unethical. *Id.* at 61-62, 417 A.2d at 506. The plaintiff refused to work on a project which required the research and development of a liquid drug containing saccharin. *Id.* at 62, 417 A.2d at 506-07. Because the drug contained the controversial ingredient, the plaintiff felt the development of the drug violated her interpretation of the Hippocratic Oath. *Id.* at 63, 417 A.2d at 507. The New Jersey Supreme Court maintained that where the discharge is contrary to a clear mandate of public policy, a cause of action will lie. *Id.* at 72, 417 A.2d at 512. However, the court noted that the employee is required to clearly identify the specific public policy violated by the employer in order to successfully assert an action for wrongful discharge. *Id.* at 72-73, 417 A.2d at 512-13. While the court indicated that the state's public policy may be found in the Hippocratic Oath or other codes of professional responsibility, the court determined that research on a "controversial" drug, as opposed to a banned drug, would not violate the code of conduct nor state public policy. *Id.* at 76, 417 A.2d at 514.

The court also observed that this action could have been predicated on a

terest, attorney fees, and punitive damages.[22]

Shaner filed a complaint and jury demand in New Jersey Superior Court, Law Division.[23] Horizon moved for partial summary judgment, seeking to limit Shaner's cause of action to his claim under the LAD.[24] The trial court granted the motion for partial summary judgment, dismissing the claim under the ADEA[25] and the claim for wrongful discharge in violation of state public policy,[26] leaving only the LAD claim.[27] The trial court also

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breach of an implied contractual obligation that an employer will not discharge an employee for failure to perform an act which violates a clear mandate of public policy. *Id.* at 72, 417 A.2d at 512. *Cf.* Vasquez v. Glassboro Servs. Ass'n, Inc., 83 N.J. 86, 415 A.2d 1156 (1980) (failure of an employment contract to provide a migrant farm worker with reasonable opportunity to find shelter before dispossession is against public policy—implied into the contract is provision for reasonable time to find alternative housing). The *Pierce* court also stressed that an action in tort may be maintained under the facts presented in that case. *Pierce*, 84 N.J. at 76, 417 A.2d at 514.

22 *Shaner*, 116 N.J. at 435, 561 A.2d at 1130-31. In denying these allegations, the defendant maintained that the plaintiff was an employee at-will and was fired for just cause. *Id.*

23 *See* Brief for Respondent at 3, Shaner v. Horizon Bancorp, 116 N.J. 433, 561 A.2d 1130 (1989) (No. 28,324).

24 *Shaner*, 116 N.J. at 435, 561 A.2d at 1131.

25 *Id.* During oral argument, the plaintiff conceded that he could not seek relief under the federal remedy because his claim did not fall within ADEA's two-year statute of limitation period. *See* Shaner v. Horizon Bancorp, No. 28,324, slip. op. at 2 (App. Div. Jan. 12, 1988). The statute of limitations for an action brought under the ADEA is addressed by 29 U.S.C. § 626(e)(1) which states that the applicable limitations period is found in the Portal to Portal Act of 1947, 29 U.S.C. §§ 255(a) and 259. *See* Age Discrimination in Employment Act, 29 U.S.C. § 626 (e)(1) (1982); Portal to Portal Act, 29 U.S.C. §§ 255 and 259 (1982). Section § 255(a) states in full:

> Any action . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . . .

See id. at § 255(a). *See generally* Michaels v. Jones & Laughlin Steel Corp., 628 F. Supp. 48 (W.D. Pa. 1985) (plaintiff did not satisfy two-year ADEA statute of limitations because accrual date began to run upon notice of termination, not upon date of actual termination). The federal act allows for reinstatement with back pay and liquidated damages, but not for compensatory or punitive damages that may be recovered with claims arising under the LAD. *See* 29 U.S.C. § 626 (b), (c) (1982) and N.J. STAT. ANN § 10:5-3 (West Supp. 1989). Customarily, a plaintiff will assert federal and state remedies concurrently, so as to fully recover. *See, e.g.*, Jackson v. Consolidated Rail Corp., 223 N.J. Super. 467, 538 A.2d 1310 (App. Div. 1988) (held punitive damages could be awarded under the LAD).

26 *Shaner*, 116 N.J. at 435, 561 A.2d at 1131. The trial court judge ruled that Shaner had no cause of action under *Pierce*. *See* Shaner v. Horizon Bancorp, No. 28,324, slip. op. at 2 (App. Div. Jan. 12, 1988). The wrongful discharge action is recognized in New Jersey only upon proof of a specific mandate of public policy.

granted Horizon's motion to strike Shaner's demand for a jury trial.[28] Thereafter, the trial court conducted a non-jury trial, ruling that Shaner's discharge did not violate the LAD on the basis of age discrimination.[29]

Shaner appealed, challenging both the pre-trial order dismissing the demand for a jury trial and the trial court decision on the merits.[30] The appellate division affirmed both rulings.[31] Shaner filed an appeal as of right to the New Jersey Supreme Court.[32] The supreme court upheld the appellate division's ruling, rejecting Shaner's argument that he had a constitutional right to jury trial in claims involving wrongful age discrimination under the LAD.[33]

The seventh amendment of the United States Constitution, adopted in 1791, preserves the right of trial by jury in civil suits as it existed at common law.[34] Upon cursory review, the entitlement to trial by jury in state civil actions may appear to have been settled with the ratification of the fourteenth amendment of the

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See Pierce v. Ortho Pharmaceuticals, 84 N.J. 58, 72, 417 A.2d 505, 512. *See supra* note 21 and accompanying text (discussing the *Pierce* case).

27 *See Shaner*, 116 N.J. at 435, 561 A.2d at 1131. In the process of granting Horizon's partial summary judgment, the superior court determined that a six-year statute of limitations was applicable to a judicial action under the LAD. *See Shaner*, slip. op. at 2 (App. Div. Jan. 12, 1988). However, under N.J. STAT. ANN. § 10:5-18 (West Supp. 1989), a complainant pursuing the administrative remedy, as opposed to the judicial remedy, has 180 days to file his/her complaint with the Division on Civil Rights. *See* N.J. STAT. ANN. § 10:5-18 (West Supp. 1989). *See, e.g.*, Nolan v. Otis Elevator, 197 N.J. Super. 468, 485 A.2d 312 (App. Div. 1984) *rev'd* 102 N.J. 30, 505 A.2d 580, *cert. denied*, 479 U.S. 820 (1986) (held six-year limitation period applied to discrimination action rather than 180 day period applicable to administrative proceedings initiated with the Division on Civil Rights).

28 *Shaner*, 116 N.J. at 435, 561 A.2d at 1131.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *See* U.S. CONST. amend. VII. The seventh amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried a by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id. See, e.g., Dimick v. Schiedt, 293 U.S. 474 (1934) (utilizing a seventh amendment historical test to establish that the common law does not require a right to jury trial when a plaintiff refuses to consent to additur and requests a new jury trial); Baltimore & Carolina Line v. Redman, 295 U.S. 654, (1934) (utilizing a seventh amendment historical test to determine that a court may take a verdict subject to its ultimate ruling on questions of law which it has reserved, without requiring a new jury trial). *See also* James, *supra* note 8, at 655.

federal Constitution.[35] The Bill of Rights, however, has not been totally incorporated through the fourteenth amendment so as to provide for the application of the seventh amendment to the states.[36]

In 1916, in *Minneapolis & St. Louis Railroad Co. v. Bombolis*,[37] the United States Supreme Court addressed the constitutionality of a Minnesota statute prescribing the number of jurors necessary to constitute a verdict in a civil cause of action.[38] That statute specifically mandated that a decision of five-sixths of the jury be deemed a "unanimous" decision when a jury fails to reach a unanimous decision after twelve hours of deliberation.[39] The Court upheld the statute authorizing a jury to reach a less than unanimous verdict in a civil cause of action.[40]

The Supreme Court reasoned that the ten amendments of the Bill of Rights were not concerned with state action, but rather only with federal action.[41] The Court emphasized that the sev-

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[35] *See* Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN L. REV. 639, 646 n.21 (1973). Prior to the passage of the fourteenth amendment, the rights and protections found in the Bill of Rights only applied as a limitation on the exercise of power by the federal government. *Id.* (citing Barron v. The Mayor and City Council of Baltimore, 32 U.S. 243 (1833)). After the passage of the fourteenth amendment in 1868, the Court held that the seventh amendment was not applicable to the states through the due process or privileges and immunities clauses of the fourteenth amendment. *See* Walker v. Sauvinet, 92 U.S. 90, 92-93 (1876).

[36] *See* Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 n.2 (1982). *Cf.* Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting) (arguing that the framers of the fourteenth amendment intended the amendment to totally incorporate the Bill of Rights to render them applicable to the states). *See* U.S. CONST. amend. XIV, § 1, cl. 2, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[37] 241 U.S. 211 (1916).

[38] *Id.* at 217.

[39] *Id.* at 216.

[40] *Id.* at 219-20. The defendant specifically challenged the Minnesota statute on the grounds that the particular cause of action against him was federal in character, and therefore the seventh amendment of the United States Constitution entitled the defendant to have a jury reach its conclusion by a unanimous verdict. *Id.* at 216.

[41] *Id.* at 217. *See also* Israel, *supra* note 36, at 253. Most of the first eight amendments have gradually become incorporated, but the seventh amendment remains one of the exceptions. *See* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1962). There is another anomalous situation in which a Bill of Rights guarantee is interpreted to have a different scope in state proceedings than in federal proceedings. *See* Israel, *supra* note 36, at 299. In interpreting the sixth amendment, the Court has upheld the constitutionality of non-unanimous jury verdicts in state criminal cases,

enth amendment applied only to proceedings in federal courts and did not, in any manner, govern jury trials or the related standards applied to jury trials in state courts.[42] Ultimately, the Court implied that the seventh amendment's trial by jury guarantee was not protected by either the due process or privileges and immunities clauses of the fourteenth amendment and thus, was not applicable to state court proceedings.[43]

In 1957, in *Fisch v. Manger*,[44] the New Jersey Supreme Court, relying on the same precedents cited by the *Bombolis* Court,[45] determined that the seventh amendment's guarantee of a jury trial in civil causes of action was not applicable to the states.[46] The *Fisch* court looked to the state constitutional provision governing the right to jury trial to determine whether a court could grant a plaintiff's request for a new jury trial conditioned upon a defendant's refusal to consent to additur.[47] In *Fisch*, the jury returned a

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even though jury verdicts in federal criminal cases must be unanimous. *Id. See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (companion cases upholding convictions of criminal defendants convicted by 11-1 and 9-3 votes, respectively).

42 Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (citing Walker v. Sauvinet, 92 U.S. 90 (1876); Pearson v. Yewdall, 95 U.S. 294 (1877)). The *Bombolis* case involved the Federal Employers' Liability Act which contemplates concurrent power in the federal and state courts. *Id.* at 218. The rights conferred by the federal act are administered in accordance with the procedures prevailing in each respective state court system. *Id.*

43 *See id.* at 211. *See also* Palko v. Connecticut, 302 U.S. 319 (1937). In *Palko*, the Court stated that not all the Bill of Rights are incorporated through the fourteenth amendment to apply to the states. *Id.* at 323. The Court explained that only those rights deemed to be fundamental and implicit in the concept of ordered liberty should be "absorbed". *Id.* at 324-26. Justice Cardozo rejected the premise that the fifth amendment's double jeopardy prohibition has been "absorbed" through the fourteenth amendment and thus, held that the fifth amendment is not applicable to the states. *Id.* at 328. *Palko* was later overruled. *See* Benton v. Maryland, 395 U.S. 784 (1969) (utilizing the selective incorporation doctrine, the Court held that the prohibition against double jeopardy should be applicable to the states). The theory of selective incorporation was set forth by Justice Brennan in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960). *See* Israel, *supra* note 36, at 253. This doctrine still prevails in contemporary Supreme Court opinions. *See* McDowell and Baer, *The Fourteenth Amendment: Should the Bill of Rights Apply to the States? The Disincorporation Debate.*, 1987 UTAH L. REV. 951, 962 (1987).

44 24 N.J. 66, 130 A.2d 815 (1957).

45 *Id.* at 74-75, 130 A.2d at 820. Although the *Fisch* court never directly cited *Bombolis*, both opinions relied on Walker v. Sauvinet, 90 U.S. 92 (1876) and Pearson v. Yewdall, 95 U.S. 294 (1877). *See Bombolis*, 241 U.S. at 217; *Fisch*, 24 N.J. at 75, 130 A.2d. at 820.

46 *Fisch*, 24 N.J. at 74-75, 130 A.2d at 820.

47 *Id.* at 75, 130 A.2d at 820. The term additur describes the power of a trial court to increase inadequate damages awarded by a jury. *See* BLACK'S LAW DICTIONARY 36 (5th ed. 1979). The increase, with the defendant's consent, is a condition of the denial of a plaintiff's motion for a new jury trial. *Id.* The term remittitur is

verdict in the amount of $3,000.[48] The plaintiff moved for a new jury trial because he viewed the damages as inadequate.[49] The trial court denied the plaintiff's motion because the defendant consented to an increase in the amount of damages.[50] After the court-prescribed increase, the plaintiff still viewed the damage award as inadequate and appealed to the New Jersey Supreme Court.[51]

The *Fisch* court asserted that the article of the New Jersey Constitution governing the right to trial by jury did not prevent a court from conditioning its grant of a new trial solely upon the defendant's failure to consent to a court prescribed damage increase.[52] The court noted that a trial court could also grant a new trial conditioned upon plaintiff's failure to consent to a court-prescribed decrease in an award.[53] The *Fisch* court reasoned that additur and remittitur were logically and realistically indistinguishable.[54] The court stressed that it must first look to the New Jersey Constitution as well as New Jersey case law to ascertain whether the practices of remittitur and additur may be employed in New Jersey without violating the right to jury trial.[55] In reaching its holding, the court concluded that the seventh amendment substantively differs from the New Jersey constitu-

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used to describe the inverse situation denying the defendant's application for a new trial upon the condition that the plaintiff consents to a prescribed reduction in the jury award. *Id.* Remittitur and additur have been viewed as useful tools in pursuing substantial justice between litigants without the burdensome delay and expense associated with new trials. *See Fisch* at 71-72, 130 A.2d at 818. *See generally* Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942) (thorough discussion on development of common law judicial verdict adjustments).

48 *Fisch*, 24 N.J. at 67, 130 A.2d at 816. The plaintiff suffered substantial injuries as a result of an automobile accident. *Id.*

49 *Id.*

50 *Id.* The damage award was increased to $7,500. *Id.*

51 *Id.* The New Jersey Supreme Court certified the appeal on its own motion, and reversed the trial court's denial of a new trial by jury. *Id.*

52 *Id.* at 80, 130 A.2d at 823. *See supra* note 6 and accompanying text. Under a seventh amendment analysis, the federal courts have adhered to the prohibition of a new jury trial for the plaintiff when the defendant consents to an additur. *Fisch*, 24 N.J. at 72-73, 130 A.2d at 818-19. Conversely, the federal courts allow a new jury trial for a defendant even if the plaintiff consents to a remittitur. *Id. See* Dimick v. Schiedt, 293 U.S. 474 (1935) (5-4 decision)(declined to upset an old common law practice in upholding the prohibition of a new trial when a plaintiff consents to additur). The *Fisch* court opined that it is doubtful the Supreme Court would still subscribe to the inconsistency of the *Dimick* holding. *See Fisch*, 24 N.J. at 74, 130 A.2d at 820.

53 *Fisch*, 24 N.J. at 76-77, 130 A.2d at 820-21.

54 *Id.* at 72, 130 A.2d at 818.

55 *Id.* at 75, 130 A.2d at 820. The court posited that a constitutional right to trial by jury relates to substance not procedure. *Id.*

tional provisions dealing with a right to jury trial, and had no application to state court proceedings.[56]

Shortly after the adoption of the revised New Jersey Constitution in 1947, the case of *Steiner v. Stein*[57] presented the New Jersey Supreme Court with an opportunity to examine the revised constitutional provision with respect to the right of trial by jury.[58] In *Steiner*, the plaintiff had previously hired the defendant as his attorney for an agreed fee of $3,300 in order to finalize the execution of a new lease involving one of the plaintiff's properties.[59] After the plaintiff's tenant rejected the defendant's redrafted lease, the plaintiff again retained the services of the defendant to renegotiate the new lease agreement.[60] The litigants disputed whether the additional services provided by the defendant were included in the original $3,300 fee finalizing the lease agreement.[61]

The plaintiff sued to redeem his papers and to remove the attorney's lien imposed by the defendant.[62] The defendant counterclaimed for the reasonable value of his services, and demanded a jury trial to determine his fee.[63] The chancery division of the trial court transferred the action to the law division without considering the defendant's demand for jury trial.[64] On its own motion, the New Jersey Supreme Court certified for review the chancery division's order of transfer in order to address the jurisdiction of the lower court as well as the defendant's right to a jury

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56 *Id.* at 74-75, 130 A.2d at 820. (citing Pearson v. Yewdall, 95 U.S. 294 (1877); Walker v. Sauvinet, 92 U.S. 90 (1876)).

57 2 N.J. 367, 66 A.2d 719 (1949).

58 *Id.* at 378, 66 A.2d at 724-25.

59 *Id.* at 369, 66 A.2d at 720. The parties already agreed to many of the terms in the proposed new lease. *Id.* The defendant/attorney was brought into the transaction after the negotiations had transpired. *Id.*

60 *Id.*

61 *Id.* The plaintiffs proffered the originally agreed upon fee of $3,300, which the defendant refused. *Id.* The plaintiffs alleged that the defendant demanded $20,000 for the additional services rendered. *Id.* The defendant ultimately rendered a bill for $40,800. *Id.* at 370, 66 A.2d at 720.

62 *Id.*

63 *Id.* at 370-71, 66 A.2d at 720.

64 *Id.* at 371-72, 66 A.2d at 721. Citing to N.J. Ct. R. 3:40-3 to support the transfer of the action to the law division, the trial court determined that it properly disposed of all the equitable issues. *Id.* at 371, 66 A.2d at 721. The supreme court emphasized that once the jurisdiction of equity attaches, the trial court may retain jurisdiction to settle legal issues and grant legal remedies. *Id.* at 378, 66 A.2d at 724 (citing Fleischer v. James Drug Stores, Inc., 1 N.J. 138, 150, 62 A.2d 383, 389 (1948)).

trial.[65]

The *Steiner* court held that it was appropriate to deny the right to trial by jury in a dispute involving attorney fees.[66] In support of the lower court's application of equitable remedies, the court noted that the nature of the attorney/client relationship was fiduciary in nature rather than contractual.[67] The court subsequently denied the demand for jury trial.[68] The court determined that the right to jury trial would be preserved only if the cause of action was triable by a jury under the New Jersey Constitution of 1844.[69] The *Steiner* court concluded that the constitutional provision protecting trial by jury did not enlarge the scope of the right, rather it only prevented the legislature and the courts from truncating that right.[70]

Two years after the *Steiner* decision, the New Jersey Supreme Court addressed the issue of whether a right to jury trial existed for newly-created statutory causes of action in *Montclair v. Stanoyevich*.[71] In *Stanoyevich*, the defendant appealed from a municipal court conviction for a petty criminal offense involving a violation of a zoning ordinance.[72] On appeal, under the authority of New Jersey Revised Statutes section 2:225-18[73] and section 2:33-121,[74] the defendant demanded a jury trial which the Essex

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65 *Id.* at 369, 66 A.2d at 719. The order transferring the action from the chancery division to the law division was based on the lower court's interpretation of the new state constitution and new court rules. *Id.* at 377, 66 A.2d at 724. The court noted that the lower court should have retained jurisdiction even though only legal issues remained. *Id.* at 378, 66 A.2d at 724.

66 *Id.* at 380, 66 A.2d at 725.

67 *Id.* at 372, 66 A.2d at 721.

68 *Id.* at 380, 66 A.2d at 725.

69 *Id.* at 379, 66 A.2d at 725.

70 *Id.*

71 6 N.J. 479, 79 A.2d 288 (1951).

72 *Id.* at 481, 79 A.2d at 289. The municipal court imposed a fine of $100 and costs on the defendant. *Id.* The defendant was the owner of a newly constructed garage which violated a zoning ordinance setting minimum frontage requirements at not less than one-half the height of the building. *Id.* at 481-82, 79 A.2d at 289. The defendant then failed to correct the mistake, whereupon complaints were filed resulting in the conviction. *Id.* at 482, 79 A.2d at 289.

73 *See* N.J. REV. STAT. section 2:225-18 (1937). The defendant relied on section 2:225-18 (the statute pre-dates the 1947 Constitution), which provided that "[e]very conviction for violating a town ordinance . . . with or without a jury trial, may be reviewed by appeal to the court of common pleas of the county in the same manner and upon same terms as appeals are or may be taken from the small cause courts . . . ." *See id.*

74 *See id.* at § 2:33-121 (1937). The defendant also pointed to N.J. REV. STAT. § 2:33-121 (1937) which provided that appeals from the small cause courts enjoy a right to demand a jury trial. *Stanoyevich*, 6 N.J. at 483, 79 A.2d at 290. Consequently, the appellant argued that these statutory provisions remained in force with

County Court subsequently denied.[75] The supreme court granted certification on its own motion[76] and determined that no right to jury trial existed for newly-created statutory causes of action when the statute failed to explicitly provide for such a right.[77]

In affirming the lower court's ruling, the New Jersey Supreme Court rejected the appellant's argument that the 1947 constitution incorporated legislative provisions on the statute books at the time of its adoption.[78] The court emphatically maintained that the right to jury trial referred to in each New Jersey Constitution since 1776, was a right as it existed at common law and remained as of July 2, 1776.[79] The court asserted that convictions before magistrates for petty criminal offenses were unknown at common law, and thus, were not protected within the scope of the right to jury trial.[80] The *Stanoyevich* opinion acknowledged that newly-created statutory offenses are not entitled to the right to jury trial if the offense is not related to a class of cases that are triable by jury at common law.[81]

The New Jersey Supreme Court further explored the right to

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the adoption of the New Jersey Constitution of 1947. *Id.* In fact, the court noted that the legislature passed a statute abolishing the office of the Justice of the Peace and small cause courts. *Id.* at 493, 79 A.2d at 295-96. The new statutes also provided that the rules promulgated by the New Jersey Supreme Court applicable to municipal courts would supersede any statutory and common law regulations if they conflict. *Id.*

75 *Stanoyevich*, 6 N.J. at 481, 79 A.2d at 289. The court concluded that the statute relied upon by the appellant was impliedly repealed by the new statute. *Id.* at 494, 79 A.2d at 296. The court noted that although the law does not favor implied repealers, it is a fundamental maxim that statutes must be interpreted according to the apparent intentions of the legislature. *Id.* The court observed that when statutes are inconsistent or repugnant to a statute concerning the same subject matter, and the more recent statute was "clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the earlier act." *Id.* (citing State v. Cortese, 104 N.J.L. 312, 315, 140 A. 440, 442 (E. & A. 1927)).

76 *Id.* at 481, 79 A.2d at 289.

77 *Id.* at 485-87, 79 A.2d at 291-93.

78 *Id.* at 485, 79 A.2d at 291.

79 *Id.* The court interpreted the 1947 New Jersey Constitution article 1, paragraph 9 which provides that "the right of trial by jury shall remain inviolate." *Stanoyevich*, 6 N.J. at 485-86, 79 A.2d at 291. The court pointed to previous cases construing the 1776 and 1844 constitutional provisions regarding trial by jury in a similar fashion. *Id.* (citing State v. Doty, 32 N.J.L. 403 (E. & A. 1868); McGear v. Woodruff, 33 N.J.L. 213 (E. & A. 1868)).

80 *Stanoyevich*, 6 N.J. at 490, 79 A.2d at 294. *But cf.* Note, *The Petty Offense Exception and the Right to Jury Trial*, FORDHAM L. REV. 205 (1979) (stating the parameters of the restriction on the right to jury trial under the Petty Offense Exception).

81 *Stanoyevich*, 6 N.J. at 487, 79 A.2d at 294 (citation omitted).

trial by jury under the New Jersey Constitution in *In re LiVolsi*.[82] In *LiVolsi*, the supreme court exercised original jurisdiction to review whether attorney fee arbitration committees deny an attorney's right to jury trial, as guaranteed by the New Jersey Constitution.[83] The New Jersey Constitution allows the New Jersey Supreme Court to make rules governing court practice and procedure.[84] The *Rules of Court* promulgated by the New Jersey Supreme Court created fee arbitration committees which render binding and unappealable determinations of attorney/client fee disputes.[85] Either the client or the attorney can request a committee to arbitrate a fee dispute, but a lawyer's consent is not required if the client requests arbitration.[86] When a client seeks arbitration an attorney is effectively denied the right to jury trial.[87]

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[82] 85 N.J. 576, 428 A.2d 1268 (1981).

[83] *Id.* at 582-83, 428 A.2d at 1272. The petitioner brought an action against the New Jersey Supreme Court in federal district court, challenging the constitutionality of Rule 1:20A. *Id.* at 582, 428 A.2d at 1271. While the action was pending, the New Jersey Supreme Court invited the petitioner to bring the challenge of Rule 1:20A to its forum. *Id.*

[84] *See* N.J. CONST. art. VI, § II, para. 3. The provision states in full: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." *Id.* The court emphasized that this provision of the New Jersey Constitution also provides an independent basis for exercising original jurisdiction. *See LiVolsi*, 85 N.J. at 583-84, 428 A.2d at 1271-72.

[85] *LiVolsi*, 85 N.J. at 581, 428 A.2d at 1270.

[86] *Id.* at 581, 428 A.2d at 1270. Conversely, a client must consent to an attorney's request for a committee determination. *Id.*

[87] *Id.* at 590-91, 428 A.2d at 1275. Aside from the jury trial argument, the plaintiff also asserted three other arguments under (1) equal protection, (2) due process clause of the fourteenth amendment of the United States Constitution, (3) and the prerogative writ provision of the New Jersey Constitution. *Id.* at 582, 428 A.2d at 1270. In rejecting petitioner's equal protection argument, the court noted that attorneys are not a suspect class and no fundamental right was being infringed upon, and that the procedurally and economically efficient remedy to correct unreasonable fees established the rational basis to support the disparate treatment. *Id.* at 586-87, 428 A.2d at 1273. The petitioner also lost arguments challenging the constitutionality of the rule on the ground that the unappealability of committee determinations is violative of the due process clause of the fourteenth amendment of the United States Constitution and the prerogative writ provision of the New Jersey Constitution article VI, section V, paragraph 4. *Id.* at 591-93, 428 A.2d at 1275-76. The court refuted the due process argument by citing an example of how determinations are appealable if the committee violates a party's constitutional rights through discrimination on account of race. *Id.* at 591, 428 A.2d at 1275-76 n.15. *See, e.g.*, Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) (challenge initiated in federal district court claiming racial discrimination in selections to the board of education nominating panel).

In denying the constitutionality argument under the New Jersey Constitution,

Utilizing the same type of historical analysis employed in *Steiner*,[88] the *LiVolsi* court stated that an attorney has no entitlement to a jury trial once a fee arbitration committee has jurisdiction.[89] The court asserted that the petitioner would have had to establish that attorneys were entitled to jury trials in cases involving client fee disputes before the adoption of the 1947 constitution.[90] The court noted that pre-1947 case law strongly supported the denial of jury trials in such actions, because attorney-client fee disputes had traditionally fallen within the broad power of the New Jersey equity courts.[91] The court concluded that New Jersey attorneys never had an absolute right to a jury trial in fee dispute cases, and that a right to jury trial in fee arbitration would render inoperative the New Jersey Supreme Court's constitutional authority in regulating the New Jersey Bar.[92]

The 1978 decision of *Peper v. Princeton University Board of Trustees*[93] is significant in LAD litigation, insofar as it admonishes that, while legislation can vindicate the New Jersey Constitution,

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the court asserted that prerogative writs were never used to review decisions of judicially created agencies. *LiVolsi*, 85 N.J. at 593, 428 A.2d at 1276. The court acknowledged, however, that prerogative writs were intended to guarantee appeals as of right from legislatively created administrative agencies. *Id.* at 596-97, 428 A.2d at 1278. The court also refuted the prerogative writ argument by explaining the importance of the New Jersey Supreme Court's obligation pursuant to the New Jersey Constitution article VI, section II, paragraph 3, to regulate the bar. *Id.* at 596-97, 428 A.2d at 1278-79.

88 *LiVolsi*, 85 N.J. at 587, 428 A.2d at 1273. *See supra* notes 57-81.

89 *LiVolsi*, 85 N.J. at 590, 428 A.2d at 1275.

90 *Id.* at 587, 428 A.2d at 1273.

91 *Id.* at 588, 428 A.2d at 1274 (citing Lewis v. Morgan, 132 N.J. Eq. 343 (Ch. Div. 1942)) (court granted an application to restrain an action at law, when the defendant attempted to transfer their attorney-client fee dispute into a court of law). New Jersey eliminated its equity courts with the adoption of the 1947 Constitution, which provided for a law division and a chancery division within the superior court. Although separate courts of law and courts of equity have ceased to exist in the federal judiciary and in most state court systems, the distinction is still viable when ascertaining whether a right to a jury trial exists. *See* CASAD & SIMON, CIVIL PROCEDURE 561-69 (1984). *See also* N.J. CONST. art. III, para. 4, which specifically provides:

> Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined.

Id.

92 *LiVolsi*, 85 N.J. at 590-91, 428 A.2d 1275.

93 77 N.J. 55, 389 A.2d 465 (1978).

it cannot somehow replace the constitution.[94] In *Peper*, the plaintiff alleged sex discrimination against defendant, Princeton University, which prevented her from being promoted.[95] The *Peper* court determined that, at the time of this action, the LAD did not apply to private universities.[96] More importantly, the *Peper* court indicated that a discrimination action was not akin to a common law cause of action, but one of state constitutional origin.[97]

A decade later in *Fuchilla v. Layman*,[98] the New Jersey Supreme Court addressed the potential of viewing the LAD as a tort action.[99] In *Fuchilla*, the plaintiff alleged discrimination due to sexual harassment.[100] The plaintiff attempted to assert her claims under the authority of the New Jersey Torts Claims Act (Act) and the LAD.[101] The court posited that the lack of an express relationship in the legislative histories of both statutes was not indicative of the existence of an actual relationship between the Act and the LAD.[102] Although "discrimination" is presuma-

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94 *See id. See also* King v. South Jersey Nat. Bank, 66 N.J. 161, 330 A.2d 1 (1974). Chief Justice Hughes, in *King*, posited: "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country." *Id.* at 177, 330 A.2d at 10.

95 *Peper*, 77 N.J. at 61, 389 A.2d at 468.

96 *Id.* at 71, 389 A.2d at 473. The plaintiff could not bring the action under the LAD due to the applicability of the LAD's definitional section, N.J. STAT. ANN. § 10:5-5, which excluded a "private university" from the accepted interpretation of the term "employer". *Id.* at 66-67, 389 A.2d at 471. The definitional section was amended to include "private university" within the scope of the definition of the term "employer", but the pre-amendment interpretation of the term "employer" was applicable to this suit because the cause of action accrued before the amendment was passed. *Id.*

97 *Id.* at 79-80, 389 A.2d at 477-78. The plaintiff argued successfully that the right to obtain gainful employment and to utilize the benefits from such labor to acquire property are fundamental rights with a constitutional basis. *Id.* at 77-78, 389 A.2d at 477-78. *See* N.J. CONST. art. I, para. 1, which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and property, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *Id.*

98 109 N.J. 319, 537 A.2d 652 (1988).

99 *Id. Cf.* Pierce v. Ortho Pharmaceutical Co., 84 N.J. 58, 417 A.2d 505 (1980) (wrongful discharge based on violation of public policy). *See supra* note 21 and accompanying text.

100 *Fuchilla*, 109 N.J. at 321, 537 A.2d at 653. The plaintiff was employed at the University of Medicine & Dentistry of New Jersey as a secretary, and she alleged sexual harassment, which resulted in her discharge. *Id.*

101 *Id.* at 320, 537 A.2d at 652-53. The plaintiff also successfully asserted a claim under 42 U.S.C. § 1983 of the Civil Rights Act. *Id.* at 321, 537 A.2d at 653.

102 *Id.* at 333, 537 A.2d at 658. (citing Healey v. Township of Dover, 208 N.J. Super. 679, 506 A.2d 824 (West 1986) (claims of sexual discrimination and harass-

bly included within the interpretation of the term "injury" as defined by the Act, the court clarified that the LAD did not explicitly provide that a discrimination action be treated as a tort.[103]

It is against this background that the New Jersey Supreme Court decided *Shaner v. Horizon Bancorp*, which addressed the right to jury trial under the LAD.[104] In a unanimous opinion authored by Justice Handler, the supreme court held that a litigant does not enjoy a right to a jury trial under the LAD on claims for wrongful discrimination based on age.[105] The court emphasized that the LAD should be construed as a newly-created statutory cause of action which did not enjoy the guarantee of an inviolate right to jury trial under the New Jersey Constitution.[106] Moreover, the court rejected the premise that the LAD was analogous to any type of common law cause of action which enjoyed the constitutional guarantee of the right to jury trial.[107]

Justice Handler began his analysis by looking to the language contained in the LAD to determine whether the statute expressly or impliedly conferred the right to jury trial.[108] The court recognized that the statute sets forth the goal of eliminating individual discrimination.[109] In addition, the court posited that dis-

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ment "fall within the expansive Tort Claims Act definition of 'injury' that includes 'injury to a person' or 'damage to or loss of property' ").

103 *Id.*

104 116 N.J. 433, 561 A.2d 1130 (1989).

105 *Id.* at 457, 561 A.2d at 1140.

106 *Id.* at 456-57, 561 A.2d at 1140. *See supra* note 6 and accompanying text.

107 *Shaner*, 116 N.J. at 455, 561 A.2d at 1141.

108 *Id.* at 435-36, 561 A.2d at 1131. *See* N.J. STAT. ANN. § 10:5-12 (West Supp. 1989). The court pointed out that the plaintiff relied on this provision, as the one specifying the substantive right that is the basis of his cause of action. *Id.* at 436, 561 A.2d at 1131. Section 10:5-12 of the New Jersey Statutes expands New Jersey Constitution article I, paragraph 5. Section 10:5-12 provides in pertinent part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, sex . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

N.J. STAT. ANN. § 10:5-12 (West Supp. 1989).

109 *Shaner*, 116 N.J. at 436, 561 A.2d at 1131. The court has previously declared that the opportunity to obtain employment is a civil right. *Id.* The court has also emphasized a state mandate of public policy reflected in the LAD, that attempts to abolish discrimination in the work place. *Id.* (citing Fuchilla v. Layman, 109 N.J. 319, 324, 537 A.2d 653, 658 (1988)).

crimination must be prevented from threatening the "institutions and foundations of a free democratic state."[110]

The *Shaner* court noted that there are distinctive procedural and substantive standards in the LAD which serve to clearly define discrimination actions.[111] The *Shaner* court recognized that a distinctive feature of the LAD is the wide ranging remedial power that may be exercised by the Director of the Division on Civil Rights.[112] Discussing the director's administrative power, the court explained how the director could grant redress to the individual while discouraging future conduct that was inconsistent with the broad societal imperative of eradicating discrimination.[113] The court pointed to the procedural choice a prospective plaintiff has in either filing the administrative complaint with the director or initiating a civil action in the superior court to illustrate the LAD's unique character.[114]

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110 *Id.* (citing N.J. STAT. ANN. § 10:5-3 (West Supp. 1989)). *See supra* note 11 and accompanying text.

111 *Shaner*, 116 N.J. at 436, 561 A.2d at 1131. The court acknowledged that the substantive standards are significantly influenced by the lessons taught from litigation under federal anti-discrimination laws. *Id.* at 437, 561 A.2d at 1131. *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81 (1978) (adopting procedures formulated in McDonnell-Douglas Corp. v. Green 411 U.S. 792 (1973), for litigation under Title VII). The court also recognized that LAD's procedural nuances are designed to locate where discrimination exists and facilitate the initiation of grievances based on that discrimination. *Shaner*, 116 N.J. at 437, 561 A.2d at 1132. *See Fuchilla*, 109 N.J. at 345, 537 A.2d at 665 (Handler, J., concurring).

112 *Shaner*, 116 N.J. at 438, 561 A.2d at 1132. *See* N.J. STAT. ANN. § 10:5-17 (West Supp. 1989). The provision states in part:

> If, upon all evidence at the hearing, the director [of the Division of Civil Rights] shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as in the judgment of the director, will effectuate the purpose of this act . . . .

Id.

113 *Shaner*, 116 N.J. at 438, 561 A.2d at 1132. (citing Passaic Daily News v. Blair, 63 N.J. 474, 308 A.2d 649 (1973) (director allowed to set standards for newspaper advertising in an effort to preclude the ads from being segregated on the basis of sex)).

114 *Id.* at 440, 561 A.2d at 1133. The court noted that the LAD allows the director to grant traditional relief for compensatory damages. *Id.* at 439, 561 A.2d 1133. *See, e.g.*, Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) (awarded rental and travel expenses as the compensatory damages against landlord for the discriminatory act of failing to lease premise to a prospective black tenant). The court observed that incidental damages for pain and suffering or personal humiliation are

The *Shaner* court observed that the New Jersey Legislature amended the LAD in 1979 to add the judicial action not as a replacement for, but as an alternative to the administrative action.[115] The court posited that since the judicial and administrative authority with respect to the LAD's goals are very similar in purpose, the differing procedures should yield consistent results.[116] The court interpreted the legislative history of the amendment to reveal that the underlying purpose of the judicial action provision was the reduction of costs and backlog of cases to the Division on Civil Rights.[117] The court maintained that the legislative intent could not be reconciled with the utilization of a right to jury trial in an LAD-based court action.[118]

Justice Handler reiterated that the express language in the amendment indicates that the legislature did not intend to confer

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within the director's broad remedial power. *Id.* *See also* Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973) (awarded compensatory damages for the pain and suffering to an unmarried female tenant, due to the fact she was denied the opportunity of renting a listed apartment solely because of her sex and marital status).

115 *Shaner*, 116 N.J. at 440, 561 A.2d at 1133. The court posited that the remedies are complementary. *Id.* Although a claimant may pursue only one remedy at a time, he or she may seek alternative or successive vindication. *See, e.g.*, Hermann v. Fairleigh Dickinson Univ., 183 N.J. Super. 500, 444 A.2d 614 (App. Div.), *certif. denied*, 91 N.J. 573 (1982). The court further noted that the choice to bring judicial action, as an alternative to administrative relief, was expressly authorized by a 1979 amendment to the LAD. *Shaner*, 116 N.J. at 440, 561 A.2d at 1133.

116 *Shaner*, 116 N.J. at 441, 561 A.2d at 1134. The court emphasized that the two actions need not be identical. *Id.* In fact, judicial actions may afford *more* monetary damages than might be otherwise obtained in an administrative proceeding. *Id.* The court noted Justice Handler's concurring opinion in *Fuchilla* which stated: "[A]ny interpretation of the [LAD] that makes the initiation of discrimination suits in Superior Court less attractive than administrative proceedings before the Division on Civil Rights must be viewed as a disincentive, frustrating the intended effect of the 1979 amendment [explicitly granting a judicial remedy]." *Id.* at 440-41, 561 A.2d at 1135 (quoting Fuchilla v. Layman, 109 N.J 319, 346, 537 A.2d 652, 665-66 (1988) (Handler, J., concurring)). *See also* Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 265 A.2d 404 (Ch. Div. 1970) (prior to 1979 amendment, complainant could file a damages action under the LAD in superior court only until after such time as the person chooses to exhaust the administrative remedy).

117 *Shaner*, 116 N.J. at 442-43, 561 A.2d. at 1135. The court noted that the underlying purpose should be achieved "so that society's war on discrimination would not slacken." *Id.*

118 *Id.* at 443, 561 A.2d at 1135. The court observed that the legislative history suggests that the right to bring a suit in superior court was intended to allow a cause of action that would be fully consistent with administrative actions under the LAD. *Id.* at 442, 561 A.2d at 1134-35. The court also cited the delays and inherent limitations which would defeat the legislative goals of reducing agency backlog and providing a judicial alternative comparable to the administrative action. *Id.* at 442-43, 561 A.2d 1135.

the right to jury trial in LAD actions.[119] Furthermore, the court cited many examples of newly-created statutory causes of action to illustrate how the legislature has consistently conferred the right to jury trial only through express provisions.[120] The court noted that employment discrimination actions under Title VII have traditionally been characterized by the United States Supreme Court as primarily equitable in nature, and thus, these actions are undeserving of a right to jury trial.[121] Moreover, the court compared the LAD cause of action with employment discrimination actions under Title VII to support the proposition that the right to jury trial does not accompany an action under the LAD.[122] The court reinforced its analysis by analogizing the remedial powers utilized by the Director of the Division on Civil Rights to the remedies provided under Title VII.[123] The court determined that the New Jersey Legislature did not expressly or impliedly create a traditional action at law, nor did it intend to confer the right to jury trial in equitable actions when it amended the LAD to allow the judicial remedy.[124]

The *Shaner* court then addressed whether the right to jury trial under the LAD was conferred by the New Jersey Constitution.[125] The court opined that as of the adoption of the New

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119 *Id.*

120 *Id.* *See supra* note 9 and accompanying text.

121 *Shaner*, 116 N.J. at 443, 561 A.2d at 1135. *See* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979); Curtis v. Loether, 415 U.S. 189, 197 (1974).

122 *Shaner*, 116 N.J. at 443-45, 561 A.2d at 1136-37. The Supreme Court determined that legal or monetary awards are incidental in Title VII actions. *Id.* The Supreme Court stated that, because Title VII claims summon the equity powers of the courts, they do not require a right to jury trial. *Id.* at 444, 561 A.2d at 1136.

123 *Id.* at 445-46, 561 A.2d at 1136. The court noted that 42 U.S.C. § 2000e-5(g) describes the powers a federal court may utilize when it finds unlawful employment practices. *See* 42 U.S.C. § 2000e-5(g) (1984), which, in pertinent part, provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

124 *Shaner*, 116 N.J. at 446, 561 A.2d at 1136-37. The court noted a case in Camden County Superior Court cited by the plaintiff, in which an LAD claim was tried before a jury. *Id.* at 446 n.3, 561 A.2d at 1137 n.3. The court pointed out that the plaintiff failed to demonstrate whether the LAD claim, in that case, was independent of other claims which entitled the party to a right to jury trial. *Id.*

125 *Id.* at 446, 561 A.2d at 1137. The plaintiff contended that since the right to

Jersey Constitution of 1776, the provisions governing the right to jury trial in the three respective New Jersey Constitutions have only protected that right where the right existed at common law.[126] The *Shaner* court employed an historical analysis, as previously used in *Steiner*, *Stanoyevich*, and *LiVolsi*, to examine whether the cause of action enjoyed the right to jury trial at common law.[127] The court noted that lower courts have continuously followed this historical test in denying a right to jury trial for newly-created statutory causes of action.[128]

After briefly discussing other states' positions on the right to jury trial under anti-discrimination statutes,[129] the court distinguished its analysis from that of the federal courts.[130] The *Shaner* court explained that federal courts focus primarily, if not entirely, on the remedy, as opposed to the cause of action, in assessing the right to jury trial.[131] However, the *Shaner* court stressed that its approach was discernible in that it examined the nature of the underlying controversy, as opposed to looking strictly at the remedy required.[132] Thus, the court rejected the plaintiff's argument that he had an entitlement to a jury trial because he was seeking solely legal relief.[133]

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jury trial, as noted in the New Jersey Constitution, shall remain inviolate, then the right cannot be restricted by legislative actions. *Id.* at 446-47, 561 A.2d at 1137.

126 *Id.* at 447, 561 A.2d at 1137.

127 *Id.* at 447-51, 561 A.2d at 1137-39. *See In re* LiVolsi, 85 N.J. 576, 428 A.2d 1268 (1981); Steiner v. Stein, 2 N.J. 367, 66 A.2d 719 (1949). *See also supra* notes 57-94 and accompanying text.

128 *Shaner*, 116 N.J. at 448, 561 A.2d at 1137-38. *See supra* note 5 and accompanying text.

129 *Shaner*, 116 N.J. at 449, 561 A.2d at 1138. The other state courts also utilize an historical analysis to determine whether the right to jury trial is conferred in their anti-discrimination statutes. *Id.* However, these courts are divided on whether their anti-discrimination statutes "have codified pre-existing common law causes of action" that historically bestowed a right to jury trial or have created entirely new substantive rights for the purpose of determining whether the litigants enjoy the right to jury trial. *Id. See, e.g.*, Murphy v. Cartex Corp., 337 Pa. Super. 181, 546 A.2d 1217 (1988) (denying right to jury trial because discrimination causes of action were foreign and unknown to the common law). *Cf.* Schafke v. Chrysler Corp., 147 Mich. App. 751, 383 N.W.2d. 141 (1985) (granting a right to jury trial because discrimination causes of action were previously recognized by the common law).

130 *Shaner*, 116 N.J. at 449-50, 561 A.2d at 1138.

131 *Id.* at 449, 561 A.2d at 1138 (citing Curtis v. Loether, 415 U.S. 189 (1974)) (the Court noted that the actual and punitive damages sought in that case are akin to the damages offered in courts of law).

132 *Shaner*, 116 N.J. at 450-51, 561 A.2d at 1139.

133 *Id.* at 451, 561 A.2d at 1139. The court also refuted this by stressing that the plaintiff included attorney fees which is a distinctively statutory and *equitable* form of relief. *Id.* (emphasis added). (citing Urban League of Greater New Brunswick v.

The court also refuted the argument that employment discrimination on the basis of age should be perceived as a tort or contract claim observed at common law.[134] The court acknowledged that employment discrimination actions may involve tort or contract principles that utilize conventional legal remedies, and may even contain elements similar to those of an LAD-based claim.[135] The court stressed however, that the LAD cause of action had neither codified nor incorporated those common law causes of action.[136] Thus, the court maintained that the LAD furnished a distinctive and unique statutory cause of action that was not to be equated with any other type of common law tort or contract cause of action.[137]

Finally, the court addressed whether the LAD cause of action could be recognized as a constitutional cause of action conferring the right to a jury trial.[138] While noting that the New Jersey Constitution of 1947 prohibited discrimination "because of religious principles, race, color, ancestry or national origin,"[139] the court articulated that the LAD gave practical effect to this provision, and further added gender and age as classifications requiring protection in the area of unlawful employment practice.[140] The court stated that the LAD did not displace the constitution, but implemented the constitution itself.[141] The court restated that the LAD was not analogous to common law actions involving jury trials.[142] Moreover, the court posited that the LAD sought to ef-

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Mayor and Council of Cranbury, 115 N.J 536, 559 A.2d 1369; Singer v. State, 95 N.J. 487, 472 A.2d 138 (1984)).

134 *Shaner*, 116 N.J. at 451-53, 561 A.2d at 1139-40.

135 *Id.* at 452-53, 561 A.2d at 1140. (citing Jackson v. Consolidated Rail Corp., 223 N.J. Super. 467, 538 A.2d 1310 (1988)).

136 *Shaner*, 116 N.J. at 453, 561 A.2d at 1140. (citing Erickson v. Marsh & McLennan Co., 227 N.J. Super 78, 545 A.2d 812 (1988)).

137 *Id.* The court explained that the LAD is specifically aimed at the achievement of the LAD's goals. *Id.* Thus, the court rejected the argument that "the action involves rights and remedies of the sort enforced at law" and "there is no justification for denying the jury trial right." *Id.* at 453, 561 A.2d at 1140 (citation omitted).

138 *Id.* at 455, 561 A.2d at 1141.

139 *Id.* *See* N.J. CONST. art. I, para. 5. *See supra* note 10 and accompanying text.

140 *Shaner*, 116 N.J. at 455-56, 561 A.2d at 1141. *See* N.J. STAT. ANN. § 10:5-12 (West Supp. 1989). *See supra* note 109 and accompanying text.

141 *Shaner*, 116 N.J. at 456, 561 A.2d at 1140. *See* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 389 A.2d 465 (1978). The court emphasized that *Peper* did not suggest that a constitutional cause of action was a functional equivalent to a common law cause of action, nor did *Peper* indicate that the constitutional cause of action confers a right to jury trial. *Shaner*, 116 N.J. at 456, 561 A.2d at 1146. *See also supra* notes 93-96 and accompanying text.

142 *Shaner*, 116 N.J. at 457, 561 A.2d at 1142.

fectuate social goals and individual interests which were basically equitable in nature.[143] Before concluding that the LAD did not entail the right to jury trial,[144] Justice Handler acknowledged that the opinion neglected to address the issue as to whether age discrimination directly violated the New Jersey Constitution.[145]

While the *Shaner* decision may appear to have settled the question surrounding a right to jury trial in new causes of action having no common law basis, the underlying issue of the potential presence of a constitutional violation for age discrimination has yet to be addressed. By acknowledging the court's hesitancy to address the issue of whether age discrimination directly violates the New Jersey Constitution, Justice Handler implied that the court is cognizant of the sensitive waters upon which the judiciary is treading. Indeed, if the *Shaner* court had not exercised its judicial discretion, and instead ruled upon the issue, it is likely that its action would be viewed as an egregious encroachment of the powers of the New Jersey Legislature. By acknowledging the issue, but opting not to address it, the court may be attempting to put the legislature on notice that legislative action needs to be taken on the question of whether age discrimination directly violates the New Jersey Constitution. It remains a distinct probability that this question will become ripe for examination in the very near future. Until that time, the court appears to be unwilling to overstep its bounds.

This case provided an opportunity to test the uncertainty surrounding the right to jury trial in state court exclusively under the LAD. Because the majority of plaintiffs file their claims jointly under both federal and state law, the procedural aberration which occurred in this case may render the holding in *Shaner* to be limited in effect.[146] In cases where the statute of limitations has run on federal ADEA claims, federal courts in the Third Cir-

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143 *Id.*

144 *Id.*

145 *Id.* at 456, 561 A.2d at 1142. Although plaintiff never asserted the argument, the court hinted that an equal protection violation under the New Jersey Constitution may occur when an older person is deprived of a right to acquire property because of age discrimination. *Id.*

146 In response to *Shaner*, the New Jersey Legislature passed a bill which provides for jury trials for all actions arising under the LAD. 125 N.J.L.J. 868 (April 5, 1990). Governor Florio signed the bill into law on April 16, 1990. 1990 N.J. Laws Ch. 12 (April 16, 1990). The legislation entitles whistleblowers and persons alleging racial, sexual, and age discrimination to jury trials. *Id.* The legislation specifically applies to cases brought under the LAD and the Conscientious Employee Protection Act (Whistleblowers Law). *Id.* With this new legislation, New Jersey has become one of the few states to offer jury trials under state anti-discrimination laws.

cuit have granted jury trials under the LAD.[147] New Jersey has since passed a law which grants a plaintiff the right to a jury trial for claims arising under the LAD.[148] Notwithstanding the fact that this new law usurps the *Shaner* holding, *Shaner* remains significant as an illustration of the New Jersey Supreme Court's adherence to a rigid historical test.

The New Jersey Supreme Court's decisions in *Steiner v. Stein*,[149] *Stanoyevich v. Montclair*,[150] and *In re LiVolsi*,[151] clearly illustrate the court's position that no present right to jury trial exists unless it existed prior to the passage of the state constitution.[152] These decisions are significant because they demonstrate the supreme court's consistent adherence to historical inquiry in ascertaining whether an entitlement to a jury trial for a particular cause of action existed at common law.[153] Only those rights that existed prior to the adoption of the constitution will endure.[154]

In order to comprehend the intricacies of the right to jury trial issue one must understand the common law structure of the American legal system which derived law from both courts of equity and courts of law. In most United States court systems, the distinction between law and equity was eliminated through the merger of the two jurisdictions into one court.[155] However, the distinction between law and equity remains important for the task of ascertaining whether a right to jury trial should exist. Historically, cases cognizable by courts of law were triable by a jury while equity provided no right to a jury trial.[156] When the two

147 *See* McMillan v. Lincoln Fed. Sav. & Loan Ass'n, 678 F. Supp. 89 (D.N.J. 1988). Upon removal to the federal court, Judge Bissell allowed the right to jury trial based on application of the seventh amendment and his reading of Curtis v. Loether, 415 U.S. 189 (1974) which states the LAD "creates legal rights and remedies" for a LAD claim. 678 F. Supp. at 91.

148 *See* 1990 N.J. Laws Ch. 12 (April 16, 1990).

149 2 N.J. 367, 66 A.2d 719 (1949).

150 6 N.J. 479, 79 A.2d 288 (1951).

151 85 N.J. 576, 428 A.2d 1268 (1981).

152 The court used the type of historical analysis employed in *Steiner*, which referred to the 1844 Constitution. *Stanoyevich* pointed to the 1776 Constitution, while *LiVolsi* relies on the 1947 document. The court in *Shaner* does not resolve the differences between pertaining provisions in the three similar constitutions. *See* Shaner v. Horizon Bancorp, 116 N.J. 433, 561 A.2d 1130 (1989).

153 *See supra* notes 44-92 and accompanying text.

154 *See supra* note 7 and accompanying text.

155 In New Jersey the distinction was eliminated under the 1947 Constitution so that the law and chancery divisions each exercise the power and functions of the other when the ends of justice so require. *See* N.J. CONST. art. VI, § III, para. 4.

156 *See* Steiner v. Stein, 2 N.J. 367, 376, 66 A.2d 719, 725 (1949).

jurisdictions merged, the right was determined by the application of an historical test.

The *Shaner* court's use of an historical test to address the right to a jury trial in new causes of action arising under the purview of the New Jersey Constitution marks yet another New Jersey milestone in a well-developed area of the law. Many have argued that the historical test is an outdated tool that does not properly mesh with contemporary legal analysis because it fails to account for the merger of law and equity jurisdictions in United States' court systems. Indeed, the federal courts' progressive response to the merger changed from focusing its analysis on the form of an action, to focusing on the substance of the rights and remedies.[157] Many state judicial systems on the other hand were not as progressive, and as a result numerous state courts, including New Jersey, still focus on the form of the action.[158] Some doubt remains as to whether the merger of law and equity jurisdictions should have any effect on the outcome of an historical test. If it does have relevance, then the historical test may operate ineffectively in modern legal analysis. The chronology of cases reviewing the right to jury trial evidences the court's steadfast reliance on the historical test, which operates to restrict the right to jury trial in new causes of action where the Legislature has not explicitly provided for the right. The New Jersey Supreme Court has consistently applied a more liberal interpretation of the law than the federal judiciary when interpreting fundamental, constitutional rights. The New Jersey Supreme Court's rigidness in this instance appears to be an oxymoron when reconciled with its past record.[159]

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157 *See* Shaner v. Horizon Bancorp, 116 N.J. 433, 449-50, 561 A.2d 1130, 1138-39 (1989).

158 *Id.*

159 *See* A. TARR & M. PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988).