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God, Labor, and The Law: The Pursuit of Religious Equality in Northern Ireland's Workforce

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God, Labor, and The Law: The Pursuit of Religious Equality in Northern Ireland's Workforce

ABSTRACT

In Northern Ireland, a Catholic man is twice as likely to be unemployed as his Protestant counterpart. This employment differential can be attributed directly to the religious sectarianism that has plagued Northern Ireland for almost 400 years. Traditionally, the Protestant community has used economic rights and employment opportunities to maintain its power and authority over the Catholic community. Resolution of this employment differential would be a key step toward achieving peace and unity in Northern Ireland; however, no progress can be made toward this goal until both communities share economic benefits and hardships. In 1989, the British Parliament passed the Fair Employment (Northern Ireland) Act of 1989 in an attempt to reduce the disparity of employment opportunities between the Catholic and Protestant communities. Although the 1989 Act outlaws both direct and indirect discrimination and sets forth a program of affirmative action, the Act desperately needs reform and refined implementation. In addition, the British Parliament needs to consider constitutional reforms that would provide a stronger foundation for employment legislation. This Note provides a brief introduction to the historical development of hostility between the Catholic and Protestant communities and its effect on Northern Ireland's economy. The Note then analyzes the distribution of employment between the two economies and the policies enacted to ensure fairness of distribution. Finally, it addresses the role of religion and sectarian strife in Northern Ireland's experience with employment discrimination, the need for legislative reform of the 1989 Act, and the importance of treating the sectarian divide as a constitutional issue.

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I. INTRODUCTION

Religious sectarianism has permeated life in Northern Ireland for almost 400 years. Like racism and sexism, it creates barriers to achieving equal opportunity. During the last twenty-five years, many policies have been developed in an attempt to deal with these barriers and the societal divide between the minority Catholic community and the Protestant community.¹ The

1. The sectarian strife that has persisted since the British resumed direct control over Northern Ireland is commonly referred to as the "troubles." David

unresolved "national question" (whether Northern Ireland should remain part of the United Kingdom (Protestant Unionist view) or be incorporated into the Republic of Ireland (Catholic Nationalist view))² has perpetuated this division and ultimately undermined any action taken to address specific manifestations of the sectarian divide, specifically the employment differential between the two communities.

Regardless of the ultimate determination of the national question, the British government must take effective action now to protect the rights of both communities in Northern Ireland. While equal employment is a fundamental issue in all societies, it is vital to attaining social justice in Northern Ireland where two distinct communities compete for power and influence. Traditionally, the Protestant community has used economic rights and employment opportunities to maintain its power and authority and to force the migration of prolific Catholics.³ Because of this dynamic, no progress can be made until the two communities share economic benefits as well as hardships and a belief that employers are as much "ours as theirs."⁴

The British Parliament passed the Fair Employment (Northern Ireland) Act of 1989⁵ (1989 Act) in an attempt to reduce the disparity of employment opportunities between Northern Ireland's Catholic and Protestant communities. Its passage signals what the government describes as its determination "to eradicate job discrimination and to ensure the active practice of

Fitzpatrick, *Ireland Since 1870*, in THE OXFORD ILLUSTRATED HISTORY OF IRELAND 213, 272 (R.F. Foster ed., 1989).

2. The national question cannot be viewed as a strictly Protestant and Catholic divide. A small percentage of Catholics in Northern Ireland support the Union with the United Kingdom, and a similarly small percentage of Protestants support a united and independent Ireland. See H. BOOTH, THE MACBRIDE PRINCIPLES AND U.S. COMPANIES IN NORTHERN IRELAND 20 n.2 (1989).

3. See *infra* notes 27 & 64 and accompanying text.

4. Christopher McCrudden, Fellow of Lincoln College, Oxford, and foremost scholar on civil rights in Northern Ireland, has noted that "any future [progress towards equality of employment] will depend on increasing the degree of mutual respect between the two communities." Christopher McCrudden, *The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament, in DISCRIMINATION AND PUBLIC POLICY IN NORTHERN IRELAND* 244, 244 (Robert J. Cormack & Robert D. Osborne eds., 1991) [hereinafter DISCRIMINATION AND PUBLIC POLICY].

5. The Fair Employment (Northern Ireland) Act (1989) (Eng.) [hereinafter 1989 Act]. The 1989 Act amended The Fair Employment (Northern Ireland) Act (1976) (Eng.) [hereinafter 1976 Act].

equality of employment opportunity in Northern Ireland."⁶ The most radical fair employment law ever passed by the U.K. Parliament,⁷ it outlaws both direct and indirect discrimination and sets forth a program of affirmative action.

Despite its breadth, the Act remains an inadequate solution to the problem. Northern Ireland's employment discrimination plight merits additional attention and action because it stems from a violent religious divide.⁸ No type of fair employment legislation will be wholly successful until a constitutional guarantee recognizes and protects the rights of the two communities. The British government must consider the efficacy of a Bill of Rights that would provide the foundation for achieving equal employment opportunity.

Whether or not the British government embarks on constitutional reform, it must confirm its commitment to eradicating religious discrimination in employment through reform of the 1989 Act. The introduction of affirmative action in the Act may serve as a valuable tool to implement change in employment practices and procedures; however, the manner in which it has been enacted precludes significant change within a reasonable length of time. The British government needs to consider implementing preferential treatment or quotas to reverse the trend of Catholic unemployment.

After tracing the development of the hostility between the Catholic and Protestant communities and its relationship to Northern Ireland's economy, this Note outlines the distribution of employment between the communities and the policies enacted to foster fair distribution. It then addresses the role of religion and sectarian strife in Northern Ireland's experience with employment discrimination, the need for legislative reform of the 1989 Act, and the need to treat the sectarian divide as a constitutional issue.

6. Robert J. Cormack & Robert D. Osborne, *Discrimination and Disadvantage in Northern Ireland*, in DISCRIMINATION AND PUBLIC POLICY, *supra* note 4, at 5, 32 (quoting DEP'T OF ECON. DEV., KEY ELEMENTS OF THE ACT 5 (Aug. 1989)).

7. *See id.* at 32.

8. Most other countries, most notably the United States, have experienced comparable intense division and discrimination based on race or gender.

II. HISTORICAL PERSPECTIVE

The hostility between Catholics and Protestants in Northern Ireland originated during the seventeenth century.⁹ Although Anglo-Norman invasions of Ireland began in 1169, it was not until four centuries later, after the Elizabethan Wars, that James I made it a policy to Anglicize Ireland.¹⁰ Initially, he pardoned the Irish earls, restored their land taken during the Wars, and gave them English titles in return for oaths of allegiance to the English Crown and the Protestant Faith.¹¹ But shortly afterward, in 1607, the prominent O'Neill and O'Donnell families and their followers left Ireland and sailed for Spain.¹²

A. *The Development of Hostility Between Catholics and Protestants in Northern Ireland*

In response to the "Flight of the Earls,"¹³ James I confiscated all land in northern Ireland¹⁴ and colonized the area with English and Scottish settlers (the Plantation of Ulster) in an attempt to extend the industry, character, and loyalty of the English settlers to the Irish.¹⁵ As a result of the Plantation, continued English immigration to the Province, and the birth of new generations, the majority of the Ulster¹⁶ population was English (Anglo-Irish) by 1641.¹⁷ Unionist Thomas Sinclair later noted the lasting effect of the Plantation in 1912, stating: "[W]e Ulster Unionists who inhabit the province to-day [sic], or at least the greater number of us, are descendants of these settlers. The overwhelming majority

9. See Kevin A. Burke, *Fair Employment in Northern Ireland: The Role of Affirmative Action*, 28 COLUM. J.L. & SOC. PROBS. 1, 4 (1994).

10. See Nicholas Canny, *Early Modern Ireland c.1500-1700*, in THE OXFORD ILLUSTRATED HISTORY OF IRELAND, *supra* note 1, at 104, 121-22.

11. See *id.* at 128-32.

12. See R. F. FOSTER, MODERN IRELAND: 1600-1972, at 3 n.i, 43-45 (1988).

13. See *id.* at 43-45.

14. The northern counties colonized were Armagh, Derry, Tyrone, Fermanagh, Antrim, and Down. They are commonly referred to as Ulster and constitute the Northern Ireland substate. See Canny, *supra* note 13; ROBERT KEE, IRELAND: A HISTORY 219 (1982).

15. See Canny, *supra* note 10, at 132-33.

16. Ulster is the name given to the nine northern counties geographically located in the northern part of Ireland; however, the term is commonly used to describe the six counties that constitute the political entity of Northern Ireland. See *supra* note 14 and accompanying text.

17. See Canny, *supra* note 10, at 70-71.

are passionately loyal to the British Throne and to the maintenance of the integrity of the Union."¹⁸

This colonization was not welcomed by the Irish Catholic community that had previously controlled Northern Ireland or by their fellow Irish further south. In 1641, the Irish revolted under the leadership of Sir Phelim O'Neill and his followers.¹⁹ They were angered by their subjection to English rule, the intolerance of the Protestant Establishment toward Catholicism, and, particularly in Ulster, immigrants' domination of Irish lands. Although O'Neill's attempt to seize Dublin Castle was thwarted, the Ulster Protestants were severely terrorized.²⁰ Many were killed during battle, and others were killed after months of imprisonment, leading historians to portray this as a Protestant massacre.²¹ Following these events, separate identities and attitudes emerged, dividing the newly established Anglo-Irish Protestants from the Irish Catholics.²² This clearly marked the beginning of more than three centuries of conflict among the Irish, Anglo-Irish, and English—a conflict that continues to manifest itself in the form of religious discrimination and intolerance.

Between 1641 and 1651, Irish Catholics' assertion of control over their province was frustrated further by Oliver Cromwell.²³ By the end of this revolutionary era, he had established the social and economic background for a Protestant Ascendancy class that would dominate Ireland for almost three centuries.²⁴ Although numerically small, the Anglo-Irish Protestants, with their religious and economic aspirations and loyalty to the British Parliament at Westminster, controlled Ireland's social and economic life and perpetuated religious intolerance.

The Ulster²⁵ Protestants' authority and power were confirmed by their resolute victory (with the aid of English supplies) in the Irish Revolution, which occurred from 1688 to 1691.²⁶ The ensuing Treaty of Limerick symbolized the domination of the Protestant Ascendancy and British control under William III.²⁷

18. Thomas Sinclair, *The Position of Ulster*, in *AGAINST HOME RULE: THE CASE FOR UNION 170, 170* (S. Rosenbaum ed., 1912).

19. See FOSTER, *supra* note 12, at 86.

20. See *id.* at 87.

21. See *id.* at 85.

22. See *id.*

23. See Canny, *supra* note 10, at 146.

24. See *id.* at 161.

25. See *supra* note 16 and accompanying text.

26. See FOSTER, *supra* note 12, at 143.

27. See R. F. FOSTER, *Ascendancy and Union*, in *THE OXFORD ILLUSTRATED HISTORY OF IRELAND*, *supra* note 11, at 161, 163.

The British Parliament's subsequent passage of the Penal Laws severely diminished the property and religious rights of the Catholics and formally excluded them from most areas of public life.²⁸

As the Protestant Ascendancy entered the eighteenth century, its strength continued to grow, as did tension with the Catholic community. The Anglo-Irish developed a class consciousness which was attached integrally to their religion.²⁹ Although Grattan's Irish Parliament (1782-1800) is praised for its strong Irish self-government, social cohesion, and the demise of religious strife, it was formed entirely by Protestant landlords loyal to the British Parliament at Westminster.³⁰ Although the government offered some relief to Catholics in the form of the "Catholic Relief Acts," this relief was inadequate; Catholics remained barred from public office until 1829.³¹ As a result, the unrest continued, reinforced by sectarian divisional mistrust, unemployment grievances, high rents, and mandatory tithes to the Protestant Church.³²

In an attempt to soothe the tension, Great Britain signed the Act of Union with Ireland in 1800.³³ This act fused Grattan's Irish Parliament and the British Parliament (Westminster) into one entity.³⁴ The act provided for Irish representation in the House of Commons in London and made the British Parliament the official legislative body of Ireland.³⁵ The tension was not alleviated, however, because southern Catholics (Nationalists) argued that Irish people should handle Ireland's affairs, and they promoted their plan of Home Rule. They demanded that Ireland be granted a parliament of its own with an executive responsible to the Irish legislature.³⁶ Civil war was forestalled only by the outbreak of World War One.³⁷

28. In the 1690s, the British government excluded Catholics from the armed forces, the judiciary, and the legal profession. They already were excluded from Parliament. The laws also forbade Catholics from holding long-term leases on land, purchasing Protestant lands, managing schools, and sending their children to be educated abroad. In addition, all Catholic clergy were banned. See Cormack & Osborne, *supra* note 6, at 2.

29. See FOSTER, *supra* note 12, at 170.

30. See *id.* at 226.

31. See BOOTH, *supra* note 2, at 39.

32. See *id.*

33. See *id.*

34. See FOSTER, *supra* note 27, at 183.

35. See FOSTER, *supra* note 12, at 282-85, 290.

36. See *id.* at 397-428.

37. See *id.* at 433.

After the war, the British Parliament passed the Government of Ireland Act of 1920 in another attempt to soothe the tension.³⁸ This act created two parliaments—one with jurisdiction over the six counties in the North and one with jurisdiction over the twenty-six counties in the South—joined together by a Council of Ireland.³⁹ This act was the defining element of Northern Ireland's ostensible autonomy from the British government. Its Parliament, referred to as Stormont, was entrenched by a Unionist majority loyal to the British government.⁴⁰ The south of Ireland convened a Parliament composed of Nationalists who sought total independence from British control, not merely nominal legislative freedom.⁴¹

The unrest persisted, forcing the British government to create the Irish Free State in 1921, which gave dominion status to Southern Ireland.⁴² Southern Ireland quickly outgrew this limited autonomy. The new Republic gained total independence through the creation of its own constitution in 1937, withdrawal from the British Commonwealth in 1948, and the adoption of a strong foreign policy of total disassociation from anything remotely British.⁴³

This separation of Northern and Southern Ireland produced a period of calm, magnified by World War Two, which led to the passage of legislation to improve social conditions.⁴⁴ Yet the religious conflict remained polarized beneath the surface. Religious identity framed political identity and became a means of characterizing citizenship and loyalty.⁴⁵ The Ulster Protestants perceived their status and power to be threatened on two fronts. On one side, the Catholic state on its southern border had an explicit constitutional mandate to reunite the whole territory separate from British control.⁴⁶ On the other, the Protestants faced an internal Catholic minority that did not identify with the ideology of the majority.

These perceived threats played a direct role in the Ulster Protestants' development of Northern Ireland. Ostensibly, the

38. See *id.* at 503.

39. See JOHN HICKEY, RELIGION AND THE NORTHERN IRELAND PROBLEM 29 (1984); see also Fionnuala Aolain, *Where Hope and History Rhyme—Prospects for Peace in Northern Ireland*, 50 J. INT'L AFF. 63, 65 (1996).

40. See Aolain, *supra* note 39, at 66.

41. See *id.*

42. See *id.*

43. See *id.* at 66 n.12.

44. See HICKEY, *supra* note 39, at 22.

45. See Aolain, *supra* note 39, at 66.

46. Bunreacht na hEireann [Constitution], art. 2, 3 (Ir.).

state was structurally democratic following a policy of one vote per person.⁴⁷ In practice, however, electoral boundaries were manipulated and voting rights were linked to property ownership to force Protestant victories.⁴⁸ In addition, both communities voted along clear religious lines, ensuring Protestant domination of power.⁴⁹ Once elected, the primary focus of these legislators was to safeguard Protestant power, achieved through legislative mechanisms such as the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922.⁵⁰ This act allowed internment without trial, retrospective criminal legislation, entry and search without warrant, and other similarly invasive procedures.⁵¹ These procedures were used consistently against the Catholic community, leading to the emergence of the civil rights movement in the 1960s.⁵²

The advent of the Campaign for Social Justice in 1964 and the birth of the Northern Ireland Civil Rights Association in 1967 symbolized minority discontent as the Catholic community sought inclusion in Northern Ireland's legal and political affairs and an end to religious discrimination.⁵³ The Campaign also demanded equal voting and employment rights for Catholics.⁵⁴ The Ulster Protestants failed to accept reform and viewed the movement as a direct threat to their authority.⁵⁵ This response opened the door to violent civil discord in the form of rioting and sectarian violence that plagued Northern Ireland through the late 1960s. The British government's attempt to placate Catholic demands led to additional violent sectarian riots and demonstrations led by the Irish Republican Army (IRA).⁵⁶ The Protestants, believing the government was failing in its effort to stop the violence, resorted to violence themselves.⁵⁷

Finally, in 1969, the British government stationed the British Army in Belfast to restore order to Northern Ireland, and in 1972

47. See Aolain, *supra* note 39, at 68. Both men and women were entitled to vote. *Id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.*

52. See *id.*

53. See DAVID J. SMITH & GERALD CHAMBERS, *INEQUALITY IN NORTHERN IRELAND* 11 (1991).

54. See *id.*

55. See Aolain, *supra* note 39, at 65.

56. See FOSTER, *supra* note 12, at 589-91.

57. See *id.* at 591. Their organization was referred to as the Ulster Volunteer Force (UVF). See *id.*

introduced direct rule from Westminster in an attempt to tighten control and end the violence.⁵⁸ Nevertheless, tension and resulting violence have continued to plague this region.

B. *The Development of Northern Ireland's Economy*

During the nineteenth century, despite continuing sectarian tension, Northern Ireland moved toward industrialization with the formation of linen and cotton industries and iron foundries.⁵⁹ By the 1880s, Northern Ireland was a thriving industrialized province geared toward external markets.⁶⁰ This industrialization became the foundation for Ulster's⁶¹ economic progress and prosperity, which were in turn linked with Protestant virtues, a British identity, and imperial markets.⁶²

Belfast quickly developed as the base of this industrialization because of its close proximity to Great Britain. The Belfast market drew in mass capital investment in the engineering, shipbuilding, and long-established linen industries.⁶³ This concentration of industry around Belfast fostered the development of a religiously divided workforce.⁶⁴ Politics became similarly polarized as the Protestants' distrust and contempt for the Catholic community intensified.⁶⁵

This sectarianism was most virulent among the low-level workers who preferred to promote their interests through conflict

58. See David Fitzpatrick, *Ireland Since 1870*, in THE OXFORD ILLUSTRATED HISTORY OF IRELAND, *supra* note 1, at 213, 270. The British government had refused to exercise its right to intervene up to this point despite repeated protests from civil rights and other groups. The violent Protestant reaction shocked the world and forced London to reintroduce direct rule. Gary MacEoin, *Job Discrimination Worked in N. Ireland: McBride Principals Can Be Effective Way to Create Level Playing Field For Catholics; Part 2*, NAT'L CATH. REP., Oct. 29, 1993, at 10.

59. See FOSTER, *supra* note 12, at 198.

60. See Fitzpatrick, *supra* note 58, at 213.

61. See *supra* note 16 and accompanying text.

62. See FOSTER, *supra* note 12, at 342, 388.

63. See Fitzpatrick, *supra* note 58, at 213. A. G. Malcolm wrote in his 1852 article, "The Sanitary State of Belfast": "There are in this town 48 flax and cotton spinning and weaving factories, 53 bakeries, and 33 confectioneries, 14 large clothing establishments, and 14 foundries, besides several large sewed muslim work-rooms . . . Little more than twenty years ago, we could boast of but a single flax-spinning factory." A. G. Malcolm, *The Sanitary State of Belfast* (1852), in PROBLEMS OF A GROWING CITY: BELFAST, 1780-1870, at 156-61 (1973).

64. See FOSTER, *supra* note 12, at 389.

65. See *id.* at 389; see also Fitzpatrick, *supra* note 58, at 229 (discussing Protestant unionism).

rather than trade unionism.⁶⁶ Between 1871 and 1911, Protestant workers were highly successful in removing Catholics from the workforce by edging them out of the better paid and higher level skill positions.⁶⁷ In addition, both Catholics and Protestants strengthened their sectarian identities through membership in secretive and ritualistic fraternities.⁶⁸

In the mid-1880s, when the Nationalists threatened this prosperity with the prospect of a Catholic-controlled Parliament at Dublin,⁶⁹ Ulster's Protestant merchants and industrialists reacted to protect their economy.⁷⁰ On January 19, 1886, the Representatives of Irish Commerce wrote to the Marquis of Salisbury in support of maintaining the Union:⁷¹

We appear before your Lordship as persons vitally concerned in the banking, railway, shipping, manufacturing, and general mercantile interests of Ireland as distinct from the landowning interest . . . Confiding in the maintenance of order and the supremacy of British law, men of energy and property have devoted their minds and their capital to the various forms of mercantile enterprise by which the property of Ireland has been advanced.⁷²

The report also stated that the political agitation over Home Rule had injured commerce and paralyzed enterprise, letting stocks, securities, and prices fall.⁷³ The Unionists feared the economically protective policies of the Home Rulers because their industries thrived on the policy of free trade enjoyed with Great Britain and other world markets.⁷⁴

In July 1893, Thomas Sinclair further elaborated on the Unionist beliefs in a response to a Home Ruler's comment, stating:

Ulster and her cities have proved the possibility of establishing in Ireland a condition of mercantile and industrial progress, and of social contentment and prosperity, which not only compares favorably with corresponding conditions in other provinces, but is not unworthy of being classed with similar results in Great Britain. Ulster maintains that under the shelter of the Union, protected by

66. See Fitzpatrick, *supra* note 58, at 229.

67. See *id.*

68. See *id.*

69. See *supra* note 36 and accompanying text.

70. See Fitzpatrick, *supra* note 58, at 228.

71. Ulster Protestants and Unionists considered themselves British, politically and culturally, and did not favor any type of Irish Home Rule. See *supra* notes 36 & 40 and accompanying text.

72. Deputation of the leading mercantile men of cities and towns in Ireland, *The Representatives of Irish Commerce*, in PARLIAMENTARY PAPERS 43 (1886).

73. See *id.*

74. See FOSTER, *supra* note 12, at 388.

British commercial laws, with the advantage of British fiscal legislation in which she shares, there has grown up in her midst the first really great development of trade and industry ever known in the history of the country.⁷⁵

In 1912, Sinclair further commented that "Home Rule will seriously injure Ulster's material prosperity—industrial, commercial, [and] agricultural."⁷⁶

This state of affairs, which culminated in the Government of Ireland Act and the division between Northern and Southern Ireland,⁷⁷ forced Ireland's economic development to suffer and cemented Northern Ireland's dependence on Great Britain and its export market.⁷⁸ Although World War One produced an agricultural boom, it was followed by an economic collapse in the stability of the remaining major industries of linen and shipbuilding.⁷⁹ The linen industry collapsed with the stock market during the Great Depression, and the shipbuilding industry continued to be depressed after the war.⁸⁰ The Great Depression caused mass unemployment; one quarter of all workers were unemployed by 1931, further stirring religious unrest and violence.⁸¹ Specifically, in Belfast 20,000 were unemployed in the linen industry in 1930 and over fifty percent of the linen workers were unemployed by 1938.⁸² The shipbuilding industry's work force declined from 20,000 in 1924 to 2,000 in 1933.⁸³

This high unemployment continued through the 1950s and the 1960s and into the 1980s as the major industries failed to be revived. Violence intensified in the early 1980s as a result of the 1979 recession, which forced a number of multinational plant shutdowns.⁸⁴ These job losses, coupled with the high birth rate, the low number of public sector job openings, and further declines in the shipbuilding and garment industries, increased

75. Thomas Sinclair, *Ulster: Facts and Figures, A Reply*, in 64 CONTEMP. REV. 30 (1893).

76. Sinclair, *supra* note 18, at 177-79.

77. See *supra* notes 38-41 and accompanying text.

78. See BOOTH, *supra* note 2, at 10; L.M. CULLEN, AN ECONOMIC HISTORY OF IRELAND SINCE 1660, at 185-86 (1972).

79. See CULLEN, *supra* note 78, at 171-73.

80. See *id.* at 174.

81. See *id.* at 176.

82. See *id.* at 176-80.

83. See *id.* at 180.

84. See BOOTH, *supra* note 21, at 25.

the unemployment rate to twenty percent and as high as fifty percent in some inner city areas.⁸⁵

C. Disparities between Catholic and Protestant Employment

The effects of the hostility between the Protestant and Catholic communities in Northern Ireland have been most obvious in the distribution of employment opportunities. The major differences that existed in the employment opportunities and the status of Catholics and Protestants in the early 1900s remain to the present day.⁸⁶ An analysis of social mobility in 1973 and 1974 concluded it "would be inaccurate and foolish to assume that present day inequities are only legacies from the past that will somehow gradually fade into oblivion of their own volition."⁸⁷

The 1971 census data produced the first cross tabulation of employment data and religion since 1911 and provided a clear picture of the disparity between the employment profiles of Catholics and Protestants.⁸⁸ In 1971, the Catholic unemployment rate was more than 2.4 times greater than the Protestant rate.⁸⁹ The male unemployment rate was even more marked: 17.3% for Catholic males compared to 6.6% for Protestant males.⁹⁰ In 1985, the disparity had increased to an overall unemployment rate of twenty-seven percent for Catholics and twelve percent for Protestants, with the male unemployment rate at thirty-six percent for Catholics and fourteen percent for Protestants.⁹¹ Analysis of class profiles showed that Catholics were more likely

85. See *id.* at 26, 28.

86. Statistics show that a Catholic man is still more than two times as likely to be unemployed as a Protestant man. See Philippe Bernes-Lasserre, *Northern Ireland Faces Ongoing Battle Over Jobs Discrimination*, Agence France Presse, Sept. 4, 1995, available in LEXIS, News Library, AFP File.

87. R.L. Miller, *Religion and Occupational Mobility*, in RELIGION, EDUCATION AND EMPLOYMENT: ASPECTS OF EQUAL OPPORTUNITY IN NORTHERN IRELAND 76, 76 (Robert J. Cormack & Robert D. Osborne eds., 1983) [hereinafter RELIGION, EDUCATION AND EMPLOYMENT].

88. Robert J. Cormack & Robert D. Osborne, *Religion and the Labour Market: Patterns and Profiles*, in DISCRIMINATION AND PUBLIC POLICY, *supra* note 4, at 49, 53.

89. See *id.* at 57, tbl. 2.5. The Catholic unemployment rate was 13.9%, while the Protestant rate was 5.6%. *Id.*

90. *Id.*

91. *Id.* This data was constructed from census and survey reports such as the Continuous Household Survey and the Labour Force Survey.

to work in semi-skilled or unskilled jobs than Protestants, who mainly worked in non-manual and skilled professions.⁹²

The causes of the persisting employment differential have been much debated. Some argue it results from a practice of discrimination by Protestant employers against Catholic workers.⁹³ Others argue that Catholics are to blame because of their high fertility rate, which contributes too many potential Catholic workers to the labor market.⁹⁴ This argument is then extended: not only are there too many Catholic children, but they also fail to possess the skills necessary for available jobs, they live in areas of little opportunity, and they are unwilling to move to areas of greater opportunity.⁹⁵ Several factors contribute to this adapted argument, such as migration, fertility, education, and mobility.⁹⁶

Migration has always helped to contain Ireland's population growth.⁹⁷ In recent decades, however, the migration has diminished despite a decline in economic opportunities and a sharp increase in unemployment.⁹⁸ Although some migration has continued to the United Kingdom and other countries, it has not

92. See *id.* at 53 (citing E. Aunger, *Religion and Occupational Class in Northern Ireland*, ECON. & SOC. REV. 7:1 (1975)). Aunger's analysis revealed four categories of inequality:

1. Skilled/Unskilled: The typical Protestant male was a skilled worker and the typical Catholic male was an unskilled worker.
2. Masculine/Feminine: Protestants tended to engage in occupations identified as primarily male while Catholics tended to engage in occupations identified as primarily female. For example Protestant men were engaged in administrative, financial, or business oriented professions, and Catholic men were engaged in health care work or teaching.
3. Superordination/Subordination: Protestants attained positions involving authority and influence while Catholics performed more service-oriented tasks.
4. Employed/Unemployed: Although Catholics constituted only 1/3 of the population in 1975, they constituted a majority of the unemployed.

Cormack & Osborne, *supra* note 88, at 53.

93. See David Eversley, *Demography and Unemployment in Northern Ireland*, in DISCRIMINATION AND PUBLIC POLICY, *supra* note 4, at 72.

94. See *id.*

95. See *id.*; see also Dick Grogan, *Nationalists Ridicule Report on Jobs Bias*, IR. TIMES, May 4, 1996, at 9.

96. See Eversley, *supra* note 93, at 72.

97. See DAVID EVERSLEY, RELIGION AND EMPLOYMENT IN NORTHERN IRELAND 45 (1989).

98. See *id.*

been enough to outweigh the increase in population by natural growth.⁹⁹

Although precise demographic information is unavailable, more Catholics than Protestants have emigrated from Ireland. This has especially been true of the agriculture sector, which discharged workers on a constant basis, forcing them to seek employment in other countries. This kept the population balance in check even with the higher Catholic fertility rate.¹⁰⁰ Yet agriculture is no longer discharging its workers, and the construction market that emigrants sought in other countries has been reduced by recessions.¹⁰¹ This change has forced potential Catholic emigrants to remain in Ireland, increasing the population and decreasing the relative size of the available employment market.¹⁰²

Along with migration, Catholics' higher fertility rate has played a role in the unemployment problem.¹⁰³ The result has been a relatively greater number of Catholic entrants to the labor market.¹⁰⁴ Although the fertility rate for both sectors has fallen recently, the differential remains.¹⁰⁵

In addition, Catholic schoolchildren do not attain the educational levels of Protestant children.¹⁰⁶ Fewer Catholic children complete grammar school than Protestants,¹⁰⁷ partly as a result of the sectarian school system. Catholic private schools are often poorly-funded compared to their Protestant, publicly-funded counterparts, and they place greater emphasis on the humanities while Protestant schools emphasize the more practical sciences and mathematics.¹⁰⁸ Traditionally, young Catholic men sought jobs in the shipyards, engineering industries, or security services, which helped alleviate concerns about the quality of their education; however, continuing workforce reductions in

99. *See id.*

100. *See id.*

101. *See id.* at 45-46.

102. *See id.*

103. *See id.* at 47.

104. *See id.* at 54-55.

105. *See id.* at 51-52 tbls.3.3 & 3.4.

106. *See id.* at 191.

107. *See id.*

108. *See id.* Recently the British government secured public funding for Catholic schools and integrated schools within the public system; however, these efforts have done little to improve Catholic education. *See Aidan Donaldson, Integrated Education Is Not A Panacea for North's Ills*, IR. TIMES, Jan. 21, 1997, at 14.

these sectors have left this group unemployed and undereducated.

Influencing all of these factors is the lack of mobility that constrains the Catholic population.¹⁰⁹ Catholics tend to live in the peripheral areas in the South and the West of Northern Ireland. The lack of adequate transportation limits educational choices as well as employment options. These areas lack sufficient resources for either.¹¹⁰ The lack of adequate transportation has fostered the development of segregated housing and a fear of leaving traditionally Catholic areas for safety and comfort reasons.¹¹¹ The Catholic community fears traveling through, working in, or living in areas hostile to Catholics.¹¹² Inadequate transportation has contributed to this overall lack of mobility as well.¹¹³

Individually and as a whole, these factors alone do not fully explain the high level of unemployment in the Catholic community.¹¹⁴ Thus, advocates of reform in Northern Ireland have had a difficult time identifying and correcting causes of disparate employment rates in the Catholic and Protestant communities.

III. PAST EFFORTS AND LEGISLATION

When the British government assumed control in 1972,¹¹⁵ it implemented a number of governmental changes, including forming an office for the Parliamentary Commissioner for Administration (PCA) to hear religious discrimination complaints.¹¹⁶ In addition, a working party, chaired by William van Straubenzee (MP), was organized to consider ways to counter religious discrimination.¹¹⁷ The working party reported in 1973 that religious discrimination was an established fact of Irish daily life and made recommendations that eventually became the basis for the Fair Employment (Northern Ireland) Act of 1976.¹¹⁸ In

109. See EVERSLEY, *supra* note 97, at 215.

110. See *id.* at 209-11.

111. See *id.* at 215.

112. See *id.*

113. See *id.* at 209-11.

114. See Eversley, *supra* note 93, at 92.

115. See *supra* note 58 and accompanying text.

116. See Lisette M. Currier, *Religion and Employment in Northern Ireland: U.S. Influence on Anti-Discrimination Legislation*, 12 COMP. LAB. L.J. 73, 85 (1990).

117. See Cormack & Osborne, *supra* note 6, at 11.

118. See *id.* at 11-12.

response to these recommendations, the British government in 1973 passed the Northern Ireland Constitution Act, which outlawed discrimination on religious or political grounds.¹¹⁹

A. *The Fair Employment (Northern Ireland) Act of 1976*

The 1976 Act prohibited discrimination in employment on religious or political grounds and promoted equality of opportunity.¹²⁰ This act implemented the essence of van Straubenzee's plan, including four fundamental recommendations: (1) legal support for the voluntary eradication of discrimination; (2) use of a civil rather than criminal process; (3) use of an independent agency to enforce the law; and (4) activation of the agency's authority to investigate and rectify any inequality that it discovered.¹²¹

The 1976 Act also created the Fair Employment Agency (FEA), independent of but financed by the government, to implement and enforce the Act's provisions.¹²² The FEA was given three main powers and responsibilities:

- (1) "the investigation of individual complaints of discrimination,"¹²³
- (2) "the power, under Section 12 of the Act, to investigate employment practices and to judge whether or not they accord with principles of equality of opportunity";¹²⁴ and
- (3) "to conduct research germane to fair employment in Northern Ireland and to pursue an educational program to inform employers of what are considered to be fair and proper employment practices."¹²⁵

The FEA was also enjoined to follow the *Guide to Manpower Policy and Practice (Guide)*, prepared under the 1976 Act by the Department of Manpower Services.¹²⁶ The *Guide* provided

119. Northern Ireland Constitution Act, § 19 (1973).

120. See BOOTH, *supra* note 2, at 34.

121. See Currier, *supra* note 116, at 86 & n.121. These principles were heavily influenced by the U.S. attempt to eliminate racial discrimination. See *id.*

122. See EVERSLEY, *supra* note 97, at 231.

123. Cormack & Osborne, *supra* note 6, at 12.

124. *Id.* Section 3 of the 1976 Act stated that equality of opportunity exists when a person of a particular religious belief has, in all circumstances, the same opportunity that a person of differing religious beliefs would have in the same circumstances. See BOOTH, *supra* note 2, at 34.

125. Cormack & Osborne, *supra* note 6, at 12.

126. See *id.*

recommendations to employers for establishing policies and practices that promote equal opportunity.¹²⁷

Specifically, the FEA was required to maintain a list of all employers and organizations that subscribed to a Declaration of Principle and Intent (Declaration) to promote employment equality.¹²⁸ As of 1988, 9387 of the 25,000 employers and organizations had signed the Declaration.¹²⁹ Employers were motivated to sign the Declaration in part because the government awarded contracts to employers who had signed the Declaration.¹³⁰

B. Failure of the 1976 Act

By the late 1980s, however, the work of the FEA had deteriorated to such a degree that no progress was being made toward fair employment.¹³¹ The enforcers were reticent in adopting the forceful van Straubenzee affirmative action program, and public perception was at best confused.¹³² This may have resulted from inexperience on the part of enforcers, courts, and lawyers, or because relatively few complaints were brought before the FEA.¹³³

Between 1976 and 1980, only 216 complaints were made to the FEA, and by 1981, only two or three complaints were being filed per month.¹³⁴ The paucity of complaints most likely resulted from public doubt as to the fairness of governmental remedies and the difficulty of proving discrimination.¹³⁵ Of the 216

127. See *id.*

128. See BOOTH, *supra* note 2, at 34.

129. See *id.* at 34.

130. See *id.* at 34-35.

131. See *id.* at 40-41. Tension was reported among the Agency's educational, research, and investigative functions, as well as its judgmental and law enforcement functions. Additionally, public perception of the FEA's investigative work was confused as to the true impartiality of its work. See *id.* To correct this perception, the FEA published its 1986 consultative paper, *Equality of Opportunity in Employment in Northern Ireland: Future Strategy and Options*. The paper proposed creating two bodies within the FEA to delineate functions clearly. One body, the Directorate, would promote equality in employment while the other would oversee the correction of specific instances of religious discrimination brought to its attention by the Directorate. See *id.* at 42-43.

132. See *id.* at 41.

133. See Christopher McCrudden, *The Experience of the Legal Enforcement of the Fair Employment (Northern Ireland) Act 1976*, in RELIGION, EDUCATION AND EMPLOYMENT, *supra* note 87, at 206-08.

134. *Id.* at 208.

135. *Id.* at 210.

complaints filed, the FEA found discrimination in only ten.¹³⁶ Of these, six were appealed and four overturned.¹³⁷

Although the number of complaints grew annually, this growth was not significant.¹³⁸ By 1988, the FEA had investigated 605 complaints.¹³⁹ It found discrimination in favor of Catholics in fifty-two cases, or 8.6%.¹⁴⁰ Fourteen of these cases were subsequently overturned, with the final percentage of successful cases at 6.3%.¹⁴¹

Ironically, the first twelve years of FEA activity witnessed an increase in unemployment in Northern Ireland.¹⁴² A 1987 study confirmed these numbers by reporting that the 1976 Act had little effect on employers' practices.¹⁴³ The study found that most employers experienced little or no impact from the 1976 Act and failed to examine or alter employment practices and procedures or monitor their workforce.¹⁴⁴ For example, in 1988, Cross Channel Dock of Belfast advertised for dock labor.¹⁴⁵ Of the 164 Protestants and 29 Catholics who applied, only 41 Protestants were short-listed.¹⁴⁶ Ultimately, none of the fifteen Protestants hired were dockers and eight Catholics who were former dockers were excluded.¹⁴⁷

In addition, courts have posed a barrier to the FEA's success.¹⁴⁸ Unlike countries such as the United States, Northern Ireland was not familiar with using the law to fight discrimination.¹⁴⁹ The government was not prepared to deal with

136. *Id.*

137. *Id.*

138. See BOOTH, *supra* note 2, at 37. There were 33 complaints in 1982, 71 in 1983, and 81 in 1985.

139. See MacEoin, *supra* note 58.

140. See *id.*

141. See *id.*

142. See *id.*

143. See Currier, *supra* note 116, at 90.

144. See *id.*; see also GERALD CHAMBERS, EQUALITY AND INEQUALITY IN NORTHERN IRELAND, PART 2: THE WORKPLACE 250 (1987).

145. See MacEoin, *supra* note 58.

146. See *id.*

147. See *id.* The Fair Employment Commission, see *infra* note 185 and accompanying text, later investigated the Association and determined it had discriminated against the Catholic applicants "on the ground of religious belief, in that it failed to place them on the short list for consideration for employment for a number of posts as dock workers which it was in the process of filling." MacEoin, *supra* note 58. On appeal, the Court of Appeals upheld the Commission's finding. *Belfast Port Employer's Ass'n v. Fair Employment Comm'n*, 1994 (Transcript) (N. Ir.) available in LEXIS, Nilaw Library, CASES File.

148. See Currier, *supra* note 116, at 90.

149. See *id.* at 91.

complaints and resistance by both employers whom the law forced to change and the Catholic community which the law was intended to protect. Furthermore, the legal community was not versed in using litigation to effect broad social change.¹⁵⁰ As a result, lawyers were often unwilling to get involved in such a multifaceted controversial situation.¹⁵¹

Irish society similarly was not prepared to deal with legislation in such a sensitive area. The Catholics, whom the law was intended to protect, had traditionally refused to recognize Northern Ireland as a state.¹⁵² They were not granted any specific rights under the Northern Ireland Constitution and therefore lacked the ability to seek effective judicial protection from the courts. This situation, coupled with the political climate that fostered a general distrust in the impartiality of the courts, excluded those who needed its protection the most.¹⁵³

IV. THE INFLUENCE OF IRISH-AMERICANS AND U.S. LEGISLATION ON NORTHERN IRELAND'S REASSESSMENT OF EMPLOYMENT DISCRIMINATION

Frustrated by the failure of the British government to combat unemployment and religious discrimination, Irish civil rights activists in the United States, referred to as the Irish National Caucus,¹⁵⁴ fought to translate their concern into legislative proposals. They engaged in a two-pronged effort to elicit legislation from a traditionally conservative government notorious for its reluctance to advance equal opportunity policy anywhere in the United Kingdom.¹⁵⁵ First, in 1983, the Caucus attempted to prevent the U.S. government from purchasing aircraft from Shorts Missile Systems Ltd., a Belfast aircraft company.¹⁵⁶ Accusing the company of active discrimination against Catholics, the Caucus forced the British government to intervene to

150. See Christopher McCrudden, *The Experience of the Legal Enforcement of the Fair Employment (Northern Ireland) Act 1976*, in RELIGION, EDUCATION AND EMPLOYMENT, *supra* note 87, at 204, 217.

151. See *id.*

152. See *id.* at 204 (explaining the experience of the legal enforcement of the 1976 Act).

153. See *id.* at 217.

154. The Irish National Caucus was founded by Father Sean McManus in 1974 as a lobby for Irish causes on Capitol Hill. It is a nonprofit, nonviolent human rights organization dedicated to the reunification of Ireland. It conducts no foreign relations and "does not support, morally, or financially, any group or party in any part of Ireland." Burke, *supra* note 9, at 10 n.4.

155. See Cormack & Osborne, *supra* note 6, at 15.

156. See *id.*

counteract this allegation.¹⁵⁷ As a result, the company instituted major changes in its employment practices under the guidance of the FEA, leading to an increase in its Catholic workforce.¹⁵⁸

Second, the Irish-Americans decided to follow the lead of the South African Civil Rights Movement.¹⁵⁹ The Sullivan Principles, developed by Leon Sullivan, an African-American Baptist Minister from Philadelphia, served as guidelines for outside investors in South Africa to ensure equal opportunity for workers.¹⁶⁰ They were intended:

to promote racial equality in employment practices for U.S. firms operating in the Republic of South Africa[,] to promote programs which can have a significant impact on improving the living conditions and quality of life for the non-white population, and to be a major contributing factor in the end of apartheid.¹⁶¹

Following suit, Harrison Goldin, then Comptroller of the City of New York, assigned staff member Patrick Doherty to investigate discrimination in Northern Ireland and develop a similar set of principles.¹⁶² Doherty completed his assignment and asked Sean MacBride to offer his name to the principles. MacBride did this,

157. *See id.*

158. *See id.* For example, Shorts created the position of Equal Opportunities Manager in 1991. *See* Burke, *supra* note 9, at 10 n.41; *see also infra* notes 253-62 and accompanying text (discussing the Shorts case).

159. *See* MacEoin, *supra* note 58; *see also* Cormack & Osborne, *supra* note 6, at 15.

160. *See* MacEoin, *supra* note 58, at 10-11. They were promulgated by the Interfaith Center for Corporate Responsibility (ICCR), a coalition of 250 Protestant Denominations and Catholic institutions with the National Council of Churches. *See id.*

161. Currier, *supra* note 116, at 92 (citing H.R. 3008, H.R. 3597, 97th Cong., 1st Sess. (1982)). The Sullivan Principles are as follows:

1. Non-Segregation of the races in all eating, comfort and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of development of training programs that will prepare in substantial numbers, Blacks and other non-whites for supervisory, administrative, clerical and technical jobs.
5. Increasing the number of Blacks and other non-whites in management and supervisory positions.
6. Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.

Id.

162. *See* Cormack & Osborne, *supra* note 6, at 15.

signing the MacBride Principles in 1984.¹⁶³ The preamble states the principles were put forth “in light of decreasing employment opportunities in Northern Ireland and on a global scale, and in order to guarantee equal access to regional employment.”¹⁶⁴ They consist of nine guidelines for corporations doing business in Northern Ireland that promote “equal hiring practices” and “security and safety of employees.”¹⁶⁵

163. See *id.* Sean MacBride (1904-1988) was co-founder of Amnesty International, a U.N. assistant secretary general, and secretary general of the International Commission of Jurists. He was an aggressive Irish civil rights activist, and the only person ever to receive three major peace awards: the Nobel Peace Prize, the Lenin Peace Prize, and the American Medal of Justice. See MacEoin, *supra* note 58, at 11. In addition, the principles were signed by Dr. John Robb, a Northern Irish surgeon; Inez McCormack, a Northern Irish trade union leader; and Father Brian Brady, a West Belfast priest. Cormack & Osborne, *supra* note 6, at 15.

164. BOOTH, *supra* note 2, at 55.

165. MacEoin, *supra* note 58, at 11. The MacBride Principles appear in italics with the amplifications issued by Sean MacBride in 1986 following each principle:

1. *Increasing the representation of individuals from underrepresented religious groups in the workforce, including managerial, supervisory, administrative, clerical and technical jobs.*

A workforce that is severely unbalanced may indicate *prima facie* that full equality of opportunity is not being afforded all segments of the community in Northern Ireland. Each signatory to the MacBride Principles must make every reasonable lawful effort to increase the representation of underrepresented religious groups at all levels of its operations in Northern Ireland.

2. *Adequate security for the protection of minority employees both at the workplace and while traveling to and from work.*

3. *The banning of provocative religious or political emblems from the workplace.*

4. *All job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from underrepresented religious groups.*

5. *Layoff, recall and termination procedures should not, in practice, favor particular religious groups.*

6. *The abolition of job reservations, apprenticeship restrictions and differential employment criteria, which discriminate on the basis of religion or ethnic origin.*

7. *The development of training programs that will prepare substantial numbers of current minority employees for skilled jobs, including the*

The MacBride Principles have been used primarily in the area of shareholder resolutions and local legislation.¹⁶⁶ The shareholder actions began in 1985 with the submission of shareholder proposals and requests for their companies to adhere to the principles and conduct detailed reviews of corporate policies and operations in Northern Ireland.¹⁶⁷ The shareholders

expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of minority employees.

This does not imply that such programs should not be open to all members of the workforce equally.

8. *The establishment of procedures to assess, identify and actively recruit minority employees with potential for further advancement.*

This section does not imply that such procedures should not apply to all employees equally.

9. *The appointment of a senior management staff member to oversee the company's affirmative action efforts and the setting up of time-tables to carry out affirmative action principles.*

Id. (emphasis added).

166. See Cormack & Osborne, *supra* note 6, at 16.

167. See *id.* at 17. Lockheed Corporation's shareholder proposal at a 1990 annual meeting provides a clear example of shareholder activism:

Proposal Regarding Non-Discrimination in Ireland

WHEREAS, Lockheed Corporation has entered into a contractual agreement with GEC PLC, parent company of GEC Turbines of Larne, Northern Ireland,

WHEREAS, Catholic civil rights activists and political leaders in Northern Ireland have accused GEC PLC of religious discrimination in its politics relating to employment, and,

WHEREAS, Catholic workers at the Company's Northern Ireland plant, GEC turbines in Larne have been subjected to illegal harassment and intimidation; and,

WHEREAS, Lockheed Corporation has a policy of equal opportunity in employment in its domestic and international operation;

RESOLVED, Shareholders request the Board of Directors to:

1. Report to the shareholders by September, 1990 on the Company's relationship with GEC PLC. This report should include the extent to which GEC PLC and other Lockheed sub-contractors are required to adhere to Lockheed's policies of non-discrimination, certain non-proprietary information and be prepared at reasonable cost.

2. Call on GEC PLC to adhere to Lockheed's non-discrimination policy in their operations in Northern Ireland.

Shareholder's Supporting Statement

The Systems' statement in support of the proposal is as follows:

—Continued discrimination and worsening employment opportunities have been cited as contributing to increased support among Catholics for a violent solution to Northern Ireland's problems.

—Unemployment in Northern Ireland has reached record proportions, increasing by over 100% during the last seven years. Statistics released

of approximately twenty-four U.S. firms agreed to "make all lawful efforts to implement the fair employment practices embodied in the MacBride principles in the Northern Ireland operations."¹⁶⁸

Local legislation has been aimed at encouraging companies to monitor and, if necessary, improve their employment practices.¹⁶⁹ Approximately sixteen states and forty cities and counties have adopted the MacBride Principles to date.¹⁷⁰ It is hoped that this participation and the courses of action it promotes eventually will improve the state of employment distribution in Northern Ireland.¹⁷¹

by the British Government in 1986 show 23% of the workforce as unemployed. Male unemployment in some of the Belfast's Catholic neighborhoods has been estimated to be as high as 80%.

—An insistence that major sub-contractors adhere to Lockheed's policies of non-discrimination will demonstrate the Company's concern for human rights and equality of opportunity in its international operations. Please vote your proxy FOR these concerns. Lockheed Corporation, Notice of Annual Meeting of Shareholders (Mar. 29, 1990).

Later in 1990, the Lockheed Corporation agreed "to urge its subcontractors in Northern Ireland to implement the MacBride Principles."

FATHER SEAN MCMANUS, *THE MACBRIDE PRINCIPLES: GENESIS AND HISTORY AND THE STORY TO DATE* 126 (1993); see also Burke, *supra* note 9, at 13 (discussing the MacBride principles).

168. MCMANUS, *supra* note 167, at 126. These firms include Alexander and Alexander, AM International, American Home Products, Avery Dennison, AT&T, Data General, Digital Equipment Company, DuPont, Federal Express, Fruit of the Loom, GATX Corporation, Honeywell, Hyster (NACCO Industries), IBM, NYNEX, Oneida, Pitney Bowes, Inc., Proctor & Gamble, Sara Lee, Sonoco, Teleflex, Texaco, Unysis, and VF Corporation. See Burke, *supra* note 9, at 12 n.47.

169. See Cormack & Osborne, *supra* note 6, at 17.

170. See Conor O'Clery & Sean Cronin, *MacBride Principles "Keeping Fund Alive in Climate of Cuts,"* IR. TIMES, June 2, 1995, at 10. States that have adopted the MacBride Principles include Connecticut, Florida, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island. States that have passed resolutions endorsing the MacBride Principles include Arkansas, Kentucky, Montana, and Virginia. Cities that have adopted the MacBride Principles include Baltimore, MD; Binghamton, NY; Boston, MA; Burlington, VT; Chicago, IL; Cleveland, OH; Detroit, MI; Hartford, CT; Kansas City, MO; Lackawanna County, PA; Minneapolis, MN; Monroe, Orange City, NY; New Haven, CT; New York, NY; Philadelphia, PA; Pittsburgh, PA; Rochester, NY; San Francisco, CA; Scranton, PA; St. Louis, MO; St. Paul, MN; Springfield, MA; Tuscon, AZ; Washington, D.C.; and Wilmington, DE. Cities and counties that have passed resolutions endorsing the MacBride Principles include Bridgeport, CT; Bucks County, PA; Cambridge, MA; Carbondale, PA; Honolulu, HI; Lawrence, MA; Nashua, NH; Orangetown, NY; Portland, ME; Providence, RI; Rockland County, NY; Union City, NJ; West Caldwell, NJ; Westchester County, NY; Worcester, MA; and Yonkers, NY. See Burke, *supra* note 9, at 13 n.49.

171. See Burke, *supra* note 9, at 13.

V. NORTHERN IRELAND'S REASSESSMENT OF EMPLOYMENT
DISCRIMINATION: THE STANDING ADVISORY COMMISSION ON HUMAN
RIGHTS, THE CONSULTATIVE PAPER, AND THE WHITE PAPER

Pressure for reform from Irish Americans coincided with strenuous efforts from within Northern Ireland to assess and provide relief from the disparity of employment. In 1987, the Standing Advisory Commission on Human Rights (SACHR) published its findings based on its examination of whether the law in practice gave adequate protection against discrimination on the grounds of religious belief or political opinion and whether equality of opportunity actually existed.¹⁷² The SACHR studied eleven factors, including regional factors, education levels, attitude, and class¹⁷³ in determining as follows:

172. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS (SACHR), RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPINION IN NORTHERN IRELAND: REPORT ON FAIR EMPLOYMENT iii (1987) [hereinafter SACHR First Report]. The SACHR was established by Parliament under Section 20 of the Northern Ireland Act of 1973 for the purpose of "advising the Secretary of State on the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the grounds of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground." *Id.*; see also Cormack & Osborne, *supra* note 6, at 20 (discussing the SACHR).

173. The eleven factors and a brief description of the SACHR's conclusion are as follows:

1. Regional Factors: Catholics tend to be concentrated in areas with fewer employment opportunities, particularly in the western portion of the province far away from Belfast. The SACHR found that this made a "clear but small contribution to the overall differential." SACHR First Report, *supra* note 172, at 26.

2. Differential Labor Markets: Protestants and Catholics enter different labor markets to the disadvantage of Catholics. The 1971 population census showed over and under-representation of the two communities in certain industries. For example, there were significantly more Protestants in the energy and engineering industries and more Catholics in construction; however, the SACHR determined that this was a mere expression of the established differentials and not a explanation for such. *Id.* at 27.

3. Class Differences: There is a higher proportion of Catholics in the lower classes. The SACHR found that this too was an expression of the differential and not necessarily an explanation. *Id.* at 28.

4. Differences in Education: Catholics are afforded fewer educational opportunities and tend to lean towards the humanities as opposed to the sciences which effects their overall employment opportunities. The SACHR determined that some of the differential "may reasonably be attributed to this factor." *Id.* at 30.

5. Differences in Attitudes toward work: Catholics have a lower motivation for and commitment to work than Protestants. The SACHR found this to be absolutely untrue. *Id.*

It cannot be concluded that this residual element [unemployment rates among Catholics] is or is not due to unlawful direct or indirect discrimination. In the absence of other plausible explanations, however, it is reasonable to suppose that *religion* is the most likely explanatory factor which accounts for at least some if not most of the residual element.¹⁷⁴

Based on this conclusion, the SACHR's policy recommendations were substantially incorporated into the Fair Employment (Northern Ireland) Act of 1989, including the importance of selection and promotion based on merit.¹⁷⁵ Also incorporated was the SACHR's belief that positive or reverse discrimination was inappropriate at this point.¹⁷⁶ The SACHR defined reverse discrimination as occurring when, in an attempt to correct an existing imbalance in the workforce composition, certain persons are selected preferentially or promoted over at least one better qualified person of a different religion;¹⁷⁷ however, the SACHR did endorse broad affirmative action measures, such as outreach measures designed to enhance representation at both the application and the appointment

6. Age: The Catholic population has a higher percentage of youth than the Protestant community. There is clearly an uneven employment rate throughout the age groups to the disadvantage of the younger age groups. *Id.* at 31.

7. Family Size: Catholics tend to have larger families than Protestants, and heads of larger families tend to have more trouble finding employment than those of smaller families. The SACHR was unable to find a clear reason for this phenomenon. *Id.* at 32.

8. The Chill Factor: Catholics and Protestants do not want to seek employment in areas or places that are considered hostile. The SACHR, relying on findings of the Policy Studies Institute reported that this is a "potent factor." *Id.* at 33.

9. Security Occupations: Catholics have systematically excluded themselves from employment in security occupations. The SACHR concluded that the chill factor may operate here in the form of ostracism from their own communities for joining any type of police force. In addition, there is reluctance to support security forces in a state that has not allowed Catholics to fully participate in society. *Id.* at 34.

10. The Black Economy: Some argue that the "unemployed" actually have occasional or permanent work. The SACHR, however, was unable to determine the extent to which such a market affects the employment differential. *Id.*

11. Religion: The SACHR concluded that religion, as quoted above in the text, is the "most likely explanatory factor." *Id.* at 35.

174. *Id.*; Cormack & Osborne, *supra* note 6, at 24 (emphasis added).

175. See Cormack & Osborne, *supra* note 6, at 25.

176. See SACHR First Report, *supra* note 172, at 70-71.

177. See *id.* at 70.

stages.¹⁷⁸ In addition, it left the door open for future consideration of reverse discrimination in the event other affirmative action measures failed.

These conclusions were bolstered by the contemporaneous publication of new options and legislative proposals related to fair employment principles in the 1987 Consultative Paper, which was followed by the White Paper in 1988.¹⁷⁹ The Consultative Paper, the government's response to the MacBride Principles, supported basic reform principles, including (1) the rejection of quotas, (2) the centrality of the merit principle, and (3) the unacceptability of improving the circumstances of one community at the expense of the other.¹⁸⁰

The White Paper rejected this multidimensional approach and focused on religious discrimination. It proposed the introduction of a legally required monitoring process, the explicit prohibition of indirect discrimination, the referral of individual discrimination cases to industrial tribunals, the use of outreach goals and tables in affirmative action remedies, and a form of contract compliance.¹⁸¹

VI. THE FAIR EMPLOYMENT (NORTHERN IRELAND) ACT OF 1989

The Fair Employment (Northern Ireland) Act of 1989 (1989 Act) was published in December 1988 in response to the findings of the SACHR as well as the prominent proposals of both the Consultative Paper and the White Paper.¹⁸² The government additionally was provoked by statistics that showed "serious underrepresentation [of Catholics] at every level" of public service organizations and revealed that at least 559 private sector companies and ten public authorities employed fewer than ten Catholics.¹⁸³

The 1989 Act substantially strengthened the provisions set forth under the 1976 Act and was considered by the government to be "the most radical fair employment law ever passed by the

178. See *id.* at 71. The government followed the SACHR's recommendation for affirmative action measures, but stopped short of endorsing religion-specific targeting of outreach measures. See *infra* notes 207-48 and accompanying text.

179. See Cormack & Osborne, *supra* note 6, at 29.

180. See *id.*

181. See *id.* at 31.

182. See *id.*

183. See MacEoin, *supra* note 58, at 11. These companies included two of Northern Ireland's biggest employers: the Harland and Wolff Shipyard, 94.5% Protestant, and the Royal Ulster Constabulary (RUC), 92.5% Protestant. See *id.*

United Kingdom Parliament."¹⁸⁴ The Department of Economic Development (DED) published *Key Details of the Act* in 1989 with a foreword by Margaret Thatcher. The foreword set forth what the government considered to be the most salient features of the 1989 Act:

The new Fair Employment (NI) Act 1989 shows that the Government is determined to eradicate job discrimination and to ensure the active practice of equality of employment opportunity in Northern Ireland In summary, it puts new duties on employers to ensure the active practice of fair employment. Employers must register, monitor their workforces and regularly review their recruitment, training and promotion practices. They must take affirmative action measures and set goals and timetables where necessary. There are both criminal fines and economic sanctions—involving loss of business grants—for those guilty of bad practice. There are two new enforcement bodies, the Fair Employment Commission (FEC) (which replaces the present Agency and inherits its investigatory powers) and the Fair Employment Tribunal (FET). In addition, indirect discrimination, whether intentional or not, is outlawed.¹⁸⁵

More specifically, the 1989 Act requires all private-sector employers with more than ten employees¹⁸⁶ to register with the FEC.¹⁸⁷ All public sector employers are registered automatically.¹⁸⁸ In addition, all registered employers are required to engage in the annual FEC monitoring process to identify employees' religious affiliations.¹⁸⁹ Employers must also review their recruitment, training, and promotion policies to

184. Cormack & Osborne, *supra* note 6, at 38.

185. *Id.* at 32-33 (quoting DEPT OF ECON. DEV., KEY ELEMENTS OF THE ACT 5 (Aug. 1989)).

186. Initially the act only applied to employers with more than 25 employees. The act provided that, within two years of effectiveness, this number would be reduced to 10, the current standard. 1989 Act, *supra* note 5, § 23.

187. *Id.* § 23; Cormack & Osborne, *supra* note 6, at 33. By February 1, 1991, the FEC did not know of any company that should have registered that had not done so. The FEC estimated that 1600 companies with more than 25 employees existed, but by February 2, 1991, 1856 companies had registered. JOHN EDWARDS, AFFIRMATIVE ACTION IN A SECTARIAN SOCIETY 34 (1995). The self-employed, individuals of government-training schemes, the unemployed, those working less than 16 hours per week, and those working in firms with less than 11 employees are not monitored. The monitored group accounts for approximately 70% of the Northern Ireland workforce, or 380,439 out of 545,850 employees. See Burke, *supra* note 9, at 16 n.63.

188. See 1989 Act, *supra* note 5, §§ 22, 26.

189. See *id.* § 27. For larger employers, public-sector and private-sector with over 250 employees, this requires monitoring applications. Smaller employers must maintain records of applications. See *id.* § 27(4).

assess whether affirmative action is necessary¹⁹⁰ to achieve "fair participation"¹⁹¹ among Protestants and Catholics in the workforce. This review must be done a minimum of every three years according to the guidelines set forth in the FEC's "Code of Practice."¹⁹²

The 1989 Act also gave the FEC authority to carry out investigations of any public or private sector employer "for the purpose of assisting it in considering, what, if any, action for promoting equality of opportunity ought to be taken."¹⁹³ After the FEC has conducted a § 11 investigation, it then has the power to "ensure that the [employer] concerned takes such action for promoting equality of opportunity as is, in all circumstances, reasonable and appropriate, and . . . where appropriate, to secure a satisfactory written undertaking by him that such action will be taken."¹⁹⁴ The FEC was also authorized to set goals and timetables¹⁹⁵ and to direct employers to take affirmative action measures:¹⁹⁶

[I]n order to favour intentionally an underrepresented group the Commission can direct training at a particular place in Northern Ireland, or for a particular class of persons (provided that selection for training does not take place on the basis of religious belief or political opinion); and it can direct contacts by employers with specific schools in order to encourage a greater flow of applicants from an underrepresented community.¹⁹⁷

The 1989 Act specifically outlawed direct discrimination and, unlike the 1976 Act, included indirect discrimination as an illegal practice.¹⁹⁸ Accordingly, it is illegal to "use job selection

190. *Id.* § 31(2).

191. *Id.* § 31(1).

192. *Id.* § 7.

193. *Id.* § 11(1).

194. *Id.* § 12(2).

195. *Id.* § 36.

196. *Id.* § 32(5).

197. *Id.* § 53; Cormack & Osborne, *supra* note 6, at 33.

198. 1976 Act, *supra* note 5, §§ 17-23. The 1989 Act amended the 1976 Act definition of illegal discrimination by incorporating the definition of indirect discrimination. Indirect discrimination refers to an employer applying a "requirement or condition" equally to all employees, present and potential, but where "the proportion of persons of the same religious belief or of the same political opinion" who can comply with the provision is "considerably smaller" than those who do not share that belief or opinion. *Id.* § 49(2)(b). Examples of indirect discrimination include the following:

- requiring all employees to live in Protestant East Belfast;
- recruiting all employees from a particular youth club which is run by the Catholic Church;

requirements or conditions which—though applied equally to both religious groups—have a disparate or adverse impact on one group, are not justifiable irrespective of religious belief or political opinion, and are to the detriment of the individual concerned.”¹⁹⁹ These requirements are supported by a set of strict criminal and economic sanctions.²⁰⁰ The FEC has the authority to issue a “notice of disqualification”²⁰¹ to a noncompliant employer, which will remove the employer from competition for any public-sector contracts and government grants.²⁰²

Most striking, the 1989 Act established a Fair Employment Tribunal (FET).²⁰³ Section 3 of the Act provides for the appointment of a president, a vice president and a panel of chairmen of the FET to hear complaints of unlawful discrimination based on religious or political belief.²⁰⁴ The FET has authority to hear all individual discrimination cases as well as employer appeals from FEC directives.²⁰⁵ If the FET finds that a complaint of unlawful discrimination is well-founded, the most widely used remedy is an order for compensation. Initially, the FET had the authority to award up to £30,000 in damages.²⁰⁶ Since 1996, however, there has not been a cap on the compensation the FEC may award.²⁰⁷

- recruiting on the recommendation of current employees where the current workforce is overwhelmingly of one religion;
- promoting only people with particular qualifications which are generally unavailable to people from one community, or promoting only people with a certain length of service where members of a particular religious group are underrepresented among those with that length of service.

Burke, *supra* note 9, at 16 n. 58.

199. Cormack & Osborne, *supra* note 6, at 33 (quoting DEP'T OF ECON. DEV., KEY ELEMENTS OF THE ACT 14 (Aug. 1989)).

200. 1989 Act, *supra* note 5, §§ 14-18, 38-42.

201. *Id.* §§ 38-39.

202. *Id.* §§ 41-43. Section 40 provides a mechanism for appeals of such notices.

203. See Cormack & Osborne, *supra* note 6, at 34.

204. Vivianne Jones, *The Practice and Procedure of the Fair Employment Tribunal*, in FAIR EMPLOYMENT LAW IN NORTHERN IRELAND: DEBATES AND ISSUES 105, 106 (Denise Magill & Sarah Rose eds., 1997).

205. See *id.*

206. 1989 Act, *supra* note 5, § 17(3)(b). If the Tribunal accepts a claim of discrimination, it may (1) issue a declaration of the parties' rights, (2) issue a recommendation that the offending party take certain steps within a certain time period to alleviate the effects of such discrimination, or (3) award damages in the form of compensation for injured feelings, exemplary damages, or aggravated damages. See Burke, *supra* note 9, at 16 n.60.

207. *Employment Brings Work*, LAW., May 28, 1996, at 41, available in LEXIS, News Library, LAWYER File.

Although the 1989 Act remedied many of the weaknesses of the 1976 Act, it failed to incorporate various SACHR recommendations.²⁰⁸ The two most significant lapses involve a complainant's burden of proof and the exclusion of various industries from coverage.²⁰⁹ Whereas the SACHR recommended that a complainant should only have to show that an employer treated certain employees less favorably than others because of employees' religious or political views,²¹⁰ the standard actually adopted requires applicants to prove they were better qualified for the job than the applicant hired or promoted. The SACHR also recommended that the 1989 Act cover all industries, yet the 1989 Act exempts various employment sectors, such as teaching. In addition, and in contrast to the SACHR's proposals, in failing to address religious and political discrimination done in the name of national security, public safety, or public order, the 1989 Act implicitly allows such action.

VII. THE ROLE OF AFFIRMATIVE ACTION²¹¹

The 1989 Act embraced affirmative action and introduced it to Northern Ireland for the first time.²¹² In contrast to experiences with affirmative action in the United States²¹³ and

208. See Currier, *supra* note 116, at 101.

209. See *id.*

210. See *id.*

211. There is a lot pressure for affirmative action to succeed in Northern Ireland. The 1989 Act is intended to increase Roman Catholic representation and reduce the unemployment differential. It is also intended to reduce sectarian violence, maintain and increase U.S. investment in the province, meet pressure from U.S. lobbies, promote economic growth, and further the future of the Anglo-Irish Agreement. See EDWARDS, *supra* note 187, at 3.

212. See *id.* at 1. Equal employment opportunity was first introduced explicitly to the political agenda in 1969 with the joint publication by the British and Northern Irish of the "Downing Street Declaration." The first step in the direction of legislation that dealt specifically with equal employment opportunity in came through the van Straubenzee Report in 1973, see *supra* note 117 and accompanying text. The report interpreted equal opportunity to mean not only the removal of discriminatory barriers, but a more "positive concept" requiring "determined steps—through programs of 'affirmative action'—to remove the constraints and impediments which at present inhibit the realization of equality of opportunity." EDWARDS, *supra* note 187, at 5. The recommendations of the van Straubenzee report were largely incorporated into the 1976 Act. See *id.*

213. United States Executive Order 11246 requires the use of affirmative action programs for government contractors with contracts worth \$50,000 or more per year and 50 or more employees. Voluntary affirmative action is also mandated by Title VI and VII of the Civil Rights Act 1964 (now amended in part by the Civil Rights Act 1991). The purpose of such affirmative action programs is to

Britain,²¹⁴ however, the 1989 Act requires the use of affirmative action with respect to both Catholics and Protestants where they are under-represented in a particular workforce.²¹⁵ The 1989 Act encompasses efforts to support and guide under-represented groups in gaining employment and subsequently obtaining promotions.²¹⁶ In addition, it seeks to remove barriers, such as intimidation and violence, that prevent applicants from looking for employment in certain areas and industries.²¹⁷ Ultimately, the 1989 Act attempts to cure the disadvantages that afflict the Catholics while at the same time promoting a merit-based system.²¹⁸ As such, it is a means of "effectively and constructively combating the employment disparity that now plagues Northern Ireland."²¹⁹

The process of affirmative action, according to the 1989 Act, permeates the whole registering process²²⁰ and monitoring requirements²²¹ and subsequently may be triggered through a § 31 Review.²²² This section requires: "[I]n the case of each registered concern, the employer shall, from time to time review the composition of those employed in the concern . . . and the employment practices of the concern for the purposes of determining whether members of each community are enjoying . . . fair participation in employment in the concern."²²³ The Act also provides: "In a case where it appears to the employer . . . that members of a particular community are not enjoying . . . such participation, he shall, as part of the review determine the affirmative action (if any) which would be reasonable and appropriate."²²⁴

benefit minority groups in areas where they may be under-represented. *See id.* at 2, 17.

214. The Race Relations Act in Great Britain exclusively benefits minority groups. *See id.*

215. *See id.*

216. *See* Burke, *supra* note 9, at 19.

217. *See supra* note 112; Burke, *supra* note 9, at 19.

218. *See* Burke, *supra* note 9, at 19. In the process of promoting the Catholic community, the act proposes neither to force the selection of undeserving applicants or workers nor to force employers to accept a lower quality workforce. Rather, it seeks to identify and develop those who must overcome additional barriers to receive deserved selection. *See id.*

219. *See id.*

220. *See supra* notes 185-86 and accompanying text.

221. *See supra* note 187 and accompanying text.

222. *See supra* notes 188-89 and accompanying text.

223. 1989 Act, *supra* note 5, § 31(1).

224. *Id.* § 31(2).

Thus, every registered employer must review its recruitment, training, and promotion practices at least every three years to estimate any under-representation.²²⁵ If the results are such that the FEC determines corrective affirmative action measures are necessary, the employer, with the aid of the FEC, must effect such measures.²²⁶ As of June 1992, just under one half of the companies in Northern Ireland had begun a § 31 Review.²²⁷

Regrettably, the 1989 Act defines affirmative action less actively than earlier proposals that never reached codification. This weakness has prompted criticism despite the apparent success of the registering, monitoring, and subsequent reviews. In 1973, the van Straubenzee Report defined affirmative action as "deliberate programs under which equality of employment opportunity may be achieved."²²⁸ The White Paper subsequently defined it as "special measures taken to promote a more representative distribution of employment in the work force and designed to give all sections of the community full and equal access to employment opportunities."²²⁹ These definitions appear to promote the use of additional measures above and beyond normal practices to reach the goal of fair opportunity in employment. The 1989 Act approaches affirmative action in a less aggressive manner, defining it as:

[a]ction designed to secure fair participation in employment by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland by means including:

- the adoption of practices encouraging such participation, and
- the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.²³⁰

This definition has prompted many critics to question the British government's commitment to eliminating employment discrimination.²³¹ The definition fails to promote the goal of more representative distribution of Protestants and Catholics by avoiding any reference to it, in contrast to the White Paper.²³²

225. See EDWARDS, *supra* note 187, at 36; *supra* notes 190-91 and accompanying text.

226. See EDWARDS, *supra* note 187, at 36.

227. See *id.*

228. See *supra* notes 177-78 and accompanying text; Burke, *supra* note 9, at 21.

229. See *supra* notes 177 and 179 and accompanying text; see also Burke, *supra* note 9, at 21 (quoting and discussing the White Paper).

230. 1989 Act, *supra* note 5, § 58(1).

231. See Burke, *supra* note 9, at 22 n.93.

232. See 1989 Act, *supra* note 5, § 58(1); see *supra* text accompanying note 216, for the definition of affirmative action in the 1989 Act.

The 1989 Act instead focuses primarily on providing for fair procedure.²³³ It does not promise to make substantive improvements in a society permeated by inequality and internal sectarian strife. In addition, the 1989 Act's reliance on "fair participation,"²³⁴ not defined in the legislation, leaves the solution even murkier. The existing construction ultimately leaves the decision to implement affirmative action measures to the discretion of individual employers, with no substantial reward or recourse for participation or lack thereof.²³⁵

This lack of incentive for employer participation is exacerbated by the ambiguity of the statutory provisions regarding acceptable affirmative action programs. While attempting to encourage the use of affirmative action, the 1989 Act fails to provide protection against claims of illegal reverse discrimination that pose a large problem in the arena of indirect discrimination.²³⁶ The 1976 Act, as amended and incorporated by the 1989 Act, states that indirect discrimination occurs when a person:

[a]pplies to that other person a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—

i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it, and

ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied, and

iii) which is to the detriment of the other because he cannot comply with it.²³⁷

The 1989 Act currently carves out and protects three specific programs of affirmative action from claims of indirect or reverse discrimination.²³⁸ The first exemption allows an employer to

233. See McCrudden, *supra* note 4, at 246-47.

234. 1989 Act, *supra* note 5, § 58(1).

235. See Burke, *supra* note 9, at 22.

236. See *id.* at 24.

237. 1989 Act, *supra* note 5, § 49.

238. See EDWARDS, *supra* note 187, at 32. There are eight further affirmative action measures that do not require statutory protection: (1) advertising vacancies in such a way as to reach all potential candidates of a community, (2) opening vacancies in senior management to outside competition, (3) abandoning preferences in recruitment and promotion for friends and relations of existing employees, (4) removing employment conditions that are not strictly job-related, (5) ending all informal selection procedures, (6) removing qualification requirements that are higher than necessary for the proper conduct of job tasks,

target-train at a particular location or with a particular class of persons not defined by religion to equip them with the appropriate qualifications for employment.²³⁹ The second exemption allows outreach measures to encourage applications for employment or training from an under-represented group through advertisements or contacts.²⁴⁰ The third encourages employers to negotiate alternative redundancy schemes²⁴¹ with trade unions or other workforce representatives to protect affirmative action gains.²⁴² However, these and other similar efforts arguably can be viewed as indirect or reverse discrimination against the traditionally advantaged community, and such efforts may be illegal according to the 1989 Act's definition of indirect discrimination.²⁴³

This fine line between promotion of affirmative action and the potential illegality of such programs has caused confusion among many employers.²⁴⁴ The FEC has noted clearly that employers have not responded to affirmative action in a "sophisticated manner," but attributes this to a lack of understanding as to what is expected of them.²⁴⁵ Employers often fall into the trap of viewing affirmative action as merely a system of quotas despite the attempt of the 1989 Act to discourage such practices.²⁴⁶

The FEC, however, does suggest that employers are eager to embrace fair employment practices, but fear violating the legislation in the absence of what Belfast law firm Jones & Cassidy termed a "straight answer regarding the legislative requirements."²⁴⁷ However it is characterized, the practical effect of this confusion is an "atmosphere in which there is scant regard

(7) ending all word of mouth recruitment, and (8) ending the display at workplaces of flags, emblems, posters, and graffiti that are likely to give offense to one section of the population whether intended or not. *Id.* at 33.

239. *See id.* at 32.

240. *See id.* The outreach exemption is the only one that allows employers to frame programs specifically with members of the Catholic or Protestant community in mind. *See* Burke, *supra* note 9, at 24.

241. A redundancy scheme is the process by which employers temporarily or permanently dismiss particular persons from employment. *See* Burke, *supra* note 9, at 25 n.112. Traditionally, a last in-first out procedure has been the accepted procedure, but this resulted in a disproportionately high number of Catholic dismissals. *See* EDWARDS, *supra* note 187, at 32.

242. *See* EDWARDS, *supra* note 187, at 32.

243. *See* Burke, *supra* note 9, at 24.

244. Many employers feel they are expected to resolve issues of discrimination without the aid of the government. *See id.*

245. *See id.* at 28.

246. *See id.*

247. *Id.* at 29.

for enforcement."²⁴⁸ This fosters a perception that little is being done to combat the tradition of employment inequality in Northern Ireland despite added legislative verbage.

Recently, the use of alternative redundancy schemes has received the most attention because it has the most potential to play a significant role in reversing the employment disparity. The 1989 Act purports to protect alternative schemes, but it has failed to define clearly the nature of an acceptable scheme.²⁴⁹ It prohibits schemes developed with reference to religion or political belief, but allows those that "[have] or may have the effect that the proportion of employees of a particular religious belief . . . who are selected is smaller than the proportion of employees not of that religious belief."²⁵⁰ Thus, an employer cannot create a scheme with the intent of alleviating the employment inequalities between Catholics and Protestants or alter a current scheme with the intent of keeping Catholics in their jobs.²⁵¹ Such schemes can only be developed if employers can pose an otherwise legitimate purpose.²⁵² This lack of clarification may inhibit successful implementation of these alternative schemes.

In 1996, the Employment Tribunal and the Court of Appeals specifically addressed this issue in *Hall and Others v. Shorts Missile Systems Ltd.*²⁵³ This case involved Shorts' use of length of service as a criterion in making employment decisions in redundancy situations.²⁵⁴ Employees were given points for each year of service to the corporation in addition to other factors such

248. *Id.* at 33.

249. *See id.* at 26.

250. 1989 Act, *supra* note 5, § 54.

251. *See* Burke, *supra* note 9, at 26.

252. *See id.*

253. *Hall v. Shorts Missile Sys. Ltd.* (Transcript) (N. Ir. C.A. 1996) available in LEXIS, Nilaw Library, CASES File. Shorts is one of the principal employers of labor in Northern Ireland. In 1991, the Court of Appeals upheld an employer's elimination of length of service as a factor in its redundancy scheme in *Robinson v. Ulster Carpet Mills Ltd.*, [1991] L.R.Ir. 348 (N. Ir. C.A.), available in LEXIS, UK Library, ALLCAS File. At the time, Ulster Carpet employed a workforce that was 92% Protestant. *Id.* The Court determined that the existence of fair employment legislation justified departure from traditional procedures. *See Hall*, (N. Ir. C.A. 1996) available in LEXIS, Nilaw Library, CASES File.

254. *See Hall*, (N. Ir. C.A. 1996), available in LEXIS, Nilaw Library, CASES File. The other criteria used for selection included quality of work, productivity, attitude, ability to work unsupervised, housekeeping, and disciplinary record. *See id.* Each employee was assessed annually in each of these criteria. *See id.*

as quality of work and productivity.²⁵⁵ The employees with the lowest point values were the first to be dismissed.²⁵⁶

This process fostered a last in-first out practice that disadvantaged Catholics because they were typically among those employees hired last.²⁵⁷ To correct this process, Shorts instituted two different practices in the two divisions of the parent company. One division removed the practice of awarding points for years of service while the other division decreased the point value per year.²⁵⁸ Shorts subsequently was sued under both policies.²⁵⁹ A group of predominantly Protestant workers made a claim based on indirect discrimination and unfair dismissal under the policy where no points were awarded for length of service, while a group of predominantly Catholic workers made a similar claim under the policy that decreased the annual point value.²⁶⁰ The claims were condensed into the issue of whether the failure to award points for length of service rendered subsequent dismissals unfair and indirectly discriminatory.²⁶¹

Both the Tribunal and the Court of Appeals held that the use of points for length of service in redundancy situations would have the dual effect of indirectly discriminating and undoing the beneficial effects of Shorts' affirmative action program.²⁶² Thus, the Appellate Court, endorsing the Tribunal's earlier disposition, upheld the use of affirmative action for the first time, significantly strengthening the authority of the FEC and moving one step closer to equality in the workplace.²⁶³

VIII. THE IMPACT OF THE 1989 ACT

The goal of the 1989 Act and particularly the FEC is to assure that religious demographics in employment mirror

255. *See id.*

256. *See id.*

257. *See id.* On July 1, 1992, Shorts had a total workforce of 1264, of which 112 were Catholics. *Id.* Of those 112, 54 had been with the company less than five years, 28 had been with the company less than 10 years, and only 13 had been there for up to 15 years. *Id.*

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.*

263. *See Ulster Takes Crucial Step Towards Equality in Workplace*, FIN. TIMES (London), Dec. 3, 1996, at 12 [hereinafter *Ulster*].

religious demographics in the population generally.²⁶⁴ Although significant improvements have been made toward that goal, such as the *Shorts* decision,²⁶⁵ the unemployment differential remains. The current population of Northern Ireland is 1.6 million, of which fifty-seven percent are Protestant and forty-three percent are Catholic.²⁶⁶ Yet, unemployment rates show that fifty-eight percent of the unemployed are Catholic as compared to forty-two percent Protestant—an exact reversal of their proportion of the population.²⁶⁷ Of the long-term unemployed, sixty-five percent are Catholic.²⁶⁸ Overall, the 1996 figures show that Catholic males are more than twice as likely to be unemployed as Protestant males.²⁶⁹ In addition, two-thirds of the companies monitored still report religious imbalances.²⁷⁰ Yet, the FEC and Tribunal have been used abundantly and successfully.

Recent cases and determinations of the FET illustrate the effectiveness of the FEC's implementation of the 1989 Act. In *Smyth v. Croft Inns Ltd.*,²⁷¹ the Court of Appeals upheld the FET's decision that an employer unlawfully discriminated against an employee on the basis of religious belief. The case involved a Catholic barman who worked in a Loyalist area of Belfast with predominantly Protestant customers.²⁷² In March 1991, two customers approached the Protestant-head barman and told him to tell Mr. Smyth that he should not come to the bar the following week and that this message came from "someone of higher authority."²⁷³ The head barman relayed the message immediately to Mr. Smyth. Expecting his employer to handle the situation, Mr. Smyth showed up for work the following Monday. At around noon, the bar manager called him and told him that he could either stay or go home. Fearing personal harm, Mr. Smyth left and subsequently filed a claim with the FEC for unlawful discriminatory constructive dismissal on the basis of religious

264. See John Murray Brown, *Irish Peace in the Balance: US Lobbyists Eat Words on Discrimination*, FIN. TIMES (London), Nov. 17, 1995, at 9.

265. See *supra* note 261 and accompanying text.

266. Bernes-Lasserre, *supra* note 86.

267. See *id.*

268. See Gerry Moriarty, *Sectarian Gap in Northern Ireland Workforce Narrowing*, IR. TIMES, Dec. 18, 1995, at 10.

269. See Edward Mortimer, *Social Engineering in Northern Ireland Has Reached Its Limits*, FIN. TIMES (London), July 17, 1996, at 20; see also Moriarty, *supra* note 268.

270. See *Ulster*, *supra* note 263.

271. *Smyth v. Craft Inns Ltd.*, [1996] I.R.L.R. 84 (N.Ir. C.A.), available in LEXIS, UK Library, ALLCAS File.

272. See *id.*

273. See *id.*

belief.²⁷⁴ The Tribunal determined that Mr. Smyth had been discriminated against because if he had been a Protestant the company would have treated him differently. The Court of Appeals agreed.²⁷⁵

In April 1996, the FET awarded a Catholic man £22,600 following a finding of religious discrimination against the Police Authority for Northern Ireland.²⁷⁶ The man applied for the post of armourer in November 1990 and was not included among the ten Protestant men shortlisted as suitable.²⁷⁷ The Tribunal found the man was as qualified and experienced for the post as three of the successful candidates and that two others who had been shortlisted did not meet the criteria for the job.²⁷⁸ In addition, the Tribunal described the interviewing procedure as "fundamentally contrary" to the guidance for employers set out in the Fair Employment Code of Practice.²⁷⁹

In June 1996, a Catholic man from west Belfast was awarded almost £40,000 compensation for religious discrimination by Ford Motor Company.²⁸⁰ This is the highest award made yet by the Tribunal.²⁸¹ The man had been an employee of the company for eighteen years and was rated the most suitable candidate in 1992 when he applied for the post of training officer.²⁸² He filed a complaint with the FEC after he failed to be appointed to the position.²⁸³ The FEC determined he had been referred to as an "active Catholic" in an internal memo and that his promotion had been blocked by a senior Ford Europe Executive.²⁸⁴ Although Ford claimed to review internal policies continually, it admitted that it would have to "consider the findings of the Tribunal in detail."²⁸⁵

This success makes it harder to understand why the unemployment differential of Catholics to Protestants still persists. Although it is moving in the right direction, it is doing

274. *See id.*

275. *See id.*

276. *See* Dick Grogan, *Tribunal Finds Northern Ireland Police Body Guilty of Bias*, IR. TIMES, Apr. 26, 1996, at 7.

277. *See id.*

278. *See id.*

279. *See id.*; *see supra* note 190 and accompanying text.

280. *See* Suzanne Breen, *Anger At Ford After Pounds 40,000 Bias Award*, IR. TIMES, June 5, 1996, at 6.

281. *See id.*

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

so slowly, from 2.6:1 in 1971 to 2.1:1 in 1993 for men.²⁸⁶ The problem is that, while the unemployment differential is decreasing slowly, there is still no conclusive evidence that discrimination is a significant cause.²⁸⁷ It is becoming harder to blame the employment differential on direct or even indirect discrimination.²⁸⁸

Some critics argue that no real progress can be achieved toward equality until the employment differential is reduced significantly.²⁸⁹ These critics view discrimination as one of the key factors among a multitude of factors that causes employment inequality.²⁹⁰ Others view the employment differential as a signal of the inequalities that exist, but do not believe discrimination plays a major role in the inequality.²⁹¹ Instead, other factors outside the scope of the 1989 Act sustain the employment differential.²⁹² This divergence of thought makes it difficult to determine the criteria for measuring the success of the 1989 Act.²⁹³

Northern Ireland's experience with employment discrimination, and affirmative action specifically, has been strikingly different from other countries' experiences, which may affect the manner in which it works and explain the relatively slow progress. First, religious groups, rather than racial or ethnic groups of the American and Canadian experiences, are affected, and they bear a different relation to the social structure and culture.²⁹⁴ Second, an overlay of sectarianism attaches to the separation of religion. This is not a feature of racial or ethnic difference.²⁹⁵ These differences jointly play a role in sustaining the employment differential in Northern Ireland and separately affect the status of discrimination and the success of affirmative action.

While it is difficult to determine the extent to which religion shapes the social structure in Northern Ireland, it is likely as much a factor as race in the United States.²⁹⁶ Religion is a fundamental part of a voluntary belief system subscribed to in a

286. EDWARDS, *supra* note 187, at 75.

287. *See id.*

288. *See* Mortimer, *supra* note 269, at 20.

289. *See* EDWARDS, *supra* note 187, at 74.

290. *See id.*

291. *See id.*

292. *See id.*

293. *See id.* at 75.

294. *See id.* at 91.

295. *See id.*

296. *See id.*

way race is not.²⁹⁷ In addition, the divisions, enmity, and hatred race maintains are equally maintainable by religion, particularly in a society such as Northern Ireland where intolerance is accepted.²⁹⁸ Yet, race does not require dislike or hatred for meaning and sustenance. Religious differences in most cases do require and systematically create these feelings.²⁹⁹

Secondly, the sectarian divide is inextricably linked to these religious differences that together permeate all of civil and political life in Northern Ireland.³⁰⁰ Sectarian differences are the product of deep-rooted belief systems that do not need visible differences to drive them.³⁰¹ In Northern Ireland, the sectarian differences derive from historical oppression and engender active hatred of the opposing side.³⁰² They require constant reinforcement of identity through the use of symbols and stereotypes and amplification of the hate toward the other group.³⁰³ In Northern Ireland, sectarianism is accompanied by force and violence that heightens the loyalties on both sides.³⁰⁴

These factors, unparalleled by the issues raised in racial or gender-based programs, have seriously impacted the effectiveness of affirmative action.³⁰⁵ Most significantly, the willingness with which affirmative action plans will be subscribed to is a key issue.³⁰⁶ Reticence to use affirmative action measures may be the result of employer prejudice, fear of sectarian backlash, or fear of change in the resulting workforce.³⁰⁷

The response to this reluctance and the power of the sectarian divide must be addressed by the FEC and ultimately subjected to the threat of legal action.³⁰⁸ The FEC already has refused to accept fears of sectarianism as an excuse for failure to implement necessary affirmative action measures.³⁰⁹ In addition, the FEC has stated that the promotion of affirmative action is a "key focus" of its agenda.³¹⁰

297. See *id.* at 92.

298. See *id.*

299. See *id.*

300. See *id.* at 99.

301. See *id.*

302. See *id.*

303. See *id.* at 99-100.

304. See *id.* at 100.

305. See *id.* at 101.

306. See *id.*; see *supra* notes 240-42 and accompanying text.

307. See EDWARDS, *supra* note 187, at 101.

308. See *id.*

309. See *id.*

310. Burke, *supra* note 9, at 30 (citing FEC. Ann. Rev. 9 (1992-93)).

To maximize effectiveness, the FEC has developed a three-pronged plan of action:

- (1) Ensure employer compliance with their statutory obligations to register with the FEC and monitor the composition of their workforces;
- (2) Ensure employer completion of Section 31 Reviews of workforce composition and hiring practices; [and]
- (3) Implement a program of Section 11 investigations.³¹¹

In support of the third prong, the FEC already has improved its targeting of problem areas within the workforce, on which it focuses the bulk of its energies. First, it targets the worst offenders, such as those employers who have less than ten percent of a particular community represented on their workforce.³¹² Second, it watches the largest employers closely because a direct correlation has been identified between the size of the employer and the extent of the discrimination.³¹³ Last, because discrimination rates are higher in predominantly male industries, the FEC closely monitors industries and companies that primarily employ men.³¹⁴ This targeting approach allows the FEC to direct its efforts toward the worst arenas of discrimination and at the same time affect the largest portion of the population.

The FEC also has devised a sample format to be applied selectively to employers who have been the focus of an investigation or have been warned by the FEC in the absence of an investigation.³¹⁵ The format recommends that employers nominate a senior member of management to ensure the use of fair employment principles and immediately end and replace all informal methods of recruiting and promoting employees with systematic and objective methods.³¹⁶ It also recommends that employers set goals and timetables³¹⁷ with regard to all recruiting and promoting to enhance the proportions of its workforce.³¹⁸ Employers also are asked to provide the FEC with a biannual report of the results of these practices. These reports must contain the composition, by community background, of all applicants and final choices for employment or promotion, copies

311. *Id.*

312. *Id.*

313. *See id.* at 31.

314. *See id.*

315. *See id.*

316. *See id.*

317. *See* 1989 Act, *supra* note 5, § 36.

318. *See* Burke, *supra* note 9, at 31.

and locations of job advertisements, and information regarding the selection panels.³¹⁹

IX. THE FUTURE DIRECTION OF THE 1989 ACT

Robert Cooper, chairman of the FEC, recently recognized:

While it is probable that the increase in the proportion of Roman Catholics in employment has more than kept pace with the natural increase of Roman Catholics in the economically active population, it is likely that an even greater increase would be needed to make major dents in the unemployment deficit.³²⁰

The British government agrees. According to a document dated July 1992 prepared by the Northern Ireland Office, marked "confidential" but subsequently leaked, "an analysis of the key area of employment suggests that the unemployment differential between Catholics and Protestants is unlikely to alter significantly over the next decade."³²¹

The existing legislative framework of monitoring and reporting, negotiation, and consultation simply does not appear capable of seriously effecting any significant change within a reasonable amount of time. The FEC currently monitors more than 4000 public and private bodies.³²² Although it focuses on targeting the worst offenders,³²³ it is still unable to address all discriminatory acts of the worst offenders or severe discrimination by employers that do not fit within the target categories. In addition, each investigation, consultation, or other action takes time, and the FEC can only handle a certain number of investigations appropriately within the next five to ten years.

Thus, reform of the current system and legislation is absolutely necessary. Such revision may take the form of clearly delineated statutory affirmative action exemptions, mandatory affirmative action, or the use of preferential treatment or quotas. Whatever avenues the FEC and the legislature decide to take, such action needs to be taken immediately before the fight for employment equality becomes a movement of the past.

319. See *id.* at 34 n.165-66.

320. See *id.* at 37.

321. MacEoin, *supra* note 58, at 11.

322. See John Murray Brown, *Jobs Imbalance in Ulster "May End By 2000,"*

FIN. TIMES (London), Dec. 19, 1995, at 6.

323. See *supra* note 307 and accompanying text.

A. Clearly Delineated Statutory Exemptions for Affirmative Action

To cure the current confusion among employers³²⁴ as to the distinctions between affirmative action and illegal positive discrimination (reverse discrimination), the statutory exemptions that allow affirmative action need to be explicit in their scope. The SACHR dealt with this issue in its second report, published in 1990, where it recognized: “[T]he greater the coverage and potential impact of anti-discrimination provisions . . . , the greater is the need for consideration to be given to the need for the exemption of measures designed for purposes and having the effect of securing or increasing equality of treatment or opportunity.”³²⁵

The SACHR recommended an amendment to the Northern Ireland Constitution Act of 1973 that would “exempt[] from the anti-discrimination provisions any legislation and any executive action authorised by law which has as its object to secure or increase equality of treatment or opportunity for different sections of the community defined by religious belief or political opinion.”³²⁶

Such measures must be protected by law explicitly to prevent any “government department or public authority . . . [from] embark[ing] on a programme of affirmative action which would amount to reverse discrimination of a kind which might be unacceptable.”³²⁷ In addition, the amendment would allow legislation affecting private parties to protect affirmative action explicitly.

The current legislation protects three affirmative action programs,³²⁸ but each needs further clarification as to the extent of its use and legality. As written, the programs allow employers to provide outreach programs or alternative redundancy schemes, but not to increase the representation of an under-represented group. This restriction undermines the purpose of the legislation and forces employers to devise programs creatively to increase representation without expressly admitting such activity. If employers determine their workforces under-represent a particular community, they should be able to target that

324. See *supra* note 240 and accompanying text.

325. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS (SACHR), RELIGIOUS AND POLITICAL DISCRIMINATION AND EQUALITY OF OPPORTUNITY IN NORTHERN IRELAND: SECOND REPORT 38 (1991) [hereinafter SACHR Second Report].

326. *Id.* at 39.

327. *Id.*

328. See *supra* notes 234-39 and accompanying text.

community specifically with outreach programs or to devise alternative schemes for the express purpose of improving or protecting that community's representation.

In addition, the legislation must provide for a more comprehensive system of protected areas or exemptions to promote greater implementation of affirmative action. Protecting activities such as recruitment that specifically target the unemployed or removing redundancy schemes that favor long-term employees would help reduce employment disparity. A wide range exists of affirmative action programs³²⁹ that can be developed and implemented to identify, recruit, and advance under-represented groups. Legislation must not only promote these programs to achieve increased religious diversity in the workforce, but also to develop appropriate skills in the under-represented groups.

Development of a comprehensive system will decrease confusion and increase flexibility among employers, who will tailor specific programs to their particular circumstances. Such a system could also provide the much requested protection and assurance for employers³³⁰ that the government supports their efforts and will not arbitrarily accuse them of indirect or reverse discrimination. The government must commit itself to eliminating employment discrimination and the employment differential by protecting employers, methods, and programs that further the goal of fair employment.

B. *Mandatory Affirmative Action*

In addition to clarifying the boundaries of the legislation, the government should also implement measures that would guarantee employer adoption of these programs. Employers fail to initiate programs on their own for a variety of reasons, including a fear that initiating such action will seem to be an admission of past discrimination.³³¹ The FEC has recognized the fact that employers are reticent to initiate affirmative action programs.³³² Thus, if no employee brings suit and the FEC does not target an employer for investigation, the employer will be unlikely to act on its own.

329. See *supra* note 238 and accompanying text.

330. See *supra* note 240 and accompanying text.

331. See Burke, *supra* note 9, at 41; see also *supra* notes 241 & 243 and accompanying text.

332. See *supra* note 245 and accompanying text.

For these reasons, legislation that not only explicitly protects affirmative action, but also makes implementation mandatory at a basic level, would greatly enhance the FEC's progress. While the FEC has expressed concern that, to be effective, affirmative action programs must be tailored to the particular circumstances of each employer, there should be general requirements for all employers regardless of the situation. For example, the legislation could require all employers to advertise in any form of media or arena to which an under-represented community is exposed, to appoint a fair employment manager to oversee the employment policies and practices of the firm or industry, or to open vacancies in senior management to outside competition. The FEC's Code of Practice provides other examples of affirmative action that are appropriate for mandatory application, such as abandoning preferences in recruitment, selection, and promotion; removing employment conditions that are not specifically job-related; and ending informal selection processes in favor of objective evaluations.³³³ Such activities should not cause any undue financial or other burden on employers and would clearly accelerate the progress toward decreasing the unemployment differential.

The key to clarifying the legislative mandate for affirmative action and mandating a certain level of implementation is to create a system of fair employment principles that apply to all employment settings. Such a system will accelerate the realization of the 1989 Act's goals to secure fair employment. In addition, it will enhance the quality of the workforce, benefit the economy, and uphold the use of the merit-based system of employment selection.

If this fails to improve the employment differential, however, the FEC and the government will be forced to consider the use of preferential treatment. When the legislation was first introduced, analysts warned that only relatively small changes in the broad socioeconomic profiles of the two communities could be expected.³³⁴ Some believed that, inevitably, there would be further demands for strengthening the legislation through the use of preferential treatment³³⁵ or quotas;³³⁶ however, the

333. See 1989 Act, *supra* note 5, § 7; see also the FEC's Code of Practice, *supra* note 192, at § 6.5.23.

334. See Cormack & Osborne, *supra* note 6, at 7.

335. See EDWARDS, *supra* note 187, at 104. In the United States, the use of quotas is banned by Title VII of the Civil Rights Act 1964 (as amended by the Civil Rights Act 1991); however, preferential treatment is a common practice. See *id.* at 106-07.

336. See Cormack & Osborne, *supra* note 6, at 8; EDWARDS, *supra* note 187, at 106.

government clearly eschewed this possibility during the creation, introduction, and implementation of the 1989 Act.³³⁷ It realized that associating the Act with such practices might undermine the whole enterprise.³³⁸ Denial clearly may not have been the best manner to deal with the issue.

C. Preferential Treatment

At this stage, Northern Ireland must consider educating its employers and installing a program of preferential treatment. This program is much more likely to get results than affirmative action, and its potential for success has been seen in the United States.³³⁹ It will also override the merit principle of hiring the best individual for the job, which now turns more on socialization (right college, tie, golf club, etc.) than true ability in Northern Ireland.³⁴⁰

While Northern Ireland is not ready for the use of a blatant quota system, a gray area surrounds the use of merit that allows for subtle, almost normal practices that support and provide the results of preferential treatment. For example, the use of ranked groups of applicants with all members of a group being viewed as equally qualified is a common procedure in the United States.³⁴¹ Employers maximize the chance that the top-ranked group includes at least one or two minority members, and given that all group members are equally qualified, selection of employees can then proceed on "other than traditional merit criteria."³⁴²

Other techniques include ensuring strong minority representation on interview and selection boards, concentrating job advertisements in minority press or areas, amending qualifying criteria to benefit a specific minority, using word-of-mouth recruiting, and hiring minority applicants when other factors are equal. These subtle yet effective procedures will bring

337. EDWARDS, *supra* note 187, at 104.

338. *See id.*

339. *See id.* at 17-25, 105.

340. Edwards points out that the distinction based on merit between affirmative action and preferential treatment is that the latter overrides merit while the former does not. This distinction elevates merit to a moral position that it does not deserve. Reliance on merit actually allows reliance on family connections, the right university, and other factors that have nothing to do with the actual ability to complete the job, but concern the ability to fit with the employer. *See id.* at 105. Although this is an important aspect of hiring, it should not be used to hold one community subordinate to another systematically.

341. *See id.* at 107.

342. *See id.*

quicker results than reliance on affirmative action.³⁴³ The government needs these quicker results for legitimizing purposes, and Irish society needs them for balance.

There is no obvious reason why these techniques, used in the United States,³⁴⁴ cannot translate into effective use in Northern Ireland. Based on the U.S. experience, it is a fair assumption that the most effective techniques, both in commonality of use and effectiveness, will be those not readily observable to the public. Target advertising and word-of-mouth recruiting might not be the best methods;³⁴⁵ however, minority networks that serve as a conduit for information and contacts for search committees may work well in Northern Ireland despite its small size.³⁴⁶

The likelihood that preferential treatment will become common in Northern Ireland depends on two factors: the failure of affirmative action and a societal demand to see returns on the investment made in fair employment principles. Affirmative action may work despite the influence of sectarianism; however, if it fails, pressure will have to come from other areas. Such pressure could come from frustrated employers, who, tired of the FEC's programs and the ineffectual nature of affirmative action, will institute their own procedures that act more like preferential treatment than affirmative action. While this would not produce widespread preferential treatment, it would have an impact. Employers may also simply hire as many Catholics or Protestants as necessary in one swift movement to reach the goals of the 1989 Act. Other groups from the sectarian divide, peer groups, or other employers may encourage or force employers to take the necessary steps to eradicate the employment differential in practice. Affirmative action will have to fail, though, before any of these pressure points may be pushed.

On the other hand, the negative moral cost of preferential treatment, in denying the job to the "best person," must be considered. The whole premise of the 1989 Act would collapse if knowledge of the use of preferential treatment spread. In addition, such knowledge might ignite a sectarian backlash that would destroy any progress toward achieving fair employment. The government additionally faces the threat of widespread noncompliance, which would render the provisions of the 1989 Act wholly ineffective. These potential failures must be balanced against the potential success of preferential treatment. The

343. See *id.* at 109.

344. See *id.* at 107-09.

345. See *id.* at 111.

346. See *id.*

possibility of eradicating employment inequality brings with it other positive societal effects, such as creating peace and boosting the economy and relations with other world markets.

Sectarian strife, however, remains the key issue. Is the practice of fair employment worth potentially fueling the continuation of sectarian violence? This is the question the British government and Northern Irish society need to answer as they enter the twenty-first century with a world systematically moving in the direction of equal opportunity for all.

In answering this question, the British government and Northern Irish society need to consider that perhaps affirmative action programs and fair employment legislation are not the most effective vehicles for achieving employment equality. New constitutional and legal protections may be necessary before the 1989 Act and the FEC can operate effectively. A bill of rights or a similar constitutional measure that guarantees freedom of religious exercise and nondiscrimination would provide a protective foundation of equality for both communities that the 1989 Act has been unable to provide. In addition, a constitutional guarantee would foster a wider dialogue about accommodation and diversity in an intensely divided society and provide the framework from which to implement stronger fair employment legislation. Without such groundwork, religious division will continue to generate societal discord despite any progress toward achieving fair employment principles.

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